THE CONSTITUTIONAL DISTRIBUTION OF TAXATION POWERS IN CANADA

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I. INTRODUCTION

Immediately prior to Confederation, British North America, though politically structured, was an economically decentralized cluster of small and scattered settlements.[1] Only twenty per cent of its 3.5 million people lived in cities. Transportation difficulties were formidable and proved to be the main obstacle to development. This was intensified by a severe winter which annually closed all water routes for five months.

By 1866 the then province of Canada and the municipalities had extended loans totalling $40 million to railway companies. The investments soured. There was a substantial public debt and poor public credit. The railway network was conceived on a continental scale; it was ill-suited to the economic needs of the primarily agricultural province of Canada.

After the Act of Union[2] in 1840, British opinion mounted for Canada to become responsible for her own defence. At the same time, American pressure on the western territories became severe. The Northern Pacific Railway, chartered by Americans in 1864, had the object of providing transcontinental service. American settlement was pushing ever northward. Without the protection of British troops, American expansionist claims to the west seemed impossible to resist.

The scheme of Confederation was principally designed to overcome these problems. It was thought that a larger, strongly centralized political unit would be capable of (a) re-establishing the public credit, (b) undertaking the considerable public expenditure on transport which was the condition precedent to development, and (c) offering a sufficient defence posture to resist American pressure.

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[1] *See generally* REPORT OF THE ROYAL COMMISSION ON DOMINION-PROVINCIAL RELATIONS, Vol. I, CANADA 1867-1939 ch. 1 (Rowell C.J.O., J. Sirois Chairmen 1940); A.M. MOORE, J.H. PERRY & D. BEACH, THE FINANCING OF CANADIAN FEDERATION: THE FIRST HUNDRED YEARS 1-16 (Canadian Tax Papers, No. 43, 1966); J. FLYNN, STUDIES OF THE ROYAL COMMISSION ON TAXATION, No. 23, FEDERAL-PROVINCIAL FISCAL RELATIONS 43-50 (1964); A.E. SAFARIAN, CANADIAN FEDERALISM AND ECONOMIC INTEGRATION 15-18 (1974).

[2] The British North America Act 1840, 3 & 4 Vict., c. 35.

Cultural and sectional rivalries proved insuperable obstacles to the legislative union foreseen by Sir John A. Macdonald. A federal state, characterized by strong cultural and regional guarantees, was the compromise. But there was to be no question of economic decentralization.[3] By the British North America Act, 1867 the Dominion government was granted legislative power over:

> 91(3) The raising of Money by any Mode or System of Taxation.

By section 122 of the Act customs and excise, which accounted for the vast bulk of public revenue immediately prior to Confederation, were brought within the central government's exclusive competence. Section 118 of the Act, since repealed,[4] made provision for payment of subsidies by the central government to the provinces, with the intent that they be "in full settlement of all future demands on Canada". In the early years of Confederation such subsidies accounted for some fifty per cent of all provincial revenues.

These provisions left no doubt in the minds of the founders that the Dominion would have the pre-eminent power of taxation. Both the Quebec and London Resolutions declared that payment of subsidies to the provinces was "in consideration of the transfer to the General Parliament of the powers of taxation".[5]

The B.N.A. Act granted powers of taxation to the provincial legislatures too. These were not considered significant. It was thought that provincial activities would be limited and their revenue needs slight; the legislatures, accordingly, would have no need to resort to most tax pools.[6] Therefore, by section 92 of the B.N.A. Act, the legislatures were restricted to:

> 92(2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
> 92(9) Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local or Municipal Purposes.

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[3] On peut maintenant tenter de définir ce que fut la fédération canadienne à ses débuts. Elle fut avant tout un compris entre le groupe qui désirait une forte centralisation et même une union législative pour des raisons économiques et le groupe qui insistait sur la décentralisation pour préserver la diversité des cultures et des conceptions sociales. En général, on peut dire que les deux groupes ont gagné leur point et que, en tenant compte de la signification limitée de ces termes à l'époque, la politique économique a été centralisée et la politique sociale, y compris l'administration de la justice, décentralisée...[Les provinces] perdaient les principales fonctions économiques de l'Etat à cette époque au profit du gouvernement fédéral....
M. LAMONTAGNE, LE FEDERALISME CANADIEN: EVOLUTION ET PROBLEMES 12 (1954).

[4] Statute Law Revision Act, 1950, 14 Geo. VI, c. 6, sched. 1.

[5] The Quebec Resolutions, No. 64; The London Resolutions, No. 62, in DOCUMENTS ON THE CONFEDERATION OF BRITISH NORTH AMERICA 164, 227 (G. Browne ed. 1969).

[6] Canadian Industrial Gas & Oil Ltd. v. Saskatchewan, 18 N.R. 107, at 141-42, [1977] 6 W.W.R. 607, at 637-38, 80 D.L.R. (3d) 449, at 474-75 (S.C.C.) (*per* Dickson J. dissenting), *rev'g* [1976] 2 W.W.R. 356, 65 D.L.R. (3d) 79 (Sask. C.A. 1975).

One of the overriding ideas of the Confederation scheme was the creation of a large free trade area in which strong industry could develop and prosper. This fundamental principle was constitutionally expressed by section 121 of the B.N.A. Act, which reads:

> 121. All Articles of Growth, Produce or Manufacture of any one of the Provinces shall from and after the Union, be admitted free into each of the other Provinces.

The last constitutional provision currently of significance is section 125. It contemplates restrictions of substance which grow out of the realization, noted by Chief Justice Marshall, that "a right to tax is a right to destroy".[7] The restrictions ensure that taxing powers will not be used to upset the framework of Confederation. Section 125 provides:

> 125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

II. FEDERAL TAXING POWER

A. *Extent of Federal Power*

The taxation power granted to Parliament by section 91(3) is *prima facie* plenary and absolute. No restriction appears in the text of the section, nor, absent the special cases of sections 121 and 125, does any appear in the British North America Act. There are, however, determinate criteria of form. By section 53, all federal taxing bills must originate in the House of Commons. Section 54 provides that it is not competent to the House to adopt any taxing bill for any purpose unless the bill has first been recommended to the House by Message of the Governor-General during the session in which such bill is proposed. Provincial legislatures, by section 90, are subject to like requirements in respect of provincial taxation measures.

By their terms, sections 53 and 54 contemplate significant prescriptions that should contribute to the political restraints which brake a taxing legislature. They contemplate that any parliamentary exercise of taxation power must be signaled to the electorate loud and clear by an announcement of the event in prescribed form. The sections demand that the accountable body take clear responsibility for reaching into the taxpayer's pocket.

In fact, the sections have proved to be toothless, and for two principal reasons. First, it is by no means clear that sections 53 and 54

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[7] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, at 347, 4 L. Ed. 579, at 587 (1819). *See* the remarks of Duff J. in Attorney-General of British Columbia v. Attorney-General of Canada, 64 S.C.R. 377, at 385, [1923] 1 W.W.R. 241, at 245, [1923] 1 D.L.R. 223, at 227, *aff'd* [1924] A.C. 222, [1923] 3 W.W.R. 1249, [1923] 4 D.L.R. 669 (P.C.).

are limitations of substance as opposed to internal rules of parliamentary procedure.[8] The distinction is important, for the latter speaks to the House of Commons alone; it is not reviewable by the courts.[9] If the House fails to act, the law stands unchallengeable. Second, the sections fall within the amending power of Parliament.[10] Even if the sections permit judicial review, "nothing prevents Parliament from indirectly amending ss. 53 and 54 by providing for the levy and appropriation of taxes in such manner as it sees fit, by delegation or otherwise."[11] Accordingly, it may well be that parliamentary failure to observe the terms of the sections, without more, is sufficient to constitute an implied amendment of the sections. If this latter view be right, then the sections stand as polite requests only; they have no independent force. Since this is the view which has been adopted *obiter* by a majority of the Supreme Court,[12] it is unlikely that parliamentary failure to comply with these sections will result in constitutional defect on a court challenge.

B. *Restrictions on Federal Taxing Competence*

1. *Direct Taxation within a Province for Provincial Purposes*

Although section 91(3) *prima facie* grants plenary and absolute taxing competence to Parliament, the courts have not treated it as such. The first major difficulty concerned the question as to whether the grant to the legislatures of legislative jurisdiction over "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes" was an exclusive grant of power, sufficient to exclude Parliament from concurrent occupation of that field.

The early method adopted by the Privy Council for interpretation of the B.N.A. Act[13] appeared to dictate an affirmative answer. In *Bank of*

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[8] This issue is considered, but found unnecessary to resolve by Laskin C.J.C. in Reference *re* Agricultural Products Marketing Act, 19 N.R. 361, at 395-97, 84 D.L.R. (3d) 257, at 278-80 (S.C.C. 1978).

[9] Conklin, *Pickin and its Applicability to Canada*, 25 U. TORONTO L.J. 193, at 202-04 (1975); Swinton, *Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege*, 14 OSGOODE HALL L.J. 345, at 375-76 (1976).

[10] B.N.A. Act, s. 91(1).

[11] *Supra* note 8, at 367, 84 D.L.R. (3d) at 322, *per* Pigeon J.

[12] *Id.*, Martland, Ritchie, Beetz and de Grandpré JJ. concurring.

[13] *See* Citizens Insurance Co. of Canada v. Parsons, 7 App. Cas. 96, at 108-09, 51 L.J.P.C. 11, at 16-17 (1881):

> Notwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislatures should be absorbed in those given to the dominion parliament....So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in sect. 91; but, though the description is sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by sect. 92, it

Toronto v. Lambe,[14] Lord Hobhouse suggested that Parliament acquired no concurrent power in respect of direct taxation within the province for provincial purposes. This view was confirmed subsequently in *Caron v. The King*.[15] The result is that section 92(2) is treated as being carved out of section 91(3), leaving behind an area of federal incompetence.

2. *Indirect Taxation Within a Province for Provincial Purposes*

The fact that there was any area of federal disability raised the further question as to whether Parliament is competent to raise revenue for provincial purposes by indirect taxation. The view has been expressed[16] that this is a provincial power only, and there are judicial *dicta* to that effect.[17] Chief Justice Laskin, writing as a law professor, noted that "having regard to developed constitutional principles in respect of revenue or taxing measures, (principles emphasized by ss. 54 and 90 of the *B.N.A. Act*), it is odd indeed that governmental initiative (if not responsibility) for the raising of revenue for provincial purposes should be exercised by the federal ministry."[18] That view recites as constitutional principle a precept of politics which many Canadian Prime Ministers have uttered respectfully. Sir Wilfrid Laurier put the point this way:

> It is a sound principle of finance, and a still sounder principle of government, that those who have the duty of expending the revenue of a country should also be saddled with the responsibility of levying it and providing it.[19]

> The principle by which one government collects the revenues and another government spends them is wholly false.[20]

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obviously could not have been intended that, in this instance also, the general power should override the particular one. . .[T]he two sections [ss. 91 and 92 of the B.N.A. Act] must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other.

See also Russell v. The Queen, 7 App. Cas. 829, at 836, 51 L.J.P.C. 77, at 80 (1882):

> According to the principle of construction. . .the first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the Legislatures of the Provinces. If it does, then the further question would arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and so does not still belong to the Dominion Parliament.

[14] Bank of Toronto v. Lambe, 12 App. Cas. 575, at 585, 56 L.J.P.C. 87, at 91 (1887).

[15] Caron v. The King, [1924] A.C. 999, at 1004, [1924] 3 W.W.R. 417, at 420, [1924] 4 D.L.R. 105, at 108-09 (P.C.).

[16] W. KENNEDY & D. WELLS, THE LAW OF THE TAXING POWER IN CANADA 152 (1931).

[17] *Supra* note 15.

[18] LASKIN'S CANADIAN CONSTITUTIONAL LAW 703 (4th ed. A. Abel 1973).

[19] As cited in Huggett, *Tax Base Harmonization*, in ISSUES AND ALTERNATIVES 1977, INTERGOVERNMENTAL RELATIONS 55, at 55 (Ontario Economic Council 1977).

[20] MOORE, PERRY & BEACH, *supra* note 1, at 121 (Appendix B, Statement by Premier Maurice L. Duplessis to the Federal-Provincial Conference, Oct. 1955). Premier Duplessis also quoted the Right Honourable William Lyon Mackenzie King, who described the separation of taxing and spending authority as "a bad system, a thoroughly vicious system". *Id.*

On the other side of the balance, the following points should be noted. There is no restriction in the B.N.A. Act that Parliament confine itself to raising monies for federal purposes. In any event a rigid distinction between federal and provincial purposes as the basis for constitutional incompetence is more than a little strange. How can it ever be said conclusively that expenditure for a province is not also expenditure for the nation? The education of Quebec citizens, for example, is also the education of Canadian citizens and thereby serves of necessity twin and complementary purposes. Moreover, the plain wording of section 92(2) withholds this power from the legislatures by disentitling them from imposing any indirect taxation. If the legislatures are incompetent to the task, it seems hard to think that Parliament is similarly disabled. That would leave a power vacuum in the Constitution.

At first blush, it seems unlikely that Parliament would attempt to raise monies for purely provincial purposes. Certain delegation schemes, however, bring this problem into stark relief. A pertinent example of such a scheme is accomplished by the Agricultural Products Marketing Act[21] which, as part of a comprehensive egg marketing regulation, authorizes a provincial board to collect indirect imposts for provincial purposes. The Act recently has been the subject of a major constitutional battle.[22] In considering Parliament's competence to levy indirect taxation for provincial purposes Mr. Justice MacKinnon, in the Ontario Court of Appeal, "with some hesitation", held the indirect levies a valid exercise of Parliamentary authority.[23] That affirmative

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[21] Agricultural Products Marketing Act, R.S.C. 1970, c. A-7.

[22] Reference *re* Agricultural Products Marketing Act, 16 O.R. (2d) 451, 78 D.L.R. (3d) 477 (C.A. 1977), *aff'd in part* 19 N.R. 361, 84 D.L.R. (3d) 257 (S.C.C. 1978).

[23] The reasoning of MacKinnon J.A. is of some interest. He stated:

> The principle that the *British North America Act, 1867* has exhaustively distributed legislative power, with some limitations not here relevant, between Parliament and the Legislatures, means that if the Provinces do not have the power to tax indirectly for provincial purposes then Parliament must have that power. The one exception carved out of the general federal taxing power, as noted by Sir Montague Smith in the *Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 100 at p. 108 is "direct taxation within the province, in order to the raising of a revenue for provincial purposes". It is clear that Parliament, in carrying out its national obligations, can make grants to individual Provinces and raise money by general taxation for such purposes. Its power to impose indirect taxes for any purposes is unlimited by the constitutional Act. In light of the authorities and the legislative history of the legislation, particularly its enactment immediately following the reaffirmation of the *Crystal Dairy* characterization of equalization levies in *Reference re Farm Products Marketing Act,* and the fact that both the Province and Canada support the legislation, I am of the opinion that section 2(2) is not colourable legislation but is *bona fide*, competent legislation in relation to indirect taxation.

Supra note 22, at 468-69, 78 D.L.R. (3d) at 495.

There is an obvious policy component to this decision in that Parliament acted upon the advice of the Supreme Court in 1957 in amending the Agricultural Products Marketing

holding was pushed back into uncertainty by the Supreme Court of Canada, which, in holding that the levies in question did not amount to taxation, found it unnecessary to decide the instant point. Chief Justice Laskin said this:

> The distribution of taxing authority suggests another limitation, this being a limitation on federal power to impose indirect taxes for provincial purposes. The question, as is well known, was raised and left open in *Caron v. The King* [1924] A.C. 999 at p. 1004 by Lord Phillimore and I leave it open here. There is, nonetheless, some incongruity in Parliament legislating to impose or authorize taxation for provincial purposes but that may be an undue nod to excessive formality.[24]

The *Agricultural Products Marketing Act Reference* boldly highlights the difficulty posed by a ruling that would disentitle Parliament to levy indirect taxation for provincial purposes. By creating a power vacuum in the Constitution, certain forms of federal-provincial co-operation, desirable, *arguendo*, on all rational grounds of policy become impossible. Suppose, for example, that the levies considered in the *Reference* had been found to constitute taxation as had been the case with similar levies in an earlier Privy Council appeal.[25] In that hypothetical event, a forty-five year old attempt to find a suitable formula for marketing agricultural products would have come to a catastrophic nothing; the attempt by each legislature acting alone would have failed and the attempt at co-operative action between the central and provincial governments would also have failed. No solution to a vital Canadian problem would have lain plainly in view. The more such power vacuums litter the Constitution, the more difficult does co-operative federalism become, and the more like a strait-jacket than a blueprint for effective government do constitutional constraints appear. Absent compelling reasons of policy or human rights, power vacuums should be avoided. In my view, the suggestion that the enacting legislature must be seen to be assuming responsibility for its taxation measures has limits, and those limits are reached when the principle threatens constitutional flexibility. That would be the situation were a court to prohibit Parliament from levying or authorizing such taxation. In my submission this should not be done by any court.

Act (*supra* note 22, at 391, 84 D.L.R. (3d) at 275). Mr. Robinette, counsel for the Ontario Egg Producers' Marketing Board, forcefully made this point in seeking to support the legislation in argument before the Supreme Court (*id.* at 422, 84 D.L.R. (3d) at 298). Pursuant to the amendment, payment and collection of levies had taken place over a period of several years (Factum of the Ontario Egg Producers' Marketing Board at 5). It is a co-operative marketing scheme supported by the provinces and the federal government. Certainly any court would be slow to interfere in such a scheme and would lean to support it.

[24] *Supra* note 22, at 400-01, 84 D.L.R. (3d) at 283.

[25] Lower Mainland Dairy Products Sales Adjustment Comm. v. Crystal Dairy, Ltd., [1933] A.C. 168, [1932] 3 W.W.R. 639, [1933] 1 D.L.R. 82 (P.C.).

3. *Spending*

The federal government has a plenary authority to spend or gift any monies in its possession as it sees fit. Section 91(1A) of the B.N.A. Act, The Public Debt and Property, is the constitutional source of such authority.[26] If Parliament makes gifts, it may attach to them whatever conditions it desires.[27] It can, by means of conditional gifts, make it exceedingly tempting for a province to follow a particular course of action. There is no constitutional objection to a gift to a provincial legislature, for example, of "$1 million per annum, but if it happens that seventy per cent of the province's students fail to pass certain health requirements set out hereinafter, the gift is to terminate". No province is obliged to accept such a gift.[28]

Intergovernmental conditional transfers are of great, albeit declining importance in Canadian federalism. During the 1976-77 fiscal year, total conditional transfers to the provinces in the form of shared cost programs totalled $7.35 billion; estimated figures for 1977-78 reveal a figure of $6.05 billion.[29]

Although Parliament has a wide latitude to raise monies by taxation, and an equally wide latitude to spend monies thereby collected, it does

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[26] P. TRUDEAU, FEDERAL-PROVINCIAL GRANTS AND THE SPENDING POWER OF PARLIAMENT 12 (Gov't of Canada, Working Paper on the Constitution, 1969). My colleague, Professor E. Driedger, has taken exception to this point in conversation. He suggests that the source of the power is s. 102, which provides:

> All Duties and Revenues, over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

With respect, my difficulty with Professor Driedger's position stems from the words "the Public Service of Canada". "Public Service", to my mind, contemplates the civil service; it does not embrace capital improvements. Moreover, even if it did, the limitation to "Canada" appears to exclude appropriation purely for provincial purposes. This would be a significant restriction. For example, it would restrict disaster funds following a natural calamity.

[27] Reference *re* The Employment and Social Insurance Act, [1936] S.C.R. 427, at 457, [1936] 3 D.L.R. 644, at 669 *per* Kerwin J., *aff'd sub nom.* Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 355, [1937] 1 W.W.R. 312, [1937] 1 D.L.R. 684 (P.C.). Professor F.R. Scott suggests that the power of the Crown to make gifts, even conditional gifts (with the approval of Parliament or the Legislatures) flows from the doctrines of the Royal Prerogative and the common law. He states that "these simple but significant powers exist in our constitutional law though no mention of them can be found in the B.N.A. Acts." *See* Scott, *The Constitutional Background of Taxation Agreements*, 2 McGILL L.J. 1, at 6 (1955).

