File No. EB-2010-0184

THE ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF a motion by the Consumers Council of Canada and Aubrey LeBlanc in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10.

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15. R.D. Cairns, M.A. Chandler and W.D. Moull, "Constitutional Change and the Private Sector: The Case of the Resource Amendment" (1986) 24 Osgoode Hall L.J. 299

Case Name:

Westbank First Nation v. British Columbia Hydro and Power Authority

Westbank First Nation, appellant;
v.
British Columbia Hydro and Power Authority, respondent, and The Attorney General of Quebec, the Attorney General of Manitoba and the Attorney General of British Columbia, interveners.

[1999] S.C.J. No. 38

[1999] A.C.S. no 38

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File No.: 26450.

Supreme Court of Canada

Hearing and judgment: June 21, 1999.

Reasons delivered: September 10, 1999.

Present: Lamer C.J. and Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (46 paras.)

Constitutional law -- Crown -- Immunity -- Taxation -- Exemption of public lands -- Indian band passing assessment and taxation by-laws pursuant to the Indian Act -- Whether by-laws impose taxes -- Whether by-laws constitutionally inapplicable to provincial utility -- Constitution Act, 1867, s. 125.

Indians -- Taxation -- Money by-laws -- Indian band passing assessment and taxation by-laws pursuant to Indian Act -- Whether by-laws constitutionally inapplicable to provincial utility -- Constitution Act, 1867, s. 125 -- Indian Act, R.S.C., 1985, c. I-5, s. 83(1)(a).

Between 1951 and 1978, the respondent hydroelectric utility was granted from Her Majesty the Queen in Right of Canada eight permits to use and occupy various lands located on two Indian reserves in order to build electric transmission and distribution lines and to provide electrical energy to the residents of the reserves. In 1990, the appellant passed the Westbank Indian Band Assessment By-law and the Westbank Indian Band Taxation By-law, pursuant to its authority under s. 83(1)(a) of the Indian Act. The appellant passed additional by-laws from 1991 to 1995, under which the respondent was assessed $124,527.25 in taxes, penalties, and interest. The respondent refused to pay the assessed taxes, and did not appeal the assessment notices. The appellant brought an action to recover the unpaid amount. Summary judgment was granted to the respondent, which was upheld on appeal to the British Columbia Court of Appeal. The issue in this appeal is whether s. 125 of the Constitution Act, 1867 prevents the appellant from applying its assessment and taxation by-laws to the respondent, an agent of the provincial Crown.

Held: The appeal should be dismissed.

Section 125 of the Constitution Act, 1867 renders the impugned by-laws constitutionally inapplicable to the respondent. The by-laws are designed for the singular purpose of generating revenue for "local purposes". They were enacted pursuant to s. 83(1)(a) of the Indian Act, which authorizes "taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve". The by-laws themselves state that their purpose is "for raising a revenue for local purposes".

Section 125 of the Constitution Act, 1867 is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It advances the goals of federalism and democracy by according a degree of operational space to each level of government, free from

interference by the other. It prohibits one level of government from taxing the property of the other. However, it does not prohibit the levying of user fees or other regulatory charges properly enacted within the government's sphere of jurisdiction.

Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. In order to determine whether the impugned charge is a "tax" or a "regulatory charge" for the purposes of s. 125, several key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.

The levies are properly described as being, in pith and substance, taxation enacted under s. 91(3) of the Constitution Act, 1867. They are enforceable by law, imposed under the authority of the legislature, and levied by a public body for a public purpose. The appellant has not demonstrated that the levies are connected to a "regulatory scheme" which could preclude the application of s. 125. The charge does not form any part of a detailed code of regulation. No costs of the regulatory scheme have been identified, to which the revenues from these charges are tied. The appellant does not seek to influence the respondent's behaviour in any way with these charges. There is no relationship between the respondent and any regulation to which these charges adhere. Although the Indian Act is legislation in relation to "Indians, and Lands reserved for the Indians", this does not, in itself, create a "regulatory scheme" in the sense required by the Constitution.

As these taxes are imposed on the respondent, which it is conceded is an agent of the provincial Crown, s. 125 is engaged. The taxation and assessment by-laws are accordingly inapplicable to the respondent.

Cases Cited

Applied: Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004; Attorney-General of British Columbia v. Attorney-General of Canada (1922), 64 S.C.R. 377, aff'd [1924] A.C. 222; referred to: M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641; Eurig Estate (Re), [1998] 2 S.C.R. 565; Attorney General of Canada v. City of Toronto (1892), 23 S.C.R. 514; Attorney- General of Canada v. Registrar of Titles, [1934] 4 D.L.R. 764; Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357; Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371 ; Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929; Re Ottawa-Carleton (Regional Municipality) By-law 234-1992, [1996] O.M.B.D. No. 553 (QL); Cape Breton Beverages Ltd. v. Nova Scotia

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Statutes and Regulations Cited

Constitution Act, 1867, ss. 53, 91(3), (24), 92(2), (9), (13), 125.
Indian Act, R.S.C., 1985, c. I-5, ss. 28(2), 83(1)(a) [rep. & sub. c. 17 (4th Supp.), s. 10(1)].
Interpretation Act, R.S.C., 1985, c. I-21, s. 17.
Westbank Indian Band Assessment By-law (1990), s. 36(1).
Westbank Indian Band Property Taxation Bylaw (1994), ss. 2(1), 8(1), 28, 30, 35, 36.
Westbank Indian Band Taxation By-law (1990), ss. 2(1), 8(1), 41(1), 45, 46(1), 49.

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Magnet, Joseph E. Constitutional Law of Canada, vol. 1, 7th ed. Edmonton: Juriliber Limited, 1998.

APPEAL from a judgment of the British Columbia Court of Appeal (1997), 45 B.C.L.R. (3d) 98, 154 D.L.R. (4th) 93, 100 B.C.A.C. 92, [1998] 2 C.N.L.R. 284, affirming a decision of the British Columbia Supreme Court (1996), 138 D.L.R. (4th) 362, [1997] 2 C.N.L.R. 229, granting summary judgment to the respondent. Appeal dismissed.

Jack Woodward, Robert J. M. Janes and Patricia Hutchings, for the appellant.
Peter D. Feldberg, Anne Dobson-Mack and Cydney J. Elofson, for the respondent.
Monique Rousseau, for the intervener the Attorney General of Quebec.
Heather J. Leonoff, Q.C., for the intervener the Attorney General of Manitoba.
George H. Copley, Q.C., and Jeffrey M. Loenen, for the intervener the Attorney General of British Columbia.

Solicitors for the appellant: Woodward & Company, Victoria.
Solicitors for the respondent: Lawson, Lundell, Lawson & McIntosh, Vancouver.
Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.
Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice,

Winnipeg.
Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

The judgment of the Court was delivered by

GONTHIER J.:--

I - Introduction

1 The issue in this appeal is whether s. 125 of the Constitution Act, 1867 prevents Westbank First Nation from applying its assessment and taxation by-laws to B.C. Hydro, an agent of the provincial Crown. The answer to that question depends upon whether the by-laws enact a system of taxation, which is subject to s. 125, or some other form of regulation which is not subject to the application of s. 125. If the by-laws impose taxes, then they are constitutionally inapplicable to the provincial Crown or its agents. For the reasons that follow, it is my opinion that these by-laws are properly described as taxes, and as such, cannot be imposed on B.C. Hydro.

