

CONSTITUTIONAL REFORM AND THE INTRODUCTORY CLAUSE OF SECTION 91: RESIDUAL AND EMERGENCY LAW-MAKING AUTHORITY

K. LYSYK*
Vancouver

I. *Introduction.*

No provision of the British North America Act¹ has attracted more attention or sparked more controversy among legal commentators than has the introductory clause of section 91, together with its overlay of judicial interpretation. The introductory clause is the enacting portion of section 91 and it provides, with disarming simplicity, that Parliament shall have authority "to make laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". By its terms the clause constitutes a residual category of federal law-making authority. Further, it carries the judicially assigned responsibility of providing a constitutional base for the so-called emergency doctrine, the thrust of which is that Parliament may, to meet an emergency, enact laws which in ordinary circumstances would be beyond its constitutional reach.

Both varieties of law-making power—residual and emergency—have been the subject of proposals for change in a new or revised Canadian constitution. With respect to residual powers the government of Quebec has on a number of occasions taken the position that all powers not expressly conferred on the central government ought to be assigned to the provincial legislatures,² pointing out that in the case of most other federal constitutions

* K. Lysyk, Q.C., of the Faculty of Law, University of British Columbia, Vancouver.

¹ 1867, 30 & 31 Vict., c. 3, as am. (U.K.), hereinafter cited as B.N.A. Act.

² See Quebec's Traditional Stands on the Division of Powers, 1900-1976, pp. 84-85, a document submitted at the First Ministers' Conference on the Constitution, Ottawa (Oct. 30th - Nov. 1st, 1978), where reference is made to statements by Premier Johnson to the Confederation of Tomorrow Conference in Toronto in 1967 and, in the following year, to the first in the series of intergovernmental meetings in the constitutional review of 1968-71. Reference is made as well to similar proposals by the government of Quebec in the course of interprovincial discussions on the constitution in 1975 and 1976.

residual legislative authority is assigned to the constituent units of the federation.³ That position found support in the recent Pepin-Robarts Task Force recommendations for a single legislative residuum assigned to the provincial legislatures.⁴ The Task Force rejected the possibility of residual authority shared by Parliament and the provincial legislatures, but this latter option has found other sponsorship.⁵ Insofar as the emergency power is concerned, recent recommendations have included proposals to the effect that this exceptional legislative authority ought to be expressly dealt with, and more sharply defined, in a new constitutional clause,⁶ and some provinces are on record as advocating new constraints, either of form or substance, or of both, upon exercise of this power.⁷ At the 1978 Premiers' Conference in Regina the constitutional matters identified as requiring early consideration included both "the federal emergency power" and "the federal residual power".⁸

To assess the need for constitutional change and the form it might take, it is obviously desirable to proceed from a common understanding about the distribution of legislative authority presently effected by the constitution. It must be acknowledged, however, that on the question of the scope of law-making authority conferred by the introductory clause of section 91, consensus has proved very elusive indeed. And there continues to be considerable room for debate, notwithstanding the fact that in two recent decisions the Supreme Court of Canada has had occasion to fully consider, and to sustain federal enactments on the basis of, both the emergency and the residuary powers. In the earlier of the two decisions, the *Anti-Inflation Reference*⁹ of 1976, a divided court¹⁰

³ E.g. Australia, the United States, Switzerland and Germany. An example of the assignment of residual legislative authority to the central government is provided by the constitution of India.

⁴ The Task Force on Canadian Unity, *A Future Together* (1979), Vol. 1, pp. 89, 126.

⁵ See Canadian Bar Association, *Towards a New Canada* (1978), pp. 139-141, and British Columbia, *Constitutional Proposals: The Distribution of Legislative Powers* (Paper No. 8), pp. 33-34, cited in the Canadian Intergovernmental Conference Secretariat, *Proposals on the Constitution 1971-1978*, pp. 250-251.

⁶ See The Task Force on Canadian Unity, *op. cit.*, footnote 4, pp. 93, 127. And Canadian Bar Association, *op. cit.*, *ibid.*

⁷ See Alberta, *Harmony in Diversity: A New Federalism for Canada*, p. 24, cited in *Proposals on the Constitution 1971-78*, *op. cit.*, footnote 5, p. 252. Also, British Columbia's *Constitutional Proposals*, *op. cit.*, footnote 5.

⁸ Cited in *Proposals on the Constitution 1971-78*, *op. cit.*, footnote 5, p. 243.

⁹ *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373.

¹⁰ Reasons for judgment delivered by Laskin C.J. (Judson, Spence and Dickson JJ., concurring) and Ritchie J. (Martland and Pigeon JJ., concurring) supporting validity, with dissenting reasons by Beetz J. (de Grandpré J., concurring).

concluded that the Anti-Inflation Act¹¹ was *intra vires* by reason of the existence of an emergency or "crisis"¹² without, however, generating a set of reasons capable of attracting enough support to qualify as the judgment of the court. The decision sparked a good deal of discussion in legal journals,¹³ where a corresponding variety of opinion has been manifested. The other decision, handed down earlier this year, is *The Queen v. Hauser*.¹⁴ In that case a majority of the court reached the conclusion that the true constitutional base for the Narcotic Control Act¹⁵ is not the criminal law power (as had been indicated in an earlier holding of the court¹⁶ and generally assumed in lower court decisions¹⁷ touching the point), but Parliament's residual law-making authority under the introductory clause of section 91. In *Hauser*, while the court was again divided in the result, the reasons delivered by Pigeon J. on behalf of four of the seven judges who sat on the case provide an authoritative expression of the reasons for judgment of the court. The challenge presented by *Hauser* consists in determining the extent to which the analysis offered by Pigeon J. modifies or clarifies the pre-existing jurisprudence respecting the residual legislative authority of Parliament.

No attempt will be made in this article to provide a comprehen-

¹¹ S. C., 1974-75-76, c. 75.

¹² The term "crisis" was adopted in the reasons for judgment delivered by Laskin C.J. where it appears to be used synonymously with the more familiar term "emergency". For another example of "crisis" used in this context see the reasons of Viscount Haldane in *Fort Frances Pulp and Paper Co. v. Manitoba Free Press*, [1923] A.C. 695, at p. 706.

¹³ A.S. Abel, *The Anti-Inflation Judgment: Right Answer to the Wrong Question?* (1976), 26 U. of Toronto L.J. 409; E.P. Belobaba, *Disputed "Emergencies" and the Scope of Judicial Review: Yet Another Implication of the Anti-Inflation Act Reference* (1977), 15 Osgoode Hall L.J. 406; G.F. Brandt, *Judicial Restraint and Emergency Power: The Anti-Inflation Act Reference* (1976), 15 U.W.O.L. Rev. 191; P.W. Hogg, *Proof of Facts in Constitutional Cases* (1976), 26 U. of Toronto L.J. 386; R. Buglass, *The Use of Extrinsic Evidence and the Anti-Inflation Act Reference* (1977), 9 Ottawa L. Rev. 183; P.N. MacDonald, *Peace, Order and Good Government: The Laskin Court in the Anti-Inflation Act Reference* (1977), 23 McGill L.J. 431; P. Patenaude, *The Anti-Inflation Case: The Shutters Are Closed but the Backdoor is Wide Open* (1977), 15 Osgoode Hall L.J. 396; P.H. Russell, *The Anti-Inflation Case: the Anatomy of a Constitutional Decision* (1977), 20 Can. Pub. Admin. 632; R. Rae, *The Constitutional Validity of the Anti-Inflation Act* (1976), 34 U.T. Fac. L. Rev. 217; C. Tennenhouse, *The Emergency Doctrine and the Anti-Inflation Case: Prying Pandora's Box* (1977), 8 Man. L.J. 445.

¹⁴ *The Queen v. Hauser*, judgment pronounced May 1st, 1979 (not yet reported).

¹⁵ R.S.C., 1970, c. N-1.

¹⁶ The Supreme Court decision is *Industrial Acceptance Corporation Limited v. The Queen*, [1953] 2 S.C.R. 273.

¹⁷ Decisions in the lower courts are referred to in the dissenting reasons of Dickson J., at pp. 59-60.

sive review of the extensive body of jurisprudence that has developed around the introductory clause of section 91. Instead, the observations which follow will focus upon a few broad propositions which are considered by the writer to be of key importance in assessing the present state of the law and proposals to change it. It will be submitted that much of the confusion and controversy that has enveloped this area is attributable to failure to pay due regard to the text of the B.N.A. Act itself, especially when read in light of its constitutional antecedents, and to a mis-reading of a number of important decisions of the Judicial Committee of the Privy Council, notably those concerned with the emergency doctrine. Specifically, consideration will be given to four elements in the constitutional mix to which many of the difficulties in coming to terms with the introductory clause of section 91, and judicial interpretation of it, can be traced.

First, much analysis has proceeded on the assumption, whether explicit or implicit, that the constitution contains a single residuary category, namely, the introductory clause of section 91. This overlooks the function of the 16th head of section 92 which provides for another legislative residuum, assigned to the provinces, consisting of all matters which are of a "local or private nature in the Province". It is important not to lose sight of the fact that the B.N.A. Act contains not one legislative residuum but two parallel residuums, and that they complement and modify each other. A second source of difficulty has arisen in connection with attempts to attach some significance to, or discern some meaning in, the phrase "peace, order and good government" which will somehow assist in determining whether or not a federal enactment can be supported on the basis of the introductory clause of section 91. It will be submitted that the phrase "peace, order and good government", where it appears in the opening clause of section 91, provides no assistance at all in the task of allocating legislative authority between Parliament and the Legislatures. Focussing upon that phrase is not only unproductive but tends to draw attention away from the central question pointed to by the introductory clause, namely, whether the matter to which an enactment relates is one "not coming within" the classes of subjects assigned exclusively to provincial legislatures. A third element, and related to the approach just described, is the failure to be mindful of the historical scope of the property and civil rights clause, and the implications of the assignment of legislative authority over that class of subject to the provinces. Much of the criticism directed at the Privy Council for its rejection of the introductory clause as a constitutional base for federal enactments has failed to take cognizance of the special claims of the property and civil rights clause to a broad and generous interpretation. Fourthly, many of the legal commentators have proceeded on the assumption

that there must be a single true test, or single rationale, for reliance upon the introductory clause of section 91 to support federal legislation. Consistent with that point of view, the emergency doctrine originally propounded by Viscount Haldane, and developed through a line of Privy Council decisions, was seen as substituting a new test for reliance upon the introductory clause; the Privy Council, it was suggested, had decided that the *only* circumstance in which the clause could be invoked was when the existence of an emergency could be demonstrated. An examination of the decisions in question, however, does not bear out that analysis. The emergency doctrine represented judicial legislation supplementing, and not competing with, the residuary capacity bestowed on the introductory clause by the terms of the Act.

In the following sections of this article each of these four threads in the constitutional skein will be considered in turn. This will be followed by some observations on the import of the two recent Supreme Court decisions—the *Anti-Inflation Reference* and the *Hauser* case—and, finally, by a few thoughts on proposals for constitutional reform in this area.

II. Parallel Federal and Provincial Residual Categories.

The relevant constitutional provisions of the B.N.A. Act that I have described as being parallel in function are not parallel in form. As already noted, the federal residuum is located in the introductory clause of section 91, while the provincial residual category takes the form of an enumerated class of subject—the sixteenth and last—assigned to the provincial sphere by section 92 of the B.N.A. Act.

The lack of symmetry in these provisions appears to be attributable to “improvements” in form effected by the draughtsman of the B.N.A. Act. Both the Resolutions adopted at the London Conference of 1866¹⁸ and the Resolutions of the Quebec Conference of 1864¹⁹ by adopting a parallel structure clearly demonstrated an intention to provide for complementary federal and provincial residuums. The antecedents of sections 91 and 92 of the B.N.A. Act in the London Resolutions, numbered respectively 28 and 41, read as follows:

28. The federal Parliament shall have power to make laws for the peace, welfare, and good government of the Confederation (saving the sovereignty of England), and especially laws respecting the following subjects: . . .

(36) And generally respecting all matters of a general character not specially and exclusively reserved for the Local Legislatures.

¹⁸ Joseph Pope, *Confederation: being a series of hitherto unpublished documents bearing on the B.N.A. Act (1895)*, pp. 102-106.

¹⁹ *Ibid.*, pp. 43-47.