[28] Reference *re* Employment and Social Insurance Act, *id. See generally* D. SMILEY, CONDITIONAL GRANTS AND CANADIAN FEDERALISM (Canadian Tax Papers, No. 32, 1963); Smiley & Burns, *Canadian Federalism and the Spending Power: Is Constitutional Restriction Necessary?*, 17 CAN. TAX J. 468 (1969); Hanssen, *The Constitutionality of Conditional Grant Legislation*, 2 MAN. L.J. 191 (1967).

[29] TREASURY BOARD OF CANADA, HOW YOUR TAX DOLLAR IS SPENT 61 (1976-77), 78 (1977-78).

not follow that the powers thus combined can be used to invade provincial heads of jurisdiction. There is still the requirement that the monies raised and/or spent be "in relation to" taxation or the public debt and property, or bear a "rational, functional connection" thereto.[30] Provision for the gathering together of a fund, and the spending of it, must not be "in relation to" a matter of provincial power and thus a colourable attempt to usurp provincial jurisdiction. This point was made forcefully by Lord Atkin in *Attorney-General for Canada v. Attorney-General for Ontario (Unemployment Insurance Reference)*[31] who, in striking down the Employment and Social Insurance Act,[32] said:

> But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.
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> It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may still be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence.[33]

All taxation ultimately involves regulation; "to some extent it [taxation] interposes an economic impediment to the activity taxed as compared with others not taxed".[34] Lord Atkin's often repeated statement draws attention to that fact; it underlines that there must be a dividing line between regulatory effects created by taxation which are tolerable, and regulatory effects which are not tolerable.

What is that dividing line? Ultimately that question falls to be decided in this way: if a taxing statute effects, in addition to taxation, clearly discernible regulatory results, the validity of the statute depends on whether the subject matter of the regulation falls within, or is necessarily incidental to, the regulatory powers of the jurisdiction levying the tax. If it does, the taxing statute stands unimpeded; if it does not, the taxing statute is as incompetent to the jurisdiction as is the exercise of the regulatory power *simpliciter*. This point, gleaned from American, Canadian and Australian cases, was succinctly put by Professor MacKinnon in 1964:

> In other words, where a statute both taxes and regulates, its validity as a whole depends on whether the taxing authority has power to regulate the subject

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[30] Papp v. Papp, [1970] 1 O.R. 331, at 335-36, 8 D.L.R. (3d) 389, at 393-94 (C.A. 1969).

[31] *Supra* note 27.

[32] The Employment and Social Insurance Act, S.C. 1935, c. 38, (*repealed by* S.C. 1940, c. 44, s. 103).

[33] *Supra* note 27, at 366-67, [1937] 1 W.W.R. at 316, [1937] 1 D.L.R. at 687. *See also In re* The Insurance Act of Canada, [1932] A.C. 41, at 52, 53 Que. B.R. 34, at 45, [1931] 3 W.W.R. 689, at 697, [1932] 1 D.L.R. 97, at 106 (P.C.), where Viscount Dunedin said: "Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall."

[34] Sonzinsky v. United States, 300 U.S. 506, at 513, 57 S.Ct. 554, at 555 (1937).

> matter affected by the tax, and it is immaterial whether the tax is inoperative in respect of those who comply with the statute's regulations. The tax is in aid of the regulation; if the regulation be valid, then so also is the tax; if the regulation be invalid, the tax is invalid also.[35]

The spending power draws attention to a rather nice question. Suppose Parliament raises monies by taxation, and launders those monies through the Consolidated Revenue Fund. It proceeds to return the monies to the provinces in the form of conditional grants directed to purposes under provincial jurisdiction. Is the prohibition in the *Unemployment Insurance Reference* thereby activated? It seems hard to believe that this means of subverting provincial jurisdiction would be tolerated were *Hansard* to disclose this intention in relation to the scheme as a whole. Yet the question remains as to how far conditional grants need go before they are viewed as a device subversive of Confederation. Professor Laskin (as he then was) suggested that perhaps Lord Atkin, in the *Unemployment Insurance Reference*, went too far.[36] It is decidedly worth considering whether, on the contrary, he did not go far enough.

Objections to federal use of the spending power have been confined to the political and administrative levels; Canada's eleven governments have exhibited a clear reluctance to test the reach of the federal spending power by a court challenge. Nevertheless, intergovernmental transfers ultimately are subject to constitutional constraints. These cannot be fully appreciated without consideration of the policy issues involved.

At the outer limit of the spending power three heads of policy emerge. First, intergovernmental transfers blur electoral lines of responsibility. The electorate is confused as to which governmental body is responsible for what policy. Electoral accountability is diminished. Secondly, intergovernmental transfers interfere with the decision-making process of the recipient government. (This objection is limited to conditional transfers only.) The donee government finds it unacceptably difficult to refuse the conditional grants as it thereby subjects its electorate to taxation without benefit. The recipient government loses motive power in initiating programs. Its priorities are altered. Thirdly, intergovernmental transfers (limited to conditional transfers) allow the donor government to formulate policy in areas of jurisdiction incompetent to it and exclusively competent to the donee government. The transfers become a means of making watertight jurisdictions permeable to action by the incompetent government. They disturb the constitutional division of powers.[37]

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[35] V. MacKINNON, COMPARATIVE FEDERALISM 99 (1964).

[36] CANADIAN CONSTITUTIONAL LAW, *supra* note 18, at 638.

[37] These objections are considered generally in TRUDEAU, *supra* note 26, at 16, 18; D. CLARK, FISCAL NEED AND REVENUE EQUALIZATION GRANTS 9-13 (Canadian Tax Papers, No. 49, 1969).

These objections are undoubtedly weighty, but they gather no strength in a vacuum. They must be tested against the constitutional design of a federal state, and the federal purposes that are nourished by the challenged procedure. Absent specific constitutional prohibition, allegations of implicitly obnoxious constitutional effects must be balanced against the special requirements of divided jurisdiction.

Intergovernmental transfers further three major policies. First, the transfers assure a minimum acceptable level of public services in different regions. This responds to the perceived consensus of the national constituency and to the inherent purpose of Confederation. National economic policies, such as the tariff, artificially force the economic growth of certain regions; intergovernmental transfers redress the balance by redistributing the benefits of federal union. This point has been succinctly summarized by Mr. Lynn:

> Some differences in service levels between regions of a federal state are acceptable as a logical consequence of the autonomy enjoyed by the regional governments, but if the differences become intolerable to those in the lower income regions, the federation may dissolve.[38]

Secondly, public investment involves certain spillover effects which result from the lack of congruence between provincial jurisdictions and tax cost/benefit areas.[39] When spillovers become great, as when the province paying for the program significantly benefits those who are not members of the tax region, provincial reluctance to undertake the program is considerable. To take the obvious example, if a province discovers that the graduates of a particular costly education program consistently migrate to other provinces, it will shrink from footing the bill for providing that particular educational opportunity. "In other words, underspending on services will result if a community is aware that some benefits generated by its spending spill over to individuals outside.... The upshot is simply that some important public services will be undersupplied from the viewpoint of society as a whole."[40] Only a government responding to a national constituency can compensate, constitutionally and politically, for regional spillover effects. Thirdly, an integrated common market, such as Canada strives to be, requires a high degree of mobility for labour and capital. If the quality of important social services and benefits differs sharply across different regions of the federation, an impermissible chill to mobility may be

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[38] LYNN, *supra* note 1, at 5.

[39] *See generally* Oates, *The Theory of Public Finance in a Federal System*, 1 CAN. J. ECON. 37, at 51-52 (1968); G. CARTER, CANADIAN CONDITIONAL GRANTS SINCE WORLD WAR II 11-20 (Canadian Tax Papers, No. 54, 1971); Young, *Federal-Provincial Grants and Equalization*, in ISSUES AND ALTERNATIVES 1977, INTERGOVERNMENTAL RELATIONS, *supra* note 19, at 41.

[40] CARTER, *id.* at 12.

generated. Inefficient or lopsided economic development may result. Federal responsibility for the national economy and for the inherent rights of citizenship demands federal attention to such effects.

In the event a constitutional challenge is made to the machinery of conditional intergovernmental transfers, it is highly dubious that a *per se* ruling, *i.e.* that the grants are or are not permissible *per se*, would be warranted. The specific grant in question should be tested upon the policies outlined above and upon whatever additional constitutional support it obtains from the catalogue of constitutional powers to which it relates. It is clear that the use of taxation power alone to amass funds does not validate any subsequent use of those funds.[41] But the precise range of objects and effects, and their mechanisms, to which the Constitution permits intergovernmental transfers to be addressed is not at present precisely discernible. It is a delicate matter of constitutional policy, to be worked out in the circumstances of each particular case, on a case by case basis, if judicial clarification should be sought. Narrow judicial rulings on highly charged political issues encourage compromise; if political compromise or restraint is not forthcoming, the court inevitably will have a second opportunity to consider the issue, and this time with the added experience of the effects judicial intervention has produced.

4. *Taxation of the Provincial Consolidated Revenue Fund*

Section 126 of the B.N.A. Act reserves to the provincial legislatures control of the provincial Consolidated Revenue Fund to be appropriated for the Public Service of the province. Section 125 additionally prohibits taxation of property belonging to any province. It is difficult to see that the Consolidated Revenue Fund is not property belonging to the province. Thus, Parliament is disentitled from imposing on the provincial Fund.

5. *Double Taxation Unobjectionable*

It is clear law that no objection can be taken to a federal taxing statute on the ground that it, in harness with a provincial impost, constitutes double taxation.[42] If the taxpayer's assets are insufficient to satisfy both levies, the federal and provincial claims rank *pari passu*.[43] By the paramountcy doctrine, Parliament is competent to

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[41] *Supra* note 27, at 366-67, [1937] 1 W.W.R. at 315-16, [1936] 1 D.L.R. at 687.

[42] Forbes v. Attorney-General for Manitoba, [1937] A.C. 260, [1937] 1 W.W.R. 167, [1937] 1 D.L.R. 289 (P.C. 1936).

[43] *In re* Silver Bros., [1932] A.C. 514, 53 Que. B.R. 418, [1932] 1 W.W.R. 764, [1932] 2 D.L.R. 673 (P.C.).

provide that, in the case of insufficiency, its claims shall be satisfied first.[44]

III. Provincial Taxing Powers

A. *Direct Taxation*

The constitutional division of expenditure authority in Canada has remained largely unchanged since Confederation. The provincial governments still are responsible for such areas as education, health, welfare and other forms of social assistance, asylums, administration of justice in the province, local public works and municipalities. What has changed, and changed radically since 1867, is the substance of political economy and consensus respecting what is the proper role of government in discharging responsibility for precisely these areas of jurisdiction. In 1867, in accordance with *laissez-faire* economics, provincial expenditures in the above fields were negligible. The complete opposite obtains today. There is active and expanding governmental initiative in all the above-mentioned provincial areas of jurisdiction. The amounts account for the vast bulk of public expenditure. Very considerable sums, oftentimes half of the total expended, are recouped by the provincial governments from the federal government in the form of conditional and unconditional transfers. In the 1976-77 fiscal year such transfers totalled over $9 billion. Certain figures are particularly revealing. In 1976-77, total federal conditional grants to the provinces in respect of hospital insurance amounted to $2.8 billion; medicare amounted to $0.95 billion; post-secondary education amounted to $1.5 billion; other health and welfare amounted to another $1.5 billion.[45] The University of Ottawa, for example, which is one of fifteen provincially supported universities in Ontario, had an annual operating budget during 1977-78 in excess of $68 million. Half of this sum is recouped by means of grants from the federal government. The balance comes largely from the provincial treasury, which must be filled by means of provincial taxation. Of course, all of this would be impossible by the original inspiration, in respect of taxing and spending authority, of the B.N.A. Act.

In fact, the constitutional distribution of taxation powers proved unworkable from the start. The provinces found themselves without sufficient revenues to discharge their limited functions. Moreover, the

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[44] *Re* R.A. Nelson Construction Ltd., 53 W.W.R. 574, 52 D.L.R. (2d) 189 (B.C.S.C. Chambers 1965). *See also Re* Adams Shoe Co., 54 O.L.R. 625, at 629, [1923] 4 D.L.R. 927, at 931 (S.C. in Bankruptcy) for the proposition that the provinces cannot legislate so as to give their claim for taxes priority over a claim of the federal Crown.

[45] Treasury Board of Canada, *supra* note 29.

transfer of revenues and responsibilities following Confederation put all provinces in a deficit position.[46] When the Privy Council's interpretation of the B.N.A. Act enormously increased provincial jurisdiction, some means had to be found to finance expanding provincial responsibilities.

Three mechanisms were tried to ameliorate this unsatisfactory constitutional arrangement. The first was dissolution of the Confederation. This was not conspicuously successful. Nova Scotia was the only government to attempt it. Within two years after union, under the leadership of Joseph Howe, the Imperial Parliament was petitioned to release the province from Confederation. The second alternative involved an increase in the subsidies paid under the B.N.A. Act. Despite some early federal willingness to alter the subsidies stated by the B.N.A. Act to be in full settlement of all claims on the central government, several events intervened to make the Dominion government rely on the full settlement clause and refuse further increase. A global depression, beginning in 1873, placed a severe crimp in the central government's fiscal capacities. The railroads entailed vast expense, creating further federal monetary restraint. From 1873 until 1906 the subsidy payments stood unaltered. Lastly, resort by the provinces to their own powers of taxation was explored. Some means had to be developed to make these significant. The means found was a judicial stretching of the concept of "direct taxation" to encompass modes of taxation which would have been quite unimaginable to the Fathers of Confederation.

1. *The Legal Test*

The terms "direct and indirect taxation" were first considered by the Privy Council in *Attorney-General for Quebec v. Reed*.[47] In that case the Earl of Selborne L.C. took as the measure of these words, their use in Mill's *Principles of Political Economy*. Mill had said:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very person who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs. The producer or importer of a commodity is called upon to pay tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.[48]

In *Bank of Toronto v. Lambe*,[49] a Quebec statute imposed a tax on

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[46] LYNN, *supra* note 1, at 48.

[47] Attorney-General for Quebec v. Reed, 10 App. Cas. 141, 54 L.J.P.C. 12 (1884).

[48] J.S. MILL, Vol. II, PRINCIPLES OF POLITICAL ECONOMY Bk. V, ch. 3, 418 (from 5th London ed. 1889).

[49] *Supra* note 14, at 581-82, 56 L.J.P.C. at 89.

every bank doing business in the province, varying with the paid-up capital of the bank. Lord Hobhouse, in considering the validity of the tax, applied Mill's test, but vastly changed the meaning and scope of the words used. First, it was said that the test was a legal and not an economic one; accordingly, the opinions of economists as to the ultimate incidence of the tax were of no relevance. Second, the question was what did the words mean as used in the statute. Accordingly, the court had to determine the general tendency of the tax and the common understanding of men as to those tendencies.

The general tendency of a tax is a question of substance and not of form; it does not depend on the particular words used in the statute.[50] Moreover, the ultimate incidence of the tax in any particular case is not of significance in determining the legal validity of the tax within Lord Hobhouse's test.[51]

It is all very well to distinguish general tendency from ultimate incidence. But the question has to be put squarely as to what meaning, if any, the concept "general tendency as commonly understood" has. In *Lambe*'s case there could be no question that the taxation would work its way through the bank's operations and be passed on to the bank's customers in the form of increased charges for services. Does the test mean, therefore, that the court should pretend a total lack of sophistication in appreciating this?

A lot of learning can go into distinguishing direct and indirect taxation. But how useful is it? The original rationale for the distinction was that the provinces should be prevented from embarking on ambitious expenditures. It was thought the best way to do this was by subjecting the legislatures to the political resistance encountered in levying direct taxation. By archaic political economy, direct taxation was thought to be more perceived. It provided, therefore, for greater scrutiny of the actions of the legislature by the electorate.[52]

No one now seriously believes that the provinces do not have very significant and expensive responsibilities. Nor does anyone seriously contend that direct taxation has any more or less advantages than indirect taxation from the viewpoint of political economy. A crucial question, to which I shall return, must be put: what purpose does the distinction between direct and indirect taxation serve at the present day and what constitutional value does it protect?

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[50] *See* The King v. Caledonian Collieries, Ltd., [1928] A.C. 358, at 362, [1928] 2 W.W.R. 417, at 420, [1928] 3 D.L.R. 657, at 659 (P.C.).

[51] Halifax v. Estate of Fairbanks, [1928] A.C. 117, at 125, 97 L.J.P.C. 11, at 15 (1927); Attorney-General for British Columbia v. Kingcome Navigation Co., [1924] A.C. 45, at 52, 57, [1933] 3 W.W.R. 353, at 356, 359-60, [1934] 1 D.L.R. 31, at 35, 39 (P.C.); Charlottetown v. Foundation Maritime Ltd., [1932] S.C.R. 589, at 594-95, [1932] 3 D.L.R. 353, at 357-58.

[52] *Supra* note 6.

2. *Collateral Indirectness*

By Mill's political economy, any indirectness in a taxing statute was in and of itself invidious as tending to obfuscate the actions of the legislature. If any indirectness whatever is a stigma going to provincial legislative competence, complex forms of provincial taxation must give the courts considerable difficulty. Further, hybrid forms of taxation specifically must be incompetent to provincial legislatures, insofar as the hybrid partakes of a measure of indirectness.

One of the more positive developments in recent jurisprudence has been the tolerance by the courts, and indeed the explicit condonation, of ancillary or collateral features of indirectness in a taxing statute. This is very important in that most forms of taxation leading to constitutional attack today are hybrid forms, forms which were unknown in 1867 or in the early years of the present century.

The judicial tendency to uphold provincial powers of collateral indirect taxation is observable in several recent cases. *Re Minister of Finance of British Columbia v. Pacific Petroleums Ltd.*[53] involved the validity of the Coloured Gasoline Tax Act, 1946,[54] which imposed a tax on every purchaser of coloured gasoline. A "purchaser" was defined as "any person who within the Province purchases gasoline when sold for the first time". The definition of purchaser was subsequently amended retroactively. It defined a purchaser as one who "purchases or receives delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of, or as an agent for, a principal who is acquiring the gasoline for use or consumption by the principal or by other persons at his expense". The Act was held initially invalid as imposing an indirect tax, similar to the Fuel-oil Tax Act[55] considered by the Privy Council in *Attorney-General for British Columbia v. C.P.R.*[56] but it was cured retroactively by amendment of the definition of "purchaser". Gasoline intended primarily for resale, as opposed to gasoline which is used or consumed by the purchaser, is not liable to taxation as such on the theory that the former situation involves a commodity tax, the latter a consumer tax only. In the course of so holding, Mr. Justice Craig said this:

> If there were anything in the Act from which one could infer that there was a relatively small gallonage "resold" as opposed to "used" within the meaning of s. 10, one could reasonably hold that the tendency of the tax was on the ultimate "consumer" or "user" and that, therefore, the tax was a direct tax.[57]

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[53] *Re* Minister of Finance of British Columbia and Pacific Petroleums Ltd., 71 D.L.R. (3d) 404 (B.C.S.C. Chambers 1976).

[54] R.S.B.C. 1960, c. 63, s. 1, *as amended by* S.B.C. 1976, c. 32, s. 5.

[55] R.S.B.C. 1924, c. 251, (*replaced by* S.B.C. 1930, c. 71).

[56] [1927] A.C. 934, [1927] 3 W.W.R. 460, [1927] 4 D.L.R. 113 (P.C.).

[57] *Supra* note 53, at 410. Craig J. concluded, however, that in this instance "there is nothing in the Act to justify such an inference".

The crucial point to notice is that ancillary or collateral indirectness is not, in and of itself, invidious such as to invalidate the statute. A "small" measure of indirectness is competent to the provinces if in object and purpose, pith and substance, the tax is a direct tax.

