

Notes and Comments

Herbert Marx*

The Energy Crisis and the
Emergency Power in Canada

1. Introduction

The *Energy Supplies Emergency Act* passed on January 11, 1974 does not have a preamble. However, it would seem that the long title of the Act incorporates in resumé fashion what a preamble would normally contain. The *raison d'être* of the Act is set out in the title which is as follows: "An Act to provide a means to conserve the supplies of petroleum products within Canada during periods of national emergency caused by shortages or market disturbances affecting the national security and welfare and the economic stability of Canada. . ." The Act was adopted after the 1973 Yom Kippur War when there was a threat of a fuel oil and gasoline shortage. However, no significant shortage has materialized as yet.

Section 11(1) of the Act provides for the declaration of a national emergency: "When the Governor in Council is of the opinion that a national emergency exists by reason of actual or anticipated shortages of petroleum or disturbances in the petroleum markets that affect or will affect the national security and welfare and the economic stability of Canada, and that it is necessary in the national interest to conserve the supplies of petroleum products within Canada. . ." The subsequent sub-sections specify that a notice of motion to approve the declaration is to be tabled in both Houses of Parliament and the declaration is to be revoked if the House of Commons negatives the motion.¹

Once the Act is in force a "mandatory allocation program" (s.12) for the distribution of petroleum products is set up by the Energy Supplies Allocation Board that is established by s.3 of the Act. The Board has extensive regulatory powers (s.16) and it can

*Herbert Marx, Associate Professor of Law, University of Montreal.

1. The motion moved by the Minister of Energy, Mines and Resources concerning the laying of a declaration before Parliament provided that it would be revoked if negated by either House of Parliament. This was modified on a motion proposed by Stanley Knowles (see, House of Commons Debates, January 9, 1974 at 9212 and 9215).

specifically regulate imports (s.17) or exports (s.18). It may also, with the approval of the Governor in Council, enter into arrangement with provincial authorities concerning the regulation and pricing of electric power (s.15). Rationing is provided for in sections 19 and 20. Provisions relating to contractual obligations affected by regulations adopted under the Act, restrictive trade practices, environmental problems, transportation and enforcement of the Act are set out in sections 21 to 32.

A mandatory allocation program terminates at the latest twelve months after coming into force unless terminated earlier by an order of the Governor in Council, and it can be extended for twelve month periods (s. 35). The Act itself expires June 30, 1976 (s. 37). As of June 1975 the Act has not been proclaimed in force. This note will briefly explore two questions raised by the adoption of this Act, its constitutional foundation and its constitutional litigation.

2. The Constitutional Foundation of the Energy Supplies Emergency Act

It can be argued that the constitution authority for the Act can be found in the enumerated paragraphs or in the introductory paragraph of section 91 of the *B.N.A. Act*. I would suggest, however, that predicating the Act on the emergency power derived from the introductory paragraph of s.91 would give the government the widest powers and make it easiest to defend the constitutionality of the Act.

The following heads of s.91 can be cited in support of federal intervention in controlling petroleum supplies: no 2., the regulation of trade and commerce; no. 7, the defence power; no. 10, navigation and shipping; no. 13, ferry services; and the implicit heads of power founded on the federal jurisdiction over aeronautics and interprovincial or international transportation. To this should be added the local works and undertakings under federal jurisdiction by virtue of s.92 head 10 (c) of the *B.N.A. Act*. However, even the aggregate of all the enumerated or equivalent powers would fall short of offering the federal government the complete and untrammelled authority that it may find necessary to exercise in order to cope with an energy crisis.

Of the powers mentioned above it is essentially the trade and commerce power that would offer some scope for a mandatory allocation scheme. The other powers, although of some importance, would permit a very limited control over petroleum supplies. It is

unquestionable that the commerce power does permit the regulation of imports and exports (ss. 18 and 19 of the Act) and the determination of the market area for imports (see, s. 16 (1) (m)). In *Caloil Inc. v. A.-G. of Canada*² the Supreme Court held that a regulatory scheme providing for the importation into restricted areas of Canada of petroleum products was incidental to federal jurisdiction over extraprovincial trade and commerce.