41. The Local Legislatures shall have power to make the following laws respecting the following subjects: . . .

(18) And generally all matters of a private or local nature not assigned to the General Parliament.

The above quoted provisions from the London Resolutions were unchanged from the version adopted earlier at the Quebec Conference.²⁰ In each case, the final item in the list of subjects assigned to Parliament is a residuum of matters with only two identifying characteristics: first, the matters must be "of a general character" and, second, they must not be matters "specially and exclusively reserved for the Local Legislatures". Similarly, the final item in the list of subjects assigned to the Legislatures is a residuum of matters with just two distinguishing features: first, they comprise matters "of a private or local nature" and, second, they must not be matters "assigned to the General Parliament".

The parallel structure of these resolutions makes the intent unmistakable. The first complementary feature is that the federal residuum comprises matters "of a general character" as compared with the provincial residuum which catches matters of "a private or local nature". Assuming that the two clauses were to cover all legislative matters not expressly dealt with in the enumerations or elsewhere in the constitution, it would follow that the reference to matters "of a general character" was intended to be synonymous with, and a shorthand way of describing, all such residual matters other than those "of a private or local nature". The second component of the two residuums is the matching qualifier, making it clear that for purposes of allocating legislative authority specific assignments effected by the enumerations were to be determinative regardless of whether the particular matter was one of a "general character" or one of a "private or local nature".

In casting sections 91 and 92 of the B.N.A. Act, the draughtsman departed from the strictly parallel structure of the London and Quebec Resolutions. With respect to the list of provincial powers in section 92, the residuum of local-private matters retained its position as the final item in the enumerations:

92. In each Province the Legislature may exclusively make laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, . . .

(16) Generally all Matters of a merely local or private Nature in the Province.

²⁰ The corresponding provisions in the Quebec Resolutions are numbered 29 (37) and 43 (18). There is one minor difference between the enacting clause of article 29 of the Quebec Resolutions and article 28 of the London Resolutions; the former made reference to "the federated provinces" instead of "the Confederation". In section 91 of the B.N.A. Act the corresponding reference is to "Canada".

However, in the section 91 description of Parliament's legislative authority, the residuum appears not as the last of the enumerated classes of subjects but, instead, is contained within the introductory clause.

Relocation of the federal residual power no doubt made the complementary nature of the two residuums somewhat less obvious, but not so obscure as to escape the attention of Lord Watson in the *Local Prohibition* case, where he stated:²¹

In s. 92, No. 16 appears to [their Lordships] to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated.

Lord Watson, evidently (and, it is submitted, quite properly) read sections 91 and 92 as effecting essentially the same kind of distribution which the London and Quebec Resolutions patently called for, that is to say, specific allocations of subjects or classes of subjects to Parliament and to the Legislatures, together with complementary residuums for all matters not caught by the enumerations, such matters outside the enumerations being divided between those local or private in nature (and therefore within provincial competence) and all other matters (assigned to Parliament).

One further comparison might be drawn between the London and Quebec Resolutions on the one hand and the B.N.A. Act on the other with respect to treatment of residuary matters. The last enumeration relating to Parliament's legislative authority in the Resolutions conferred authority over all matters "of a general character" not reserved for the Legislatures. It was suggested above that this phrase simply represented a shorthand method of reference to all non-enumerated matters other than those of a local or private

²¹ *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at p. 365. The passage is quoted with approval in the majority judgment of the Supreme Court in *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at pp. 699-700 (per Ritchie J., delivering the reasons of the court). A number of commentators have taken issue with Lord Watson's description of the introductory clause as "supplementary" of the s. 91 enumerations. But the salient point, which the language of s. 91 clearly establishes, is that Parliament's legislative authority under the enumerations stands on a different plane than its authority under the introductory clause. The s. 91 enumerations qualify, and enjoy primacy over, the provincial enumerations. The introductory clause does not qualify, and must yield to, the provincial enumerations, since its scope is limited to matters "not coming within" the provincial enumerations. The structure of s. 91 is examined in the next section of this article.

nature. The introductory clause of section 91 contains no counterpart to the phrase "of a general character". It was therefore left to the courts to invent compendious forms of expression to carry the thought contained in the cumbersome phraseology which would most accurately complement section 92(16)—matters not within the other provincial enumerations and not of a merely local or private nature in the province. This function is performed by the description "matters of national concern", and equivalent judicially-coined phrases employed to refer to the scope of Parliament's residual law-making authority under the introductory clause of section 91.

III. *Peace, Order and Good Government.*

A closer examination of section 91 of the B.N.A. Act is called for at this point. It consists of three distinct segments: (i) the introductory (or enacting) clause; (ii) the declaratory clause, together with the 31 (originally 29) enumerations incorporated within it; and (iii) the deeming clause. Compartmentalized in that way for convenience, section 91 reads as follows:

Introductory Clause:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order and good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces;

Declaratory Clause:

—and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—[enumerations 1 to 29].

Deeming Clause:

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

As noted above, the introductory clause is the enacting, or power-conferring, portion of section 91. The thrust of the introductory clause is that Parliament can make laws relating to matters "not coming within" the classes of subjects which the Act assigns exclusively to the Provinces.²² In form, at least, the only function of the balance of section 91 is to aid in determining the scope of the classes of subjects assigned exclusively to the provincial legislatures, the central question being whether the "matter" to which an enactment is found to relate is one "coming within" the classes of

²² A common, but not strictly accurate, paraphrase opposes the introductory clause to the classes of subjects enumerated in s. 92. The legislative authority over education conferred on provincial legislatures by s. 93 is also exclusive.

subjects allocated to the provinces. The second (declaratory) and third (deeming) clauses of section 91 perform that function in the following ways.

The declaratory clause stipulates that Parliament can (notwithstanding anything in the Act) exclusively legislate on matters coming within specified classes of subjects: the thirty-one enumerations. These enumerations, according to the opening words of the declaratory clause, are made "for greater certainty". This might be imagined to indicate that since the items have been listed in section 91 only to provide greater certainty, they are all ones which, by their very nature, might have been deduced to fall outside the classes of subjects assigned to the provinces even if the draughtsman of the B.N.A. Act had not thoughtfully provided us with a checklist by way of reminder. Of course, this is not the case, for without the enumerations in the declaratory clause, what governing constitutional principle would have disclosed that penitentiaries²³ lay beyond provincial legislative competence? Or Sable Island?²⁴ Or marriage and divorce?²⁵ Or intellectual property?²⁶ In fact, many of the enumerations of section 91 do not merely add "greater certainty"; they supply new information in that they carve out exceptions or exclusions from the provincial classes of subjects which the latter, read in isolation, would not disclose or even permit, much less require.

The "for greater certainty" phrase in the present context, then, is a draughtsman's embellishment which performs no useful function. Moreover, it appears to have contributed to a theory advanced from time to time that the enumerations of section 91 are merely "illustrative" of some undefined, but broader, federal power. In reality, however, the enumerated heads of power assigned to Parliament include classes of subjects which illustrate nothing more nor less than an intention by the Fathers of Confederation to effect various specific exclusions, for various specific reasons, from what would otherwise fall within the ambit of the legislative powers assigned to the provinces. Again, the pre-Confederation Resolutions speak more clearly than does the B.N.A. Act. The counterparts in the London Resolutions to section 92(13) and (16) of the B.N.A. Act read as follows:

²³ S. 91(28). According to the Quebec Resolutions (1864), penitentiaries would have been assigned to the provinces: art. 43(9). By the time of the London Resolutions (1866), however, penitentiaries had been transferred to the list of Parliament's powers: art. 28(31). The change had to do with financial costs, not with fundamental principles of federalism.

²⁴ S. 91(9).

²⁵ S. 91(26).

²⁶ S. 91, heads 22 ("Patents of Invention and Discovery") and 23 ("Copyrights").

41. The Local Legislatures shall have power to make the following laws respecting the following subjects: . . .
- (15) Property and civil rights (including the solemnization of marriage), *excepting portions thereof assigned to the General Parliament.*
- (18) And generally all matters of a private or local nature *not assigned to the General Parliament.*²⁷

What the italicized qualifying phrases acknowledge explicitly in a way that the B.N.A. Act formulation does not (and which the "for greater certainty" phrase actually obscures) is that the heads of legislative authority assigned to Parliament include subjects which would have fallen within "property and civil rights" or "matters of a private and local nature" had they not been expressly set out in the list of federal powers. The Resolutions make no pretence that the enumerations in the federal catalogue are only for the purpose of lending certainty to propositions capable of being elicited from an examination of the list of provincial powers alone.

The purpose of the deeming clause at the end of section 91 would seem to emerge quite clearly from the text. If the matter to which an enactment relates is one coming within any one of the enumerations in the declaratory portion of section 91, then that matter shall be treated as falling within the legislative sphere allocated to Parliament, and not that of the provincial legislatures, notwithstanding the fact that it might otherwise have been characterized as coming within "the Class of Matters of a local or private Nature comprised in [the provincial enumerations]". As pointed out by Sir Montague Smith in the *Parsons* case,²⁸ in its grammatical construction the deeming clause clearly refers to the sixteenth head of section 92. So read, the clause simply effects an exclusion from the provincial residuum of any matter which, however local or private in nature, comes within the catalogue of powers assigned to Parliament by the section 91 enumerations. This is quite consistent

²⁷ Pope, *op. cit.*, footnote 18, at p. 106, emphasis supplied. Equivalent qualifying phrases appear in the Quebec Resolutions, *ibid.*, at p. 47, and also in the fourth draft of the British North America Bill, *ibid.*, at pp. 200-201.

²⁸ *The Citizens Insurance Company of Canada v. Parsons* (1881), 7 A.C. 96, at p. 108. The Privy Council had also made the connection between the deeming clause and s. 92(16) in one of its earliest decisions on the B.N.A. Act: *L'Union St. Jacques de Montreal v. Belisle* (1874), 6 A.C. 31, at pp. 35-36. There the Privy Council went on to state that where the matter to which the enactment relates is one of a local or private nature (in that case an Act for relief of a benevolent society), the onus lies on the party who maintains that it nevertheless falls within one of the classes of subjects enumerated in s. 91 (e.g. "Bankruptcy and Insolvency"). In that case the onus was not discharged and the validity of the provincial enactment was sustained on the basis of s. 92(16). This latter point concerning the onus was recently adopted in the majority judgment of the Supreme Court in *Attorney-General for Canada and Dupond v. Montreal*, [1978] 2 S.C.R. 770, at p. 793 (per Beetz J., delivering the reasons of the Court).

in result with the intent clearly manifested by the provincial residual clause as it appeared in the London and Quebec Resolutions.²⁹ Provincial matters, according to the formulation in the Resolutions, extended to all matters of a private or local nature except those [specifically] assigned to Parliament.

The Privy Council subsequently departed from the interpretation of the deeming clause offered in the *Parsons* case, holding that the clause referred not merely to the sixteenth head of section 92 but to the other fifteen heads as well.³⁰ This re-interpretation of the deeming clause would seem to assign to it a task already fully discharged by the declaratory clause of section 91, that is, making it clear that matters coming within the section 91 enumerations are exclusively for Parliament, and are not within the competence of the provincial legislatures. Since the force both of the declaratory clause and of the deeming clause is limited to matters "coming within" the enumerations of section 91, it is not altogether clear why the Privy Council appears to have felt it necessary to attribute this responsibility to the deeming clause. The reason given — that is, to support federal enactments dealing with matters which, although of a local or private nature, are necessarily incidental to the exercise of legislative authority in relation to matters falling within the enumerated powers of Parliament³¹—could have been just as readily achieved under the interpretation of the deeming clause advanced in *Parsons*.

Returning now to the question of what assistance can be derived from the language of the introductory clause itself, it will be recalled that it provides that it shall be lawful for Parliament to make laws, "for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces . . .". The clause is sometimes referred to as the "peace, order and good government clause", but this does not capture its essence. It may be noted, to begin, that the clause does not authorize Parliament to enact laws *in relation to* peace, order and good government. It confers authority to legislate *for* the peace, order and good government of Canada, but only *in relation to* matters not coming within provincial classes of subjects. The point is not merely technical, but one of substance. An examination of Part VI of the B.N.A. Act ("Distribution of Legislative Powers", sections 91 to 95, inclusive) discloses that the power-conferring provisions invariably employ the phrase "*in relation to*" for the purpose of

²⁹ See *supra*, footnote 27, and accompanying text.