2 The proper approach to characterizing a governmental levy has been considered on numerous occasions by this Court in various contexts. The characterization is relevant when determining the constitutionality of a provincial levy that has indirect tendencies, for if it is a regulatory charge, or otherwise is a component of a regulatory scheme, then the provinces are constitutionally competent to impose such a charge. It is equally relevant when considering s. 53 of the Constitution Act, 1867, because if the levy is a tax, then it must be imposed by the legislature. And, as I discuss below, if the levy is characterized as a tax, then it is constitutionally inapplicable to the other level of government.

3 The impugned by-laws are designed for the singular purpose of generating revenue for "local purposes". They were enacted pursuant to s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5, which authorizes "taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve". The by-laws themselves state that their purpose is "for raising a revenue for local purposes". There are no restrictions to the expenditure of these revenues; they are simply revenues for the discretionary spending of the Westbank First Nation.

4 The impugned charges bear all of the traditional hallmarks of a "tax". They are enforceable by law, imposed pursuant to the authority of Parliament, levied by a public body, and are imposed for a public purpose. There is no "nexus" between the revenues raised and the cost of any services provided. As such, they do not resemble a user fee, nor any other form of a regulatory charge. I disagree with the submissions of the appellant that they are attached to a regulatory scheme, as none

of the indicia of a "regulatory scheme" recognized by this Court in constitutional law are present in this case. As such, these charges are properly characterized as being in pith and substance "taxation" levied under s. 91(3) of the Constitution Act, 1867, and as such, are rendered inapplicable to the provincial government by s. 125 of the Constitution Act, 1867. As it is my opinion that s. 125 prevents the application of the by-laws to the respondent, it is unnecessary to address the additional arguments raised concerning s. 17 of the Interpretation Act, R.S.C., 1985, c. I-21.

II - Facts

5 The relevant facts of this appeal are not in dispute. Between 1951 and 1978, the respondent acquired eight permits from Her Majesty the Queen in Right of Canada to use and occupy various lands on the Tsinstikeptum Indian Reserves No. 9 and No. 10 in British Columbia. The permits were granted pursuant to s. 28(2) of the Indian Act with the consent of the appellant. The respondent held the permits in order to build electric transmission and distribution lines and to provide electrical energy to the residents of the Reserves. In 1990, the appellant passed the Westbank Indian Band Assessment By-law ("1990 Assessment By-law") and the Westbank Indian Band Taxation By-law ("1990 Taxation By-law"), pursuant to its authority under s. 83(1)(a) of the Indian Act. These by-laws were amended in subsequent years, but the relevant provisions remained the same. The appellant passed additional by-laws from 1991 to 1995, and under these by-laws the respondent was assessed $124,527.25 in taxes, penalties, and interest. The respondent refused to pay the assessed taxes, and did not appeal the assessment notices.

6 The appellant brought an action against the respondent to recover the unpaid amount. The respondent counterclaimed for declaratory relief stating that it was not subject to taxation under the by-laws. Both parties brought applications to the Supreme Court of British Columbia for summary judgment under Rule 18A of the British Columbia Rules of Court. Summary judgment was granted to the respondent, which was upheld on appeal to the British Columbia Court of Appeal.

III - Relevant Constitutional and Statutory Provisions

7 A. Constitution Act, 1867

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to

all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, ___

...

3. The raising of Money by any Mode or System of Taxation.

...

24. Indians, and Lands reserved for the Indians.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, ___

...

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

...

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

...

13. Property and Civil Rights in the Province.

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

B. Indian Act, R.S.C., 1985, c. I-5

28. ...

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

> 83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,
>
> (a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

C. Westbank Indian Band Taxation By-law (1990)

> 2. (1) As provided in this by-law, and for raising revenue for local purposes,
>
> (a) land and interests in land are subject to taxation;
> (b) subject to any exemption contained in this by-law, every interest holder of land shall be assessed and taxed on his interest in such land...

D. Westbank Indian Band Assessment By-law (1990)

> 36. (1) Land held or occupied by a municipality or the Crown in Right of the Province of British Columbia, held or occupied by, or on behalf of, a municipality or the Crown in Right of the Province of British Columbia, is, with the improvements on it, liable to assessment under this section, subject to the Constitution Act, S.C.

IV - Judgments Below

A. Supreme Court of British Columbia (1996), 138 D.L.R. (4th) 362

8 Downs J. held that s. 125 of the Constitution Act, 1867, exempted B.C. Hydro from taxation imposed by the appellant. At trial, the parties agreed that the respondent is an agent of the provincial Crown and that s. 125 applies to agents of the Crown. The appellant argued that s. 125 only confers immunity from taxation imposed under s. 91(3) of the Constitution Act, 1867, and the tax imposed in this case was founded on s. 91(24) of the Constitution Act, 1867. This argument was also rejected by Downs J., who held that the legislation in pith and substance fell under s. 91(3) of the Constitution Act, 1867. Downs J. distinguished this type of tax from regulatory charges, which would not attract the scrutiny of s. 125.

9 Downs J. further rejected the appellant's alternative argument that the Westbank by-laws bound the Crown because of s. 17 of the Interpretation Act. After reviewing s. 17 of the Interpretation Act,

Downs J. held that s. 83(1)(a) of the Indian Act did not expressly bind the Crown, nor would the Band's taxation regime be "wholly frustrated" if the Crown were not bound. Therefore, she held that s. 83(1)(a) and the Westbank by-laws were not binding on the provincial Crown by implication.

10 Related to this issue was the argument that the respondent was bound to accept the burden of the assessment by-law because it accepted the benefit of the permits for the rights of way. Here, Downs J. held that there was no nexus between the permits and the taxes, given that the respondent held the permits long before s. 83 of the Indian Act was enacted. Further, the by-law itself expressly stated that it was subject to the Constitution Act, and as such, the "benefit/burden" principle did not apply.

11 Downs J. also rejected numerous other arguments advanced by the appellant, which either have not been appealed or have been conceded by the appellant before this Court. As such, Downs J. granted the respondent's application for summary judgment.

B. British Columbia Court of Appeal (1997), 154 D.L.R. (4th) 93

12 Writing for the Court, Goldie J.A. found that B.C. Hydro was clearly an agent of the Crown, and held that it "at no time acted in these proceedings other than as an agent of the Crown in right of the Province" (p. 101). As B.C. Hydro was an agent of the provincial Crown, Goldie J.A. then considered the application of s. 125 of the Constitution Act, 1867. Having regard to the by-laws' preambles and effects, Goldie J.A. agreed with the trial judge that the by-laws were properly characterized as by-laws to "raise revenue for local purposes". As such, the charges were imposed pursuant to s. 91(3) of the Constitution Act, 1867, not s. 91(24). Section 91(24) could not allow the federal government "to do indirectly what it could not do directly, namely, tax the Province through its agent for the purpose of raising a revenue" (p. 103). He accordingly dismissed the appeal.