By far the most important judicial pronouncements illuminating this question appear in the very recent judgment of the Supreme Court of Canada in *Canadian Industrial Gas and Oil Ltd. v. Saskatchewan*.[58] The majority struck down a scheme of legislation which had the effect of freezing the profits from production and sale of Saskatchewan oil at pre-oil crisis levels, and bringing the excess revenues into the provincial treasury. Mr. Justice Martland interpreted the provisions as an export tax, the classic form of indirect taxation, and an undue interference with interprovincial trade and commerce. But the remarks made by Mr. Justice Dickson, in dissenting reasons, respecting a different point are highly illuminating. His Lordship specifically noted that collateral or incidental indirectness was not sufficiently invidious as to void provincial competence:

> [T]axation may well have aspects which are direct and others which are indirect. By nineteenth century political economy, any element of indirectness was a stigma as tending to obfuscate the actions of the Legislature. That consideration is of minor importance today. . . [M]ore important than a vestige of indirectness, is the prohibition of the imposition by a province of any tax upon citizens beyond its borders.[59]

3. *Hybrid Forms of Taxation*

The realization that collateral indirectness is not in itself disabling to a province turns a spotlight on hybrid forms of taxation. These are the more common forms of taxation raising constitutional questions in the courts today. Examples of hybrid forms of taxation are The Oil and Gas Conservation, Stabilization and Development Act, 1973[60] and the Social Services and Education Tax Act.[61] Certainly an important question, which remains unanswered notwithstanding judicial recognition of provincial powers of collateral indirect taxation, is this: how far may a province impose indirect taxation ancillary to a taxing statute which is "in relation to" direct taxation? There is a second aspect to the problem. If a hybrid statute employs no recognizable form of taxation within historically understood direct and indirect categories, how far is it competent to a province, within the meaning of Mill's test as developed by the courts, to levy collateral indirect taxation? Some answers appear from recent cases.

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[58] *Supra* note 6.
[59] *Id.* at 143, [1977] 6 W.W.R. at 638-39, 80 D.L.R. (3d) at 475.
[60] S.S. 1973-74, c. 72, *as amended by* S.S. 1973-74, c. 73.
[61] R.S.N.B. 1973, c. S-10.

In the *CIGOL* case, the court had to consider a complex of legislation central to which was a mineral income tax. The tax was a 100 per cent levy on the difference between the price received by production companies and the "basic well-head price", a statutory figure equal to the price received by the producing companies immediately prior to the phenomenal rise in the price of oil caused by the "energy crisis". In other words, the legislation sought to drain off the fortuitous profits accruing to the oil producers by reason of the energy crisis and to divert those revenues into provincial coffers. The government of Saskatchewan, in considering whether to leave the benefits in the pockets of eastern Canadian consumers, leave the profits in the pockets of the oil producing companies, or appropriate the profit to itself, chose the latter. The tax was attacked as an indirect tax. The theory in support of this submission was that since the companies were prohibited from selling oil at a lesser price than prevailing world prices by reason of the tax, the levy came as a burden which would cling to the commodity and impose a tax on extraprovincial consumers. In other words, counsel for the companies contended that the producing companies were no more than a conduit through which the government of Saskatchewan sought to reach the consumers of eastern Canada. The Saskatchewan Court of Appeal declined to so hold. Chief Justice Culliton noted that the intent and purpose of the tax was obvious. The intent was to drain off "any increased return which might otherwise have come to those persons having an interest in the oil produced and sold from a well in a producing tract in Saskatchewan, as the result of any increase in the selling price after the 1st January 1974".[62] A minority of the Supreme Court of Canada agreed, but the majority adopted a narrow categories approach, characterizing the legislation as an export tax and a tax on production specifically incompetent to the provinces.[63]

In *Central Canada Potash Co. v. Saskatchewan*,[63a] the Supreme Court reaffirmed the *CIGOL* doctrine so far as it concerns provincial regulatory measures which interfere with export trade. Chief Justice Laskin stated specifically that provincial authority does not extend to the control or regulation of marketing of a provincial product where the minerals or natural resources are in interprovincial or export trade. He reiterated what the Court had said in *CIGOL*, which was that "[p]rovincial legislative authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market."[63b]

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[62] *Supra* note 6, at 370, 65 D.L.R. (3d) at 92.

[63] *Supra* note 6, at 126, 129-30, [1977] 6 W.W.R. at 622, 626, 80 D.L.R. (3d) at 461, 464-65.

[63a] (S.C.C. Oct. 3, 1978).

[63b] *Supra* note 6, at 129, [1977] 6 W.W.R. at 626, 80 D.L.R. (3d) at 464 (quoted in *Central Canada Potash, id.* at 29 (Laskin C.J.C.)). *But see* Ideal v. Saskatchewan (Sask. Q.B. Nov. 15, 1978): Mineral Taxation Act upheld; property tax not obnoxious to 91(2).

The tendency to allow a measure of collateral indirect taxation in a hybrid tax situation was widened by the New Brunswick Court of Appeal in *Simpson-Sears Ltd. v. Provincial Secretary of New Brunswick.*[64] In that case catalogues sent into the province of New Brunswick by Simpson-Sears Ltd. and distributed free of charge were sought to be taxed under the Social Services and Education Tax Act which levied a tax against "every consumer of goods consumed in the Province".[65] A "consumer" was defined as "a person who utilizes or intends to utilize within the Province goods for his own consumption, or for the consumption of any other person at his expense". "Consumption", by the definition section, included "use".[66]

At first instance the tax was held indirect. Mr. Justice Barry considered that, if valid, the tax necessarily would be passed on to the final consumer or user of the catalogue if such consumer or user purchased goods from Simpson-Sears Ltd. He noted that since every person who received a catalogue was not a customer of Simpson-Sears, then, in respect of such non-customers, the transaction was complete in Ontario so far as concerned the retailer. That meant, according to Mr. Justice Barry, that the profits in respect of that transaction would be taxation of an extraprovincial citizen, which taxation would be to that extent indirect and invalid.[67]

The Court of Appeal reversed. Chief Justice Hughes noted that Simpson-Sears had several retail stores and sales offices in New Brunswick and therefore was a person within the province who may be taxed, if taxed directly. In order to qualify as a direct tax, "the tax must be one levied against the ultimate or final consumer or user".[68] He went on to hold that the tax imposed by the Act on catalogues "is not related or relateable to any unit of the commodities which the company advertises and sells and cannot be regarded as a tax which clings as a burden to a unit of the commodity or its price, or to the transaction presented to the market".[69] The tax qualified as a consumption and use tax and it was therefore irrelevant that the company may have been able to shift the burden of the tax to purchasers of its merchandise. There was, he said, no question as to taxation of an extraprovincial citizen: "Although the company has its head office in Ontario it has several places of business within New Brunswick and is therefore a person within the Province who may be taxed here, if taxed directly...."[69a]

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[64] 14 N.B.R. (2d) 289 (Q.B. 1975), *rev'd* 14 N.B.R. (2d) 631, 71 D.L.R. (3d) 717 (C.A. 1976), *rev'd on other grounds* 20 N.B.R. (2d) 478, 82 D.L.R. (3d) 321 (S.C.C. 1978).

[65] R.S.N.B. 1973, c. S-10, s. 4.

[66] S. 1.

[67] *Supra* note 64, at 296-97.

[68] *Supra* note 64, at 641, 71 D.L.R. (3d) at 723.

[69] *Id.* at 644, 71 D.L.R. (3d) at 724.

[69a] *Id.* at 641, 71 D.L.R. (3d) at 723.

Further appeal to the Supreme Court produced inconclusive results on the constitutional issue. The Court split four to four. Chief Justice Laskin, the ninth voice, contented himself with allowing the appeal on the basis that proper construction of the New Brunswick statute failed to bring Simpson-Sears within its ambit; he left the constitutional question open.[70]

Taxation of promotional materials — the essence of the Simpson-Sears dispute — does raise nice questions as to directness or indirectness. Ultimately the tax is borne by the purchaser of the promoter's goods. The retailer is in business for profit, not for fun. In that sense the tax is indirect in that the legislature taxes the consumer, through the retailer, in the form of an increase in the price of the goods. Even unsophisticated evidence will reveal this; in fact, such evidence formed the foundation of Mr. Justice Ritchie's reasoning in holding the statute constitutionally defective for want of compliance with the directness requirement.[71]

However, this aspect — the ultimate incidence of the taxation — is precisely what the courts ever since *Bank of Toronto v. Lambe*[72] have refused to regard as determinative. Evidence that the ultimate incidence of the tax is passed on is irrelevant; there is weighty authority that such evidence is not even admissible.[73] *Bank of Toronto v. Lambe* is itself the *locus classicus* of this rule and the perfect example.[74] That case involved consideration of a tax on the paid-up capital of the bank. The bank, like Simpson-Sears, was also in business for profit, and not for fun. It, too, passed on the tax to its customers in the form of increased charges for services. But the tax does not thereby become indirect. The test is not the ultimate incidence; it is the "general tendency as commonly understood".

The lack of judicial accord in these cases is startling. This suggests an uncertain and unstable state of law. There is a certain inevitability about this in the hybrid tax situation; although the courts are prepared to accept small quantums of indirectness collateral to a direct taxation statute, hybrid taxes present them with intractable puzzles. The difficulties in applying Mill's test as developed by the courts are in any

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[70] *Supra* note 64, at 491, 82 D.L.R. (3d) at 322.

[71] *Id.* at 486, 488, 82 D.L.R. (3d) at 327, 328.

[72] *Supra* note 14.

[73] Cairns Construction Ltd. v. Saskatchewan, 27 W.W.R. 297, at 306-07, 16 D.L.R. (2d) 465, at 470-71 (*per* Martin C.J.S.), and at 327-28, 16 D.L.R. (2d) at 490-92 (*per* Culliton J.A., Proctor and McNiven JJ.A. concurring) (Sask. C.A. 1958), *aff'd* [1960] S.C.R. 619, 24 D.L.R. (2d) 1). Gordon J.A. dissented on this point: *id.* at 319-20, 16 D.L.R. (2d) at 483. For a discussion of this case and of the issue of the admissibility of extrinsic evidence generally, *see* the judgment of Laskin C.J.C. in Reference *re* Anti-Inflation Act, [1976] 2 S.C.R. 373, at 389-90, 9 N.R. 541, at 557-58, 68 D.L.R. (3d) 452, at 468-69.

[74] *Supra* note 14, at 582, 56 L.J.P.C. at 89.

case formidable; hybrid taxation increases the complexity and leads to unpredictable, judicially erratic results. Not one of these cases is free in each court from a statement by a judge that the question for consideration is "difficult".

Drafting technique can help. It would, however, be wrong to think that the draftsman should concentrate his major energies on the directness requirement. That is precisely where the courts will lean to assist him if he strays from the straight and narrow and produces collateral indirect results. The prudent draftsman should insure that he has a firm basis of jurisdiction "within the province". The jurisdiction must fasten on persons, property or transactions located within the provincial jurisdiction and the draftsman should take pains that the statute does so plainly. If the statute produces collateral indirect effects, the draftsman must make obvious that these do not travel beyond the provincial borders. The basis of jurisdiction to which the statute attaches cannot be used as a conduit to reach extraprovincial citizens. The statute must be drafted so that *both* the tendency and the incidence of the taxation do not overstep the provincial territory and clearly can be seen not to do so; if it does, the draftsman will find little aid forthcoming from the courts. This tendency emerges from all of the recent case law, and it is specifically referred to by the minority of the Supreme Court in the *CIGOL* appeal.[75] In short, collateral indirectness, either ancillary to a direct taxation statute or as part of the effect of a hybrid statute, will be tolerated if the effect is relatively small and localized to the province. It seriously jeopardizes the entire statute when the incidence of taxation plainly reaches extraprovincial residents, or when, in a hybrid statute, it cannot plainly be seen to impose a tax locally only.

4. *Commodity and Consumer Taxes Distinguished*

(a) *Basis of the Distinction*

One of the most important ways in which the concept of direct taxation has been stretched to flatter provincial competence is by the introduction of a distinction between commodity taxes and consumer taxes. A commodity tax as a category *per se* is indirect.[76] Mill himself said so;[77] he noted that a commodity tax was a means of building into the price of a commodity an impost and through the producer of the commodity to send that impost abroad to the purchaser of the commodity. He considered such to be the classic form of indirect taxation.

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[75] *Supra* note 6, at 142-43, [1977] 6 W.W.R. at 638-39, 80 D.L.R. (3d) at 475.

[76] Attorney-General for British Columbia v. C.P.R., *supra* note 56; Attorney-General for Britsh Columbia v. McDonald Murphy Lumber Co., [1930] A.C. 357, [1930] 1 W.W.R. 830, [1930] 2 D.L.R. 721 (P.C.).

[77] MILL, *supra* note 48, at 435.

A consumer tax is very much like a commodity tax in its mode of operation, but the intention is very different. It is an intention to tax the last purchaser, *i.e.* the consumer, only. Accordingly, there can be no passing on of the tax. Consumer taxes are held by the courts to be direct.[78]

The distinction between commodity and consumer taxes is necessitated by the need to escape from the strait-jacket of Mill's archaic political economy. A commodity tax, if given its head as a category incompetent to the provinces *per se,* is capable of voiding any attempt to tax a transaction where a subsequent sale may be anticipated.[79]

The commodity-consumer tax distinction first received judicial elaboration in *Atlantic Smoke Shops, Ltd. v. Conlon.*[80] The Privy Council considered in that case The Tobacco Tax Act of New Brunswick.[81] The tax was set at ten per cent of the price paid and was imposed on anyone who purchased tobacco for his own consumption from a retail vendor in the province. By regulation, the tax was to be collected by the retail vendor who was constituted a crown agent for that purpose and allotted three per cent of receipts as remuneration.[82] Viscount Simon held that, since the tax fell on the last purchaser, there could be no question of further resale; hence the tax was direct, since it fell on the person who actually bore the burden of it and could not be passed on.[83] In *Cairns Construction v. Saskatchewan,*[84] a

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[78] Atlantic Smoke Shops, Ltd. v. Conlon, [1943] A.C. 550, [1943] 3 W.W.R. 113, [1943] 4 D.L.R. 81 (P.C.) (consumption of non-durable goods); Cairns Construction Ltd. v. Saskatchewan, [1960] S.C.R. 619, 35 W.W.R. 31, 24 D.L.R. (2d) 1, *aff'g* 27 W.W.R. 297, 16 D.L.R. (2d) 465 (Sask. C.A. 1958), *rev'g in part* 22 W.W.R. 193, 9 D.L.R. (2d) 721 (Sask. Q.B. 1957) (durable goods).

Gerard La Forest, in G. LA FOREST, THE ALLOCATION OF TAXING POWER UNDER THE CANADIAN CONSTITUTION 70-73 (Canadian Tax Papers, No. 45, 1967), is of the view that the categories test formulated by the Privy Council in Halifax v. Fairbanks, *supra* note 51, at 124-25, 97 L.J.P.C. at 14-15, is a departure from Mill's theory: an errant judicial innovation in an otherwise orderly progression. It follows from the above that I am in total disagreement with this view. I consider that the categories test was an intensified application of Mill's theories. It stretched his arcane political economy to the breaking point. Mr. La Forest (at 72), thinks the categories test is not dead; in my view it is so, at least insofar as new forms of taxation are concerned. Such forms are almost always hybrids. No intelligent analysis attempting to be faithful to searching methods of constitutional scrutiny, would employ such an unsophisticated device in respect of hybrid taxes.

[79] In Attorney-General for British Columbia v. C.P.R., *supra* note 56, at 938, [1927] 3 W.W.R. at 463, [1927] 4 D.L.R. at 116, Viscount Haldane voided the Fuel-oil Tax Act, R.S.B.C. 1924, c.251 on the theory that since fuel oil is a marketable commodity, "those who purchase it, even for their own use, acquire the right to take it into the market. It therefore comes within the general principle which determines that the tax is an indirect one."

[80] *Supra* note 78.

[81] S.N.B. 1940, c. 44 (*now* R.S.N.B. 1973, c. T-7).

[82] *Supra* note 78, at 561, [1943] 3 W.W.R. at 117-18, [1943] 4 D.L.R. at 84.

[83] *Id.* at 563, [1943] 3 W.W.R. at 120, [1943] 4 D.L.R. at 87.

[84] *Supra* note 78. *See also* Due, *The Cairns Decision,* 9 CAN. TAX J. 363 (1961); Baker, Comment, 1 ALTA. L. REV. 594 (1961).

tax levied on all consumers of tangible personal property at a retail sale in the province, to which was annexed the mechanism of collection by the retail vendor, was held to be direct. The facts of the case concerned the purchase by a building contractor of pre-fabricated housing components. Of course, in this instance, the tax would be passed on as part of the selling price of the house, but the courts had long ago said that the ultimate incidence in particular cases could not affect the validity of the tax.[85]

Finally, in *Attorney-General of Newfoundland v. Avalon Telephone Co.*,[86] Chief Justice Furlong considered the validity of The Social Security Assessment Act, which required that "every purchaser shall pay to Her Majesty at the time of making the purchase an assessment at the rate of five per centum of the purchase price of the tangible personal property purchased."[87] A purchaser was defined to be "any person who acquires tangible personal property at a retail sale in Newfoundland for his own consumption or use, or for the consumption or use by others at his expense. . .".[88] Chief Justice Furlong, following the lead of the Supreme Court in *Cairns Construction Ltd. v. Saskatchewan*, held the tax direct on the theory that it was a consumer as opposed to a commodity tax:[89] the tangible personal property referred to in the Act contemplated consumption for use and not resale. The factual situation of the litigation was that the tax was imposed on equipment purchased by a telephone company. It is inconceivable that the tax on that property would not eventually be passed on to telephone company customers in the form of increased service charges. The Newfoundland court did not believe that was the point. The fundamental point was that indirect taxation utilizes the concept of a cut-off point. Insofar as telephone equipment was not processed, fabricated or manufactured into the telephone service (which would render it exempt from assessment by regulation) the court would not look to the obvious pattern or route which the tax followed.[90] The point to notice is that in the *Avalon Telephone* case, the court has gone beyond the theory of general

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[85] Attorney-General for British Columbia v. Kingcome Navigation Co., *supra* note 51; Charlottetown v. Foundation Maritime Ltd., *supra* note 51.

[86] 33 D.L.R. (2d) 402 (Nfld. C.A. 1962).

[87] R.S.N. 1952, c. 41, s. 3(l), *as amended by* S.N. 1960, No. 64, s. 2(l) (*now* R.S.N. 1970, c. 354).

[88] S. 2(f).

[89] *Supra* note 86, at 411. Dunfield and Winter JJ. both concurred with Furlong C.J. in finding that the tax being levied was a direct tax: *id.* at 420, 421. However, Mr. Justice Dunfield was stinging in his criticism of the Act's contents, while Mr. Justice Winter disagreed with his brothers on the Act's applicability to the telephone company. He contended that the equipment purchased by the company was purchased for resale and thus was not subject to the provisions of the Act. Alternatively, he stated that the equipment would fall within the regulation exempting from assessment tangible personal property acquired for the purpose of being "attached to" other tangible personal property for the purpose of retail sale.

[90] *Id.* at 410-11.

tendency of the taxation which characterized the earlier Privy Council appeals. It has artificially hived off the material used in the construction and maintenance of the company's telephone system from the purpose of that construction and maintenance — the sale of telephone services — in order to uphold the validity of provincial tax.