³⁰ *Attorney-General for Ontario v. Attorney-General for the Dominion* (the *Local Prohibition* case), *supra*, footnote 21, at p. 359; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91, at pp. 99-100.

³¹ *Ibid.*

identifying the matters or subjects or classes of subjects which are being allocated. What the introductory clause assigns to Parliament, to repeat, is not authority to make laws in relation to peace, order and good government but authority to make laws in relation to matters "not coming within" the provincial heads of power. In other words, Parliament is not authorized to legislate in relation to a matter caught by the provincial categories simply because it might in some sense be thought to qualify as contributing toward the "peace, order and good government of Canada".

Further, it would have been quite inappropriate to assign to Parliament authority to make laws in relation to "peace, order and good government" because that phrase had been used throughout British colonial history to confer the full range of legislative authority characteristic of a unitary, not a federal, state.³² Prior to Confederation the "peace, order and good government" phraseology had been used repeatedly in British North America to confer law-making authority.³³ The words were not intended to be descriptive of the power granted in the sense that it invited the question of whether a particular local enactment was conducive to peace or to order or to good government.³⁴ The salient point, however, is simply that the phrase could hardly be thought to have any relevance to the federal principle, for prior to 1867 it had never been employed with respect to a federation. What it denotes in the introductory clause, as in the case of the earlier enactments, is simply plenitude of legislative authority, subject to expressed limitations and to overriding Imperial legislation. And what Parliament is authorized to make laws in relation to is not the totality—not peace, order and good government generally—but only that portion of the whole which consists of matters "not coming within" the

³² See, e.g., Jennings, *Constitutional Laws of the Commonwealth* (1957), Vol. 1, pp. 48-49; Hogg, *Canadian Constitutional Law* (1977), p. 242. The phrase "peace, order and good government" appears to have been used interchangeably with "peace, welfare and good government", with the latter having been employed in the Quebec and London Resolutions: see text accompanying footnotes 18 and 19, *supra*. On the equivalence of "order" and "welfare", cf. Lefroy, *Constitutional Law of Canada* (1897), p. 214, footnote 1, and p. 310, footnote 2. The phraseology can be traced back to the 17th century: see O'Connor, *Report to the Senate of Canada Relating to Enactment of the British North America Act, 1867* (1939), Annex 1, p. 53.

³³ E.g., in the Royal Instructions of 1749 establishing Cornwallis as Governor of Nova Scotia (reproduced in Kennedy, *Documents of the Canadian Constitution* (1930), p. 6), in the Royal Proclamation of 1763 after the cession of New France to Britain (reproduced in R.S.C., 1970, Appendix II, No. 1), in the Quebec Act of 1774 (*ibid.*, No. 2), the Constitutional Act of 1791 (*ibid.*, No. 3) and the Union Act of 1840 (*ibid.*, No. 4).

³⁴ *Riel v. The Queen* (1885), 10 A.C. 675. Cf. A.S. Abel, *What Peace, Order and Good Government?* (1968), 7 U.W.O.L. Rev. 1, where such an approach is advocated, but not put forward as one supported by either history or authority.

classes of subjects assigned to the provinces. While use of the "peace, order and good government" expression carries the thought that the entirety of legislative authority is bestowed on Parliament and Legislatures together, it provides no assistance at all on the question of where the line between their respective areas of competence is to be drawn. Insofar as the distribution of legislative authority is concerned, in other words, the reference to "peace, order and good government" contributes nothing.

In sum, for purposes of allocating legislative authority, the introductory clause stripped to essentials simply provides that Parliament can "make laws . . . in relation to all matters not coming within the classes of subjects . . . assigned exclusively to the Legislatures of the Provinces". If one wished to epitomize Parliament's law-making authority thereunder one might wish to describe it (were the phrase not so awkward) as the "not coming within" clause. Labelling it the "peace, order and good government" clause, on the other hand, focuses upon a phrase that performs no useful function in drawing the constitutional boundary between federal and provincial legislative authority. Moreover, it diverts attention from the central thrust of the introductory clause, which calls for determining the scope of the provincial enumerations in order to ascertain what remains for Parliament after the provincial heads of power, properly construed in light of the Act as a whole, have been exhausted.³⁵ A good deal of the criticism directed at the courts for not having accorded a wider reach to Parliament's residual power under the introductory clause has, in fact, amounted to a curiously oblique way of stating that the provincial enumerations have been too broadly construed.

IV. *The Property and Civil Rights Clause.*

Like "peace, order and good government", the phrase "property and civil rights" was a familiar one in British North America well before Confederation.³⁶ The blanket imposition of English law after the conquest having been recognized to be ill-advised, the Quebec Act of 1774 reinstated the colony's pre-existing French civil law by providing:

³⁵ To illustrate, suppose a statute contained a clause purporting to apply to the Pacific Ocean except for that part lying beyond the continental shelf. References to the "Pacific Ocean clause" would have the virtue of brevity, but would be somewhat misleading as to the reach of the clause.

³⁶ On the property and civil rights clause and its constitutional history see, generally, Tremblay, *Les Compétences législatives au Canada et les pouvoirs provinciaux en matière de propriété et de droits civils* (1967); Hogg, *op. cit.*, footnote 32, pp. 295-298; W.R. Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation* (1975), 53 Can. Bar Rev. 597, at pp. 601-603; O'Connor, *op. cit.*, footnote 32, pp. 109-145.

That all his Majesty's Canadian Subjects within the Province of Quebec . . . may hold and enjoy their Property and Possessions, together with all Customs and usages relative thereto, and all other their Civil Rights, in as large, ample and beneficial Manner, as if the said Proclamation, Commissions, Ordinances . . . had not been made and as may consist with their Allegiance to his Majesty and Subjection to the Crown . . . and that in all Matters of Controversy, relative to Property and Civil rights, Resort shall be had to the laws of Canada as the Rule for the Decision of the same³⁷

while retaining English criminal law:

. . . whereas the Certainty and Lenity of the Criminal Law of England, and the Benefits and Advantages resulting from the use of it, have been sensibly felt by the inhabitants . . . be it therefore further enacted . . . that the same shall continue to be observed as Law in the Province of Quebec³⁸

"Property and civil rights" was evidently intended to be descriptive of the full range of civil law, as opposed to criminal law. Following the Constitutional Act of 1791,³⁹ Upper Canada went its own way by repealing the material provisions of the Quebec Act and providing that "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule of decision of the same".⁴⁰ In general terms, the design which emerged distinguished between criminal law on the one hand and, on the other, "property and civil rights" as denoting the whole area of civil law concerned with rights enforceable in litigation between citizens, such as rights respecting property, contractual rights, and so forth. The broad distinction, as Sir Montague Smith was to point out in *Russell v. The Queen*,⁴¹ was between public wrongs and civil rights. To the extent that pre-Confederation constitutional usage provided a guide therefore, it would seem that the phrase "property and civil rights" was identified with the whole field of civil (in the sense of non-criminal) law.⁴²

³⁷ *Supra*, footnote 33, para. VIII.

³⁸ *Ibid.*, para. XI.

³⁹ *Supra*, footnote 33.

⁴⁰ S. Upp. Can. 1792 (32 Geo. III), c. 1, s. 1.

⁴¹ *Russell v. The Queen* (1882), 7 A.C. 829, at p. 839.

⁴² *Cf. Hogg, op. cit.*, footnote 32, p. 297, where it is stated that it is clear that the framers of the B.N.A. Act understood the "property and civil rights" phrase in the same sense as obtained in the Constitutional Act and the Quebec Act, "that is to say, as a compendious description of the entire body of private law which governs the relationships between subject and subject, as opposed to the law which governs the relationships between the subject and the institutions of government". The private law-public law dichotomy is perhaps less clear in the B.N.A. Act. While criminal law is assigned exclusively to Parliament, public law in the wider sense of relationships between the subject and the institutions of government is, for the most part, within the legislative sphere of the government concerned. A number of the s. 92 enumerations are concerned with public law in this sense, including those concerned with the amendment of the provincial constitution (head 1), taxation, financing and licensing (heads 2, 3 and 9), provincial offices and certain public

The broad sweep of the property and civil rights clause received recognition by the Privy Council at an early stage in the course of its decisions interpreting the B.N.A. Act. In the landmark decision in *Parsons* sustaining provincial legislation concerned with the terms of insurance contracts, Sir Montague Smith noted that in the Quebec Act, "the words 'property' and 'civil rights' are plainly used in their largest sense; and there is no reason for holding that in the [B.N.A. Act] they are used in a different and narrower one".⁴³ The words "civil rights", he observed further, "are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in express terms in any of the enumerated classes of subjects in section 91".⁴⁴ The message here is an important one, and it goes a considerable distance toward explaining the subsequent decisions of the Privy Council touching Parliament's legislative authority under the introductory clause of section 91. Whatever the outer limits of the property and civil rights clause might be, there could be no doubt that it conferred upon provincial legislatures authority to legislate in relation to contractual arrangements generally. If an enactment were characterized as one concerned primarily with contractual rights, therefore, it was to be expected that it would be assigned to the property and civil rights clause. And it would follow, of course, that such an enactment could therefore not be supported as a valid exercise of federal authority based on the introductory clause of section 91, for the latter provides that it can only be invoked where the matter is one "not coming within" the provincial enumerations.

Without stopping to review the cases in detail (and putting aside consideration of the emergency doctrine for a moment), it may be noted that many of the key decisions in which the introductory clause of section 91 was advanced unsuccessfully on behalf of federal authority were ones in which the legislation in question was directed at certain aspects of contracts or contractual relationships: contracts

institutions (heads 4, 6 and 7), public lands (head 5), municipal institutions (head 8) and administration of justice (head 14). For a recent example of allocation of a matter with a public law flavour to the provincial residuum in head 16, see the recent decision of the Supreme Court in *Dupond, supra*, footnote 28 (municipal by-law respecting assemblies and demonstrations). S. 92(16) is also relied on, together with s. 92(13), in the court's recent decision on film censorship in the *McNeil* case, *supra*, footnote 21. On this point, see Clement, *The Law of the Canadian Constitution* (3rd ed., 1916), pp. 817-818, where the association of s. 92(13) with civil law, as opposed to criminal law, is preferred. See also Stanley, *A Short History of the Canadian Constitution* (1969), pp. 30-32.

⁴³ *Supra*, footnote 28, at p. 111.

⁴⁴ *Ibid.*, at p. 110. Had authority over contracts generally been assigned to Parliament, he reasoned, it would not have been necessary to specify the particular class of contracts mentioned in section 91(18): "Bills of Exchange and Promissory Notes".

of employment, including labour relations⁴⁵ and labour welfare legislation,⁴⁶ commercial contracts associated with local trade,⁴⁷ contracts of insurance,⁴⁸ and a public insurance programme analogous to private insurance schemes and touching employment contracts.⁴⁹ The pattern is clear. The introductory clause has not fared well when pitted against the property and civil rights clause, and particularly when provincial hegemony over contractual matters, conferred under the rubric of "civil rights," has been challenged.

Correspondingly, the situations in which the Privy Council and the Supreme Court of Canada have been disposed to find support for federal enactments in the introductory clause of section 91 have tended to be ones in which it could fairly be said that the paramount thrust of the legislation was not directed at regulating the contractual arrangements or the property rights of individuals, although such matters may have been incidentally affected. Examples of such federal enactments would include those concerned with the regulation of aeronautics,⁵⁰ radio-communications⁵¹ and the national capital region.⁵² Even in the difficult case of federal temperance legislation the Privy Council decided, after some initial hesitation,⁵³ that the competing provincial power was located not in the property and civil rights clause but in the provincial residuum of matters of a merely local and private nature.⁵⁴ In other situations in which

⁴⁵ *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396. The fact situation did not offer a very satisfactory test case from the federal point of view involving, as it did, application of the federal enactment to local public utility operations in Toronto.

⁴⁶ *Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions case)*, [1937] A.C. 326.

⁴⁷ *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 377, affirming *Reference re Natural Products Marketing Act*, [1936] S.C.R. 398.

⁴⁸ *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588.

⁴⁹ *Attorney-General for Canada v. Attorney-General for Ontario (Unemployment Insurance Reference)*, [1937] A.C. 355.

⁵⁰ *In re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 304.

⁵¹ *In re the Regulation and Control of Radio Communications in Canada*, [1932] A.C. 304.