Although the Act is predicated on a supply crisis of petroleum, it would appear that the commerce clause would not permit total and effective federal control over a purely local problem — for example, an acute shortage of gasoline in the metropolitan Toronto area or in Saint-Louis de Ha! Ha!, Quebec. As well, it may be desirable to couple an allocation scheme with price fixing as is suggested by s. 16 (1) (1) of the Act.³ It is arguable whether the trade and commerce head covers regulation of prices of products moving in interprovincial commerce, and it surely does not apply to purely intraprovincial transactions.⁴

The introductory paragraph of s.91 of the *B.N.A. Act* has given birth to three theoretical formulations for the exercise of federal powers — a residual power, an emergency power, and a power to deal with questions of national dimensions or of national interest. The allocation of petroleum supplies does not fall wholly under the residual power insofar as it is dealt with in s.92 of the *B.N.A. Act*. As well, it would be quite difficult to defend such allocation as being under federal jurisdiction because the matter is one of national dimensions. If the subject matter of petroleum energy supplies can be justified as being under federal jurisdiction by virtue of the national dimensions theory, the provinces would be ousted from what have long been considered traditional areas of provincial jurisdiction. And, if petroleum allocation falls under permanent federal control, what is next? To so decide would also require tortuous distinguishing, if not outright overruling, of Judicial Committee and Supreme Court decisions.

2. [1971] S.C.R. 543; 20 D.L.R. (3d) 472.

3. Section 16 (1) (1) provides that the Board may make regulations “prescribing the prices at which, or range of prices within which, any controlled product may be sold by suppliers to wholesale customers in particular market areas or generally and prescribing, except for pipeline companies governed by the *National Energy Board Act*, the charges for transportation between market areas”.

4. See, e.g., Rand, J. in *Reference re the Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198 at 208 ff; 7 D.L.R. (2d) 257 at 276 ff.

Federal legislation based on the emergency power means that a “new aspect of the business of Government is recognized as emerging”⁵, an aspect which falls under federal jurisdiction for the limited duration of the emergency. It is essential for the validity of emergency legislation that it clearly be of a temporary nature as is the case with the *Energy Supplies Emergency Act*.

During the prolonged economic depression of the 1930’s the Federal Parliament adopted unemployment insurance legislation in order to cope with the crisis. In the *Employment Insurance Reference*, counsel for the government characterized the problem and the federal burden as follows: “With regard to the facts which show the seriousness of the situation, the highest percentage of unemployed was 32.9, in March, 1933. By August, 1935, it was down to 17.4 per cent. Eleven per cent was regarded by the statistical department as normal; but it was seasonal to some extent. Relief measures were adopted from 1930 to 1935, and the expenditure of the Dominion Government to relieve the unemployment situation during that period amounted to \$192,291,683.”⁶ Surely this was an emergency! However, the federal legislation could not be supported as falling under the emergency doctrine because the “operation [of the Act was] intended to be permanent”.⁷

It should be emphasized that neither the Judicial Committee of the Privy Council nor the Supreme Court of Canada has ever hinted that the emergency power should be restricted to a war or insurrection related emergency. No doubt federal emergency legislation could override provincial jurisdiction in cases of famine or of an epidemic, to cite only two of the extreme examples favoured by the Judicial Committee of the Privy Council. Though their Lordships did not validate the federal economic legislation of the 1930’s — because it was not perceived as that extraordinary peril that would justify federal intervention — their interpretation was coloured, at least in part, by the fact that the proposed legislation, if held

5. *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*, [1923] A.C. 695 at 705; [1923] 3 D.L.R. 629 at 634; On the emergency power generally, see H. Marx, *The Emergency Power and Civil Liberties in Canada* (1970), 16 McGill L.J. 39; H. Marx, *The “Apprehended Insurrection” of October 1970 and the Judicial Function*, (1972), 7 U.B.C.L. Rev. 55.

6. *A.-G. for Canada v. A.-G. for Ontario*, [1937] A.C. 355 at 359; (Also reported but without argument [1937] 1 D.L.R. 684).