(b) *Indirect Sales Taxes for the Provinces?*

These decisions have opened the door to provincial imposition of the lucrative high-yield, low-rate retail sales tax, and all provinces, with the sole exception of Alberta, have entered. The taxes must observe rigid requirements of form; they must be drafted as taxes on consumption or use; they cannot validly emerge as pure indirect taxes on the retailer himself. Many suggestions have been made that indirect sales taxes be opened to the provinces; in fact, constitutional amendments have been proposed and narrowly rejected to that effect.[91] There are several difficulties with such an amendment. First, it is generally agreed that the tax must be levied at the retail, as opposed to the manufacturing level. The reason is that a disproportionate amount of manufacturers' sales — eighty-six per cent in the 1967-68 fiscal year — occur in Ontario (fifty-eight per cent) and Quebec (twenty-eight per cent). That would unduly concentrate the benefit of the taxes in those two provinces. Retail sales taxes do not produce this problem: only sixty-three per cent of the retail sales occur in Ontario and Quebec.[92] Moreover, manufacturers' taxes are difficult to localize. They travel throughout the country, resting ultimately on the consumer. This implies that provinces given the jurisdiction to impose taxes on manufacturers' sales might unfairly reach taxpayers outside of their borders.

These considerations leave open the possibility of a constitutional amendment to authorize provincial indirect sales taxes at the retail level. In my view, such an amendment is unwise, and for two principal reasons. First, retail sales taxes are inherently regressive and unfair; they strike hardest at the lowest end of the income scale:

> As incomes become larger, the non-discretionary element in expenditure declines as a proportion of total expenditure, so that larger incomes must bear relatively heavier taxes if the criterion of vertical equity is to be satisfied. Since sales taxes (it is assumed) are shifted forward and allocated among individuals

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[91] *See generally* MOORE, PERRY & BEACH, *supra* note 1, at 36-37; E. BENSON, THE TAXING POWERS AND THE CONSTITUTION OF CANADA 38-48, 70 (Gov't of Canada, Working Paper on the Constitution, 1969); A. TARASOFSKY, STUDIES OF THE ROYAL COMMISSION ON TAXATION, No. 6, THE FEASIBILITY OF A CANADIAN FEDERAL SALES TAX (1966); Due, *The Provincial Sales Taxes and Their Relationship to the Federal Sales Tax*, 11 CAN. TAX J. 523 (1963); J. DUE, PROVINCIAL SALES TAXES 17-34 (Canadian Tax Papers, No. 37, rev. ed. 1964).

[92] BENSON, *id.* at 42, 66.

> in proportion to their consumption expenditure and since consumption tends to fall as a proportion of income as income rises, it is clear that sales taxes are certain to be inequitable by this criterion.[93]

This consideration led the Royal Commission on Taxation to conclude that "rigid adherence to our equity principles would call for the complete abolition of all sales taxes".[94] Entrenchment of such an inequity in the Constitution should not, in my view, be instituted.

Secondly, any provincial indirect sales tax would have to be founded on an agreed allocation formula for this tax base in order to guard against provincial imposition of its sales tax on a citizen beyond its borders. In other words, retail sales taxes are hard to confine; an allocation formula would be mandatory to ensure equity and efficiency in the system. If an agreed tax base for each province were entrenched, it might well prove to be a strait-jacket as the economy of the country metamorphoses; if the base were not entrenched, the potential for jurisdictional conflict would thereby be created. Neither result, in my opinion, should be encouraged in a federal system.

Finally, it has never been conclusively demonstrated that change to an indirect form of sales tax possesses any significant advantage over the present form. The amendment proposals originated because the validity of existing provincial imposts had been called into question following the *Attorney-General for British Columbia v. C.P.R.*[95] and *Kingcome Navigation*[96] cases. That doubt has long since been laid to rest. Greater efficiency of collection is undemonstrated, and, in fact, all evidence suggests that the present mechanism is sufficiently flexible to allow for all desirable improvements.[97] The courts have already upheld wide provincial penal powers found in Retail Sales Tax Acts as a valid exercise of section 92(15) of the B.N.A. Act;[98] it is highly unlikely that any greater enforcement efficiency would be forthcoming under an indirect mode of tax imposition. Given the highly speculative nature of the advantages to be gained by an indirect retail sales tax amendment, and the clear negative fallout, namely, the constitutional entrenchment of inequitable taxation and the creation of opportunities for federal tensions, such an amendment must be deemed unwarranted and undesirable.[99]

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[93] R. BIRD, SALES TAX AND THE CARTER REPORT 8 (1967).

[94] REPORT OF THE ROYAL COMMISSION ON TAXATION, Vol. 1, 8 (K. Carter Chairman 1966).

[95] *Supra* note 56.

[96] *Supra* note 51.

[97] DUE, *supra* note 91, at 31-33.

[98] R. v. Christopoulos, 16 O.R. (2d) 729, 36 C.C.C. (2d) 399 (Div'l Ct. 1977).

[99] Mr. Due's comments in DUE, PROVINCIAL SALES TAXES, *supra* note 91, at 33-34, are instructive:

> The advantages claimed for a constitutional amendment to permit an indirect retail sales tax are thus highly illusory. The basic operation of the tax would not be changed by a shift to the indirect form, and improvements in conveni-

5. *Constitutional Litigation and the Taxing Power*

The consumer-commodity tax distinction is partly based in logic — the inability of the ultimate consumer to pass on the tax — but is more properly seen as based in constitutional policy. The courts are judicially developing the concept of direct taxation in order to allow the provincial legislatures wider taxing powers. This was explicitly stated by Chief Justice Furlong in the *Avalon Telephone* case.[100] There is a realization by the courts that the taxation power flows from a constitutional document, and that such a document must be supple in the hands of the courts in order to provide for the needs of national life.

A constitution is not simply a statute like any other. It sets the framework of our national intercourse. It is written in broad general language capable of evolution to provide for the growth of our nation. Of course, it is impossible decisively to answer the argument, made by those hostile to judicial review, that the Constitution is limited to the original understanding of its framers.[101] It is worth noting, however, that the courts do not treat it as such.[102] This is particularly

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ence, efficiency, compliance, and cost of collection would be relatively minor. The only important advantage, the elimination of the need for separate accounting for the exact amount of tax collected, could be attained equally well under the present form of tax by allowing the retailer to keep any overage collected as compensation for his work in collection of the tax. The tax would not become hidden without drastic legislation, which would be fundamentally undesirable and would create a storm of protest if proposed.

On the other hand, an amendment has several disadvantages. A change in the form of the tax would complicate the application of the tax to goods bought outside the province and brought in for use, since this element would still have to be imposed on a consumer basis. As noted, any attempt to force concealment of tax would give rise to a wave of protests, and is undesirable in terms of usual principles of taxation. Furthermore, any amendment which would be politically acceptable might well be saddled with restrictions which would later prove troublesome. The 1950-51 proposed amendment limited the sales tax rate to 3%; most provinces already use a 5% figure. All in all, an amendment would not produce significant advantages, and would create substantial uncertainty and the potentiality of highly undesirable consequences.

[100] *Supra* note 86, at 405-06.

[101] This theory was expressed in *In re* the Regulation and Control of Aeronautics in Canada, [1932] A.C. 54, at 70, [1931] 3 W.W.R. 625, at 632-33, [1932] 1 D.L.R. 58, at 65 (P.C.).

[102] *E.g.* Edwards v. Attorney-General for Canada, [1930] A.C. 124, at 136, [1929] 3 W.W.R. 479, at 489, [1930] 1 D.L.R. 98, at 106-07 ("The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits"); British Coal Corp. v. The King, [1935] A.C. 500, at 518, [1935] 2 W.W.R. 564, at 573, [1935] 3 D.L.R. 401, at 410 (P.C.); Attorney-General for Ontario v. Attorney-General for Canada, [1947] A.C. 127, at 154, [1947] 1 W.W.R. 305, at 320, [1947] 1 D.L.R. 801, at 814-15 (P.C.).

In Reference *re* Anti-Inflation Act, *supra* note 73, at 412, 9 N.R. at 578, 68 D.L.R. (3d) at 487, Laskin C.J.C. expressly negatived the view that the Constitution is limited to the original understanding of its framers:

> This is not to say that clear situations are to be unsettled, but only that a Constitution designed to serve this country in years ahead ought to be regarded as a resilient instrument capable of adaptation to changing circumstances.

Mr. Justice Dickson has also explicitly noted that it is unlikely that the "original

true in the evolution of taxation powers. The court must be guided by rigorous judicial principle certainly, but this rigour must be tempered by the sober realization that the court is an organ of government and a political institution; "judicial review will survive only as long as the Court does not cut too sharply athwart the stream of political power, wherever the sources of that power may be found."[103] In the *Avalon Telephone* case, Chief Justice Furlong put the point this way:

> Now it has been repeated many times that law is an organic and living system by which we are enabled to conduct our day to day life in society with the minimum of disturbance. Law has to keep pace with social change — it has to operate in the society which it helps to organize, which means, in short that it has to regard the conditions of the day as they are and not as they were. This is equally true in the field of taxation. The conditions which created the definition of the many forms of taxes a century ago are in many instances no longer existing. A tax which was a direct tax 90 years ago may be an indirect tax today, and the definition of the economist may require re-statement; because the propositions of modern economics are not without the certainty of the propositions of Euclid.
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> . . .If virtually all taxation today is ultimately borne by the consumer of goods and services are we then expected to say that all taxation is indirect and that consequently the field for provincial taxation is almost non-existent? I think not. I think we have to see what was meant when the words were used in the Act, and then see if like conditions prevail today.[104]

The *Avalon Telephone* case exemplifies a mature court, confident of its abilities to safeguard constitutional integrity and confident, moreover, of its ability to respond with that considered flexibility which constitutional litigation requires.

Our courts do not always act in this fashion. They often search for received categories or utilize certain, if outmoded, forms of analysis. In *Regina v. Churchill*,[105] the British Columbia Supreme Court was asked to adjudicate the validity of the Mobile Home Park Fee Act which imposed a tax on "every person who is in charge of, or operates, a mobile home park".[106] Counsel for the defendant argued that the tax was a novel form of taxation, unknown historically, and not, therefore, capable of assignment to any determinate form of taxation. Counsel asked the court as a consequence to apply Mill's test as developed by the Privy Council: the court declined counsel's invitation. The mere involvement of land produced a knee-jerk reflex action in the court, which assigned it to the category of direct taxation as a tax

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intent" school of interpretation is appropriate for the B.N.A. Act. In the *CIGOL* case, *supra* note 6, at 142, [1976] 6 W.W.R. at 638, 80 D.L.R. (3d) at 475, he stated: "[T]here is no reason to believe that the B.N.A. Act is not a document of evolving meaning, not limited to its original inspiration. . . ."

[103] T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 5 (1969).

[104] *Supra* note 86, at 405-06.

[105] R. v. Churchill, [1972] 6 W.W.R. 107, 29 D.L.R. (3d) 368 (B.C.S.C.).

[106] S.B.C. 1971, c. 35, s. 2 (*replaced by* Mobile Home Tax Act, S.B.C. 1973, c. 55).

on land.[107] The reasoning is of interest for it indicates a theoretical rigidity, a rigidity which is not in keeping with the spirit of constitutional litigation. It is decidedly unhelpful for a court to lock itself into firm categories or determinate modes of classification which are incapable of evolution. That is the lesson to be gleaned from the *Avalon Telephone* case. The *Churchill* case illustrates that the lesson has been incompletely appreciated.

6. *Section 92(2): Form and Substance*

(a) *"Direct Taxation" as a Matter of Form*

Direct taxation has become an elastic concept. Many courts are very tolerant, absent certain prohibitions of substance, of provincial indirect taxation as a collateral or incidental matter. But there is no clear unanimity of view in the courts. The restriction that the provinces limit themselves to direct taxation is a restriction of form only and serves no useful purpose — except as a reminder of historical ideas in political economy — at the present day.

(b) *"Within the Province" as a Matter of Substance*

Section 92(2) however, does contain a crucial limitation of substance; provincial taxation must be "within the province". A province must found its jurisdictional competence to tax on one of three bases: it may fasten on to provincially located persons, property or transactions. The rules of jurisdictional competence strictly preclude any province from taxing outside its borders or from imposing taxes on extraprovincial citizens. No province has the ability to shift its tax burden generally to the citizens of Canada or to the residents of another province. This point was made very early by the Privy Council in *Bank of Toronto v. Lambe*[108] and was recently underlined by a minority of the Supreme Court of Canada in the *CIGOL* appeal.[109] In *Bank of Toronto v. Lambe,* Lord Hobhouse suggested that the limitation to tax directly was a means of keeping the burden of the taxation from falling beyond the provincial border.[110]

(c) *Taxation of Economic Activity within the Province*

There is an exception to the above limitation on the provinces. If the extraprovincial citizen is conducting economc activity within the

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[107] *Supra* note 105, at 112, 29 D.L.R. (3d) at 372.

[108] *Supra* note 14.

[109] *Supra* note 6, at 143, [1977] 6 W.W.R. at 639, 80 D.L.R. (3d) at 475-76.

[110] *Supra* note 14, at 586, 56 L.J.P.C. at 92:

> There are obvious reasons for confining [the provincial legislatures'] power to direct taxes and licences, because the power of indirect taxation would be felt all over the Dominion.

provincial territory, the province is competent to levy taxation in respect of that activity. This was made clear by the Supreme Court of Canada in *Alworth v. Minister of Finance*.[111] This case involved consideration of the Logging Tax Act of British Columbia,[112] which by section 3(1) levied a tax as follows:

> 3(1) Every taxpayer shall for each taxation-year pay a tax of fifteen per centum calculated on his income derived from logging operations in British Columbia.

The Court considered the essential question to be whether the tax was *in personam* or whether the tax was on economic activity within the province. It found that the charging section of the tax was not limited to persons residing in the province but pointed also to a class of persons identified with the operations in respect of which the tax was imposed. The Court pointed out that it was the income derived from logging operations which carried the burden of the tax, and not any class of persons. Therefore, as the logging activity was entirely provincial, the tax was taxation "within the province". As the Chief Justice remarked, "[i]t would be to substitute form for substance and, indeed, empty the charging section of substance (by inviting easy evasion) to hold that a personal tax is imposed by the Act."[113]

In some respects *Alworth* is a simple case. It only involves determination of the question whether the tax fell on the logging operations (which are clearly within the province) or on the logger (who may be within or without the province). But a much more difficult question may arise: the courts may have to determine where business income is "earned". This often is very arbitrary; there is no tested and true common law method for making this assessment. The Income Tax Act[114] offers definitions,[115] but they are not constitutionally obligatory. Great difficulties can arise, therefore, when two provinces provide for different ways of making this determination. Prior to the rules found today in the Income Tax Act, the situation was a jungle. The Rowell-Sirois Commission, in reviewing corporate taxation in 1940, described the field as inequitable, inefficient, complex, and chaotic. The Commission's solution[116] was simple — the Dominion alone should have the power to impose corporate taxes — but this was found unacceptable at a 1941 conference, and dropped. At the Victoria Conference in 1971, the federal government revived this suggestion. It

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[111] 15 N.R. 405, [1977] 4 W.W.R. 268, 76 D.L.R. (3d) 99 (S.C.C.), *aff'g* [1976] 4 W.W.R. 701, 71 D.L.R. (3d) 540 (B.C.C.A.).

[112] R.S.B.C. 1960, c. 255, s. 3(1) (*replaced by* S.B.C. 1963, c. 24, s. 3(a), *as amended by* S.B.C. 1968, c. 25, s. 3).

[113] *Supra* note 111, at 408, [1977] 4 W.W.R. at 271, 76 D.L.R. (3d) at 101.

[114] R.S.C. 1970, c. 1-5, *as amended*.

[115] Income Tax Regulations, Part IV, S.O.R./62-19 (96 Can. Gazette, Pt. II, 78)

[116] REPORT OF THE ROYAL COMMISSION ON DOMINION-PROVINCIAL RELATIONS, Vol. II, RECOMMENDATIONS 114 (Rowell C.J.O., J. Sirois Chairmen 1940).

proposed a renunciation by the provinces of their powers to tax business incomes in favour of the central government. At present the problem is dormant since the provinces have agreed upon an allocation formula proposed by the federal government.[117]

Allocation of business income as between the various provincial jurisdictions is a crucial problem in any federal state's fiscal system. Failure to reach a workable formula can result in one of three difficulties: (a) a jurisdiction might impose a tax on profits that, by any measure, cannot be regarded as having been earned there; (b) a jurisdiction might refrain from levying a tax on profits rightly regarded as earned there; or (c) two or more jurisdictions might impose a tax on the same profits. Economic inefficiency and inequitable taxation would result in each case; interjurisdictional political and administrative relations would be strained. In an economic system like our own, where the most significant taxable entities straddle provincial and national borders, it is especially important that an effective and equitable allocation formula be maintained. It goes without saying that any such formula must be tested by the demands of the Constitution.

In Canada, the allocation rules have never been the subject matter of a court challenge. The applicable constitutional criteria, therefore, are entirely theoretical. But this much is clear law: persons, including corporations, property and transactions located in a province may be taxed there if taxed directly.[118] There is no requirement that the person be domiciled or resident within the province. If a corporation carries on business there, that is a sufficient foundation upon which provincial taxing jurisdicition can fasten.[119]

It is important to distinguish upon which of the three possible foundations — persons, property or transactions — provincial jurisdiction has attached. This is a question of statutory construction; it must be discerned precisely on which of the three the statute intends to impose a tax. That determination having been made, the question of jurisdictional competence to tax falls to be decided according to whether the basis of jurisdiction is within the province.

Jurisdictional competence to tax is an entirely different question from competence to levy a particular rate or measure of tax. Suppose, for example, that Prince Edward Island fastens its jurisdiction upon a

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[117] The business income allocation system, as well as its development, is described by Smith, *Allocating to Provinces the Taxable Income of Corporations: How the Federal-Provincial Allocation Rules Evolved*, 24 CAN. TAX J. 543 (1976). BENSON, *supra* note 91, at 22, repeats the position of the federal government that "the only surer way of accomplishing this objective [reaching accord on the allocation of business income] would be for the provinces to forgo their power to tax business income, by agreement or constitutionally, and leave it to Parliament to levy these taxes."

[118] Bank of Toronto v. Lambe, *supra* note 14, at 584, 56 L.J.P.C. at 91; Alworth v. Minister of Finance, *supra* note 111, at 408, [1977] 4 W.W.R. at 270, 76 D.L.R. (3d) at 101.

[119] Bank of Toronto v. Lambe, *id.*

large multi-national corporation maintaining a small retail outlet in Charlottetown. The jurisdiction clearly is well-founded. The corporation is within the province. Now suppose that the measure of tax is fourteen per cent of the corporation's world-wide income, and that such an amount trebles the hitherto province-wide tax yield. Can constitutional objection successfully be taken against this rate?

The answer appears to be no.[120] The theory is that if jurisdiction is valid, the matter of rate or the source of income to be taxed poses no separate constitutional hurdle. The constraints are entirely political. If a province taxes unfairly, by this theory, the taxpayer may seek a more accommodating jurisdiction in which to carry on its activities.

To the mind of a constitutional lawyer, there is a certain unreality about this conclusion. The Constitution is not such a toothless instrument that some politically fanatic group temporarily in office can try to drive out multi-national business as if ridding the world of a plague.[121] It may be that some relief could be had under the theory of a federally incorporated company's immunity to provincial laws which impair its status and essential powers,[122] or under the prohibition to provincial legislatures from interference with interprovincial streams of commerce. But whether those doctrines be pressed into service to deal with an expanded set of problems or whether a new judicial rule be designed, it seems extravagant to think that a total breakdown in the political arrangements as to allocation of business income would avoid constitutional scrutiny on a court test. In any event, the jurisdictional immunities offered by the federal entity on trade and commerce theories are unsubtle. They would result in total provincial incompetence when the complaint really goes to the undue exercise of that competence. The theories deal in jurisdictional terms with a complaint as to measure of taxation. In my submission, measure of tax, as opposed to jurisdictional competence, is a distinct subject matter for constitutional scrutiny, and only awaits a proper case to be subdued by constitutional principle.[123]

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[120] Kerr v. Superintendent of Income Tax, [1942] S.C.R. 453, [1942] 4 D.L.R. 289; C.P.R. v. Provincial Treasurer of Manitoba, 10 W.W.R. (N.S.) 1, [1953] 4 D.L.R. 233 (Man. Q.B.).