⁵² *Munro v. The National Capital Commission*, [1966] S.C.R. 663. Property and civil rights were clearly affected (as they are in the case of expropriation powers, zoning regulations, and the like, associated with enactments respecting airports or national parks). However the legislation was found, not surprisingly, to take its constitutional colour from its public character and association with the seat of the national government.

⁵³ In the *Local Prohibition* case, *supra*, footnote 21, at p. 365.

⁵⁴ *Attorney-General of Manitoba v. Manitoba Licence Holders Association*, [1902] A.C. 73.

Parliament's residuary power has been relied upon, a contest with the property and civil rights clause was avoided by reason of federal authority flowing by necessary implication from a limitation on some other head of provincial power,⁵⁵ or because of the restriction on provincial authority under section 92(13) to property and civil rights "in the province".⁵⁶

The broad reach of the property and civil rights clause,⁵⁷ together with the correspondingly limited scope remaining for the federal residuary power when the enactment in question is primarily concerned with contractual rights, provides the setting for an assessment of the emergency doctrine.

V. The Emergency Doctrine.

Simply stated, the "emergency doctrine" amounts to this: to meet an emergency (by definition a temporary and abnormal situation), Parliament may legislate in relation to matters which would ordinarily come within the classes of subjects assigned to the provinces. From its genesis in the judgment of the Privy Council delivered by Viscount Haldane in the *Board of Commerce* case⁵⁸ in 1922 through its most recent application in the Supreme Court of Canada decision in the *Anti-Inflation Reference* of 1976, it has represented part of the constitutional freight carried by the introductory clause of section 91.

⁵⁵ E.g., the conferral of authority in s. 92(11) over "The Incorporation of Companies with Provincial Objects", which impliedly excludes from the jurisdiction of the provinces authority to incorporate companies with other than provincial objects, the latter therefore being left for the federal residuary power: *Great West Saddlery Co. v. The King*, *supra*, footnote 30.

⁵⁶ E.g., *Reference re Offshore Mineral Rights*, [1967] S.C.R. 792.

⁵⁷ It is interesting to note that in the final draft of the British North America Bill, the deeming clause following the federal enumerations in what was to become s. 91 of the Act read, "And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the *Subject of Property and Civil Rights* comprised in the Enumeration of the Classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces": Pope, *op. cit.*, footnote 18, p. 234 (emphasis supplied). The breadth of the clause has prompted many writers to observe that it constitutes the real residuum of legislative authority: see, e.g., Hogg, *op. cit.*, footnote 32, p. 296; Laskin, *Canadian Constitutional Law* (4th ed. rev., 1975), p. 366. Clement commented that, "It would seem, indeed, that this class really throws the largest residuum to the provinces; but that the field comprised within it is one which from time to time grows narrower as the necessity for federal legislation upon the various classes of s. 91 increases": *op. cit.*, footnote 42, pp. 821-822. However wide the ambit of the clause, it is nevertheless associated with certain *kinds* of matters. The same cannot be said of the residual categories represented by the introductory clause of s. 91 and s. 92(16), which are definable only negatively (as falling outside the other enumerations of s. 92 and the federal enumerations) and in complementary (local-private or non-local-private) terms.

⁵⁸ *In re the Board of Commerce Act and the Combines and Fair Prices Act*, [1922] 1 A.C. 191.

One of the recurring themes in the extensive legal commentary on judicial interpretation of section 91 has been that in the line of cases in which the emergency doctrine was developed by the Privy Council, that tribunal proceeded on the basis that the *only* circumstances in which the introductory clause of section 91 could be relied upon to support federal enactments was where the existence of an emergency could be demonstrated. What the Privy Council had done, so it was suggested, was to substitute a new test for application of the introductory clause, draining that clause of all other content, and restricting its application to emergency situations. However, an examination of the judgments of the Privy Council discloses that the analysis just described cannot be sustained. From the outset, in fact, the emergency doctrine was advanced not in substitution for, but in supplement of, the capacity of the introductory clause of section 91 to support federal legislation relating to residual matters.

The emergency doctrine was developed primarily in nine decisions of the Judicial Committee of the Privy Council⁵⁹ reviewing federal enactments, and in each of those cases the legislation was characterized as being in relation to matters ordinarily coming within the property and civil rights clause.⁶⁰ The result of that characterization was that in none of those cases could the purely residuary capacity of the introductory clause be relied upon. In six of the cases the enactments did not purport to deal with, or to be limited to the duration of, an emergency, and a finding of *ultra vires* resulted.⁶¹ In the other three cases, due to abnormal circumstances (war and the aftermath of war), the legislation was sustained as directed toward meeting an emergency.⁶²

How is the special legislative power available to Parliament to deal with emergencies to be reconciled with the limitation in the introductory clause restricting federal authority to matters "not coming within" the provincial enumerations? The inventor of the

⁵⁹ (1) *Board of Commerce* case, 1922, (Haldane), *supra*, footnote 58; (2) *Snider* case, 1925, (Haldane), *supra*, footnote 45; (3) *Labour Conventions* case, 1937, (Atkin), *supra*, footnote 46; (4) *Unemployment Insurance Reference*, 1937, (Atkin), *supra*, footnote 49; (5) *Natural Products Marketing Reference*, 1937 (Atkin), *supra*, footnote 47; (6) *Canadian Federation of Agriculture v. Attorney-General for Quebec (Margarine Reference)*, [1951] A.C. 179 (Morton); (7) *Fort Frances* case, 1923, (Haldane), *supra*, footnote 12; (8) *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada*, [1947] A.C. 87 (Wright); (9) *Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427 (Radcliffe).

⁶⁰ This finding was explicit in the first eight cases listed in the previous footnote, and implicit in the ninth.

⁶¹ *Supra*, footnote 59, cases (1) to (6).

⁶² *Ibid.*, cases (7) to (9). See also the decision of the Supreme Court of Canada in *Reference as to the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124.

emergency doctrine, Viscount Haldane, employed expressions which suggest a temporary transcending of the confines of the provincial heads of power. In the *Board of Commerce* case he stated that, "in special circumstances, such as those of a great war, such an interest [of the federal government] might conceivably become of such paramount and overriding importance *as to amount to what lies outside the heads in section 92, and is not covered by them*".⁶³ To the same effect he observed in the *Fort Frances* case that, "it is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within section 91 because in their fullness *they extend beyond what section 92 can really cover*"⁶⁴, and that in an emergency, "a new aspect of the business of Government is recognized as emerging, an aspect *which is not covered or precluded by the general words in which powers are assigned to the Legislatures of the Provinces* as individual units".⁶⁵ Again, in the *Snider* decision he stated: "No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order *that passes beyond the heads of exclusive Provincial competency*. Such cases may be dealt with under the words at the commencement of section 91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for." ⁶⁶ While the language employed in these examples is consistent with a temporary transfer of authority from the provincial enumerations to the federal residuum, Haldane was clearly of the view that a federal constitution must accommodate centralized power in an emergency situation even if (as in the case of the United States) residuary powers are at the local level.⁶⁷

The question of terminology, in itself, is of minor import. It is of no particular consequence how one describes the phenomenon of the extra constitutional muscle acquired by the introductory clause of section 91 for the duration of an emergency. What is important, however, is that it not be mixed up with the wholly distinct capacity of that clause to support permanent legislation in relation to matters which are residual in the sense of not coming within the provincial enumerations under any circumstances. A striking example of failure to distinguish between the two situations is provided by the analysis of Viscount Simon in the *Canada Temperance Federation* de-

⁶³ *Supra*, footnote 58, at p. 197, emphasis supplied.

⁶⁴ *Supra*, footnote 12, at p. 704, emphasis supplied.

⁶⁵ *Ibid.*, at p. 705.

⁶⁶ *Supra*, footnote 45, at p. 412, emphasis supplied.

⁶⁷ The *Fort Frances* case, *supra*, footnote 12, at pp. 704-705.

cision⁶⁸, where the residuary and emergency powers were thoroughly confused. In the context of discussing *Russell v. The Queen*⁶⁹ and its treatment in *Snider*⁷⁰, Viscount Simon stated:⁷¹

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

That proposition is incontestable in that the B.N.A. Act does not, of course, expressly provide for an emergency power. Noting that the legislation under consideration in *Russell* was permanent and not temporary (a valid rebuttal of Viscount Haldane's suggestion that *Russell* represented an exercise of the emergency power) Viscount Simon continued:⁷²

In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms.

The examples listed by Viscount Simon in the above passage include some representing permanent enactments relating to matters in no way hinging on the existence of a temporary crisis (aeronautics and radio), and others which equally clearly are concerned with measures designed to meet emergency situations (war and pestilence). He went on to conclude:⁷³

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.

This culminating proposition cannot be reconciled with the basis of the emergency doctrine as clearly enunciated in earlier decisions of the Judicial Committee.⁷⁴ The entire thrust of the emergency

⁶⁸ *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193.

⁶⁹ *Supra*, footnote 41.

⁷⁰ *Supra*, footnote 45.

⁷¹ *Supra*, footnote 68, at p. 205.

⁷² *Ibid.*, at pp. 205-206.

⁷³ *Ibid.*, at p. 206.

⁷⁴ For example, in the *Fort Frances* case, the first instance of a federal enactment being sustained on the emergency doctrine, Viscount Haldane introduced his analysis with the observation that "it is clear that in normal circumstances the Dominion Parliament could not have so legislated as to set up the machinery of control over the paper manufacturers which is now in question": *supra*, footnote 12, at p. 313.

doctrine in fact amounted to this: where the nature of a federal enactment is such that it is characterized as being in relation to a matter normally coming within the classes of subjects assigned to the provinces, then it is *precisely* the existence or non-existence of an emergency which is determinative of validity. If this puzzling observation of Viscount Simon's were accepted at face value, the effect would be to deny that any extra legislative authority accrues to Parliament to enable it to respond effectively to an emergency situation such as war. No doubt because that result would have been totally inconsistent with the whole line of decisions in which the emergency doctrine had been developed, Viscount Simon's analysis received short shrift when the Privy Council subsequently sustained enactments the validity of which depended on Parliament's extraordinary constitutional powers in coping with war and its legacy.⁷⁵

The course of decision on the emergency doctrine makes it abundantly clear, therefore, that there are two separate and wholly distinct strands to the legislative authority that the introductory clause of section 91 confers on Parliament. They are entirely compatible, and cumulative. If a federal enactment is characterized as being in relation to a matter ordinarily coming within a provincial head of power, and would therefore be *ultra vires*, it may still be possible to sustain the enactment by demonstrating that it is responsive to an emergency situation.

VI. Recent Developments.

The authorities respecting the introductory clause of section 91 have been capped by two recent Supreme Court of Canada decisions upholding federal enactments on the basis of each of the two faces of the introductory clause of section 91: the *Anti-inflation Reference*⁷⁶ on the emergency power, and the *Hauser*⁷⁷ case on the residual power. These two decisions, now the leading authorities on the scope of the introductory clause, provide convenient vehicles for an assessment of the present state of the law and proposals for changing it.

(i) *Of peace-time emergencies: the Anti-inflation Reference.*

The Privy Council had recognized in *obiter* that the federal emergency power could be activated by situations short of war and

⁷⁵ *Supra*, footnote 59, cases 8, and 9. The Supreme Court of Canada also applied the emergency doctrine in the *Wartime Leaseholds Regulations Reference*, *supra*, footnote 62, with only one of seven opinions (that of Rand J.) referring to the *Canada Temperance Federation* case.

⁷⁶ *Supra*, footnote 9.

⁷⁷ *Supra*, footnote 14.

post-war conditions. It did not, however, have occasion to base a decision upholding a federal enactment on a finding of an emergency situation taking the form of a temporary crisis or peril not associated with war. As to what might constitute such an emergency, Lord Atkin, in the *Labour Conventions* case, recited some of the expressions that had commended themselves to the Judicial Committee:

It is only necessary to call attention to the phrases in the various cases, "abnormal circumstances", "exceptional conditions", "standard of necessity" (*Board of Commerce* case), "some extraordinary peril to the national life of Canada", "highly exceptional", "epidemic of pestilence" (*Snider's* case), to show how far the present case is from the conditions which may override the normal distribution of powers in sections 91 and 92.⁷⁸

Apart from striking cautionary notes, however, the Privy Council provided little guidance concerning the potential for exercise of the emergency power in peace-time. That was left for the Supreme Court of Canada to deal with, effectively as a matter of first impression, in the *Anti-Inflation Reference*.