V - Issues

13 On December 1, 1998, the Chief Justice stated the following constitutional questions:

1. Is the Province constitutionally competent to constitute the Respondent, British Columbia Hydro and Power Authority ("B.C. Hydro"), an agent of the Province for the purpose of acquiring and holding interests within exclusive federal jurisdiction, namely an interest in land on an Indian Reserve?
2. If the answer to question 1 is yes, is the interest of B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia, in land and improvements located on the reserves ("Reserves") of the Appellant, Westbank First Nation ("Westbank") immune, as a result of the application of s. 125 of the Constitution Act, 1867, from taxation imposed by Westbank pursuant to assessment and taxation by-laws ("By-law") promulgated pursuant to the authority of s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5? If so, are such By-laws purporting to impose such taxation ultra vires, or inapplicable to B.C. Hydro?

3. If the answer to question 2 is no, does the Indian Act, R.S.C., 1985, c. I-5, authorize the passing of by-laws imposing taxation on the interests of the Provincial Crown or its agents on Indian reserves? If not, are the By-laws ultra vires or inapplicable to the extent that they purport to impose taxation on the interests of B.C. Hydro on the Westbank Reserves?

14 At the outset of the hearing before this Court, counsel for the appellant stated that he was "abandoning" his arguments concerning the first constitutional question, and arguments relating to a "commercial activity" exception to s. 125. Although this Court is not bound by these concessions, in my view, it was quite proper for counsel to have abandoned these arguments, which were either not raised in the courts below, or are not necessary to be decided on this appeal. I therefore find it unnecessary to consider these arguments any further.

VI - Analysis

15 The only issue to be determined in this appeal is whether s. 125 of the Constitution Act, 1867, precludes the Westbank First Nation from imposing its taxation and assessment by-laws on B.C. Hydro, an agent of the provincial Crown. To answer this question, it is useful to first understand the underlying purpose of s. 125. It is these constitutional values that inform the constitutional distinction between "taxes" and "regulatory charges", and which explain why s. 125 applies to the former but not the latter. As I explain in this section, the impugned charges are best characterized as taxation by-laws, which are constitutionally inapplicable to the respondent.

A. Section 125 of the Constitution Act, 1867

16 Section 125 of the Constitution Act, 1867 was not originally considered at the Charlottetown Conference in September 1864. It was first tabled by the then Attorney General, Sir John A. Macdonald on October 26, 1864, at the Quebec Conference (G. P. Browne, Documents on the Confederation of British North America (1969), at p. 88). The motion read: "That no lands or property belonging to the General or Local Governments shall be liable to taxation". Macdonald proposed the section along with a series of other miscellaneous clauses that dealt with the Crown prerogatives, and rights of Crown representatives. The motion was approved without any notable debate, and inserted into the "Miscellaneous" section of the Quebec resolutions, labelled as clause 47. The resolution attracted no scrutiny during the Confederation debates, although it was relocated several times before receiving its final designation of s. 125. The final text of s. 125 read: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

17 The section is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It grants to each level of government sufficient operational space to govern without interference. It is founded upon the concept that imposing a tax on a level of government may significantly harm the ability of that government to exercise its constitutionally mandated governmental functions. In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), at p. 431, Marshall C.J. explained this concept as follows:

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

In Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004, the majority of this Court referred to these statements at p. 1056, explaining at p. 1065 that "s. 125 is plainly intended to prevent inroads, by way of taxation, upon the property of one level of government, by another level of government".

18 While Canadian federalism requires some separation between each level of government, this rule is not absolute. Canada's federal system is a flexible one, and the Constitution does not create "enclaves" around federal or provincial actors. As Dickson C.J. explained in OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 18, "[t]he history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers" (see also Dickson C.J.'s comments in General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641, at p. 669). Flexible federalism demands protection from taxation, but not from all forms of charges, when the charges are levied in support of other regulatory objectives within the competence of the taxing authority.

19 While the primary constitutional value served by s. 125 is federalism, it also secondarily advances the constitutional value of democracy. As this Court recently explained in Eurig Estate (Re), [1998] 2 S.C.R. 565, at para. 30, the Canadian Constitution (through the operation of s. 53 of the Constitution Act, 1867) demands that there should be no taxation without representation. In other words, individuals being taxed in a democracy have the right to have their elected representatives debate whether their money should be appropriated, and determine how it should be spent. Intergovernmental taxation is prohibited, in part, because one group of elected representatives should not be allowed to decide how taxes levied under and within the authority of another group of elected representatives should be spent. At the same time, governments are not immune from paying user fees, such as water rates, in part because the government can choose whether to use the service, and the money charged is spent solely on providing that service: Attorney General of Canada v. City of Toronto (1892), 23 S.C.R. 514; Attorney-General of Canada v. Registrar of Titles, [1934] 4 D.L.R. 764 (B.C.C.A.), at pp. 771-72. In this way, imposing a user fee is more like charging a fee for a merchantable commodity than imposing any form of taxation.

20 These principles, and the guiding structure of the Constitution, are as applicable to Indian Band Councils exercising the right of taxation authorized by s. 83 of the Indian Act as they are to the federal and provincial levels of government. The exercise of governmental powers in Canada, by any level of government, must be done in accordance with the constitutional framework of the country. This constitutional framework includes the prohibition contained in s. 125 against taxing another level of government.

B. Regulatory Charges Distinguished from Taxes

21 The natural starting point for characterizing a governmental levy is this Court's decision in Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357, at pp. 362-63. In that case, Duff J., as he then was, explained that the impugned charges in that case were taxes because they were: (1) enforceable by law, (2) imposed under the authority of the legislature, (3) imposed by a public body, and (4) intended for a public purpose. Duff J. also noted that the charges there were compulsory, and affected a large number of people.

22 These indicia of "taxation" were recently adopted by this Court in Eurig Estate, supra, at para. 15. Major J., writing for the majority of this Court, added another possible factor to consider when characterizing a governmental levy, stating at para. 21 that "[a]nother factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided". This was a useful development, as it helps to distinguish between taxes and user fees, a subset of "regulatory charges".

23 A distinction is made between simple "taxation" and "regulation", or what has elsewhere been described as "regulatory charges": P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.), vol. 1, at p. 30-28; J. E. Magnet, Constitutional Law of Canada (7th ed. 1998), vol. 1, at p. 481; G. V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution (2nd ed. 1981). The distinction between taxes, on the one hand, and regulatory charges, on the other, was highlighted by the majority of this Court in Re Exported Natural Gas Tax, supra, at pp. 1055, 1070, 1072 and 1075. In that case, the majority explained at p. 1070 that a tax is to be distinguished from a "levy [imposed] primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme".

24 It goes without saying that in order for charges to be imposed for regulatory purposes, or to otherwise be "necessarily incidental to a broader regulatory scheme", one must first identify a "regulatory scheme". Certain indicia have been present when this Court has found a "regulatory scheme". The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

25 The first factor to consider is the nature of the purported regulation itself. Regulatory schemes are usually characterized by their complexity and detail. In Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371, at p. 409, the regulatory scheme there was described as a "complete and detailed code for the regulation of the gravel and soil extraction and removal trade". In Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929, at para. 28,

the charge was described as part of a "complex regulatory framework governing land development". And, in General Motors of Canada Ltd. v. City National Leasing, supra, at p. 676, the Combines Investigation Act was described as "a complex scheme of economic regulation".