[121] *See*, for an illuminating example, Attorney-General for Alberta v. Attorney-General for Canada (Reference *re* Alberta Legislation), [1939] A.C. 117, [1938] 3 W.W.R. 337, [1938] 4 D.L.R. 433 (P.C.).

[122] John Deere Plow Co. v. Wharton, [1915] A.C. 330, 7 W.W.R. 706, 18 D.L.R. 353 (P.C. 1914); Great West Saddlery Co. v. The King, [1921] 2 A.C. 91, [1921] 1 W.W.R. 1034, 58 D.L.R. 1 (P.C.). *But see* Canadian Indemnity Co. v. Attorney-General of British Columbia, [1977] 2 S.C.R. 504, 11 N.R. 466, [1976] 5 W.W.R. 748, 73 D.L.R. (3d) 111.

[123] The problems involved in devising constitutional formulae respecting the rate of taxation have been considered in an American context: Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 HARV. L. REV. 756 (1936); Comment, *Interstate Allocation of Corporate Income for Taxing Purposes*, 40 YALE L. J 1273 (1931); Powell, *Business Taxes and the Federal Constitution*, in NATIONAL TAX ASSOCIATION PROCEEDINGS (1925).

Measure of tax, as a subject matter for constitutional inquiry, turns a spotlight on the allocation rules. The court would have to determine, *ex hypothesi*, the constitutional limits within which a province may attribute income to its tax base and impose tax on it. One can only speculate as to the result, but it does not seem illogical to suppose that the principal tests of the present allocation rules, which have been developed and refined by more than thirty years of federal-provincial consultation,[124] may acquire, by convention, a quasi-constitutional status in the event of total breakdown and resort to the courts. In that case, the courts might define broad parameters around an allocation formula based upon the proportion of gross receipts[125] and wages paid in the province (weighted fifty per cent each) to total taxable income under the federal Income Tax Act.[126]

The problem of provincial taxation of interprovincial entities or interprovincial commerce is not unique to Canadian federalism. It has been considered many times in the United States. By older American law the focal point for consideration of this problem was jurisdiction to tax; it was not measure or rate of taxation. In *Spector Motor Service, Inc. v. O'Connor*,[126a] a Connecticut tax on foreign corporations doing business within the state was considered by the United States Supreme Court. The tax was measured by the net income reasonably attributed to business activities within the state. Spector Motor Services, Inc. was a Missouri based interstate trucking operation. The Court held the *jurisdiction* to tax bad on the theory that Connecticut had interfered with the federal government's exclusive competence to tax interstate commerce. It was irrelevant, according to the Court, that the measure of tax was based on activities that could be reasonably considered intrastate only.[126b]

Although the Supreme Court expressed its approval of the *Spector* doctrine in subsequent cases,[126c] that rule was attenuated by subsequent

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[124] Smith, *supra* note 117, at 568.

[125] By the Income Tax Regulations, Part IV, S.O.R./62-19 (96 Can. Gazette, Pt. II, 78), s. 402(3), this amount is subject to a reasonableness test so far as concerns attribution of total revenue to the "permanent establishment", of fixed place of business, in the province. By s. 402(4), gross revenue is attributed to the place of shipment of goods to the customer, *i.e.* the residence of the customer, instead of to the place where the sales of goods were negotiated, *i.e.* the point of shipment. *See* Eaton, *Provincial Profit Allocation*, 6 CAN. TAX J. 7, at 8 (1958). *See also* McGurran, *The New Order in Provincial Profit Allocation*, 6 CAN. TAX J. 150 (1958). By s. 402(5), gross revenue does not include certain investment income.

[126] *See* the Income Tax Regulations, Part IV, s. 402(3). Part IV of the Regulations provides special rules for special industries, but it is doubtful if elaborate technical refinements are constitutionally cognizable. One would want a court test to provide a broad rule to define the outer limits of competence. Fine tuning of tax equities would be a matter for the legislature, not for constitutional elaboration.

[126a] 340 U.S. 602, 71 S. Ct. 508 (1951).

[126b] *Id.* at 607-09, 71 S. Ct. at 511-12.

[126c] *E.g.* Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 74 S. Ct. 558 (1954).

decisions[126d] and decisively overruled in *Complete Auto Transit Inc. v. Brady*.[126e] In *Complete Auto Transit*, the Court examined the question whether, assuming a sufficient nexus to impose tax (jurisdictional competence), a non-discriminatory state tax could be imposed on interstate commerce. The Court, in overruling *Spector*, unequivocally held that such a tax was valid, but that it must meet constitutional requirements as to measure. Those requirements were twofold: (a) the tax must be fairly apportioned to the activities within the state; and (b) the tax had to bear a relationship to state-provided services. Since the company did not allege or affirmatively prove objectionable features on those grounds, the Mississippi tax considered in the case withstood the constitutional attack squarely. The crucial point to notice is that in *Complete Auto Transit*, measure of taxation, as opposed to jurisdictional competence, is the central axis around which the dispute orbits.

These developments are of considerable interest to Canadian law. It is extremely useful to note that the judicial formulation of constitutional requirements elaborated in *Complete Auto Transit* is not at all unlike the Canadian allocation rules. However, in the United States, these rules are now considered in the context of *measure* of taxation, as opposed to juridictional competence to tax. In the present writer's view, this is a far more subtle and rich focus of constitutional inquiry. It allows the real nature of objection to the tax to be considered thoroughly. That objection is *measure*; absent discriminatory taxes on interstate commerce, the complaint is not as to jurisdiction.[126f] By considering measure of taxation, a court is able to give a more refined and precise definition of the limits within which state or provincial interference, by taxation, with interstate or interprovincial streams of commerce is tolerable. Consideration of the problem in jurisdictional terms is rough-hewn, and at best uncertain as the *CIGOL* appeal makes all too plain. The court's answer given in jurisdictional

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[126d] *E.g.* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S. Ct. 357 (1959).

[126e] 430 U.S. 275, 97 S. Ct. 1076 (1977). For a discussion of this case, *see* Jaray, *Recent Developments in State Taxation of Interstate Commerce: Complete Auto Transit, Inc. v. Brady and National Geographic Society v. California Board of Equalization*, 7 CAPITAL U.L. REV. 143 (1977).

[126f] However, it is conceivable that the jurisdictional issue still might arise. Suppose an outrageous measure of tax were imposed on domestically located property or activities. For example, a province attempts to impose a tax on the provincially located portion of a pipeline. The measure of the tax has reference to the value of the entire pipeline extending across Canada. Objection is taken to the measure of the tax. This objection could be dealt with in jurisdictional terms by striking down the portion of the tax having reference to sections of the pipeline outside the provincial borders for failure to comply with the requirement of s. 92(2) that it be "within the province". It might be that the severability doctrine could be engaged to support that part of the tax being imposed on the domestically located pipeline. Thus, the measure of the tax could be held incompetent to the extent that it operated upon property located outside the province The objections to the measure of tax could be given in jursidictional and object and purpose terminology.

terms is, of necessity, blunt. The court says only that the tax sought to control or did not seek to control interprovincial commerce. In my opinion measure of taxation can refine this answer; it is an appropriate focus for Canadian constitutional doctrine. The "measure" test would enrich Canadian constitutional law so far as concerns difficulties respecting provincial taxation of interprovincial commerce.

One last problem remains to be considered relating to taxation of economic activity within the province. It is clear law that a province is not entitled to levy a discriminatory tax on goods destined for export; it is clearer still that a province, by the taxation of export products, cannot provide a stimulus to provincial industry. In *Texada Mines v. Attorney-General of British Columbia,*[127] the Supreme Court struck down British Columbia legislation which imposed a tax on iron ore mined in the province, and provided a premium for iron ore processed in British Columbia. The intent of these two Acts was to provide incentives for refining facilities to locate in British Columbia. The principal statute of the scheme was struck down as an export tax.

Suppose that a province, rather than imposing taxation on export goods, provides for significant write-offs in respect of goods that are locally processed. The legislation might distinguish between different industries, or different sectors of the same industry. Would such a scheme withstand constitutional examination? Certainly the export tax theory would be highly relevant. The point to notice is that by means of a taxation scheme, discrimination would result between the prices charged for goods in the export market according to whether the good was or was not processed in the local jurisdiction. Such a scheme suffers from a second constitutional defect: it discriminates between goods in the current of interprovincial trade.

(d) *Relation to Federal Trade and Commerce Power*

The second constitutional prohibition of substance is that provincial tax systems may not be used as impediments to the "flow" of interprovincial trade. Section 92(2) imperfectly expresses this idea by requiring the tax to be "in order to the raising of a Revenue". In *Brant Dairy Co. v. Milk Commision of Ontario,*[128] the Supreme Court made it clear that the governing test respecting undue interference with federal trade and commerce by a province lies in the intention to restrict or control the

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[127] Texada Mines Ltd. v. Attorney-General of British Columbia, [1960] S.C.R. 713, 32 W.W.R. 37, 24 D.L.R. (2d) 81.

[128] Brant Dairy Co. v. Milk Comm'n of Ontario, [1973] S.C.R. 131, at 165, 30 D.L.R. (3d) 559, at 569 (1972). This test extends to import goods as well as export goods: *see, e.g.,* Attorney-General for Manitoba v. Manitoba Egg and Poultry Ass'n, [1971] S.C.R. 689, [1971] 4 W.W.R. 705, 19 D.L.R. (3d) 169, *aff'g* Reference *re* Interprovincial Trade Restrictions on Agricultural Commodities, [1971] 3 W.W.R. 204, 18 D.L.R. (3d) 326 (Man. C.A.).

free flow of interprovincial trade. Collateral interference with the flow is tolerable.[129]

It is extremely difficult, however, to say how far this prohibition reaches in respect of provincial taxation powers. It is clear law that a province is incompetent to legislate "in relation to" the price of export goods.[130] One is unable to say, however, when taxing legislation is "in relation to" price. In this respect the Supreme Court of Canada appears to regard evidence of the fact that a commodity is sold in the market at prevailing market prices as insufficient to support provincial taxing competence.[131]

The second difficulty encountered in appreciating the prohibition against interference, by means of taxation, with goods in the flow of interprovincial trade is the uncertainty of current law on the federal trade and commerce power. It is by no means clear at what point goods enter or leave the stream of interprovincial trade, thus marking the start or finish of the exportation process.[132] The clearest statement of law on this point is by Laskin J. (as he then was) who, in the *Manitoba Egg Reference*,[133] expressed the view that goods did not leave the export stream upon entry into the province where they were destined to be sold, but only when they had passed to a retailer for distribution to the consumer.

In the United States, the courts conceive of a "process of exportation" whereby goods are carried out of the territorial limits and severed from the mass of property domestically held. There must be an

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[129] Carnation Co. v. Quebec Agriculture Marketing Bd., [1968] S.C.R. 238, 67 D.L.R. (2d) 1.

[130] Attorney-General for Manitoba v. Attorney-General for Canada, [1925] A.C. 561, [1925] 2 D.L.R. 561 (P.C.); Canadian Industrial Gas & Oil Ltd. v. Saskatchewan, *supra* note 6. There is no objection, however, to a provincial scheme fixing maximum and minimum prices for goods sold within the province even if the goods originated outside the province: *see, e.g.*, Home Oil Distributors, Ltd. v. Attorney-General of British Columbia, [1940] S.C.R. 444, [1940] 2 D.L.R. 609. This case can only be rationalized as a situation where goods have left the "flow" of interprovincial trade.

[131] Canadian Industrial Gas & Oil Ltd. v. Saskatchewan, *supra* note 6. The majority's reasoning has been heavily criticized in the popular press. An editorial by Claude Ryan was entitled "Un jugement inquiétant et dangereux" (Le Devoir (Montréal), Nov. 29, 1977, at 4, col. 1). Another editorial by Pierre Tremblay in Le Droit referred to it as "de l'huile sur le feu" (Le Droit (Ottawa), Nov. 30, 1977, at 6, col. 1). In an article by Jes Odam in the Montreal Star, British Columbia economist Marvin Shaffer is quoted as calling the decision "a great blow to confederation as any cultural outrage one could imagine being perpetuated [*sic*] on Quebec" (The Montreal Star, Dec. 10, 1977, at B-5, col. 4). An article by Stephen Duncan in The Financial Post suggested that "the Supreme Court appears to be swinging one way showing a strong federalist bias while popular sentiment is swinging the other (The Financial Post, Dec. 10, 1977, at 2, col. 2).

[132] *Compare* Home Oil Distributors Ltd. v. Attorney-General of British Columbia, *supra* note 130; Carnation Co. v. Quebec Agricultural Marketing Bd., *supra* note 129; Attorney-General for Manitoba v. Manitoba Egg & Poultry Ass'n, *supra* note 128; Brand Dairy Co. v. Milk Comm'n of Ontario, *supra* note 128; Burns Foods Ltd. v. Attorney-General for Manitoba, [1975] 1 S.C.R. 494, 1 N.R. 147, [1974] 2 W.W.R. 537, 40 D.L.R. (3d) 731.

[133] *Supra* note 128, at 716, [1971] 4 W.W.R. at 726, 19 D.L.R. (3d) at 189.

intention of uniting the goods to the mass of things belonging to a foreign country.[134] The process of exportation is narrowly conceived. Goods do not cease to be part of the general domestic mass until they are shipped or entered with a common carrier for the purpose of transportation to a foreign state. It is not enough that there be an intention or plan of exportation, or an integrated series of action which will end with export, to mark the entry of goods into the export stream. In *Empresa Siderugica S.A. v. Merced,*[135] a cement factory was sold to a Columbian corporation. Title passed and possession was taken by the purchaser. An export license was obtained pursuant to which twelve per cent of the plant was shipped. A tax levied by a municipality at that point was upheld by the United States Supreme Court on the theory that the remaining portion of the factory might still have been diverted into the domestic market.

(e) *Recommendations*

To my mind, the best way to deal with these problems is to widen simultaneously federal jurisdiction over the export streams and provincial powers of collateral indirect taxation. The process of exportation ought to be robustly conceived. Goods should be held to enter the export stream when they are produced with the intention that they are destined for the export market, and acts are done in furtherance of that intention which leave no uncertainty in the mind of the court that the goods are actually destined for export. Receipt into the foreign jurisdiction where the goods are destined for consumption may be a premature point at which to mark exit from the export stream. Such an early exit would allow a province to discriminate between provincially produced goods and extraprovincially produced goods. The prevention of such discrimination is the chief advantage to be gained by delaying exit from the export stream until delivery to the retailer for sale to the customer.

This broad conception of the reach of the export stream has the advantage of preventing a province from sending its imposts abroad, through the exportation current, to Canadians generally. However, in my view, in tandem with this schematic of the export stream, provincial powers of collateral indirect taxation ought to be simultaneously flattered.[135a] No province should find itself embarrassed for want of compliance with purely formal requirements when those formal requirements have ceased to serve any known constitutional value. Finally, clear evidence of actual interference with the export stream ought to be

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[134] United States v. Hill, 34 F. 2d 133 (2d Cir. 1929).

[135] 337 U.S. 154, 69 S.Ct. 995 (1949).

[135a] Prime Minister Trudeau is prepared to offer a plenary power of indirect taxation to the provinces in respect of natural resources as long as it does not interfere with interprovincial or international trade (The Globe and Mail (Toronto), Oct. 21, 1978, at B5, col. 4).

mandatory. The courts presume that the legislatures have acted constitutionally.[136] Mere speculation that there is interference with price, or with the level of trade flow, is not enough. Therefore, actual interference should be affirmatively established by those attacking provincial competence.

7. *Death Taxes*

The provinces have a wide latitude in imposing death taxes. A province may tax (a) any beneficiary domiciled or resident within its borders, (b) all or any of the testator's property situate in the province at his death, and (c) any transactions that occur within the province by reason of death. If the tax is a personal tax, as long as it falls directly on persons domiciled or resident within the province, there can be no objections taken that the measure of the tax has reference to property located both within and without the province.

There are two limitations. A province may not impose death taxes upon non-residents in respect of property located outside of the province (whether or not the deceased was resident within the province). Furthermore, a province cannot impose such taxes on a domestically located executor in the expectation he will recoup from extraprovincial beneficiaries.

The substantive rule is that a province must limit itself to imposing death taxes within the province (on persons, property or transactions), but the substantive rule often finds expression in a formal requirement that the tax be direct within the meaning of Mill's test. Thus, in *Provincial Treasurer of Alberta v. Kerr*,[137] the Privy Council made it clear that the executor could not be used as a conduit to reach extraprovincial beneficiaries, although there would be no objection to a requirement that the executor be used as a gathering point for collection of tax imposed on domestic citizens. The same point had been made earlier by the Privy Council in *Cotton v. The King*. This case concerned a Quebec tax which was imposed on all moveable property, wherever situate, of a testator domiciled in the province. Lord Moulton, in considering whether the tax was direct, said this:

> Take, for instance, the case of moveables such as bonds or shares in New York bequeathed to some person not domiciled in the province. . . . How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from some one who was not intended himself to bear the burden but to be recouped by some one else [the notary]. Such an impost appears to their Lordships plainly to lie outside the definition of direct taxation. . . .[138]

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[136] Kruger v. The Queen, [1978] 1 S.C.R. 104, at 112, 75 D.L.R. (3d) 434, at 439 (1977).

[137] [1933] A.C. 710, [1933] 4 D.L.R. 81 (P.C.).

[138] [1914] A.C. 176, at 195, 15 D.L.R. 283, at 293. (P.C. 1913).

The point to notice is that Lord Moulton considered the crucial example to be an impost which fell on extraprovincial citizens. This was expressed in the language of direct and indirect taxation. It is my submission that this analysis goes too far. Can there be any worthwhile objection to this form of tax if the tax is confined within the provincial borders, although it be framed substantially as an indirect tax? My view is that there is no reasonable objection. Accordingly, I would suggest that the measure of a province's collateral indirect taxation power, in respect of succession duties, be taken to be any taxation short of that which traverses the provincial border and imposes on citizens outside of the provincial jurisdiction. Such could take the form of a tax on the executor, although the only safe course for a draftsman to follow is a tax on the beneficiaries with the executor used as a collection agent.

These rules can require rather gymnastic feats of legislative drafting. The Nova Scotia Succession Duties Act[139] provides as follows:

> 8(1) Subject as hereafter otherwise provided, duty shall be paid on all property of a deceased that is situated, at the time of the death of the deceased, within the Province.
>
> (2) Subject as hereafter otherwise provided, where property of a deceased was situated outside the Province at the time of the death of a deceased and the successor to any of the property of the deceased was a resident at the time of the death of the deceased, duty shall be paid by the successor in respect of that property to which he is the successor.
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> 2(5) Where a corporation which is not a resident in the Province, other than a corporation without share capital, by reason of the death of a deceased acquires or becomes beneficially entitled to property of the deceased,
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> (a) the corporation shall be deemed not to be the successor of the property except to the extent that the value of the shares of the shareholders of the corporation is not increased in value by the corporation acquiring or becoming beneficially entitled to the property; and
>
> (b) each of the shareholders of the corporation shall be deemed to be a successor of property of the deceased to the extent of the amount by which the value of his shares in the corporation is increased by the corporation acquiring or becoming beneficially entitled to the property.

These provisions were considered in *Cowan v. Minister of Finance of Nova Scotia*.[140] In that case the deceased had transferred considerable assets to an Alberta corporation in exchange for shares and a promissory note. By his will the shares and note were bequeathed to executors to pay income to a second Alberta corporation, whose shares were beneficially owned by a third Alberta corporation, whose shares were in turn owned by the testator's wife. On the death of the wife, the securities were to be divided into four parts; one part was to be transferred to a daughter resident in the United States, and the three remaining parts were to be distributed among three Alberta companies whose shares were owned by three of the testator's daughters resident

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[139] An Act Respecting Succession Duties, S.N.S. 1972, c. 17.