The Anti-Inflation Act⁷⁹ and the Guidelines made thereunder dealt with controlling prices of commodities and services, profit margins and compensation paid to employees. A series of decisions in the Privy Council⁸⁰ and in the Supreme Court⁸¹ had consistently characterized enactments of general application directed at controlling or fixing prices-profits-wages as being in relation to matters that (in the absence of a national emergency) fell within the property and civil rights clause, and not within any of the enumerations of federal authority such as the trade and commerce⁸² or criminal law⁸³ powers. The Anti-Inflation Act purported to apply to industries and to contracts of sale and employment that would normally be subject to provincial regulatory authority. If the court were to sustain the legislation on the basis of the introductory clause of section 91, therefore, it was faced with a choice between two possible courses of

⁷⁸ *Supra*, footnote 46, at p. 353. The passage of which this quotation forms part was cited with approval in the last decision in which the Judicial Committee gave consideration to the peace, order and good government clause: *Canadian Federation of Agriculture v. Attorney-General for Quebec*, *supra*, footnote 59, at pp. 197-198.

⁷⁹ *Supra*, footnote 11.

⁸⁰ See, the *Board of Commerce* case, *supra*, footnote 58, at pp. 197-198 and the *Fort Frances* case, *supra*, footnote 12, at p. 703.

⁸¹ See *Home Oil Distributors Limited v. Attorney-General of British Columbia*, [1940] S.C.R. 444, at p. 445 (per Duff C.J.); pp. 446-447 (per Kerwin J., Rinfret J. concurring); p. 448 (per Crocket J.); pp. 450-451 (per Davis J.); and p. 455 (per Hudson J.) and the *War-time Leasehold Regulations Reference*, *supra*, footnote 62, p. 130 (per Rinfret C.J.).

⁸² S. 91(2).

⁸³ S. 91(27).

action. One approach would involve recharacterizing this type of legislation with a view to opening the way for a conclusion that the enactment was in relation to some residual matter "not coming within" the property and civil rights clause or any other provincial enumerations. This would require de-emphasizing the enactment's impact on contractual arrangements and local industries, and such an analysis would not be easy to reconcile with previous authority. The alternative was to conclude that an emergency was in existence, in which case the emergency doctrine would unquestionably provide adequate (albeit temporary) constitutional support for the legislation.

The reference was heard by a full court of nine judges and produced three sets of reasons, none of which represent the judgment of the court. Laskin C.J., expressing reasons to which three other members of the court subscribed, and Ritchie J., delivering reasons with which two others concurred, were in agreement to the extent of concluding that the legislation could be supported on the basis of the emergency doctrine. They differed in that Ritchie J. took the position that this was the sole basis on which the legislation could be sustained while Laskin C.J. stopped short of that conclusion, holding open the possibility that the legislation could have been found *intra vires*, had it been necessary to do so, even without a finding of emergency. The two dissenting members of the court, whose reasons were delivered by Beetz J., agreed with Ritchie J. that the fate of the legislation turned on the question of whether the requirements of the emergency doctrine had been satisfied; they concluded, however, that the question must be answered in the negative with the result, in their view, that the legislation was *ultra vires*.

The reasons for judgment in the *Anti-Inflation Reference* are extensive, and are amply reviewed elsewhere.⁸⁴ For present purposes it will suffice to note those features which appear to bear most directly on proposals for constitutional reform.

By way of preliminary observation, it may be noted that the court clearly drew a distinction between the special and temporary legislative authority accruing to Parliament in emergency situations on the one hand and, on the other, the authority it enjoys at all times to enact legislation over matters which are residual in the sense of falling outside the classes of subjects assigned to the provinces. As in the earlier authorities, there is some variety in terminology, and it may be observed that the expressions associated with the introductory clause may not always be used in the same sense, or in a way which makes it entirely clear which of its two capacities is being

⁸⁴ *Supra*, footnote 13.

invoked.⁸⁵ However, the fundamental difference between the two functions of the clause, supported by two distinct lines of judicial decisions, was accepted, and any attempt to fashion a single test for applicability of the introductory clause, à la Viscount Simon in the *Canadian Temperance Federation* case,⁸⁶ may now be taken to have been abandoned.⁸⁷

One of the major issues presented in the *Anti-Inflation Reference* had to do with a question of form, that is, whether the federal enactment to be supported must, in terms, purport to be a measure aimed at meeting an emergency situation. In those cases where federal legislation had been sustained on the basis of the emergency power in the past, the emergency had been of such proportions—as in the outbreak of war—that the court could take judicial notice thereof,⁸⁸ or the legislation on its face either declared an emergency to exist or made provision for such declaration by the

⁸⁵ Terminology frequently employed in conjunction with the introductory provisions of s. 91 includes references to the “dimensions” doctrine and to conferral of authority over matters of “national concern”. The quoted words were used in conjunction with each other in the familiar two sentence passage in the *Local Prohibition* case, *supra*, footnote 21, where Lord Watson stated (at p. 361): “Their Lordships do not doubt that some 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 a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.” The context does not disclose whether Lord Watson intended the references to “dimensions” and “national concern” to describe two distinct situations. In the *Anti-Inflation Reference*, in the reasons of both Ritchie and Beetz JJ., the expressions “national concern” and “national dimensions” are used interchangeably. The latter treats those terms as describing legislative matters which can attract the support of the introductory clause in ordinary (non-emergency) circumstances (at p. 453), but the sense in which they are used by Ritchie J. (at p. 437) is less clear. The reasons of Laskin C.J., furthermore, suggest that he did not view the “national dimensions” doctrine as synonymous with “national concern” (at pp. 412-414). In the *Hauser* case, Dickson J. follows the usage adopted by Beetz J. in the *Anti-Inflation Reference*, equating “national concern” and “national dimensions” and applying those terms to non-emergency situations: *supra*, footnote 14, at p. 15 of Dickson J.’s reasons.

⁸⁶ See text accompanying footnotes 68 to 74.

⁸⁷ In the *Anti-Inflation Reference* an argument in support of the validity of the legislation was advanced to the effect that national emergency was synonymous with national concern, and propounded a “single test” theory for all applications of the introductory clause which, however, did not find favour with the court. The argument is referred to by Beetz J., at p. 470. On the course of argument generally, see Russell, *op. cit.*, footnote 13, pp. 645-653.

⁸⁸ The *Fort Frances* case, *supra*, footnote 12, at p. 701.

Governor in Council.⁸⁹ And apart from enactments which had been sustained in litigation there were other examples of federal enactments, some of them recent,⁹⁰ which stated explicitly that they were aimed at emergency situations. The Anti-Inflation Act, in contrast, came no closer to speaking in terms of the existence of an emergency than the statement in the preamble that inflation in Canada had become a matter of "serious national concern".

Beetz J., in his reasons for dissent, considered this lack of explicitness concerning the emergency nature of the enactment to be fatal to its validity. Having pointed out that the constitutional consequences of a finding of national emergency were far reaching, resulting in nothing less than a suspension of the normal distribution of legislative authority for the duration of the emergency, he outlined the rationale for his position in the following terms:⁹¹

In cases where the existence of an emergency may be a matter of controversy, it is imperative that Parliament should not have recourse to its emergency power except in the most explicit terms indicating that it is acting on the basis of that power. Parliament cannot enter the normally forbidden area of provincial jurisdiction unless it gives an unmistakable signal that it is acting pursuant to its extraordinary power. Such a signal is not conclusive to support the legitimacy of the action of Parliament but its absence is fatal. It is the duty of the courts to uphold the Constitution, not to seal its suspension, and they cannot decide that a suspension is legitimate unless the highly exceptional power to suspend it has been expressly invoked by Parliament. Also, they cannot entertain a submission implicitly asking them to make findings of fact justifying even a temporary interference with the normal constitutional process unless Parliament has first assumed responsibility for affirming in plain words that the facts are such as to justify the interference. The responsibility of the Courts begins after the affirmation has been made. If there is no such affirmation, the Constitution receives its normal application. Otherwise, it is the Courts which are indirectly called upon to proclaim the state of emergency whereas it is essential that this be done by a politically responsible body.

From an examination of the Act (buttressed by references to *Hansard*), he concluded that, "Parliament did not purport to enact it under the extraordinary power which it possesses in time of national crisis",⁹² and for that reason alone the enactment could not be sustained as an exercise of the emergency power. The Beetz view did not prevail, the majority being prepared to infer, from the material before the court, that Parliament had, in fact, proceeded on the basis of responding to an emergency. It became necessary for the majority, therefore, to consider the further questions of onus and

⁸⁹ *Wartime Leaseholds Regulation Reference*, *supra*, footnote 62, at pp. 132-133; *Japanese Canadians case*, *supra*, footnote 59, at pp. 88-92; *Hallet and Carey*, *supra*, footnote 59, at pp. 438-441.

⁹⁰ *E.g.*, the Energy Supplies Emergency Act, S.C., 1973-74, c. 52, and the Public Order (Temporary Measures) Act, 1970, S.C., 1970-71-72, c. 2.

⁹¹ *Supra*, footnote 9, at pp. 463-464.

⁹² *Ibid.*, at pp. 472.

standard of proof concerning the existence or non-existence of an emergency.

In earlier decisions dealing with the emergency power in the context of war and its aftermath, observations had been made to the effect that while a declaration as to the existence of an emergency was subject to judicial review, the courts would be slow to overrule Parliament's assessment of the situation.⁹³ In the *Anti-Inflation Reference* the seven members of the court whose views found expression in the reasons of Laskin C.J. and Ritchie J. made it clear that the burden of proof placed on anyone challenging the existence of an emergency is no less heavy in peacetime than it is in circumstances associated with war. In both sets of reasons, moreover, the formulations respecting the nature of the onus are at least as stringent in their requirements as in any previous decision. Both quote with approval the most far reaching observation made by the Privy Council on the subject, namely that of Lord Wright in the *Japanese Canadians* case, where the evidentiary requirement is expressed not only with respect to negating the continuance of an emergency, but where it is extended to the prior question of whether an emergency had ever come into existence. The passage from Lord Wright's reasons reads as follows:⁹⁴

Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliaments [*sic*] of the Dominion and the Parliaments of the Provinces comes into play. But very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, 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. To this may be added as a corollary that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation.

Further, Laskin C.J., adopting less familiar terminology, expressed the view that the court would not be justified in rejecting Parliament's assessment as to the existence of an emergency unless the material before the court led it to the conclusion that there was "no rational basis" for such an assessment.⁹⁵

It seems abundantly clear in the wake of the *Anti-Inflation*

⁹³ *Fort Frances*, *supra*, footnote 12, at p. 701; *Japanese Canadians* case, *supra*, footnote 59, at pp. 101-102; *Wartime Leaseholds Regulation Reference*, *supra*, footnote 62, at pp. 131, 135, 141-142, 145-146, 153, 157 and 166.

⁹⁴ *Supra*, footnote 59, at pp. 101-102, quoted by Laskin C.J. at p. 410 and Ritchie J. at p. 439.

⁹⁵ *Ibid.*, at pp. 423-425. For a discussion of the "rational basis" requirement in American constitutional jurisprudence, see Abel, *op. cit.*, footnote 13, at pp. 418-419.

judgment that in peacetime, as well as in circumstances associated with war, the courts will be strongly inclined to defer to Parliament's appraisal of whether or not a particular situation qualifies as an emergency, and the appropriateness of the legislative response aimed at meeting it.

One final aspect of the *Anti-Inflation Reference* invites attention, and will serve as prologue to consideration of the more recent judgment of the court in the *Hauser* case. It has to do with the task of characterizing a challenged enactment for purposes of constitutional categorization. This stage in the process of constitutional analysis can effectively be dispensed with whenever a federal enactment is sustainable on the basis of the emergency doctrine since, by hypothesis, the ordinary distribution of legislative authority stands in abeyance during the course of the emergency. As the dissenting reasons for judgment authored by Beetz J. rejected the emergency doctrine option, it became necessary for him to address the question of the "matters" to which the Anti-Inflation Act related and in the course of doing so he offered some observations concerning considerations to be taken into account when the federal residuary power is invoked.