26 A regulatory scheme will have a defined regulatory purpose. A purpose statement contained in the legislation may provide assistance to the court in this regard. Professor Magnet, supra, at p. 459, correctly explains that a regulatory scheme usually "delineates certain required or prohibited conduct". For example, in Re Exported Natural Gas Tax, supra, at p. 1075, the levy there was held to not be a regulatory charge because "the tax belies any purpose of modifying or directing the allocation of gas to particular markets. Nor does the tax purport to regulate who distributes gas, how the distribution may occur, or where the transactions may occur". In sum, a regulatory scheme must "regulate" in some specific way and for some specific purpose.

27 Regulatory schemes usually involve expenditures of funds on costs which are either known, or properly estimated. In the indirect tax cases, evidence was provided demonstrating how the revenues would be used and how the regulatory costs of the scheme were estimated. In Ontario Home Builders', supra, at para. 55, the charge levied was "meticulous in its detail" and "clearly operate[d] so as to limit recoupment to the actual costs". In Allard, supra, evidence was led by city officials demonstrating the actual costs of annual road repair, based on estimates from similar repairs in the municipality. In both cases, there was a fairly close "nexus" between the estimated costs and the revenues raised through the regulatory scheme.

28 Finally, the individual subject to the regulatory charge will usually either benefit from the regulation, or cause the need for the regulation: Magnet, supra, at p. 459. In Allard, supra, the gravel trucks caused the need for the repair to the roads; in Ontario Home Builders', supra, the developers and the new home-owners caused the need for the new schools. In both cases the individuals being charged also benefited from the regulation.

29 A regulatory charge may exist to defray the expenses of the regulatory scheme, as was the case in Allard or Ontario Home Builders', or the regulatory charges themselves may be the means of advancing a regulatory purpose. In Attorney-General of British Columbia v. Attorney-General of Canada (1922), 64 S.C.R. 377 ("Johnnie Walker" case) (aff'd [1924] A.C. 222), this Court explained that customs duties were the method of advancing the regulatory purpose of encouraging the importation of certain products, and discouraging the importation of others. Anglin J., at p. 387, explained that customs duties "are, it seems to me, something more" than simple taxation. As with customs duties, other types of charges may proscribe, prohibit, or lend preferences to certain conduct with the view of changing individual behaviour. A per-tonne charge on landfill waste may be levied to discourage the production of waste: Re Ottawa-Carleton (Regional Municipality) By-law 234-1992, [1996] O.M.B.D. No. 553 (QL). A deposit-refund charge on bottles may encourage recycling of glass or plastic bottles: Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General) (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) (aff'd (1997), 151 D.L.R. (4th) 575 (N.S.C.A.), leave to appeal refused, [1997] 3 S.C.R. vii).

30 In all cases, a court should identify the primary aspect of the impugned levy. This was the underlying current of the earlier cases on s. 125, which focussed on the "pith and substance" of the charge: "Johnnie Walker" case, supra; Re Exported Natural Gas Tax, supra. Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.

C. Section 125 Treatment of Taxes, User Fees, and Regulatory Charges

31 Section 125 applies only to taxes properly enacted under s. 91(3) or 92(2) of the Constitution Act, 1867. As this Court explained in Re Exported Natural Gas Tax, at p. 1068, s. 125 does not purport to affect activities of government other than taxation. Consequently, the section will not usually apply to user fees, for they cannot be considered to be "taxation" in the constitutional meaning of the word, as developed above: City of Toronto, supra; Minister of Justice v. City of Levis, [1919] A.C. 505; Registrar of Titles, supra. In particular, it is difficult to say that payment of charges for such merchantable commodities are "compulsory" or are used for a "public purpose": Registrar of Titles, supra, at pp. 771-72; Urban Outdoor Trans Ad v. Scarborough (City) (1999), 43 O.R. (3d) 673 (Sup. Ct.), at p. 683. However, some services may be so essential that although in theory it is not compulsory to pay for the services, in reality it is: City of Levis, supra, at p. 513; Eurig Estate, supra, at para. 17.

32 Nor does s. 125 apply to other types of regulatory charges, as I have described them above. Where a charge itself is the mechanism for advancing a regulatory purpose, such as a charge that encourages or discourages certain types of behaviour, or where a charge is "ancillary or adhesive to a regulatory scheme" which may be used to defray the costs of that scheme, then they will usually be applicable to the other order of government. As the majority of the Court explained in Re Exported Natural Gas Tax, supra, at p. 1070:

> If the primary purpose is the raising of revenue for general federal purposes then the legislation falls under s. 91(3) and the limitation in s. 125 is engaged. If, on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme, such as the "adjustment levies" considered in Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, s. A-7 et al., [1978] 2 S.C.R. 1198 or the unemployment insurance premiums in Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 355, then the levy is not in pith and substance "taxation" and s. 125 does not apply.

33 By protecting each level of government from taxation, but not from other types of regulatory charges, the Constitution accords a degree of operational space to the governments in a manner

which best advances the goals of Canada's flexible federalism. It is with these concepts in mind that I now turn to the governmental levy at issue in this case.

D. Characterization of the Westbank First Nation Taxation By-laws

34 There is no question that these levies apply to the "Lands or Property" of the Crown agent. However, the parties disagree as to whether the Court of Appeal was correct in describing these by-laws as "taxation", founded upon s. 91(3) of the Constitution Act, 1867. In my view, the Court of Appeal and the trial court below were both correct in describing these by-laws as imposing "taxation" within the meaning of s. 125.

35 The charges imposed by Westbank bear all of the hallmarks of "taxation". The charges here are enforceable by law. Failure to comply with the by-law can result in all services provided by the Band being cancelled (1990 Taxation By-law, s. 8(1); Westbank Indian Band Property Taxation Bylaw (1994) ("1994 Property Taxation By-law"), s. 8(1)). The taxes form a lien on the property (1990 Taxation By-law, s. 41(1); 1994 Property Taxation By-law, s. 28). The Band can recover the taxes by distress (1990 Taxation By-law, s. 46(1); 1994 Property Taxation By-law, s. 30), forfeiture (1990 Taxation By-law, s. 49; 1994 Property Taxation By-law, s. 35), or by court action (1990 Taxation By-law, s. 45; 1994 Property Taxation By-law, s. 36). The taxes are as compulsory as any municipal tax on land or interests in land.

36 The impugned charges are imposed under the authority of the legislature and levied by a public body. The by-laws are imposed pursuant to the power conferred by s. 83 of the Indian Act. The taxes are levied by the Band Council, under its conferred authority, and are approved by the Minister of Indian Affairs and Northern Development.

37 The charges are levied for a public purpose. In this case, the public purpose is for general Band governance. Section 2(1) of the 1990 Taxation By-law and the 1994 Property Taxation By-law state that the levies are "for raising a revenue for local purposes". As Lamer C.J. explained in Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, at para. 43, the purposes of these taxes are "to promote the interests of Aboriginal peoples and to further the aims of self-government". Thus, as the Chief Justice pointed out (at para. 43), the taxes here are "more ambitious" than simple taxation. However, the existence of this secondary purpose does not remove these taxes from the head of power under which s. 83 is founded __ s. 91(3). Indeed, while the intention of Parliament in enacting s. 83 may have been to advance self-government, that does not mean that this is the specific purpose of the taxes themselves. Here, the specific purpose of these taxes is to simply raise revenue, to be brought into the discretionary spending accounts of the Band. No evidence has been brought demonstrating that these charges have a secondary purpose of discouraging or encouraging any behaviour of the respondent, nor have any other regulatory purposes been demonstrated.