[140] [1977] C.T.C. 230 (N.S.S.C.).

in Nova Scotia. Counsel for the estate attacked section 2(5) of the Act on the ground that it was an attempt to tax property not situate within the province. That attack failed. Mr. Justice Hart relied on the Supreme Court's decision in *Kerr v. Superintendent of Income Tax*[141] as explained by Mr. Justice Freedman in *C.P.R. v. Provincial Treasurer of Manitoba*. In the latter case Mr. Justice Freedman said this:

> A Province may directly tax any person found within its borders. It is not disputed that the appellant is carrying on business in Manitoba in such a way as to make it amenable to provincial taxation. In imposing a direct tax on such a person, it is competent for the Province to measure same by income derived both from within and from without the Province: *Kerr* v. *Supt. of Income Tax*, [1942], 4 D.L.R. 289, S.C.R. 435. If, however, the tax is not a tax on a person, but is rather a tax on specific property or income apart from the person, such property or income must be within the Province (*ibid.*).[142]

Mr. Justice Hart considered that section 2(5) of the Nova Scotia Succession Duty Act was valid to the extent that the shareholders benefited were residents of Nova Scotia. He added that the province would not have power to tax non-resident shareholders of these corporations, but only those who were resident successors under subsection 8(2) of the Act.[143]

This, however, is not the end of the matter. A further distinction needs to be made between these situations: (a) a tax against beneficiaries of the estate in respect of property located outside of the province where the transmission to the beneficiary occurs by virtue of the law of the taxing province; and (b) a tax against the beneficiary in respect of property located outside of the province where the transmission to the beneficiaries occurs by virtue of laws other than those of the taxing jurisdiction. *Cowan v. Minister of Finance of Nova Scotia* is a situation (a) case. The transmission to the beneficiaries in that case took place by virtue of Nova Scotia law. The holding in the *Cowan* case makes clear that a province has competent jurisdiction to tax in situation (a).

Is a province competent to tax in situation (b)? Situation (b) could occur, for example, if the deceased died domiciled outside of the taxing jurisdiction. The transmission, thus, *ex hypothesi* would occur under the law of that province in which he died domiciled. The question contemplates the right of a province other than that where the deceased died to tax beneficiaries resident in that other jurisdiction. The answer to this question is no, the province is not competent to tax.

In *Canada Trust Co. v. Attorney-General of British Columbia*,[143a]

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[141] *Supra* note 120.

[142] *Supra* note 120, at 4, [1953] 4 D.L.R. at 236-37.

[143] Cowan v. Minister of Finance, *supra* note 140, at 251. *See also*, for the same result, MacKeen Estate v. Nova Scotia, 28 N.S.R. (2d) 3 (C.A. 1978).

[143a] [1978] 4 W.W.R. 162 (B.C.S.C.).

the court had to consider section 6A(1) of the Succession Duty Act,[143b] which provides as follows:

> 6A(1) Where property of a deceased was situated outside the Province at the time of death of the deceased, and the beneficiary of any of the property of the deceased was a resident at the time of the death of the deceased, duty under this Act shall be paid by the beneficiary in respect of that property of which he is the beneficiary.

The facts of the case concerned a deceased who died domiciled in Alberta, leaving personal property situate in Alberta under the rule *mobilia sequuntur personam*. The deceased left beneficiaries who were residents of British Columbia; section 6A has the effect of imposing a tax on those British Columbia beneficiaries. The transmission to the beneficiaries took place under the law of Alberta, *i.e.* the domicile of the deceased. The sole jurisdiction to tax was founded on the residence of the beneficiaries. In a closely reasoned and lucid judgment, Mr. Justice Berger held the jurisdiction to tax badly founded. He noted that British Columbia was competent to tax beneficiaries, but that it was incompetent to tax with respect to personal property situated outside the province passing by virtue of a transmission under other than British Columbia law. He said:

> This is not to say that British Columbia cannot tax a beneficiary; it can with respect to personal property situate outside the province passing by virtue of a transmission under the law of British Columbia. But it cannot tax a beneficiary with respect to the receipt by him of personal property situate outside the province in a case where the deceased was domiciled in another province and the beneficiary became entitled to succeed under the law of that other province.[143c]

Canada Trust Co. v. Attorney-General of British Columbia is thus clear authority for disentitling a province from competently imposing tax in situation (b).

It is clear that the province must be astute in order not to fall afoul of the formal direct taxation requirement. Where the province merely seeks to reach persons, property, or transactions situate within the province, its collateral powers to do so indirectly may be considerable; however, these powers should be relied on only by hard pressed counsel supporting existing legislation, and certainly not by any draftsman. However, when the province seeks to reach property or persons outside its borders, the formal requirement of directness becomes a requirement of substance, and the province's ancillary indirect taxing powers are minute. This raises rather subtle problems where incorporeal property is concerned. Mr. La Forest noted this in 1967:

[143b] R.S.B.C. 1960, c. 372, *as amended by* S.B.C. 1972, c. 59, s. 14 (*repealed by* S.B.C. 1977, c. 20).

[143c] *Supra* note 143a, at 172.

> [I]t seems reasonably clear that the same property may for constitutional purposes have a different *situs* for various types of taxes and thus infuse into the phrase "within the Province" a chameleon-like character. Still the law has known more curious animals, and what one is really concerned with is the proper allocation of taxing power among the provinces.[144]

Mr. La Forest, as I understand him, is of the opinion that, in approaching these matters, the court should consider itself to be an outgrowth of the Department of Regional Economic Expansion. His view is that the poorer provinces pay a disproportionate share of the burden of customs tariff. "To redress the balance there should, it is suggested, be a general judicial policy favouring the location of property in the poorer provinces."[145]

The courts have generally declined the invitation to act as branch offices of DREE. In *Re Wolfenden Estate*,[146] the British Columbia Supreme Court reaffirmed that it is necessary to determine the *situs* of incorporeal property by the applicable common law rules. Furthermore, the court held that a provincial legislature was incompetent to prescribe the conditions fixing *situs* of the shares for death tax purposes.

What are the applicable common law rules for determing *situs* of intangibles? Generally speaking, the theory relied on by the courts is the "power theory". This involves a judicial determination of the jurisdiction in which the intangibles most effectively can be dealt with. Lord Dunedin in *Brassard v. Smith* quoted from the judgment of Duff J. in the Supreme Court of Canada to establish the test:

> "And the Chief Baron's judgment, I think, points to the essential element in determing *situs* in the case of intangible chattels for the purpose of probate jurisdiction as 'the circumstance that the subjects in question could be effectively dealt with within the jurisdiction' ". This is, in their Lordships' opinion, the true test. Where could the shares be effectively dealt with?[147]

In *The King v. National Trust Co.*,[148] the Supreme Court of Canada laid down three principles which have been widely followed and which form a constitutional limitation to provincial ability to levy succession duties. They are:

(a) Intangible property can have but one local situation for the purpose of determining the incidence of a provincial tax upon property transmitted by reason of death.

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[144] LA FOREST, *supra* note 78, at 93-94. The leading Privy Council decisions respecting *situs* of intangibles for succession duty purposes are summarized at 94-123.

[145] *Id.* at 96.

[146] [1971] 5 W.W.R. 168, 21 D.L.R. (3d) 118 (B.C.S.C.), *aff'd sub nom.* Minister of Finance for British Columbia v. First Nat'l Bank of Nevada, [1975] 1 S.C.R. 525, [1974] 2 W.W.R. 636, 40 D.L.R. (3d) 739 (1973), *aff'g* [1972] 5 W.W.R. 443, 28 D.L.R. (3d) 756 (B.C.C.A.).

[147] [1925] A.C. 371, at 376, [1925] 1 D.L.R. 528, at 532 (P.C. 1924), *aff'g* Smith v. Levesque, [1923] S.C.R. 578.

[148] [1933] S.C.R. 670, [1933] 4 D.L.R. 465.

(b) The local situation of intangible property for the purpose of provincial taxation must be determined by the application of common law principles.

(c) A provincial legislature cannot increase its taxing powers by altering common law rules for determing the *situs* of intangibles.[149]

The *Wolfenden* case[150] concerned an amendment to the Companies Act of British Columbia. By that amendment, the transfer of a share or other interest of a deceased member in a company made by his personal representative could be effected only by being made on a register specified in section 82.[151] Section 82 provided that the principal register of the company be located in British Columbia. The Act, therefore, had the effect of locating the *situs* of the shares in the province of British Columbia according to the "power theory". Mr. Justice Hinkson held the amendment to the Companies Act a colourable attempt, under the guise of company law, to alter the *situs* of shares in order to bring the *situs* within the province; it was therefore invalid.[152]

There is something in Mr. La Forest's criticism that the common law rules respecting *situs* of intangibles are arbitrary and uncertain. How, after all, does one settle constitutional jurisdiction over a mortgage secured on New York lands, owed by a Quebec debtor to an Ontario testator whose executor is located in Alberta, and whose beneficiaries are scattered across the United States and Canada? But there is nothing in Mr. La Forest's solution. It is inappropriate. Nothing could be more unseemly, or engender more suspicion, than a New Brunswick court, in a dispute involving New Brunswick and Ontario, appropriating to the New Brunswick jurisdiction succession duty revenues on the "have not" theory. A court cannot take on such a blatant political function, absent clear legislative direction. Further, in my view, legislative direction to this end is not appropriate. Regional equalization is not, nor could it effectively be, a judicial task; it is, and ought to remain, a legislative and administrative task.

8. *Provincial Marketing Imposts*

The provinces were obstructed early in their efforts to regulate marketing of agricultural goods by means of compulsory pooling. Provincial competence to impose a self-financing mandatory pool was first doubted in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*.[153] Mr. Justice Duff (as he then was), held the imposition of

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[149] *Id.* at 672-73, [1933] 4 D.L.R. at 466-67.

[150] *Re* Wolfenden Estate, *supra* note 146.

[151] Companies Act Amendment Act, 1967, S.B.C. 1967, c. 12, s. 9 (*amending* R.S.B.C. 1960, c. 67, s. 94(l), *repealed and replaced by* S.B.C. 1973, c. 18).

[152] *Supra* note 146, at 177, 21 D.L.R. (3d) at 125-26.

[153] [1931] S.C.R. 357, [1931] 2 D.L.R. 193.

levies and license fees "for the purpose of defraying the expenses of operation"[154] incompetent to British Columbia in the following terms:

> I think moreover, that levies of that character, assuming for the moment they come under the head of taxation, are of the nature of those taxes on commodities, on trade in commodities, which have always been regarded as indirect taxes. If they are taxes, they cannot be justified as Direct Taxation within the province. That they are taxes, I have no doubt.[155]

In *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Ltd.*,[156] the Privy Council considered a provincial scheme whose object and purpose was to regulate the marketing of manufactured and fluid milk. The market was congested; producers for the fluid milk market received substantially higher returns than producers for the manufactured milk market. The scheme contemplated equalizing the positions of producers for the manufactured and fluid markets, and to this effect levied an adjustment impost. Ancillary to this impost was an expense levy designed to defray the cost of the marketing scheme. The Privy Council, in a heavily criticized judgment,[157] struck down the entire scheme as indirect taxation incompetent to the province. A majority of the Supreme Court of Canada, in *Reference re The Farm Products Marketing Act*,[158] specifically approved the *Crystal Dairy* doctrine respecting equalization levies in holding that the imposition of fees by Ontario to pay for losses in marketing the surplus of a regulated product, and the use of those fees to equalize the return to producers, was *ultra vires* as being an indirect tax.

There are three significant objections to the mode of analysis employed by these cases. First, the cases offer no criteria whatsoever by which to distinguish taxes and service charges,[159] although it is hard to see that expense levies are other than service charges incidental to a regulatory scheme. Secondly, the cases fail to distinguish regulation, by means of compulsory pooling of products or returns, from taxation. In a pooling scheme, compulsory levies never reach provincial coffers for general revenue purposes: they are returned to the producers rateably. In taxation, the levies fall into the general provincial fund to be used for general provincial purposes.[160] Thirdly, the analysis is

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[154] Produce Marketing Act Amendment Act, 1928, S.B.C. 1928, c. 39, s. 5 (s. 10(l)(k)) (*amending* S.B.C. 1926-27, c. 54, s. 10, *repealed by* S.B.C. 1936, c. 45, s. 2).

[155] *Supra* note 153, at 362-63, [1931] 2 D.L.R. at 197.

[156] [1933] A.C. 168, [1933] 1 D.L.R. 82 (P.C. 1932).

[157] *See* Laskin, *Provincial Marketing Levies: Indirect Taxation and Federal Power*, 13 U. TORONTO L.J. 1 (1959).

[158] [1957] S.C.R. 198, 7 D.L.R. (2d) 257. The *Crystal Dairy* case was also accepted, albeit without examination, in Lower Mainland Dairy Products Bd. v. Turner's Dairy Ltd., [1941] S.C.R. 573, [1941] 4 D.L.R. 209 and Prince Edward Island Potato Marketing Bd. v. H.B. Willis Inc., [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.

[159] *See* LA FOREST, *supra* note 78, at 49.

[160] *See generally* Laskin, *supra* note 157.

entirely unsubtle in distinguishing legislation imposing taxation (assuming the levies to be taxation) ancillary to an otherwise valid regulatory scheme, and legislation "in relation to" taxation. In other words, the cases seem to assume that there is no collateral power of indirect taxation in the provinces.

These are compelling criticisms, and largely through their force the *Crystal Dairy* doctrine was attenuated by subsequent cases. In 1938 the Privy Council, in *Shannon v. Lower Mainland Dairy Products Board,*[161] had occasion to consider a provincial marketing scheme which did not contain adjustment levies as a feature designed to equalize the returns to producers, but which did contain an expense levy to defray the cost of the scheme. The expense levy was held valid as an incidental feature of legislation otherwise valid under sections 92(9), 92(13), and 92(16). This case dealt a death blow to any suggestion that the *Crystal Dairy* doctrine extends to other than an equalization levy.

The doctrine, in respect of equalization levies, has met with a similar fate, despite its brief reaffirmation in *Reference re The Farm Products Marketing Act.*[162] In *Crawford v. Attorney-General of British Columbia,*[163] the Supreme Court considered a pooling arrangement for producers of milk, whereby all milk produced was sold to a provincial board. A feature of the arrangement was that the more lucrative fluid milk market was allocated among producers. The proceeds from the pool market were then rateably distributed to producers. The substantial producers of fluid milk received a distribution based only on their allotment for production of fluid milk as fixed by the board. That lowered their returns, but left in the total pool a higher amount for rateable distribution to other producers. It was in effect an equalization scheme having the intention of equalizing production returns to all producers in British Columbia, despite differences in production for the manufactured or the fluid milk market. The Court held the scheme valid as regulation in relation to sections 92(13) and 92(16) of the B.N.A. Act.

A similar scheme was considered by the Ontario High Court and Ontario Court of Appeal in *Ex parte Channel Islands Breeds Milk Producing Association.*[164] That case concerned comprehensive provincial regulation by means of a pooling scheme under The Milk Act, 1965,[165] which created one pool for all milk produced within Ontario. An order of the Milk Marketing Board, which established one

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[161] [1938] A.C. 708, [1938] 2 W.W.R. 604, 4 D.L.R. 81 (P.C.).

[162] *Supra* note 158.

[163] [1960] S.C.R. 346, 22 D.L.R. (2d) 321.

[164] R. v. Ontario Milk Marketing Bd., *Ex parte* Channel Islands Breeds Milk Producers Ass'n, [1969] 2 O.R. 121, 4 D.L.R. (3d) 490 (C.A.), *aff'g* [1969] 1 O.R. 309, 2 D.L.R. (3d) 346 (H.C. 1968).

[165] The Milk Act, 1965, S.O. 1965, c. 72, *as amended by* S.O. 1967, c. 53 (*now* R.S.O. 1970, c. 273, *as amended*).

class of milk only, was attacked as *ultra vires* by the Channel Island producers in that it failed to distinguish their milk from other classes of milk in the pool. Milk produced from Channel Island cows is more suitable than standard breed milk for the lucrative fluid milk market. It was said that the establishment of one pool for both industrial and fluid milk and the payment to all producers, by the Board, of one blended price for their milk regardless of the type, was a compulsory taking of a portion of the returns properly due to the Channel Island producers for the purpose of subsidizing the standard producers. In effect, it was an equalization scheme similar to the *Crawford* scheme. Counsel for the Commission submitted, first, that the *Crystal Dairy* and *Turner's Dairy*[166] cases were overruled by the *Reference re The Farm Products Marketing Act* and *Crawford* decisions. As a second point it was said that there was no material difference between the facts of the *Crawford* case and those of the *Channel Islands Producers* case. The court agreed that the *Crawford* case and the *Channel Islands Producers* case were indistinguishable, and upheld the scheme on that ground. Mr. Justice Lieff in the High Court made *obiter* remarks as to the continuing life of the *Crystal Dairy* doctrine as follows:

> I do feel constrained to remark, however, that the result in the *Crawford* case is, to my mind, totally incompatible with the *Crystal Dairy* decision. Both schemes involved an equalization of returns to all producers, regardless of the end usage of their milk. In addition, in the *Crawford* case, there was a further equalization of returns to the vendors. I note that I am reinforced in my opinion herein by the remarks of Laskin, J.A., at pp. 724-8 of his text, *Canadian Constitutional Law*, 3rd ed., 1966.[167]

Kelly J. A., speaking for the unanimous Court of Appeal, said this:

> We agree that the statement of Rand, J., in the *Farm Products Marketing Act* case, *supra*, to the effect that any element of indirect taxation is purely incidental to the major purpose of control and regulation of marketing and is not a disqualifying factor is applicable to the facts of the instant case.[168]

A case of considerable interest in this respect is the decision of the Manitoba Court of Appeal in *Gershman Produce Co. v. Manitoba Marketing Board.*[169] This was an attack on The Natural Products Marketing Act and regulations thereunder.[170] By this Act a compulsory pooling system was established for producers of Manitoba potatoes. By section 10 of Regulation 135/68, "commission service charges to potato producers, unless otherwise provided herein, shall be 15¢ per 75

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[166] *Supra* note 158.

[167] *Supra* note 164, at 335-36, 2 D.L.R. (3d) at 372-73.

[168] *Supra* note 164, at 123, 4 D.L.R. (3d) at 492.

[169] [1971] 4 W.W.R. 50, 22 D.L.R. (3d) 320 (Man. C.A.).