Beetz J. was not long detained by the task of characterizing the Anti-Inflation Act and Guidelines. He noted the line of authority supporting exclusive provincial jurisdiction (in the absence of an emergency) over control and regulation of local trade, of commodity pricing and profit margins in the provincial sectors, and of contracts of employment, including wages.⁹⁶ In consequence, he concluded that the Act and Guidelines directly interfered with "classes of matters which have invariably been held to come within exclusive provincial jurisdiction, more particularly property and civil rights and the law of contract".⁹⁷

Having characterized the enactment as essentially concerned with controlling prices, profits and pay in the provincial (as well as in the federal) sector, Beetz J. was drawn to the conclusion that the Act *prima facie* exceeded Parliament's legislative authority. He went on to hold that the legislation could not be constitutionally recharacterized through the simple expedient of describing it as an anti-inflation measure. In more general terms, he made the point that the lumping together of a number of discrete matters, or legislative means, under a new and more comprehensive label descriptive of the legislative end, could not in itself, be expected to alter the constitutional distribution of authority over the distinct legislative

⁹⁶ At p. 441.

⁹⁷ At p. 442. The conclusion is reiterated at pp. 452-453.

matters grouped under the new rubric. This part of his analysis is unimpeachable for the constitutional validity of legislation cannot turn upon the level of generality of the terminology chosen to describe it. The appropriateness of the label attached to an enactment in the characterization process does, after all, include questions of scale or degree⁹⁸ as well as of kind. The language one employs to classify the matter or matters to which an enactment relates must accommodate itself to the constitutional categories, not the reverse.

A more intriguing element in the Beetz analysis is the attention paid to the question of whether the legislation addresses a "new" matter, and the relevance of that question in determining whether or not constitutional support will be forthcoming from the federal residual power. Having reviewed instances in which the introductory clause of section 91 has been invoked successfully with respect to matters of "national concern" (federally incorporated companies, aeronautics, radio, National Capital Region) he stated:⁹⁹

[These authorities] had the effect of adding by judicial process new matters or new classes of matters to the federal list of powers. However, this was done only in cases 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. . . . The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.

I should add that inflation is a very ancient phenomenon, several thousands years old, as old probably as the history of currency. The Fathers of Confederation were quite aware of it.

This passage reflects the theme, already noted, that a candidate for characterization as a new matter or class of matters assignable to the residuary power ought to have a relative coherence or "degree of unity". But beyond that the above quoted passage, and in particular the last paragraph of it, carries the suggestion that the "newness" of the matter is relevant not only to whether the characterization of a particular enactment arises as a matter of first impression for the courts, but whether the problem which the legislation addresses is new or old and, more particularly, whether the phenomenon is or is not one which has emerged since Confederation. This latter element—the novelty or lack of novelty in the problem with which the enactment is concerned—reappears in the *Hauser* decision.

⁹⁸ See Abel, *op. cit.*, footnote 13, at p. 429, for a discussion of this criterion of "how tidy the new class of subjects is."

⁹⁹ *Supra*, footnote 9, at p. 458.

(ii) *From drink to drugs, and the revival of Russell: the Hauser decision.*

In *The Queen v. Hauser*¹⁰⁰ the constitutional question before the court had to do with the conduct of prosecutions for violation of the Narcotic Control Act.¹⁰¹ A determination of whether or not this federal enactment represented an exercise of the criminal law power,¹⁰² as opposed to some other constitutional source of Parliament's legislative authority, was particularly important due to the implications the finding would have with respect to Criminal Code¹⁰³ prosecutions.

The provincial position was that the authority given the Legislatures to make laws in relation to the administration of justice¹⁰⁴ clearly embraced criminal justice and that this conferred, at a minimum, authority to conduct prosecutions in respect of violations of federal enactments supported by the criminal law power. If that position were vindicated by the court, and the Narcotic Control Act characterized as a criminal law measure in the constitutional sense, it would follow that the provinces enjoyed the same authority with respect to drug prosecutions as they have exercised since Confederation over criminal law prosecutions generally. The broad federal position was that it was open to Parliament to make provision respecting prosecutions for violation of any federal enactments, including those based on the criminal law power. If this proposition were accepted, it would mean that Parliament could, whenever it chose to do so, take responsibility for any or all Criminal Code prosecutions out of provincial hands.

Pigeon J., delivering the reasons of the court (and writing for four of the seven judges who sat on the case)¹⁰⁵ reached the conclusion that the constitutional base for the Narcotic Control Act was not the criminal law power, as had been generally assumed,¹⁰⁶ but the federal residual power. In brief reasons for judgment, he supported this characterization of the legislation in two ways. The first involved resuscitation of, and reliance upon, *Russell v. The Queen*¹⁰⁷ where federal temperance legislation had been upheld on

¹⁰⁰ *Supra*, footnote 14.

¹⁰¹ *Supra*, footnote 15.

¹⁰² S. 91(27).

¹⁰³ R.S.C., 1970, c. C-34.

¹⁰⁴ S. 92(14).

¹⁰⁵ The reasons of Pigeon J. were concurred in by Martland, Ritchie and Beetz JJ. Separate concurring reasons were delivered by Spence J. The dissenting reasons of Dickson J. were concurred in by Pratte J.

¹⁰⁶ See footnote 16, and accompanying text.

¹⁰⁷ *Supra*, footnote 41.

the basis of the introductory clause of section 91. In that decision the Privy Council concluded that the matter to which the enactment related did not fall within any of the classes of subjects assigned to the provinces; accordingly it was caught by the opening words of section 91 and it was not necessary to consider the further question of whether it also came within one of the enumerations of that section. Pursuing the analogy, Pigeon J. emphasized the "control" aspect of the liquor legislation considered in *Russell* and of the drug enactment under review in *Hauser*. With respect to the latter he noted that medical use of some of the narcotic drugs dealt with by the legislation was contemplated (just as the liquor enactment considered in *Russell* made special provision for medicinal and certain other uses of alcoholic beverages) and this assisted him to the conclusion that the general character of the Act was "legislation for the proper control of narcotic drugs rather than a complete prohibition of such drugs".¹⁰⁸

The *Russell* decision, it would appear, has now come full circle. Over the last century it has had an extraordinary, and troubled, history. Put in doubt at an early stage in its career by the *Local Prohibition* case,¹⁰⁹ it has been variously brushed over,¹¹⁰ or rationalized on tenuous grounds,¹¹¹ or accepted with faint enthusiasm out of deference to *stare decisis*.¹¹² One result of the judgment in *Hauser* is that *Russell* is alive and well, and it remains necessary to attempt to ascertain the proposition for which it presently stands.

The basis of the *Russell* decision was that the matter to which the enactment related was one not coming within the provincial enumerations and, as already noted, having reached that conclusion

¹⁰⁸ At p. 11.

¹⁰⁹ *Supra*, footnote 21.

¹¹⁰ Viscount Haldane is reported to have observed during argument in *Snider* (*supra*, footnote 45) that "For a time no self-respecting counsel cited the *Russell* case before the Board; there was a gloomy silence whenever they did, but I think we have gotten over that now;" Canada Department of Labour, *Judicial Proceedings Respecting Constitutional Validity of the Industrial Disputes Investigation Act, 1907* (1925), p. 88, cited by MacKenzie, *The Anti-Inflation Act and Peace, Order and Good Government* (1977), 9 Ott. L. Rev. 169, at p. 171.

¹¹¹ The familiar example is the passage in Haldane's reasons in *Snider*, *supra*, footnote 45, where he suggests that at the time *Russell* was decided intemperance had brought Canada to the brink of disaster (at p. 412). He went on to indicate that *Russell* ought to be confined to its facts.

¹¹² In the *Canada Temperance Federation* case, *supra*, footnote 68, an important, if not determinative, element was that *Russell* had stood for over sixty years and accordingly, "... the decision must be regarded as firmly embedded in the constitutional law of Canada, and it is now impossible to depart from it" (at p. 206).

the Judicial Committee found it unnecessary to consider whether the enactment could have been supported under one of the specifically enumerated heads of federal power under section 91, as well as the introductory clause of that section. A noteworthy feature of the *Russell* decision, however, is the treatment of the legislation as being in the nature of prohibitory and criminal measures on the one hand as opposed to regulatory, "property and civil rights" measures, on the other. Exemplifying the former category, Sir Montague Smith made reference to laws dealing with such matters as arson, cruelty to animals and prohibitions or restrictions respecting cattle with contagious diseases, and stated:¹¹³

Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law . . .

The criminal law flavour of the reasons delivered in *Russell* was duly noted in the *Anti-Inflation Reference*.¹¹⁴

There is a difference in approach, or at least in emphasis, between the analysis of Pigeon J. in *Hauser* and the reasoning in *Russell*. In the earlier case, Sir Montague Smith was concerned to emphasize the prohibitory and punitive character of the legislation—its concern with "public wrongs"—in contrast with enactments aimed at regulating property rights or civil rights between individuals which, of course, fall within provincial jurisdiction. In *Hauser*, however, Pigeon J. drew attention to the regulatory elements of the narcotic drug enactment (and by analogy of the liquor enactment reviewed in *Russell*), and was concerned to show that the legislation was not completely prohibitory. The reason for the different tack is, of course, that his analysis required contrasting the enactment with measures supported on another head of federal authority, the criminal law power, as opposed to contrasting it with regulatory measures that might be considered to fall within the provincial bailiwick.

The reasoning of Pigeon J. demands rather careful judicial fine tuning. When the whole line of constitutional decisions respecting liquor enactments is considered, it suggests that the rationale for federal legislative authority wanes as one moves across the spectrum from purely prohibitory enactments (where the criminal law aspect is foremost) to essentially regulatory types of enactment (where the

¹¹³ *Supra*, footnote 41, at p. 839.

¹¹⁴ *Supra*, footnote 9, at p. 398 (per Laskin C.J.) and p. 454, where it was observed that, "The Judicial Committee came close to characterizing the Act as relating to criminal law; . . ." (per Beetz J.).

provincial claims under the property and civil rights clause are strongest). A federal enactment with too pronounced a regulatory flavour is apt to meet the fate of the liquor licensing enactment struck down by the Privy Council in its *McCarthy Act* decision.¹¹⁵

In assessing this part of the analysis offered by Pigeon J., therefore, with its reliance on *Russell* and the analogy of legislation aimed at suppression of traffic in liquor, the difference in viewpoint between the two cases must be kept in mind. The earlier decision involved the familiar task of delineating the boundary between federal and provincial legislative authority. In *Hauser*, however, attention was necessarily focussed on marking out the boundary between two sources of federal authority, the criminal law power and the residuary power, a question of no interest or concern to the Judicial Committee in *Russell*. The common element in the two cases, in broad terms, is the sustaining of a quasi-criminal enactment on the basis of the federal residuary power. The reasons of the court delivered by Pigeon, J. read together with *Russell* (and having regard to post-*Russell* decisions on the "drink question") would indicate that the federal residuary power catches enactments of a kind that can be said to be aimed at control as opposed to complete prohibition (the latter representing a hallmark of the criminal law power) while stopping short of a comprehensive licensing or regulatory scheme (which would bring it within the provincial sphere).

The other line of reasoning relied upon by Pigeon J., and the one on which he placed most emphasis, reflects the analysis of Beetz J. in the *Anti-Inflation Reference* where the latter had alluded to the relevance of determining whether the legislation was concerned with a "new matter" as a criterion for determining whether the federal residuary power could be relied upon.¹¹⁶ Pigeon J., observed that drug abuse had not become a problem in Canada during the previous century and that it had not provoked legislative action until 1908. He stated:¹¹⁷

In my view, the most important consideration for classifying the Narcotic Control Act as legislation enacted under the general residual federal power, is that this is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of "Matters of a merely local or private nature". The subject-matter of this legislation is thus properly to be dealt with on the same footing as such other new developments as aviation (*Re Aeronautics*, . . .) and radio communications (*Re Radio Communication*, . . .).

Apart from the element of newness of the problem or development,

¹¹⁵ No reasons given. The decision is referred to in *Attorney-General for Canada v. Attorney-General for Alberta*, *supra*, footnote 48, at p. 596.

¹¹⁶ See text accompanying footnote 99.

¹¹⁷ Reasons of Pigeon J., at p. 12.

Pigeon J. does note, as well, that the matter to which the Narcotic Control Act relates clearly cannot be assigned to section 92(16) as a matter of a merely local or private nature. This latter finding is simply stated as a conclusion, it perhaps being taken as obvious that measures for the control of traffic in drugs could not effectively or appropriately be taken at the provincial level.