38 The appellant has also not demonstrated that these charges form a nexus with any regulatory costs such as to bring it into the type of charge contemplated by Allard, supra, and Ontario Home

Builders', supra. The charge forms no part of a regulatory scheme. Although the Indian Act is legislation in relation to Indian land, this is insufficient to meet the requirements for a "regulatory scheme" in the constitutional sense. There is insufficient evidence demonstrating that the charge is attached to any "complete and detailed code"; nor can it be said that this forms part of a "complex regulatory framework". There are no costs of a regulatory scheme identified. Westbank does not seek to alter B.C. Hydro's behaviour in any way. B.C. Hydro has not caused the need for any regulation, to which the charges adhere. Nor does it benefit from any regulation provided. In summary, these charges do not "regulate" in any sense of the word, and they are not attached to any scheme which does.

39 I am also not convinced that there is any significance that can be attached to the fact that the charges are levied "for local purposes", as opposed to charges which raise revenue for the federal Consolidated Revenue Fund. In Eurig Estate, supra, para. 20, the charge was directed to the "court administration in general", as opposed to the general expenses of the province, and yet this was still held to be a tax. As in Eurig Estate, supra, at paras. 18-23, here there is only a loose, if any, relationship between the charge and any costs. I agree with the Attorney General of British Columbia's submissions that the Constitution demands more precision in order to oust the operation of s. 125.

40 None of the foregoing suggests that Westbank is constitutionally incapable of levying properly authorized regulatory charges or user fees on B.C. Hydro. In this regard, I note that the authorizing by-laws and the agreements entered into between B.C. Hydro and Westbank allow for the payment of regulatory charges in a manner which complies with the Constitution. Section 36(1) of the 1990 Assessment By-law states that land held on behalf of the Crown shall be "liable to assessment under this section, subject to the Constitution Act, S.C." (emphasis added). Section 125 was thus contemplated. In addition, clause 2 of the July 22, 1960 agreement between B.C. Hydro and the Crown, for example, states that B.C. Hydro "shall pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the said lands". Although this clause refers to "taxes", these must be interpreted to refer to those taxes authorized under the Constitution, as explicitly provided by the by-law, such as provincial taxes, which the province can levy on one of its agents: La Forest, supra, at pp. 182-83; P. Lordon, Crown Law (1991), at pp. 487-88. The remainder of this clause provides for the payment of all charges and levies constitutionally applicable to B.C. Hydro. The impugned tax simply is not one of those types of charges. For these reasons, the appeal must fail.

41 As it is my opinion that s. 125 renders these taxation by-laws inapplicable to the respondent, it is unnecessary to answer the third question framed by the Chief Justice.

VII - Summary

42 Section 125 of the Constitution Act, 1867, advances the goals of federalism and democracy by

according a degree of operational space to each level of government, free from interference by the other. It prohibits one level of government from taxing the property of the other. However, it does not prohibit the levying of user fees or other regulatory charges properly enacted within the government's sphere of jurisdiction.

43 In order to determine whether the impugned charge is a "tax" or a "regulatory charge" for the purposes of s. 125, several key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.

44 As is evident from the fifth inquiry described above, the Court must identify the presence of a regulatory scheme in order to find a "regulatory charge". To find a regulatory scheme, a court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. This list is not exhaustive. In order for a charge to be "connected" or "adhesive" to this regulatory scheme, the court must establish a relationship between the charge and the scheme itself. This will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour.

45 In the case at bar, the levies are properly described as being, in pith and substance, taxation enacted under s. 91(3) of the Constitution Act, 1867. They are enforceable by law, imposed under the authority of the legislature, and are levied by a public body for a public purpose. The appellant has not demonstrated that the levies are connected to a "regulatory scheme" which could preclude the application of s. 125. The charge does not form any part of a detailed code of regulation. No costs of the regulatory scheme have been identified, to which the revenues from these charges are tied. The appellant does not seek to influence the respondent's behaviour in any way with these charges. There is no relationship between B.C. Hydro and any regulation to which these charges adhere. Although the Indian Act is legislation in relation to "Indians, and Lands reserved for the Indians", this does not, in itself, create a "regulatory scheme" in the sense required by the Constitution.

46 As these taxes are imposed on B.C. Hydro, which it is conceded is an agent of the provincial Crown, s. 125 is engaged. As such, the taxation and assessment by-laws are inapplicable to the respondent. As this appeal can be dismissed on the second constitutional question, I find it unnecessary to consider the third constitutional question. The respondent does not seek costs in this appeal. Accordingly, it is my opinion that the appeal must be dismissed, without costs. I would therefore answer the constitutional questions as follows:

1. Is the Province constitutionally competent to constitute the Respondent, British Columbia Hydro and Power Authority ("B.C. Hydro"), an agent of the Province for the purpose of acquiring and holding interests within exclusive federal jurisdiction, namely an interest in land on an Indian Reserve?

Answer: Conceded by the appellant.

2. If the answer to question 1 is yes, is the interest of B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia, in land and improvements located on the reserves ("Reserves") of the Appellant, Westbank First Nation ("Westbank") immune, as a result of the application of s. 125 of the Constitution Act, 1867, from taxation imposed by Westbank pursuant to assessment and taxation by-laws ("By-law") promulgated pursuant to the authority of s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5? If so, are such By-laws purporting to impose such taxation ultra vires, or inapplicable to B.C. Hydro?

Answer: Yes. The By-laws are constitutionally inapplicable to B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia.

3. If the answer to question 2 is no, does the Indian Act, R.S.C., 1985, c. I-5, authorize the passing of by-laws imposing taxation on the interests of the Provincial Crown or its agents on Indian reserves? If not, are the By-laws ultra vires or inapplicable to the extent that they purport to impose taxation on the interests of B.C. Hydro on the Westbank Reserves?

Answer: Given the answer to question 2, it is unnecessary to answer this question.

cp/d/qlhbb

Indexed as:

620 Connaught Ltd. v. Canada (Attorney General)

620 Connaught Ltd., operating as Downstream Bar, 263053 Alberta Ltd., operating as Miss Italia Ristorante, 313769 Alberta Ltd., operating as Jasper House Bungalows, 659510 Alberta Ltd., operating as Buckles Restaurant and Saloon, Alex Holdings Ltd., operating as Something Else Restaurant, Alpine Grill Ltd., operating as Alpine Grill Restaurant, Athabasca Motor Hotel (1972) Ltd., operating as Athabasca Hotel, Lina and Claudio Holdings Ltd., operating as Beckers Gourmet Restaurant, Cantonese Restaurant Ltd., Earls Restaurant (Jasper) Ltd., Fiddle River Seafood Company Ltd., George Andrew & Sons Ltd., operating as Astoria Hotel Company Limited, Glacier International Ltd., operating as Whistlers Inn, Husereau Restaurant Holdings Inc., operating as Tekarra Restaurant, Jasper Inn Investments Ltd., operating as The Inn Restaurant, Kabos Holding Ltd., operating as Karouzos Steakhouse, Kontos Investments Ltd., operating as Kontos Restaurant, L & W Vlahos Holdings Ltd., operating as L & W Restaurant, La Fiesta Restaurant Ltd., Larry Holdings Ltd., operating as Mount Robson Restaurant, Maligne Tours Ltd., Sawridge Enterprises Inc., operating as Sawridge Inn & Conference Center, T.C. Restaurants Ltd., operating as Villa Caruso Steak House & Bar and Tonquin Prime Rib Village Ltd., Appellants;

v.