[170] S.M. 1964 (1st sess.) c. 35, *as amended by* S.M. 1965, c. 57 and S.M. 1966-67, c. 43 (*now* R.S.M. 1970, c. N20, *as amended*); Man. Reg. 106/68 and Man. Reg. 135/68 (*repealed by* Man. Reg. 178/72).

pounds".[171] The court rejected the attack based on indirect taxation. The court noted that since *Reference re The Farm Products Marketing Act,* "there can be no doubt it is *intra vires* a provincial legislature to authorize a marketing commission to impose fees on producers to cover service charges."[172]

The *Gershman* case bears a considerable similarity to *Prince Edward Island Potato Marketing Board v. H.B. Willis Inc.*[173] In the latter case an order of the appellant Board imposed on every dealer a levy at the rate of one cent for each 100 lbs. of potatoes shipped or exported by such dealer from the Island. Order No. 6 of the Board repealed Order No. 2 "subject to the provision that every dealer shall continue liable to pay to the Potato Board the full amount of the charge or levy which is now due. . . ."[174] Mr. Justice Kerwin, with whom Fauteux J. concurred, struck down these orders as matters in relation to export trade.[175] Mr. Justice Taschereau held the orders invalid both as matters in relation to export trade and as indirect taxation. He said: "The effect of this charge or levy necessarily tends to increase the sale price by the amount of the tax."[176] Mr. Justice Rand held the scheme invalid as primarily one of export trade regulation.[177] Mr. Justice Estey held the scheme invalid as a commodity tax which was indirect.[178]

The Manitoba Court of Appeal did not say why the levies in the *Gershman* case were distinguishable from *Willis*. One supposes that they are distinguishable as expense levies which are, since the *Shannon* case in 1938, supportable. Yet it is instructive to note that the *Willis* impost was one cent per 100 lbs. The *Gershman* impost was fifteen cents per 75 lbs. One would have thought that if the *Willis* impost was impeachable as a commodity the same could be said of the *Gershman* impost. To the extent that the *Gershman* impost is referable to the expenses of the compulsory marketing scheme, it is, of course, distinguishable. However, one cannot help but remark that either the administration of the *Gershman* scheme must have been extremely expensive, or else the legislature was attempting to collect behind the shield of expense levies. Whatever the case may be, it is clear that a measure of indirect taxation was tolerated by the Manitoba Court of Appeal in the *Gershman* case. It would seem excessive formality to distinguish the cases by saying that *Willis* involved a levy upon a dealer, while *Gershman* concerned a levy upon a producer. One would have thought that the ultimate burden was borne by the extraprovincial consumer in

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[171] *Supra* note 169, at 53, 22 D.L.R. (3d) at 324.
[172] *Id.* at 54, 22 D.L.R. (3d) at 324.
[173] *Supra* note 158.
[174] *Id.* at 409, [1952] 4 D.L.R. at 161.
[175] *Id.* at 409, [1952] 4 D.L.R. at 162.
[176] *Id.* at 411, [1952] 4 D.L.R. at 164.
[177] *Id.* at 417, [1952] 4 D.L.R. at 169.
[178] *Id.* at 431, [1952] 4 D.L.R. at 181.

either case. In the writer's submission, the *Gershman* case ought to be read as another touchstone in the growing list of cases which allow the provincial legislatures collaterally to levy indirect taxation to some extent. *Gershman* would appear to go the furthest, as the indirect taxation there intrudes across the provincial border. It is an ancillary levy on producers who produce goods that enter the flow of interprovincial trade.

I have previously argued that when, by any regulatory scheme, taxation travels across a provincial border, the province's power of collateral indirect taxation is minute. That such holds true despite the *Gershman* case is made clear in *Prince Edward Island Potato Marketing Board v. Sunny Isle Farms Ltd.*[179] In this case, Chief Justice Campbell considered a fee payable to the Potato Board pursuant to section 4 of Order A-1/1963 of the Board. This was a levy of one cent per hundred-weight of all potatoes shipped from Prince Edward Island.[180] Chief Justice Campbell held it invalid as being in the nature of an indirect tax. His reasoning is based upon the theory that the levy would be passed back by the paying dealer to his vendor, and ultimately to the producer in the way of a reduction in the purchase price per hundredweight.[181] The reasoning is suspect, but not the result. It seems the real reason such a levy is invidious is that it brings into provincial coffers monies coming from the pockets of extraprovincial citizens. The indirect feature of the levy cannot be circumvented using the distinction between consumer and commodity taxes because the consumer, in this case, is outside of the provincial territory. In this writer's submission, the province is not entitled (except to a very marginal extent, if at all) to attract extraprovincial revenues from extraprovincial citizens by means of taxation or regulatory schemes that impose fees in excess of the expenses of the regulation.

The cases just discussed clearly shrank the *Crystal Dairy* doctrine beyond recognition; the recent *Reference re Agricultural Products Marketing Act*[182] dealt a death blow to whatever remained. The *Reference* involved consideration, *inter alia*, of section 2(2) of the Agricultural Products Marketing Act.[183] This section empowered the Governor-in-Council, by order, to authorize provincial boards to impose expense and adjustment levies in respect of agricultural products in both intraprovincial (section 2(2)(a)) and interprovincial (section 2(2)(b)) trade. The Court unanimously held that marketing levies, whether expense or equalization levies, are not taxes and expressly overruled the *Crystal Dairy* case. Chief Jusice Laskin said this:

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[179] 7 D.L.R. (3d) 263 (P.E.I.C.A. 1969).
[180] *Id.* at 264.
[181] *Id.* at 268.
[182] *Supra* note 22.
[183] *Supra* note 21.

> [I]t is, in my opinion, a mistaken view to regard the various types of levies associated with marketing schemes as species of taxes; they are integral to the operation of the schemes and are, in the context, thereof, related either to their administration or to their price mechanisms designed to make the schemes tolerable and equitable for those compulsorily brought within their ambit.
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> This view is at variance with what was said by the Privy Council in the *Crystal Dairy* case, but that case was itself reduced by later cases and, in my opinion, ought no longer to be regarded as stating the law on the subject of marketing levies.[184]

Without the support of the federal indirect taxing power — the levies being held to be regulatory measures, not taxes — section 2(2)(a) of the Agricultural Products Marketing Act, which authorized the levies in respect of intraprovincial trade, had no constitutional foundation. It was a direct invasion of provincial jurisdiction over intraprovincial trade and therefore *ultra vires*. But it is instructive to note that even had section 2(2)(a) been able to gather strength from the federal taxing power by judicial refusal to overrule the *Crystal Dairy* case, the section still would have been constitutionally defective. It is clear law that the federal taxing power can never be used to finance a regulatory scheme which, standing alone, is beyond federal competence.[185] Chief Justice Laskin re-emphasized that point in his consideration of section 2(2)(a).[186]

The breadth of the ruling in *Reference re Agricultural Products Marketing Act* should not be overestimated. Adjustment or equalization levies of the kind considered in the case are not "in order to the raising of a Revenue"; they do not enhance the provincial treasury. The levies are destined for rateable distribution to producers; they do not reach, nor are they intended to reach, provincial coffers. That is principally the reason why it is artificial to regard them as taxes. Suppose, therefore, that incidental to a provincial marketing scheme, levies, in excess of expenses engendered by the regulation, were imposed without any intention that they ultimately reach the producers' pool, but were brought directly into the provincial Consolidated Revenue Fund. Does the post-*Crystal Dairy* case law or the *Agricultural Products Marketing Act Reference* lend constitutional support to such an imposition? In my submission, they do not, and absent independent constitutional grounding in the provincial catalogue of powers (so that the levies may be valid if they bear a rational, functional connection to the marketing scheme), the imposts would fall as indirect taxation.

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[184] *Supra* note 22, at 401, 84 D.L.R. (3d) at 283-84.

[185] *In re* The Insurance Act of Canada, *supra* note 33; Attorney-General for Canada v. Attorney-General for Ontario (Reference *re* Employment and Social Insurance Act, 1935), [1937] A.C. 355, at 366-67, [1937] 1 D.L.R. 684, at 687 (P.C.); Reader's Digest Ass'n v. Attorney-General of Canada, [1966] Que. B.R. 725, at 742, 66 D.T.C. 5073, at 5075, 59 D.L.R. (2d) 54, at 58-59 (C.A. 1965).

[186] *Supra* note 22, at 400-01, 84 D.L.R. (3d) at 283.

B. *The Provincial Licensing Power*

1. *Difficulties of Relating Sections 92(2) and 92(9)*

The provincial legislatures have a second source of revenue raising competence: the licensing power found in section 92(9) of the B.N.A. Act. Section 92(9) provides that:

> In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,
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> ...
>
> 9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local or Municipal Purposes.

This clause has been a source of difficulty. A plain reading of the text appears to confer a species of taxing power in respect of the enumerated categories of business. *Prima facie*, the clause contemplates indirect taxing power since the fees would be passed on as part of a higher price for goods and services. There are two difficulties obstructing this interpretation. First, the Privy Council has concluded that the enumerated businesses do not form a genus; the words "other licences" are thus unrestricted.[187] Secondly, the Privy Council has found the source of provincial trade regulatory power to be elsewhere than in section 92(9); it has said, moreover, that section 92(9) cannot constitute an independent source of such power.[188]

If the first point means that the provinces are competent to indirectly tax any type of business by means of a licensing scheme, section 92(2) is rendered substantially nugatory. If provinces are limited to direct license fees forming part of a licensing scheme, then section 92(9) has no independent force. Its revenue raising powers would be subsumed totally within section 92(2) and it has been held to confer no autonomous regulatory power either.

A possible means of overcoming these difficulties is in the suggestion that any fees levied by a province, pursuant to a licensing scheme, must be limited in amount to the expense of the scheme. In other words, the provinces are competent to regulate pursuant to heads of section 92 other than head 9; head 9 allows the costs of regulation to be defrayed by means of license fees. According to this line of argument, the provinces are incompetent to go further and levy license fees in excess of regulatory costs.

Insofar as the object of this suggestion is to revivify section 92(9) as a meaningful source of power, it is of dubious assistance. The Privy

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[187] Brewers and Maltsters' Ass'n of Ontario v. Attorney-General for Ontario, [1897] A.C. 231, at 237, 66 L.J.P.C. 34, at 36; Shannon v. Lower Mainland Dairy Products Bd., *supra* note 161, at 722, [1938] 2 W.W.R. at 610, [1938] 4 D.L.R. at 87.

[188] Shannon v. Lower Mainland Dairy Products Bd., *id.* at 719, 721-22, [1938] 2 W.W.R. at 607, 609-10, [1938] 4 D.L.R. at 85, 86-87.

Council has found the source of regulatory power in respect of local businesses to be within sections 92(13) and 92(16). Since 1938, moreover, the power to impose expense levies for such schemes has been found in those sections as well.[189] It has been unnecessary to resort to section 92(9) to support such legislation. The difficulty, therefore, remains one of logic. Either section 92(2) is rendered substantially meaningless, or section 92(9) suffers this fate.

2. *Section 92(9): How Far a Source of Indirect Taxing Power?*

The first comprehensive treatment of this problem was offered by Duff J. in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*. Mr. Justice Duff agreed with earlier authorities that section 92(9) was not a separate source of regulatory power. He said:

> On the other hand, the last mentioned head authorizes licences for the purpose of raising a revenue, and does not, I think, contemplate licences which, in their primary function, are instrumentalities for the control of trade — even local or provincial trade.[190]

Mr. Justice Duff considered that any source of provincial regulatory power must be found within other heads of section 92. This author suggests sections 92(8), 92(10), 92(13) or 92(16) as possible examples. Duff J. made it clear, however, that section 92(9) could not of itself constitute a source of regulatory power.

Did Mr. Justice Duff then consider that section 92(9) had no independent force? That proposition certainly does not emerge from his reasons. He considered that levies incidental to an otherwise valid regulatory scheme could be imposed in the form of license fees and that such levies need not meet the test of directness required by section 92(2). He stated:

> *Prima facie*, it would appear, from inspection of the language of the two several heads [s. 92(2) and s. 92(9)], that the taxes contemplated by no. 9 are not confined to taxes of the same character as those authorized by no. 2, and that accordingly imposts which would properly be classed under the general description "indirect taxation" are not for that reason alone excluded from those which may be exacted under head 9.[191]

It might of course be said that this explanation of Mr. Justice Duff's words is no explanation at all. The point could be taken that he was contemplating only an expense levy to defray the administrative costs of an otherwise valid regulatory scheme. That may be so, but it must be recognized that Mr. Justice Duff was writing in 1931, before it was clear law that an expense levy was valid. Indeed, two years later, the Privy

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[189] *Id.* at 722, [1938] 2 W.W.R. at 610, [1938] 4 D.L.R. at 87.
[190] *Supra* note 155, at 364, [1931] 2 D.L.R. at 198.
[191] *Id.* at 363-64, [1931] 2 D.L.R. at 198.

Council struck down an expense levy which was incidental to an equalization scheme.[192]

In 1938 the Privy Council made it clear in *Shannon*[193] that an expense levy was valid. But their Lordships appear to have extended the words of Mr. Justice Duff. Lord Atkin said this:

> On this part of the case their Lordships, with great respect, think that the present Chief Justice, then Duff J., took a somewhat narrow view of the Provincial powers under s. 92(9) in *Lawson* v. *Interior Tree Fruit Vegetable Committee of Direction*, where he says: "on the other hand, the last-mentioned head authorizes licences for the purpose of raising a revenue, and does not, I think, contemplate licences which, in their primary function, are instrumentalities for the control of trade—even local or provincial trade." It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. It would be difficult in the case of saloon and tavern licences to say that the regulation of the trade was not at least as important as the provision of revenue. And, if licences for the specified trades are valid, their Lordships see no reason why the words "other licences" in s. 92(9) should not be sufficient to support the enactment in question.[194]

I say that this is an extension of Mr. Justice Duff's words; however, it may be argued that their Lordships, in *Shannon*, are in fact extending *Lawson* only by interpreting section 92(9) as a separate source of provincial regulatory power and not by extending provincial taxing competence. That argument presents this difficulty: if section 92(9) is indeed a separate source of regulatory power, then the provincial legislatures would have easy access to otherwise exclusively federal fields. If this conclusion be not admitted, then I fail to see any distinction between section 92(9) and sections 92(8), (10), (13) and (16) as sources of provincial regulatory power.

I would offer another interpretation of the *Shannon* case. My view is that Lord Atkin, in holding that Mr. Justice Duff took a narrow approach, was pointing to the narrowness of restricting provincial legislation under section 92(9) to the imposition of an expense levy only. Lord Atkin went a step further. He held, as I understand him, that section 92(9) was a source of revenue raising power for the provinces not restricted to the expenses of a regulatory scheme. The section could constitute a source of indirect taxation power ancillary to an otherwise valid regulatory scheme.[195]

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[192] Lower Mainland Dairy Products Sales Adjustment Comm. v. Crystal Dairy, Ltd., *supra* note 156.

[193] Shannon v. Lower Mainland Dairy Products Bd., *supra* note 161.

[194] *Id.* at 721-22, [1938] 2 W.W.R. at 609-10, [1938] 4 D.L.R. at 86-87.

[195] It follows from this interpretation that I am in complete disagreement with the views expressed by LA FOREST, *supra* note 78, at 135, when he says that "section 92(9) is left with virtually no independent force of its own". I believe that this view is untenable from the vantage point of the cases discussed by Mr. La Forest and particularly so from the perspective of cases decided subsequent to the writing of his dissertation. See my discussion of these, *infra*.

If this interpretation be correct, the crucial question which remains in the wake of *Shannon* is this: how far does section 92(9) allow the provinces to go in levying, incidental to an otherwise valid regulatory scheme, indirect taxation for the raising of a revenue for provincial purposes? In other words, the essential question at the present day is, to what extent does section 92(9) constitute an exception to section 92(2)?

When a province undertakes to regulate a trade pursuant to a valid source of provincial power, it may impose indirect taxes against that trade in the form of license fees. But there is a *caveat*. The whole legislative scheme must be *in relation to* the regulation of a trade pursuant to some source of legislative power other than section 92(9) of the B.N.A. Act. It must not be *in relation to* the raising of monies by indirect taxation. In sum, my submission, resting on *Shannon* and later cases, is that section 92(9) constitutes an independent source of provincial collateral indirect taxation power when used ancillary to a valid regulatory scheme.

It may be argued that the recent interpretation of the provinces' taxation powers has granted such a collateral indirect taxation power without recourse to section 92(9). Even if this be true, the extent of the judicially created power, as well as the scope of power under section 92(9), remains uncertain. In any event, that the courts should have judicially created such a power does not mean that section 92(9) is not independently a constitutional source of that power. The argument does not follow that because the courts have created a provincial power of collateral indirect taxation, section 92(9), interpreted as a source of such a power, is thereby rendered meaningless.

This view of section 92(9) means that the provinces have a power of collateral indirect taxation greater than anything hitherto recognized by legal writers or the courts. To take an example: suppose that ancillary to an equalization scheme such as the one considered in *Reference re Agricultural Products Marketing Act*,[196] levies were imposed beyond the expenses of the scheme and beyond those which would be rateably returned to producers. Would such levies be valid? As noted above, the *Reference re Agricultural Products Marketing Act* itself is not of sufficient amplitude to support the levies. However, section 92(9), on this view, would support them. There is one requirement: the levies must be truly ancillary to the scheme. By ancillary, I mean that they must bear a rational functional connection[197] to it. If they do, then no

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[196] *Supra* note 22.

[197] Papp v. Papp, *supra* note 30. *But see* the dissent of Laskin C.J.C. in Attorney-General of Quebec v. Kellogg's Co. of Canada, [1978] 2 S.C.R. 211, at 216-17, 19 N.R. 271, at 275-76, 83 D.L.R. (3d) 314, at 316-17, as to whether the provinces have the power to pass legislation with features that are necessarily incidental to the exercise of their enumerated powers.

constitutional objection fairly ought to lie to the levies being brought into the general revenues of the province to be used for general provincial purposes.

3. *Recent Consideration*

The major question which remains, following *Shannon*, is how far a province may go in imposing collateral indirect taxation, in the form of license fees, pursuant to section 92(9). There are recent cases which consider the scope of power thereby granted.

The amplitude of the licensing power was considered by the Supreme Court of Canada in *Reference re The Farm Products Marketing Act*,[198] but no clear majority view is expressed in the judgments of the Court. The reference concerned the validity of certain licensing provisions respecting the marketing of hogs, peaches, and vegetables. Mr. Justice Rand, in considering the validity of the license fees, said:

> The language of Lord Atkin [in *Shannon*] seems to involve the conclusion that fees incidental to Provincial regulation of trade by licence are to be considered without reference to the restriction of s. 92(2); and this appears to have been the opinion of Duff J. in *Lawson*....
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> The power to regulate embraces incidental powers necessary to its effective exercise; and the exaction of fees to meet the expenses of such an administration as that of the schemes, regardless of their incidence, is within that necessity.[199]

Mr. Justice Locke similarly restricted himself to holding that the license fees could be justified as expense levies:

> The power vested in the Province to legislate in relation to licences in order to the raising of a revenue for provincial, local or municipal purposes under head 9 of s. 92, in my opinion, authorizes this section [s. 2 of Reg. 145/54], even though their imposition in an amount which varies with the quantity sold may tend to increase the sale-price. It must, I think, be taken as decided by the judgment of the Judicial Committee in *Shannon's Case* that it is not a valid objection to a licence, plus a fee, that it is directed both to the regulation of trade and to the provision of revenue. While the functions of the marketing board and the growers' committee are not defined in the material, it is proper to assume, in my opinion, that these licence fees are to defray the expenses of these bodies in discharging their duties under the scheme. The fact that the licence fee may be charged in respect of peaches processed for export does not, in my opinion, invalidate the section.[200]

Fauteux J. also considered that the license fees need not meet the test of direct taxation, but he limited himself to expressing an opinion on their validity as expense levies.

In *Nelson v. Dartmouth*,[201] a municipal by-law imposed a license fee of $15 per month on operators of mobile home parks for each mobile

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[198] *Supra* note 158.
[199] *Id.* at 219, 7 D.L.R. (2d) at 277-78.
[200] *Id.* at 236, 7 D.L.R. (2d) at 294.
[201] 45 D.L.R. (2d) 183 (N.S.S.C. 1964).

home situated in the mobile home park. The by-law was attacked as *ultra vires* in that it overstepped the limits of section 92(9). Counsel argued that the legislation was enacted for the colourable purpose of imposing a personal property tax upon the owners of mobile homes situated in the parks in question. Mr. Justice MacDonald, in considering this submission, held as follows:

> In my view, a genuine licensing-tax provision imposed for the primary purpose of revenue or for revenue purposes incidental to valid provincial regulation of such an operation as that of mobile home parks—as is the case here—is not invalidated by the circumstance that the tax may be indirect in its general incidence (See Laskin, *Canadian Constitutional Law*, 2nd ed., pp. 754-5; and *Reference re Farm Products Marketing Act...*).[202]

There is no requirement in this case that the indirect taxation by way of license fee be limited to the expenses of the regulatory scheme, nor is there any indication that the fees were so limited. The only limitation referred to by the court is that the license fees must be in relation to the regulation of mobile home parks and not in relation to the raising of revenue by indirect taxation.