An exploration of the national (as opposed to local) character of the problem might nonetheless have been useful, since this question was one which had caused so much difficulty with respect to the *Russell* decision. Where a federal enactment rests on the criminal law power (or any other enumerated power) the "local or private nature" of the problem is irrelevant, as we have seen, by virtue of both the declaratory and the deeming clauses of section 91. (In key post-*Russell* decisions sustaining certain provincial liquor enactments—the *Local Prohibition* case¹¹⁸ and the *Manitoba Licence Holders* case¹¹⁹—the theme struck in *Russell* concerning the criminal or quasi-criminal flavour of the enactment was ignored, and the criminal law power, somewhat surprisingly, was not discussed). In *Hauser*, the conclusion that the Narcotic Control Act fell outside the federal enumerations made it necessary, as the above-quoted extract from the reasons of Pigeon J., acknowledges, to determine whether the matter was "local or private" or non-local-and-private (national) in nature. As to the criteria to be applied in answering that question, the judgment of the court is not instructive.

Dickson J., delivering dissenting reasons with which Pratte J. concurred, came to a different conclusion but accepted the Beetz criterion of newness. Thus he (Dickson J.) observed that drug abuse was "a very ancient phenomenon" and that "[w]hile not a pressing problem at the time of Confederation, it was not then an unknown danger in North America . . .".¹²⁰ He concluded his analysis as follows:¹²¹

In the recent *Anti-Inflation Act* reference, Mr. Justice Beetz (with whom a majority of the Court agreed on the national dimensions doctrine) indicated a desire to restrict the scope of that doctrine to new matters, "distinct subject matters which do not fall within any of the enumerated heads of s.92 and which, by nature are of national concern". (p. 457) In my view, the signal restraint in the application of the general power ought to extend to a case such as this, where it would seem clear that the Narcotic Control Act can be easily and properly characterized as falling within one of the enumerated heads of federal power, namely, head 27 of s. 91.

It would seem, therefore, that the court is committed to applying an

¹¹⁸ *Supra*, footnote 30.

¹¹⁹ *Supra*, footnote 54.

¹²⁰ Reasons of Dickson J., at p. 62.

¹²¹ Reasons of Dickson J., at p. 63.

historical test to a problem or development or legislative response thereto, with particular reference to its being slotted in time as a pre- or post-Confederation phenomenon. But although such a test appears to provide an explanation for use of the residuary power in connection with such developments as radio and aeronautics, the principle on which it is based is less clear.

It has been suggested above that where an enactment has been characterized as being in relation to a matter which does not come within any of the federal enumerations or of the first fifteen enumerations of section 92, the contest becomes one between the two residuums, namely, the introductory clause of section 91 and section 92(16). If that is the case, it is necessary to determine whether the matter is one of a merely local and private nature, and therefore within provincial jurisdiction, or one of other than a merely local or private nature (or, more succinctly, one of national concern). That this is, at least, a necessary part of the analysis, is acknowledged in the extracts from *Hauser* quoted above.¹²² But if the constitutional guidelines have to do with the "localness" or "privateness" of the matter, what is the basis for adding an additional test concerned with "newness" of the matter?

Presumably, the recency of a technological development, for example, would not, *per se*, rule out the possibility of its being characterized as being one of a local or private nature. Conversely, it is not clear why the mere fact that a matter or phenomenon existed before 1867 (but was not specifically mentioned in or obviously caught by an enumerated head of power in the B.N.A. Act), should prevent its being characterized, if it qualifies on other grounds, as a matter of national concern properly finding constitutional support in the federal residual power.

The possible implications of the "newness" test are exemplified by a subject which has been treated at the trial court level but has yet to be considered in the appellate courts: the matters of nuclear energy and regulation of the uranium mining industry. Two Ontario High Court decisions, the *Pronto Uranium Mines* case¹²³ and the *Denison Mines* case,¹²⁴ sustain federal enactments asserting regulatory authority over uranium mining,¹²⁵ and therefore

¹²² See the text accompanying footnote 117, where Pigeon J. concludes that the problem "clearly cannot be put in the class of 'Matters of a merely local or private nature.'" Dickson J. adopting the words of Beetz J., notes the requirement of showing "national concern": see text accompanying footnote 121.

¹²³ *Pronto Uranium Mines Ltd v. Ontario Labour Relations Board*, [1956] O.R. 862, 5 D.L.R. (2d) 342 (McLennan J.).

¹²⁴ *Denison Mines Ltd v. Attorney-General of Canada*, [1973] 1 O.R. 797, 32 D.L.R. (3d) 419 (Donnelly J.).

¹²⁵ Regulations made pursuant to s. 9 of The Atomic Energy Control Act, R.S.C., 1970, c. A-19. Commenting on the *Pronto Uranium* decision in this Review,

labour relations in such mining operations, on the basis that atomic energy is a matter of national concern falling within the scope of the introductory clause of section 91. Whether the residuary power is the most suitable vehicle to call upon in circumstances such as these to protect the national interest is open to question. The enumerated heads of section 91, which assign to Parliament authority over such matters as defence¹²⁶ and export trade,¹²⁷ would seem to confer ample authority to impose controls requisite for national security and foreign policy purposes. And the holus-bolus allocation of regulatory authority over all aspects of uranium mining to the federal sphere, under the residuary power, appears to have generated a certain amount of federal-provincial rivalry and administrative confusion.¹²⁸ It may be, although it is not self-evident, that the national interest requires displacing the provincial legal regime and regulatory apparatus applicable to such mines as local undertakings in favour of the full panoply of federal law and administration relating to such matters as labour relations, labour welfare, occupational health, environmental standards and so forth. If so, Parliament has the option of achieving that result directly through exercise of its declaratory power,¹²⁹ which it has in fact employed under the Atomic Energy Control Act.¹³⁰ Use of the declaratory power assigns responsibility for selecting this option to a politically accountable body and has the advantage of providing greater flexibility in terms of altering the scope of, or even repealing, the declaration in response to changed circumstances and federal-provincial accommodations.

My purpose, however, is not to assess whether nuclear energy generally, or uranium mining particularly, is a worthy candidate for support under Parliament's residual law-making authority. The example is cited to give concrete form to the question of the usefulness of the criterion of "newness" of the matter to which a challenged enactment relates. Atomic energy and uranium mining are certainly "new" in the sense of representing post-Confederation developments. But of what significance is this item of information in

Professor (now Chief Justice) Laskin observed that the line of reasoning suggested a like conclusion in favour of federal power over gold mining premised on federal control over gold for monetary purposes: (1957), 35 Can. Bar Rev. 101, at p. 104.

¹²⁶ S. 91(7), "Militia, Military and Naval Service, and Defence".

¹²⁷ S. 91(2), "The Regulation of Trade and Commerce."

¹²⁸ See Saskatchewan, The Cliff Lake Board of Inquiry—Final Report (1978), ch. 6.

¹²⁹ Under s. 92(10)(c).

¹³⁰ *Supra*, footnote 125, s. 17. In the *Pronto Uranium* case, *supra*, footnote 123, McLennan J. considered it unnecessary to decide whether the enactment could have been supported on either the declaratory power or the defence power provisions of the constitution.

modifying a conclusion, independently arrived at, that these constitute matters which are merely "local or private" (or that uranium mines are "local works"¹³¹) or, alternatively, that they are matters of national concern? What inference is to be drawn from the fact that the enumerations of sections 91 and 92 make no mention of other forms of energy or types of mining that were familiar to the fathers of Confederation? If the allocation of matters between the federal and provincial residuums turns on some sort of principle of effectiveness, however formulated, which requires an assessment of provincial ability to cope adequately with the problem, how does the novelty, or lack of novelty, of the phenomenon assist in arriving at a conclusion? These questions relate to the dynamic nature, the potential capacity, of a residuary clause. This, in turn, bears directly on the question of proposals for constitutional change dealing with residuary authority.

VII. *Proposals for Reform.*

As noted at the beginning of this article, recommendations advanced for constitutional change have included a proposal that the emergency power be made the subject of a new constitutional clause.¹³² There is something to be said for doing this simply for clarification, on the ground that leaving this judicially developed doctrine to be carried by the introductory clause of section 91, along with the residual power, invites confusion and a blurring of the distinction between two entirely different constitutional functions. This rationale for a new clause may now be less compelling in light of the recent decisions of the Supreme Court of Canada affording clear recognition of the two different roles played by the introductory clause in emergency and non-emergency situations. However, if it is desired not only to make express constitutional provision for the emergency doctrine but to codify or alter some of the principles governing it, then of course a new clause will be required. It will in any event be convenient for purposes of discussion to separate the two constitutional responsibilities presently discharged by the introductory clause of section 91.

(i) *The emergency power.*

Arising from the points made earlier respecting the emergency doctrine and the *Anti-Inflation Reference*, three elements of possible constitutional change may be identified. One has to do with the question of form of the federal enactment sought to be sustained on the basis of the emergency power. A second is concerned with the possibility of special procedures for, or conditions precedent to,

¹³¹ Under s. 92(10).

¹³² *Supra*, footnote 6, and accompanying text.

invoking the emergency power, and the related question of whether a distinction should be drawn between emergencies arising out of war and those occurring in peace time. The third involves the question of the role of the courts, and the appropriate type of judicial review, when the existence or continuance of an emergency is challenged.

The requirement of form in this context would simply make it necessary for Parliament to state explicitly that the enactment was based on exercise of the emergency power. It would not require the use of "ritual words", as Beetz J. pointed out in the *Anti-Inflation Reference*¹³³, but some language that would make it unmistakably clear that Parliament was invoking this special, temporary power as opposed to relying on its ordinary constitutional authority to enact permanent legislation either in exercise of its residual law-making authority or under one or more of the enumerations. The rationale is straightforward enough. When the emergency power is successfully invoked, the potential for centralization of authority is enormous. The normal distribution of legislative authority stands suspended for the duration of the emergency, and the only legal restraint on the extent to which Parliament may penetrate what is normally provincial domain would seem to depend on the difficult task of convincing a court that the federal measure has nothing to do with meeting the particular emergency. It is a drastic and far-reaching power, and one which therefore ought not to be exercised lightly, or in an obscure fashion. A passage from the reasons of Beetz J. quoted above¹³⁴ makes the point succinctly and cogently. Because of the implications of invoking this extraordinary power, he argues, the existence of a state of emergency should be clearly proclaimed by a politically responsible body and ought not, because of the ambiguous form of the enactment, be left to be indirectly proclaimed by the courts. It might be added that if the federal government of the day seeks extraordinary constitutional powers to meet an emergency, it would not seem too great an imposition to require it to obtain from Parliament a mandate expressed in terms leaving no doubt that Parliament has focussed its collective attention on the nature of the constitutional course of action it is being asked to endorse.

The addition of an emergency power clause to the constitution would, at a minimum, achieve the result of requiring a clear Parliamentary declaration of intention to invoke temporary emergency measures. Such a requirement would not be without precedent. The B.N.A. Act has from the outset contained a few provisions that may be invoked unilaterally by the central government (for instance, disallowance¹³⁵) or by Parliament (the declara-

¹³³ *Supra*, footnote 9, at p. 464.

¹³⁴ See text accompanying footnote 91.

¹³⁵ S. 90.

tory power¹³⁶) at the expense of provincial legislative authority. In these instances, while no "ritual words" are required, the language employed must leave no doubt concerning the constitutional base for the executive or legislative action, as the case may be. And as constitutional conventions develop concerning the use (or disuse) of such exceptional powers, it is essential that reliance upon them be designated in no uncertain fashion. The sweeping authority conferred by the emergency power would seem to warrant no lesser precaution.

A second element of constitutional reform has to do with the possibility of imposing special requirements or procedures as conditions precedent to exercise of the emergency power, and the further question of whether, for that purpose, a distinction should be drawn between wartime and peacetime emergencies. The *Anti-Inflation Reference*, representing the first instance since Confederation in which a federal enactment was sustained in circumstances not associated with war or post-war conditions, provides no basis for suggesting any difference in the ground rules applicable to the two situations. It may be considered useful, however, to differentiate between war and peacetime conditions in a new constitutional clause.