7. *Id.* at 366.

constitutional, would have permanently altered the division of powers set out in the *B.N.A. Act*.

If the *Energy Supplies Emergency Act* is made operational there would not really be any pressing issue related to the division of powers. Surely the Supreme Court would not deny to the federal government temporary powers approved by the House of Commons. The federal principle — that both the federal and provincial governments be limited to their own sphere — would only be temporarily suspended not permanently eradicated. As well, such suspension would be restricted to infringement over a limited portion of provincial jurisdiction and only for a particular product.

During the Korean “Police Action” the Parliament of Canada adopted *The Emergency Powers Act*⁸ in order to make adequate defence preparations and to prevent economic disruptions. Essentially the Act provided the Governor in Council with the very wide powers the government could exercise under the *War Measures Act*⁹ except that the power to interfere with civil liberties was expressly excluded. The duration of the Act was a little over one year and provision was made for its continuance upon addresses of both Houses of Parliament. The constitutional validity of the Act was never questioned before the courts. However, given the international and domestic circumstances at the time it most probably could not have been successfully impugned. Besides, temporary federal emergency legislation has never been successfully challenged in Canada.

3. *The Constitutional Litigation of the Energy Supplies Emergency Act*

In any constitutional litigation of the *Energy Supplies Emergency Act* the burden of proof would be on the plaintiff to show that the Act is unconstitutional. As well, the Act would benefit from the presumption of constitutionality that is applicable to all legislation, whether it be federal or provincial. Considering that plaintiff already has two strikes against him, and in view of other handicaps that he will face, it is rather doubtful that he will reach first base in this litigation as to the validity of the Act.

The plaintiff’s only possible attack would be to show that an emergency does not in fact exist or that it never existed and

8. S.C. 1950-51, c. 5.

9. Now found in R.S.C. 1970, c. W-2.

consequently that the Act cannot constitutionally be made or remain operational.

The provisions of s.11 (1) of the Act that make it operational are somewhat different from those found in s.2 of the *War Measures Act* that have the same function. The latter Act provides that the issuance of a proclamation that an emergency exists is "conclusive evidence" that the emergency "exists and has existed for any period of time therein stated" (s.2). The question at issue in litigating any emergency legislation would relate to the validity of making the emergency legislation operational. That is, the argument would be that Parliament cannot trench on provincial jurisdiction, that it cannot unilaterally alter the division of powers between itself and the provincial legislatures in the absence of a valid emergency situation. However, the clause as set out in section 2 of the *War Measures Act* is not an obstacle to the constitutional litigation envisaged here because Parliament cannot insulate itself from judicial review on a question concerning federal/provincial jurisdiction.¹⁰

The following *dicta* of the Judicial Committee of the Privy Council are set out in full because they are central to any litigation of federal emergency legislation. It was stated in the *Fort Frances* case: "It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for. In such a case the law as laid down for the distribution of powers in the ruling instrument [the B.N.A. Act] would have to be invoked. But very clear evidence that the crisis has wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite."¹¹

This statement was repeated in the *Japanese Canadians* case as follows, with the added reference as to an emergency that never arose. "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 Parliament of the Dominion

10. See, e.g., *British Columbia Power Corporation Ltd. v. British Columbia Electric Co. Ltd.*, [1962] S.C.R. 642; 34 D.L.R. (2d) 196.

11. *Supra*, [1923] A.C. 695 at 706; [1929] 3 D.L.R. 629 at 635.

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."¹² This *dicta* was subsequently followed by the Supreme Court of Canada in the *Leasehold Reference*.¹³

In sum, the plaintiff can attack the implementation of the *Energy Supplies Emergency Act*, but to succeed he must prove that a petroleum supply crisis never existed or that if it existed, it has ceased to so exist. He must furthermore present "very clear evidence" on this point. Is it practically possible to discharge this burden of proof?