Some further light is thrown on this question by the judgment of the Supreme Court of Canada in *Lieberman v. The Queen.*[203] This case concerned a Saint John by-law to regulate and license pool halls and bowling alleys in the city. All keepers of pool halls and bowling alleys, as a condition precedent to operation, were required to obtain licenses at specified fees. Any person who failed to comply with any of the provisions of the by-law would be penalized by a fine of $20 for each contravention. Mr. Justice Ritchie upheld the by-law as being in pith and substance in relation to the regulation of hours at which businesses of special classes shall close in a particular locality. He went on to note that such is merely a private matter in the province:

> Nor do I think that it can be said that s. 3 of the by-law is inoperative as being in conflict with the *Lord's Day Act*. The licensing power vested in the provinces by s. 92(9) is not limited to the shop, saloon, tavern and auctioneer licenses specified in that section, and if that power is exercised in respect of a merely local matter and in a manner which is not repugnant to federal or provincial law the provincial authority is, in my opinion, entitled to attach such conditions and impose such penalties as it may see fit in respect to the manner in which the persons so licensed shall conduct the businesses which are the subject of such licenses.[204]

The point to notice is the lack of requirement that the fees and penalties not exceed the expenses of the regulatory scheme.

This problem has received recent consideration in *Coquitlam v. LaFarge Concrete Ltd.*[205] and clear support for the line of argument I

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[202] *Id.* at 186-87.
[203] [1963] S.C.R. 643, 41 D.L.R. (2d) 125.
[204] *Id.* at 650, 41 D.L.R. (2d) at 131.
[205] [1973] 1 W.W.R. 681, 32 D.L.R. (3d) 459 (B.C.C.A.1972).

have followed has thereby emerged. The municipality of Coquitlam, which is favoured with abundant supplies of sand and gravel, undertook to regulate the removal of such gravel under by-law 1489 in 1967. The by-law was a complete code of regulation providing for safety and environmental control and imposed a license fee of $50 per year. In 1971, by-law 2041 (which amended the 1967 by-law) varied the permit fee from a flat annual charge to one of fifteen cents per cubic yard of soil removed. This levy amounted to approximately ten per cent of the average selling price of the gravel removed and sold by the respondent. The amending by-law was unsuccessfully attacked before the British Columbia Court of Appeal as indirect taxation incompetent to the province or its derivative municipalities.

Mr. Justice Taggart upheld the amending by-law on the basis that its governing intention was to defray "the cost incurred and to be incurred by the appellant Municipality in constructing and maintaining roads giving access to the gravel pits and the cost of supervising, inspecting and enforcing the by-law".[206] That, essentially, treats the fees as expense levies. However, the majority of the court was not so restrictive. Mr. Justice Bull considered that indirectness in any impost which did not fall within section 92(2) "may still be within the scope of provincial competency if contemplated by, and fairly authorized under, another head such as here—Sec. 92(9)". He continued:

> In my view, the key lies in the question as to what is the primary and real purpose, or pith and substance, of the legislation—is the levy or tax (whether direct or indirect by nature) merely ancillary, or adhesive, to the licensing scheme of regulating or prohibiting a trade, or is it essentially a fiscal imposition, or taxation, under a form of disguise or a colourable concept?[207]

Mr. Justice Branca was similarly expansive in his consideration of the authorities. He declined to limit himself to the proposition that section 92(9) could impose indirect taxation ancillary to a valid regulatory scheme only to the extent of defraying the expenses of that scheme.[208]

The *LaFarge* case is of some considerable interest. It indicates that the key test is not whether the quantum of indirectness extends beyond the actual expense of a regulatory scheme. It holds, rather, that the test is whether the indirect imposts are truly ancillary, in which case they are valid. If, on the contrary, they are a colourable attempt to legislate in relation to indirect taxation, then the legislature has exceeded its powers. The distinction is fine, but it is very real, and in my submission it must now be taken to be Canadian law.

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[206] *Id.* at 699, 32 D.L.R. (3d) at 476.
[207] *Id.* at 685, 32 D.L.R. (3d) at 464.
[208] *Id.* at 698, 32 D.L.R. (3d) at 475.

IV. VACUUMS IN THE TAXING POWER

A. *Section 121*

One of the grand aims of Confederation was the creation of a single economic unit in which the diverse regional economic potentials of the new state would dovetail into complementary strength. Section 121 expressed this idea by making provision for free trade throughout the confederated union. The section, in terms, holds incompetent to any authority interference with the free admission of goods into a province.[209]

It is important to notice that the terms of section 121 offer incomplete protection to the Canadian common market. The section applies only to "articles of Growth, Produce, or Manufacture". It does not apply to services, capital or incorporeal property such as goodwill or information. Furthermore, the text of section 121 refers to "entry"; it does not apply to exit. Perhaps, in domestic commerce, entry into one province implies exit from another. But in the case of international trade, goods may exit from a province without making entry into any other province and without expressly coming within the ambit of section 121 protections.

The permeability of section 121 to provincial taxation is problematic. To take the paradigm situation, suppose that in consequence of provincial language policies a steady current of businesses move their operations out of the province of Quebec. Quebec responds by placing restrictions on capital leaving the province. In the case of business liquidations the legislature enacts a direct tax which amounts to fifty per cent of the liquidation value in cases where it is intended that the capital exit from Quebec. It is arguable—but only arguable—that such a tax falls afoul of the prohibitions against provincial interference with citizenship[210] and interprovincial trade,[211] or against provincial imposition of export taxes.[212] But if these attacks fail, does section 121 offer any more likely prospect of success?

In the first half of this century, section 121 was very narrowly construed by the courts. In *Gold Seal v. Dominion Express,* Mr. Justice Duff stated that "the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the

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[209] S. 121 reads:

All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

[210] Union Colliery Co. of British Columbia v. Bryden, [1899] A.C. 580, 68 L.J.P.C. 118, *as explained in* Cunningham v. Tomey Homma, [1903] A.C. 151, *sub nom.* Vancouver City Collector of Voters v. Tomey Homma, 72 L.J.P.C. 23 (1902).

[211] Carnation Co. v. Quebec Agricultural Marketing Bd., *supra* note 129 (provinces must not exhibit an intention to control interprovincial trade).

[212] Texada Mines Ltd. v. Attorney-General of British Columbia, *supra* note 127.

products of any province of the Union."[213] That statement of the reach of section 121 has been approved by the Privy Council[214] and widely followed.

Recent judicial consideration of section 121 indicates that it may serve as an important constitutional plank in the regulation of interprovincial streams of commerce. This suggestion was made by Mr. Justice Rand, who, in considering the word "free" in the clause, expressed the view that " 'free', in s. 121 means without impediment related to the traversing of a provincial boundary".[215] He continued:

> I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.[216]

This view was echoed by the Manitoba Court of Appeal in *Reference re Interprovincial Trade Restriction on Agricultural Commodities*.[217] The court found legislation establishing a comprehensive regulating scheme for eggs to be invalid because it had the "effect of impeding the free flow of trade between provinces and therefore runs counter to s. 121 of the B.N.A. Act".[218]

This view was approved, on appeal to the Supreme Court, by Mr. Justice Laskin (as he then was), who put the point this way:

> [T]he Manitoba scheme cannot be considered in isolation from similar schemes in other provinces; and to permit each province to seek its own advantage, so to speak, through a figurative sealing of its borders to entry of goods from others would be to deny one of the objects of Confederation, evidenced by the catalogue of federal powers and by s. 121, namely, to form an economic unit of the whole of Canada: see the *Lawson* case, supra, at p. 373.[219]

The Chief Justice gave further consideration to the substance of section 121 in *Reference re Agricultural Products Marketing Act*.[220] Counsel in that case objected to a feature of the marketing plan which permitted the amount of produce marketed in interprovincial trade to be fixed. It was said that section 24 of the Farm Products Marketing

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[213] Gold Seal Ltd. v. Dominion Express Co., 62 S.C.R. 424, at 456, 62 D.L.R. 62, at 79 (1921).

[214] Atlantic Smoke Shops, Ltd. v. Conlon, *supra* note 78, at 569, [1943] 3 W.W.R. at 126, [1943] 4 D.L.R. at 92.

[215] Murphy v. C.P.R., [1958] S.C.R. 626, at 638, 15 D.L.R. (2d) 145, at 150.

[216] *Id.* at 642, 15 D.L.R. (2d) at 153.

[217] *Supra* note 128.

[218] *Id.* at 219, 18 D.L.R. (3d) at 341.

[219] Attorney-General for Manitoba v. Manitoba Egg and Poultry Ass'n, *supra* note 128, at 717, [1971] 4 W.W.R. at 726-27, 19 D.L.R. (3d) at 190.

[220] *Supra* note 22.

Agencies Act,[221] which authorized a quota system for the marketing of eggs in interprovincial trade, effectively prevented the establishment of a single economic unit in Canada with absolute freedom of trade between its constituent parts, contrary to the dictates of section 121.[222] The Chief Justice expressed this opinion on the matter:

> It seems to me, however, that the application of s. 121 may be different according to whether it is provincial or federal legislation that is involved because what may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute. It must be remembered too that the federal trade and commerce power also operates as a brake on provincial legislation which may seek to protect its producers or manufacturers against entry of goods from other provinces.
>
> A federal regulatory statute which does not directly impose a customs charge but through a price fixing scheme, designed to stabilize the marketing of products in interprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing in such trade cannot, in my opinion, be in violation of s. 121.

There follows a cite from *Murphy* after which the Chief Justice continued:

> Accepting this view of s. 121, I find nothing in the marketing scheme here that, as a trade regulation, is in its *essence and purpose* related to a provincial boundary. To hold otherwise would mean that a federal marketing statute, referable to interprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade. I find here no design of punitive regulation directed against or in favour of any Province.[223]

That these cases expand the reach of section 121 is incontrovertible, but it is idle speculation to inquire how far section 121 currently extends, in respect of taxing legislation, without relating the section to the entire corpus of law on trade and commerce. Section 121, in its revivified form, offers textual authority for holding currents of interprovincial trade safe from interference. Taxing legislation which has the effect of impeding those currents—currents identified by recent considerations of the trade and commerce power—might well fall afoul of section 121. In principle, this result could follow whether the legislation were enacted by Parliament pursuant to sections 91(2) and 91(3) or by a provincial legislature pursuant to section 92(2).[224]

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[221] Farm Products Marketing Agencies Act, S.C. 1970-71-72, c. 65.

[222] *Supra* note 22, at 431-32, 84 D.L.R. (3d) at 305.

[223] *Id.* at 432-33, 84 D.L.R. (3d) at 306.

[224] Federal incompetence, by virtue of s. 121, to levy a tax in respect of interprovincial goods was referred to by Mr. Justice Dubin in dissenting reasons in Reference *re* Agricultural Products Marketing Act, *supra* note 22, at 458, 78 D.L.R. (3d) at 484. He stated:

> It is conceded that Parliament can impose a tax on all egg producers in Canada, but if it chooses to do so, in my respectful opinion, it should be done in the manner contemplated by the *British North America Act, 1867* with the

However, the *Murphy*[225] case makes plain that section 121 does not hold interprovincial currents of trade safe from interference in any free market or *laissez-faire* sense. Canada's federal and provincial governments are not prohibited from regulating such trade so as to achieve an efficient allocation of resources; section 121 offers no impediment *per se* to state interference in the economy. Any argument to this effect is very wide of the mark. What the section does inhibit is trade regulation serving only to reinforce purely provincial objectives.[226] The question, which remains open in the case law, is which provincial objectives? It is clear that section 121 renders incompetent legislation which protects the provincial market by taxing goods entering that market. Can it protect the provincial market for services by taxing services seeking to enter? Information? Goodwill? If the answer to these questions is negative, then the Canadian common market is incompletely realized.

B. *Section 125: Intergovernmental Immunity*

Section 125 establishes an immunity from taxation for federal and provincial lands and property.[227] There can be little doubt that the guiding spirit behind the section was the prevention of any disturbance being caused to the federal union by a misuse of taxing powers.[228]

The framers of the Constitution could not have foreseen the enormous commercial undertakings currently engaged in by all levels of government. Such activity raises questions as to how far section 125 presently reaches. If, for example, the province of Ontario were to acquire Place Ville Marie, would it do so immune from Montreal tax assessments?[229] Can Alberta's ownership of Pacific Western Airlines be enjoyed free from all tax liability?[230]

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safeguards therein provided. In the instant case, power is given to a provincial agency to impose what is said to be a tax apparently for the purpose of pooling amongst the producers of eggs engaged in the intraprovincial market of the moneys realized from the sale of their product. To uphold the validity of such legislation raises implications which, in my opinion, transcend the matters brought in issue by this Reference. Can Parliament in purporting to regulate export trade give a provincial agency authority to impose an export tax on goods which never reach the export market? If this type of legislation were to stand, a provincial agency in any Province could effectively limit the free flow of goods across provincial boundaries which would appear to be inconsistent with s. 121 of the *British North America Act*, 1867.

[225] *Supra* note 215.

[226] *See* the highly illuminating remarks of SAFARIAN, *supra* note 1, at 58-59.

[227] S. 125 reads:

No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

[228] Attorney-General for British Columbia v. Attorney-General for Canada, 64 S.C.R. 377, at 385, [1923] 1 D.L.R. 223, at 227 (1922).

[229] *See* CANADIAN CONSTITUTIONAL LAW, *supra* note 18, at 758.

[230] *See* the Income Tax Act, S.C. 1970-71-72, c. 63, s. 149(1)(d) which holds immune from tax liability corporations which are at least 90% owned by a domestic government. This section, of course, is not constitutionally obligatory.

The first distinction which suggests itself is a distinction between taxation of lands and property and taxation of occupiers or users of lands and property. A tax against property is bad,[231] but a personal tax against an occupier of property suffers from no infirmity.[232] In principle, there ought to be no objection, if the tax is a personal tax, to the fact that the measure of the tax has reference to the value of the property.

There is a second distinction of importance. Section 125 prohibits only *taxation* of Crown property; it does not prohibit charges for services rendered. If the service charge is truly other than taxation, no claim of incompetence to impose it ought to succeed because the amount of the charge is based on the value of Crown property. Neither should there be merit in a complaint as to the mode of exigibility. However, great care must be taken in drafting a statute imposing compulsory charges for services, as an involuntary mode of subscription for the service might well be decisive in attracting characterization as a tax. In *Regina v. Breton*, [233] a Quebec City levy on property owners for sidewalk maintenance was held inapplicable to the federal government by reason of section 125. In *Société centrale d'hypothèques v. Québec,*[234] a snow removal charge was held by Montgomery J., in light of its compulsory nature, to be a tax. These cases should be contrasted with *Minister of Justice v. Lévis*[235] in which charges imposed by the City of Lévis for water supplied were upheld as service charges.

Finally, it appears clear that a tax against a third party, with the expectation that the charge will be passed on to the federal or provincial Crown in the form of increased cost for services, will not attract the prohibition of section 125.[236] The tax is viewed as being a tax on the third party only, and not an invidious march on governmental immunity.

C. *Taxes Collected Pursuant to an Ultra Vires Statute*

If monies are demanded and collected pursuant to a taxing statute subsequently determined by the courts to be *ultra vires*, those monies must be returned. No government can by prior or *ex post facto* legislation give itself competence to retain such monies. This principle recently was stated by the Supreme Court of Canada in *Amax Potash Ltd. v. Saskatchewan* as follows:

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[231] Stinson v. Middleton Township, [1949] O.R. 237, [1949] 2 D.L.R. 328 (C.A.).

[232] Sammartino v. Attorney-General of British Columbia, [1972] 1 W.W.R. 24, 22 D.L.R. (3d) 194 (B.C.C.A.).

[233] R. v. Breton, [1967] S.C.R. 503, 65 D.L.R. (2d) 76.

[234] Société centrale d'hypothèques v. Québec, [1961] Que. B.R. 661 (C.A.).

[235] Minister of Justice for Canada v. Lévis, [1919] A.C. 505, 45 D.L.R. 180 (P.C. 1918).

[236] R. v. Bell Telephone Co. of Canada, 59 Que. B.R. 205 (C.A. 1965).

> To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial legislature to do indirectly what it could not do directly and by covert means to impose illegal burdens.[237]

Provincial incompetence to legislate so as to retain the monies collected follows whether the statute is *ultra vires*, as in *Amax Potash*, or inoperative for conflict with paramount federal legislation.[238]

It is a nice question whether this principle prohibits retention of the identical monies by means of retroactive taxing legislation. In principle, one would have thought the answer to be negative. *Amax Potash* prohibits retention of monies collected by an illegal statute. The case assumes a lack of authority, constitutionally exercised, to collect the monies. If the retroactive taxing legislation is in relation to a competent source of constitutional power, then there is no want of authority to collect the monies.[239] The retroactive feature makes this true *ab initio*. *Ex hypothesi*, there is constitutional power to collect the monies; accordingly, there ought to be no complaint that the legislation does indirectly that which the province cannot do directly. The point of distinction is that by retroactive taxing legislation, the legislature is doing directly that which it can do directly, but hitherto had not done.

V. General Conclusions

The regional constitutional distribution of taxation powers in Canada addressed problems which have become historically obsolete. This allocation reflected the view that the provincial legislatures were economically subordinate bodies entrusted with legislative responsibilities deemed insignificant. This has ceased to be the case entirely, in fact and in theory. A review of the constitutional cases by which the provincial taxation powers were expanded in order to take account of political reality is a history of gradual widening. This has been done by flattering provincial powers of indirect taxation, provincial powers of hybrid taxation, and, to a lesser extent, the provincial licensing power.

This case law is constructed largely upon a fictitious legal doctrine: the legal definiton of direct taxation. That definition has become so

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[237] [1977] 2 S.C.R. 576, at 590, [1976] 6 W.W.R. 61, at 73, 71 D.L.R. (3d) 1, at 10.

[238] *Re* The Coloured Gasoline Tax Act, [1977] 4 W.W.R. 436 (B.C.S.C. Chambers).

[239] *Re* The Coloured Gasoline Tax Act, [1976] 6 W.W.R. 315, at 327-28, *sub nom. Re* Minister of Finance of British Columbia and Pacific Petroleums Ltd., 71 D.L.R. (3d) 404, at 414 (B.C.S.C. Chambers); Central Canada Potash Co. v. Attorney-General for Saskatchewan, [1977] 1 W.W.R. 487, at 523, 79 D.L.R. (3d) 203, at 232-33 (Sask. C.A.), *rev'd on constitutional grounds* (S.C.C. Oct. 3, 1978). The Oil Well Income Tax Act, S.S. 1977-78, c. 26, which was passed by the Saskatchewan legislature after the Supreme Court's decision in *CIGOL*, is an attempt at such legislation

cumbrous and difficult of application that it inevitably produced judicially erratic results, and a constitutional law unsatisfactory in principle. Yet there is, through the verbiage, a clearly discernable trend. That trend is that the limitation of provincial power to direct taxation has become largely a matter of form. The substantive limitations braking provincial taxing competence is that the provinces confine themselves to taxing "within the province" by enacting taxation which, economically speaking, produces effects limited to the provincial territory. It is suggested that the fiction and verbiage be stripped away, and that the limitation of form, direct taxation, be seen for what it is, an archaic and outmoded political-economic doctrine which has ceased to serve any constitutional value. But at the same time, constitutional requirements of substance need to be underlined. These requirements are a prohibition on the provincial legislatures from interference with interprovincial streams of commerce, and an aroused sense of respect for the provincial border so far as concerns the economic ripples produced by provincial taxation measures.

Lastly, constitutional doctrine respecting the provincial licensing power needs to be rethought completely. This process has begun in certain recent cases, and it can be extended by reinterpretation of the old Privy Council decisions. But before the licensing power can take clear shape, it should be re-emphasized that the power must be subservient to demanding constitutional values. Those values may be largely synthesized by an examination of what the courts have done to the provincial direct taxation power. That is, absent compelling reasons of policy, such as the necessity that provincial taxation be confined to the provincial jurisdictions, a broad amplitude needs to be given to provincial capacity to finance provincial schemes. Having stripped away ancient and outmoded doctrine from the constitutional distribution of taxation powers in Canada, it is possible for jurisprudence concerning the provincial licensing power to pursue a more sensible course.