Attorney General of Canada, Minister of Environment, Superintendent of

[page132]

Jasper National Park and Parks Canada Agency, Respondents, and

Attorney General of Ontario, Intervener.

[2008] 1 S.C.R. 131

[2008] S.C.J. No. 7

2008 SCC 7

File No.: 31661.

Supreme Court of Canada

Heard: November 16, 2007;
Judgment: February 29, 2008.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

(50 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Constitutional law -- Taxation -- Business licence fees -- Distinction between a tax and a regulatory charge -- Fees for licences required for businesses in national park selling liquor imposed pursuant to regulatory scheme under authority granted by statute to minister -- Licensing fee ultra vires minister's powers if a tax -- Whether annual business licence fees a tax or a regulatory charge -- Constitution Act, 1867, s. 53 -- Canada National Parks Act, S.C. 2000, c. 32, s. 16(1)(n), (r) -- Parks Canada Agency Act, S.C. 1998, c. 31, s. 24 -- National Parks General Regulations, SOR/78-213, s. 39 -- National Parks of Canada Business Regulations, SOR/98-455, s. 4.

Summary:

The appellants own hotels, restaurants and bars serving alcoholic beverages in Jasper National Park and must pay a fee in accordance with the Parks Canada Master List of Fees in order to have a business selling alcohol in the park. This fee is imposed under the authority granted to the Minister of Canadian Heritage pursuant to s. 24 of the *Parks Canada Agency Act*. The Agency's policy for the year in question was to attribute revenues generated in a park back to that park. At issue, given that s. 53 of the *Constitution Act, 1867* provides that only Parliament may impose a tax, is whether the National Parks Agency under the authority of the Minister imposed a regulatory charge or a tax. Both the [page133] Federal Court and the Federal Court of Appeal found the fee to be a regulatory charge and validly imposed.

Held: The appeal should be dismissed.

The business licence fees paid by the appellants in Jasper National Park are, in pith and substance, regulatory charges and *intra vires* the Minister's delegated power. The business licence fees have several of the attributes of a tax: they are (1) compulsory and enforced by law, (2) imposed under the authority of Parliament, (3) levied by a public official, the Minister, and (4) intended for a public purpose -- the operation of Jasper National Park. However, they are regulatory charges because they are connected to a regulatory scheme. [para. 24] [para. 29]

To determine if the governmental levy is connected to a regulatory scheme, the first step is to identify the existence of a relevant regulatory scheme and, if there is such a scheme, the second step is to find a relationship between the charge and the scheme itself. Here, the regulation of Jasper National Park qualifies as a relevant regulatory scheme: (1) the *Canada National Parks Act* and the *Parks Canada Agency Act* together with the accompanying regulations form a complete, complex and detailed code governing how Jasper National Park should operate; (2) the scheme is aimed at affecting individuals' behaviour; (3) it provides for a proper estimation of the costs of the operation of the park; and (4) the appellants benefit from the regulation in that a well-maintained National Park attracts more visitors and therefore the greater the potential volume of their businesses. Also, regulations limiting development and thus the number of businesses within the Park allow the appellants to participate in a restricted market in which they are not subject to unlimited competition. With respect to the second step, the necessary relevant relationship between the fees paid by the persons being regulated and the regulatory scheme exists because the fees are tied to the costs of the regulatory scheme. While the fee revenue should not exceed the regulatory costs in order to avoid rendering s. 53 of the *Constitution Act, 1867* meaningless, the government should be given some reasonable leeway. In this case, given the evidence, it can be inferred that the fee revenues generated in Jasper National Park likely did not exceed, and certainly did not significantly exceed, the cost of the regulatory scheme for the Park. Accordingly, [page134] the business licence fees are connected to the regulatory scheme governing the Park. [paras. 25-27] [paras. 30-34] [paras. 37-40] [paras. 44-45]

Cases Cited

Applied: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134; *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357; **referred to:** *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929; *Ottawa-Carleton (Regional Municipality) By-law 234-1992 (Re)*, [1996] O.M.B.D. No. 553 (QL); *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536, aff'd (1997), 151 D.L.R. (4th) 575, leave to appeal refused, [1997] 3 S.C.R. vii.

Statutes and Regulations Cited

Bill of Rights, 1 Will. & Mar. sess. 2, c. 2, art. 4.

Canada National Parks Act, S.C. 2000, c. 32, ss. 4(1), 16(1)(*n*), (*r*), (3).

Constitution Act, 1867, ss. 53, 91(1A), 92(2), 125.

National Parks General Regulations, SOR/78-213, s. 39.

National Parks of Canada Businesses Regulations, SOR/98-455, s. 4.

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Linden, Nadon and Evans JJ.A.), [2007] 2 F.C.R. 446, 271 D.L.R. (4th) 678, 352 N.R. 177, [2006] F.C.J. No. 1083 (QL), 2006 CarswellNat 1919, 2006 FCA 252, affirming a decision of Snider J. (2005), 274 F.T.R. 311, [2005] F.C.J. No. 1107 (QL), 2005 CarswellNat 1808, 2005 FC 886. Appeal dismissed.

[page135]

Counsel:

Jack N. Agrios, Q.C., and *Janice A. Agrios, Q.C.*, for the appellants.

Kirk N. Lambrecht, Q.C., and *Cheryl D. Mitchell*, for the respondents.

Janet E. Minor and *Michael S. Dunn*, for the intervener.

The judgment of the Court was delivered by

ROTHSTEIN J.:--

I. Introduction

1 The issue in this appeal is whether the annual business licence fee for the right to sell alcoholic beverages imposed on hotels, restaurants and bars in Jasper National Park is a regulatory charge or a tax. This business licence fee is imposed under the authority granted to the Minister of Canadian Heritage pursuant to s. 24 of the *Parks Canada Agency Act*, S.C. 1998, c. 31, to "fix the fees or the manner of calculating fees in respect of products, rights or privileges provided by the [Parks Canada] Agency".

2 Pursuant to s. 53 of the *Constitution Act, 1867*, only Parliament may impose a tax. If the business licence fee is, in pith and substance, a tax, it is *ultra vires* and beyond the jurisdiction of the Minister to impose. If the fee is, in pith and substance, a regulatory charge, it may validly be imposed under the authority of the Minister pursuant to s. 24 of the *Parks Canada Agency Act* ("*Parks Agency Act*").

3 Both Snider J. in the Federal Court and Evans J.A. in the Federal Court of Appeal found that the fee was a regulatory charge and therefore was validly imposed: (2005), 274 F.T.R. 311, aff'd [2007] 2 F.C.R. 446. I am of the same view and would therefore dismiss this appeal.