The Governor in Council can bring the Act into operation when he "is of the opinion that a national emergency exists by reason of actual or anticipated shortages of petroleum or disturbances in the petroleum markets" (s.11 (1)). We have here two kinds of shortages; those that are *actual* and those that are *apprehended*. I would suggest that if it is not impossible to present "very clear evidence" that *actual* shortages or market disturbances do not exist, it is virtually impossible to make such proof as to *apprehended* shortages or disturbances. If, for example, the Organization of Petroleum Exporting Countries states that petroleum prices will rise ten per cent and production will go down by the same percentage, could not the Governor in Council legitimately anticipate, perceive or apprehend a national emergency due to a petroleum shortage or market disturbances?

It also appears that it would be equally difficult to prove that the adoption of the regulations under the emergency legislation was for an extraneous purpose. It would be necessary to prove bad faith — that the Governor in Council acted in order to achieve an unauthorized or forbidden purpose. This issue was raised in *A.-G. for Canada v. Hallet & Carey Ltd.*¹⁴ where the statutory construction of the 1945 *National Emergency Transitional Powers*

12. *Co-operative Committee on Japanese Canadians v. A.-G. for Canada*, [1947] A.C. 87 at 102; [1947] 1 D.L.R. 577 at 585-6.

13. *Reference the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124, [1950] 2 D.L.R. 1.

14. [1952] A.C. 427; [1952] 3 D.L.R. 433 (*sub nom. A.-G. of Canada v. Nolan and Hallet & Carey Ltd.*).

*Act*¹⁵ was considered. The Privy Council gave as the “true answer” to the question of purpose, the statement of Duff, C.J. in the *Chemicals Reference* who wrote: “I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such regulations necessary or advisable for the transcendent objects set forth. . . The words are too plain for dispute: the measures authorized [by the *War Measures Act*] are such as the Governor General in Council (not the courts) deems necessary or advisable.”¹⁶ In addition the concurrence of the House of Commons is necessary for keeping the *Energy Supplies Emergency Act* operational.

When the question of the validity of emergency legislation is raised in a federal advisory opinion the difficulties of having it ruled *ultra vires* are compounded. In the *Leasehold Reference* it appears that there was little factual, if any, material before the court. The judges took judicial notice of what was of public knowledge as well as what was stated in the Order of Reference. Obviously the latter document would not include information that would suggest that the court overrule the action of the Governor in Council.¹⁷

The “very clear evidence” rule linked to the necessity of proving a negative — that an emergency never arose or does not exist — makes it highly improbable that the Supreme Court would set aside what the Government and Parliament thought a necessary action in order to cope with what is perceived as a national emergency. The very temporary nature of any federal infringement on provincial jurisdiction would also tend to inhibit judicial intervention.

4. Conclusion

In conclusion, it should be noted that executive action in proclaiming an emergency is subject to parliamentary approval and control.¹⁸ Furthermore, the *Energy Supplies Emergency Act* expires

15. S.C. 1945, c. 60.

16. [1952] A.C. at 445; [1952] 3 D.L.R. at 442, citing *Reference re the Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1 at 13; [1943] 1 D.L.R. 248 at 256.

17. See the *Leasehold Reference*, [1950] S.C.R. at 127; [1950] 2 D.L.R. at 4. On this point also see, *A.-G. for Manitoba v. Manitoba Egg and Poultry Association* [1971] S.C.R. 689 at 704 (per Laskin J.); 19 D.L.R. (3d) 169 at 181.

18. In the United States, Presidential emergency edicts of the 1930's are still in force. As well, Congress has not exercised the same control as has its Canadian counterpart. See, *Emergency Powers Statutes*, Senate Report, 93d Cong., 1st Sess. No. 93-549 (1973) and *Executive Orders in Times of War and National Emergency*, Senate Report, 93d Cong., 2d Sess. (1974).

on June 30, 1976 so that if the crisis arises after that date new emergency legislation would be required. This expiry provision is not required insofar as it could have been provided that the Act remain dormant and be made operational only if and when required. Considering the real possibility of a petroleum shortage in the near future, not only should the legislative vehicle be in readiness at all times but machinery to deal with such an emergency should always be well oiled.