Once again, some assistance may be obtained from existing constitutional provisions. Section 91(1) of the B.N.A. Act states that among the provisions of the constitution of Canada that Parliament cannot unilaterally amend is the five-year limitation on the duration of the House of Commons,¹³⁷ provided however that the House of Commons may be continued by Parliament "in time of real or apprehended war, invasion or insurrection" and "if such continuation is not opposed by the votes of more than one-third of the members of such House". The clause provides a form of words (echoed in the War Measures Act¹³⁸) calculated to embrace conditions short of actual war, but nevertheless involving a direct threat to national security. It also provides a precedent for requiring a special majority vote in the House of Commons, in this case a two-thirds majority, to approve a departure from the constitutional rule applicable in ordinary circumstances.

A similar type of formula might be considered for a new emergency power clause, whether applicable to national security and to other emergencies alike or, alternatively, laying down different requirements for the two types of situations. It may be thought, for example, that decisions directly bearing on national security are best

¹³⁶ S. 92(10)(c).

¹³⁷ Imposed by s. 50 of the B.N.A. Act.

¹³⁸ R.S.C., 1970, c. W-2.

dealt with by Parliament itself simply because the central government may be required to act with greater despatch than consultation with the provinces would allow. On the other hand, when the emergency is not one relating to war/invasion/insurrection, the interests of federalism might be better served by a requirement for some degree of federal-provincial agreement for what does, after all, represent an amendment, albeit a temporary one, to the Canadian constitution.

A third subject which a new emergency power clause might address concerns the principles governing judicial review of the question of substance, which requires looking behind the Parliamentary declaration to ascertain whether an emergency has, in fact, come into existence or continues to exist. As noted above, the *Anti-Inflation Reference* demonstrates that in the case of peacetime emergencies as well as those associated with war, the courts will not readily second guess Parliament's assessment of a situation as being one which amounts to an emergency, or its view as to the suitability of the legislative measure put forward to meet the emergency. Under the existing jurisprudence, the burden of proof placed on the party challenging Parliament's statutorily expressed assessment of the situation is a very heavy one. A question which presents itself, therefore, is whether a new constitutional clause should deal with such matters as onus and standard of proof with a view to toughening the judicial review process. It is my view that this is not one of the more promising avenues for constitutional reform. This conclusion is based on the inherent limitations of judicial review and, more specifically, on the difficulties faced by the courts in coming to grips with the type of mixed fact and policy question involved in such situations.

Reference has been made in a different context to the analogy of another unilaterally exercisable power available to Parliament as a means of obtaining legislative authority over a matter formerly within the provincial domain, that is, the declaratory power.¹³⁹ With respect to exercise of that power, the courts have declined to go behind a formal Parliamentary declaration to determine whether a particular work is, in fact, one for the general advantage of Canada or of two or more provinces. And this judicial restraint, most would agree, is entirely appropriate, for the courts are not well equipped to undertake the responsibility of overriding a governmental assessment of the blend of policy and fact which a declaration of "general advantage" represents.

Similar reservations may, quite understandably, inhibit the courts in reviewing a Parliamentary (or intergovernmental) conclu-

¹³⁹ *Supra*, footnote 136.

sion that an emergency exists. In adjudicating upon this type of question, it must be remembered, a court operates under severe handicaps. Apart from such necessarily limited assistance as the doctrine of judicial notice may provide, the court is entirely dependent upon the extent to which the order of reference is supplemented by evidence which the parties choose to adduce. The court has no independent investigative capacity and, in the case of a reference, the appellate court will not even have had the benefit of evidence from witnesses subjected to cross-examination at trial. Unlike that of a parliamentary or intergovernmental committee, the court's role is necessarily a passive one; it does not search out expert witnesses on its own motion, and its internal research capacity will not ordinarily extend to the kinds of non-legal expertise needed to assess whether the fact situation can properly be characterized as an emergency.

In such circumstances, it ought not to be surprising that the courts have been inclined to defer to Parliament's assessment of the situation, and to insist that "very clear evidence"¹⁴⁰ be adduced to warrant going behind a Parliamentary declaration of emergency. Judicial restraint is in keeping with what may realistically be expected from judicial review in this context. It would be inadvisable for a court to reject a clear legislative statement respecting existence of an emergency on the basis of a finely measured balance of probabilities. These considerations suggest that an attempt to supply guidelines in a new emergency power clause with respect to such matters as onus and standard of proof is likely to be an unproductive exercise.

In brief, it is suggested that the task of deciding whether an emergency exists is one which can be discharged more effectively and appropriately by Parliament and intergovernmental forums than by the courts. It follows that constitutional reform in this area would be more usefully directed toward devising procedural safeguards in the legislative process than toward an attempt to reshape the process of judicial review.

(ii) *Residual legislative authority.*

An important reality underlying proposals for constitutional change in this area is the degree of uncertainty about the kinds of legislation which the courts might, in future, be inclined to assign to Parliament's residual law-making authority under the introductory clause of section 91. To date the traffic borne by the introductory clause has not been very heavy. But there have been some surprises: few could have predicted the *Hauser* allocation of narcotics

¹⁴⁰ See text accompanying footnote 94.

legislation to the residuary power, for example. Other candidates for support on the federal residuary power have emerged but have not yet received consideration by the Supreme Court of Canada; the example of regulation of the uranium mining industry was mentioned above.¹⁴¹ But the most significant factor in constitutional discussions will doubtless be the interest of federal and provincial governments alike in the future allocation of constitutional responsibility over new developments demanding new governmental initiatives. While the nature of these new developments is, of course, unknown, it can be assumed that some of them will not fit tidily within the specific enumerations in the B.N.A. Act, and the allocation of residual law-making authority will therefore be determinative.

It is in this context that references to the question of whether the enactment deals with a "new matter", in the *Anti-Inflation Reference*¹⁴² and in *Hauser*,¹⁴³ invite closer scrutiny. As has been noted, aeronautics and radio communications undoubtedly represent new (in the sense of post-Confederation) technological developments over which legislative authority has been assigned to Parliament. But did the claim for federal authority rest on the newness of those developments or, perhaps, on more functional considerations having to do with the advantages of a nation-wide regulatory scheme for intensely practical reasons, such as minimizing the risk of collisions between airplanes or between radio frequencies? Does the newness of technological developments such as computers impair claims for provincial authority over matters otherwise qualifying for characterization as "local" matters or undertakings? The qualifiers contained in the relevant passages respecting local matters, or stated in terms of the requirement of national concern, suggest a negative answer to the last question.¹⁴⁴ Does the "newness" test then operate solely to restrict Parliament's authority by precluding reliance on the federal residual power whenever the subject matter of the enactment relates to a pre-Confederation phenomenon? If so, it may be questioned whether it is desirable to exclude from the ambit of federal authority a range of matters of unknown extent, on a purely historical and non-functional basis.

The future course of decision will, no doubt, provide answers to some of the questions posed in the preceding paragraph. As may be apparent from the foregoing discussion, it is my view that the

¹⁴¹ See text accompanying footnotes 126 to 131. As to possible implications for what may be considered to be analogous situations, see footnote 125, *supra*.

¹⁴² See text accompanying footnote 99.

¹⁴³ See text accompanying footnotes 117, 120 and 121.

¹⁴⁴ *Supra*, footnote 122.

newness, or lack of newness, of the matter ought to be an entirely neutral factor in the process of determining the content of the federal residuary power. This assessment is related to the position adopted on the concept of a shared residuum, or parallel residuums, in the constitution. An important advantage of having matching federal and provincial residuums, in my opinion, is the compromise effected by explicitly recognizing that neither level of government has a monopoly over matters falling outside the specified classes of subjects. Or, alternatively stated, Parliament and the provincial legislatures are permitted to share in the dynamic features characteristic of a residuum.

As has been pointed out, the letter of the constitution presently provides for parallel residuums: the section 92 (16) allocation to the provinces of matters "of a local or private nature" and the authority left to Parliament, by inference, over matters other than those of a local or private nature—that is, those of national concern. And recent decisions of the Supreme Court of Canada suggest that the residuary role of section 92(16) will not be overlooked.¹⁴⁵ If the case for parallel residual categories is accepted, therefore, there should be no necessity for new constitutional language unless the future course of judicial decision develops along lines unduly obscuring this structure.

Reference was made at the beginning of this article to the recent proposal of the Pepin-Robarts Task Force to the effect that the constitution be amended to provide for a single residuary power, assigned to the provinces.¹⁴⁶ It is doubtful whether such an amendment would have more than symbolic effect. The most probable result would be an enlargement by judicial interpretation of one or more of the enumerated powers of Parliament to accommodate matters considered suitable for the attention of the central government. (In the United States, where residual authority lies with the States, the federal commerce power has been the favoured vehicle for this purpose.) On principle, however, and quite apart from the likely judicial response to such an amendment, it is my view that it would be unwise to attempt to deprive Parliament of the means of responding to developments that can neither be ascribed to the enumerated heads of federal power nor satisfactorily dealt with at the provincial level.

VIII. *Conclusions.*

An assessment of proposals for constitutional change touching the

¹⁴⁵ See comments on the *McNeil* and *Dupond* decisions, *supra*, footnotes 21, 28 and 42.

¹⁴⁶ *Supra*, footnote 4.

introductory clause of section 91 is complicated by the diversity of opinion concerning the scope of the law-making authority presently conferred by the clause. In the above comments on the terms of the constitution and the pattern of judicial interpretation, four ingredients in the constitutional mix were singled out for attention. The first point was a reminder that the terms of the B.N.A. Act provide not one, but two, residuary categories, with the provincial residuum appearing as the final enumeration of section 92. It was noted that the complementary character of the two residuums is less obvious than it would have been had the draughtsman of the B.N.A. Act adhered to the parallel structure employed in the London and Quebec Resolutions. Secondly, it was pointed out that the phrase "peace, order and good government" provides no assistance in drawing the constitutional boundary which separates federal and provincial legislative authority. Thirdly, it was observed that an important element in understanding the leading decisions of the Judicial Committee respecting the federal residuary power has to do with the reach of the provincial property and civil rights clause, and its historical association with the whole of civil (as opposed to criminal) law. Fourthly, it was noted that the constitutional waters have occasionally been muddled by running together the two wholly distinct functions of the introductory clause, that is to say, the residual law-making authority expressly conferred by the terms of section 91 and, supplementing it, the judicially-created emergency power.

Two recent decisions of the Supreme Court of Canada that assigned federal enactments to the introductory clause of section 91—the *Anti-Inflation Reference* and the *Hauser* case—have clarified the jurisprudence in some respects, while leaving some important issues unresolved. The decisions have, at least, clearly segregated emergency and non-emergency situations. The *Anti-Inflation Reference* represents the first occasion on which a federal enactment has been sustained on the basis of the emergency doctrine in circumstances not associated with war, or its aftermath. Among the noteworthy features of the decision was the finding that it is not a condition of reliance upon the emergency power that the enactment make explicit that it is an emergency measure. Further, the decision drew no distinction between the principles applicable in conditions associated with war and those applicable in peacetime. Another point of interest which emerged from the *Reference*, to become part of the *ratio* of *Hauser*, had to do with the federal residual power and the relevance of whether the challenged enactment was concerned with a "new matter" in the sense of representing a post-Confederation phenomenon. The full import of this test of newness remains problematic.

Turning to proposals for constitutional change, a new constitutional clause dealing with the emergency power could readily meet either or both of two objectives. Firstly, the addition of such a clause would require an emergency power enactment to identify its constitutional base (in the same way as an Act of Parliament invoking the declaratory power under section 92 (10)(c) must do so.) Secondly, such a new clause might impose special requirements for an enactment based on the emergency power, such as requiring a special majority in the House of Commons or, alternatively, imposing a requirement for federal-provincial consultation or some measure of federal-provincial agreement. Different procedures may be called for depending on whether or not the emergency is one directly involving national security. Constitutional reform in this area, in my submission, is better directed toward procedural safeguards in the legislative and intergovernmental framework than toward the process of judicial review.

With respect to residual law-making power, it is suggested that the optimum arrangement is a shared residuum, that is to say, parallel and complementary residuary categories for Parliament and the provincial legislatures. The letter of the constitution presently provides for this with the division being drawn between those matters which are local or private in nature and those which are not. If the usefulness of the twin residuum concept is accepted, constitutional amendment touching residual law-making authority would not be required unless the future course of judicial decision developed along lines inconsistent with the sharing of such authority which the B.N.A. Act presently permits.