[page136]

II. The Power to Tax

4 Central to our concept of democracy is the principle that the Crown may not levy a tax except with the authority of Parliament or the legislature. This principle harkens back to the *Bill of Rights* of 1689, 1 Will. & Mar. sess. 2, c. 2, art. 4, and ensures not only "that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes (and vote supply)" (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 246).

5 This principle is found in s. 53 of the *Constitution Act, 1867*, which mandates that bills imposing any tax shall originate in the House of Commons. In *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, Major J. explained the rationale underlying s. 53, at paras. 30-32:

> The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My

> interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.
>
> In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature. As Audette J. succinctly stated in *The King v. National Fish Co.*, [1931] Ex. C.R. 75, at p. 83, "[t]he Governor in Council has no power, *proprio vigore*, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament."
>
> The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation. As E. A. Driedger stated in "Money Bills and the Senate" (1968), 3 Ottawa L. Rev. 25, at p. 41:
>
> > Through the centuries, the principle was maintained that taxation required representation and consent. [page137] The only body in Canada that meets this test is the Commons. The elected representatives of the people sit in the Commons, and not in the Senate, and, consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.

6 The issue in this case is whether the Minister imposed a tax, which, in accordance with s. 53 of the *Constitution Act, 1867*, is beyond his statutory power since only Parliament may levy a tax.

III. Facts

7 The appellants own all or nearly all of the hotels, restaurants and bars in Jasper National Park serving alcoholic beverages. In order to operate these establishments, they require a business licence to sell alcohol for which they must pay a fee in accordance with the Parks Canada Master List of Fees. The 2003/2004 Master List provides that the fees for a business licence for the sale of alcohol are made up of a base fee of $75 plus 3 percent of gross value purchased annually for the sale of spirits and wines, and 2 percent of gross value purchased annually for the sale of beer.

8 The total forecasted cost of operation of Jasper National Park in 2003/2004 was $20.4 million. The total amount of business licence fees collected for the sale of alcoholic beverages in that period was $87,625. The Agency's policy for the 2003/2004 year was to attribute revenues generated in a

park back to that park.

IV. Overview of Statutes and Regulations Governing National Parks

9 The relevant statutory and regulatory provisions are contained in the appendix attached to these reasons. Parliament has jurisdiction over national parks under s. 91(1A) of the *Constitution Act, 1867*. Two statutes and relevant subordinate [page138] regulations govern the management of all national parks in Canada. The *Canada National Parks Act*, S.C. 2000, c. 32 ("*National Parks Act*"), vests the Minister with control and management of Canada's national parks, including Jasper National Park. The second relevant statute is the *Parks Agency Act* which establishes the Parks Canada Agency as having the responsibility for the administration of the *National Parks Act* and its regulations.

10 The obligation to obtain a licence to sell alcoholic beverages in national parks and pay the applicable licence fees arises from a combination of the relevant statutes and regulations. Sections 16(1)(*n*) and 16(1)(*r*) of the *National Parks Act* provide that the Governor in Council may make regulations respecting the control of businesses and the determination of fees for the use of park resources. Section 16(3) of the *National Parks Act* authorizes the Superintendent of a park to issue licences in relation to any matter that is the subject of regulations. Section 39 of the *National Parks General Regulations*, SOR/78-213, prohibits the sale of any intoxicating beverage unless the vendor has obtained a licence under the *National Parks of Canada Businesses Regulations*, SOR/98-455. The procedures for obtaining a licence to sell alcohol are set out in s. 4 of the *National Parks of Canada Businesses Regulations*. The licence application must be accompanied by the applicable fee fixed under s. 24 of the *Parks Agency Act*. This section states that the Minister may fix fees or the manner of calculating fees regarding products, rights and privileges provided by the Agency.

11 The Agency has the authority to expend the revenues generated from park operations including those listed in s. 20(2)(*c*) of the *Parks Agency Act*, i.e. "proceeds from, including fees paid under any Act of Parliament in respect of, the provision by the Agency of a service, of the use of a facility or of a product, right or privilege".

[page139]

V. Appellants' Position

12 The appellants' complaint is with respect to the fees they are required to pay on the purchase of alcohol (3 percent on wine and spirits and 2 percent on beer). The percentage fee together with the base fee of $75 amounted to $87,625 in 2003/2004.

13 The appellants say that if, as found by the Federal Court and Federal Court of Appeal, the

regulatory scheme relevant to the business licence fees imposed on them was the administration and operation of Jasper National Park, the fees they pay are unconnected to the regulation of their businesses or even businesses generally in Jasper National Park. As such, they constitute a tax and not a regulatory charge. Alternatively, the appellants contend that a regulatory scheme must be more precisely defined in order for the amounts collected to be valid regulatory charges, such as the regulation of businesses generally or businesses selling alcoholic beverages in Jasper National Park. However, if this more precise regulatory scheme is considered, there would be no nexus between the cost of the scheme and the business licence fees collected since the revenues collected would disproportionally exceed the costs of the regulatory scheme. In either case, the charge qualifies as a tax which is *ultra vires* the Minister's powers.

VI. Respondent's Position

14 The government says that the business licence fees paid by the appellants are ancillary or adhesive to the regulatory scheme governing the administration and operation of Jasper National Park. The fees collected were used to defray the cost of administration and operation of the park. As such, they qualify as regulatory charges and not as taxes. The government does not rely on a narrower regulatory scheme regulating only businesses generally or businesses selling alcoholic beverages in the park.

[page140]

VII. Selecting the Appropriate Regulatory Scheme

15 The narrow scheme proposed by the appellants focuses exclusively on the regulation of the sale of alcoholic beverages, or alternatively the regulation of businesses, in Jasper National Park. However, the appellants benefit from such things as heritage presentations, visitors' services and highway maintenance in the park. To focus only on the regulation of the sale of alcohol or the regulation of businesses ignores the reality that the appellants' businesses benefit from their location in and the operation and regulation of the park as a whole. The *National Parks Act*, the *Parks Agency Act* and the regulations together comprise the regulatory scheme governing Jasper National Park. I conclude that the appropriate regulatory scheme to consider in this case is therefore the regulatory scheme governing the administration and operation of Jasper National Park.

VIII. Analysis

1. *Analysing Whether a Government Levy is a Tax or a Regulatory Charge*

16 The task for the Court is to identify whether the fees paid by the appellants are, in pith and substance, a tax or a regulatory charge. The pith and substance of a levy is its dominant or most

important characteristic. The dominant or most important characteristics are to be distinguished from its incidental features (P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 433-36). The fees in this case have characteristics of both a tax and regulatory charges. The Court must ascertain which is dominant and which is incidental.

17 In the context of whether a government levy is a tax or a regulatory charge, it is the *primary purpose* of the law that is determinative. Although the law may have incidental effects, its primary purpose will determine whether it is a tax or a regulatory [page141] fee. In *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, Gonthier J. described the pith and substance of a government levy in terms of its primary purpose. At para. 30, he stated:

> In all cases, a court should identify the primary aspect of the impugned levy... . Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. [Emphasis deleted.]

There is no suggestion in this case that the levy is a user fee for the provision of government services or facilities. The sole question is whether in pith and substance the levy is a tax or a regulatory charge.

18 The issue of whether a levy is a tax or a regulatory charge has been considered on prior occasions by this Court. The issue was relevant when determining the constitutionality of a provincial levy that had indirect tendencies (*Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, and *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929). If it was a tax, it would be *ultra vires* the province whose taxing authority under s. 92(2) of the *Constitution Act, 1867* is restricted to direct taxes within the province. However, if it was a regulatory charge, the province was constitutionality competent to impose such charge. It was also relevant when deciding if a by-law of an Indian band enacted a system of taxation under the purported authority of the *Indian Act*, for if it was, it could not be applied to an agent of the provincial Crown by reason of s. 125 of the *Constitution Act, 1867* [page142] (*Westbank*). However, determining whether a government levy is *ultra vires* a Minister's delegated power has not yet been addressed by this Court.

2. *Regulatory Charges Distinguished From User Fees*

19 It will be useful to first differentiate a regulatory charge from a user fee. A user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this Court in *Eurig*, there must be a clear nexus between the quantum charged and the cost to the government of providing such services or facilities. The fees charged

cannot exceed the cost to the government of providing the services or facilities. However, "courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice" (see *Eurig*, at para. 22).

20 By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour, e.g. "[a] per-tonne charge on landfill waste may be levied to discourage the production of waste [or a] deposit-refund charge on bottles may encourage recycling of glass or plastic bottles" (see *Westbank*, at para. 29, referring to *Ottawa-Carleton (Regional Municipality) By-law 234-1992 (Re)*, [1996] O.M.B.D. No. 553 (QL), and *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) (aff'd (1997), 151 D.L.R. (4th) 575 (N.S.C.A.), [page143] leave to appeal refused, [1997] 3 S.C.R. vii)).

21 There is no suggestion that the business licence fees in this case are user fees and the government does not take the position that the fees are set at a level so as to proscribe, prohibit or lend preference to certain conduct. Consequently, the question is whether, in pith and substance, the licence fees constitute a tax or a regulatory charge which is used to defray the costs of a regulatory scheme.

3. *The Characteristics of a Tax*

22 In *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, Duff J. (as he then was) identified the characteristics of a tax (pp. 362-63). In *Eurig*, Major J. summarized the *Lawson* characteristics of a tax at para. 15:

> Whether a levy is a tax or a fee was considered in *Lawson, supra*. Duff J. for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.

23 These characteristics will likely apply to most government levies. The question is whether these are the dominant characteristics of the levy or whether they are only incidental.

4. *Distinguishing a Regulatory Charge From a Tax*

24 The distinction between a tax and a regulatory charge was not the way in which the Court in *Lawson* dealt with the matter before it. To address that issue, Gonthier J. in *Westbank* added a fifth consideration to those articulated by Duff J. in *Lawson*: that the government levy would be in pith and substance a tax if it was "unconnected to any form of a regulatory scheme" (para. 43). This fifth

consideration provides that even if the levy has all [page144] the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme.

25 In *Westbank*, Gonthier J. established a two-step approach to determine if the governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme. To do so:

> [A] court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. [para. 44]

The first three considerations establish the existence of a regulatory scheme. The fourth consideration establishes that the regulatory scheme is relevant to the person being regulated.

26 Although this list of factors provides a useful guide, it is not to be treated as if the factors were prescribed by statute. As stated by Gonthier J., at para. 24:

> This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

Nonetheless, there must be criteria establishing a regulatory scheme and its relevance to the person being regulated.

27 Provided that a relevant regulatory scheme is found to exist, the second step is to find a relationship between the charge and the scheme itself.

> This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour.
>
> (*Westbank*, at para. 44)

[page145]

28 In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics. Therefore, the questions to

ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax? and (2) Has the government demonstrated that the levy is connected to a regulatory scheme? To answer the first question, one must look to the indicia established in *Lawson*. To answer the second question, one must proceed with the two-step analysis in *Westbank.*

(a) Do the Business Licence Fees Have the Attributes of a Tax?

29 Certainly the business licence fees have the attributes of a tax. They are compulsory and enforced by law, imposed under the authority of Parliament, levied by the Minister, a public official, and intended for a public purpose -- the operation of Jasper National Park. However, it is still necessary to determine whether there is a relevant regulatory scheme and whether the fees are connected to that regulatory scheme, in which case the appellants' licence fees will be considered regulatory charges and not taxes.

(b) Are the Business Licence Fees Connected to a Regulatory Scheme?

Step 1:

The Criteria for Identifying the Existence of a Relevant Regulatory Scheme: Is the Regulatory Scheme Governing the Administration and Operation of Jasper National Park Relevant to the Appellants?

30 The first *Westbank* criterion is the presence of a "complete, complex and detailed code [page146] of regulation". Jasper National Park exists and operates under an overarching statutory scheme which includes the *National Parks Act* and the *Parks Agency Act*, together with the regulations. Some of these regulations apply only to specific parks; there are even regulations applying specifically to the town of Jasper. However, the majority of the regulations relate to the management of all national parks. These regulations range from wildlife management to traffic provisions. Read in conjunction with the two Acts, these regulations establish how services, rights and privileges are obtained, what is prohibited within the parks and to whom authority is delegated. Together, these statutes and the regulations form a complete and detailed scheme of how Jasper National Park should operate. Therefore, the first of the regulatory scheme criteria is satisfied.

31 The second criterion is whether the operation of Jasper National Park is a regulatory scheme which is aimed at affecting individuals' behaviour. The purpose of national parks is set out in s. 4(1) of the *National Parks Act*:

> The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

The operation of Jasper National Park must be in accordance with this principle. The object of operating the park for the benefit, education and enjoyment of the people of Canada is intended to

encourage the use of the park by Canadians, while preserving the integrity of the park for the future. Regulation of the behaviour of current visitors to and businesses in the park so that they do not use the park in a manner which would impair enjoyment of the park by present and future generations helps to achieve these goals. The second criterion is satisfied.

[page147]

32 The third criterion for identifying a regulatory scheme is the presence of a proper estimation of the costs; in this case the cost of the operation of Jasper National Park. This criterion is satisfied. Snider J. found that the forecast of expenditures for the park in 2003/2004 was estimated to be $20.4 million.

33 The evidence demonstrates that the regulation of Jasper National Park meets the first three criteria in *Westbank* and is therefore a regulatory scheme for purposes of the analysis.

34 The fourth criterion is the existence of a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation or benefits from it. In *Allard*, this Court recognized that companies that removed gravel benefited from the roads that were funded from the fees collected for the removal of gravel. In *Ontario Home Builders'*, the majority found that the benefit conferred on construction contractors was the creation of residential developments with adequate amenities. The same approach is applicable here. The appellants benefit from the existence of a well-maintained national park. The appellants' revenues are linked to the number of visitors coming each year to Jasper National Park. The more the park attracts visitors, the greater the potential volume of the appellants' business. Also, regulations limiting development and thus the number of businesses within the park allow the appellants to participate in a restricted market in which they are not subject to unlimited competition. These factors demonstrate that the appellants benefit from the regulation of Jasper National Park.

35 However, where a regulatory scheme is very broad, the scheme may not be sufficiently related to the persons being regulated either because the regulation does not benefit those persons, or because those persons do not cause the need for the regulation, except in a very indirect manner. In such a case, the fees may be found to be a tax. Evans J.A. [page148] recognized the need for a sufficient relationship in his reasons, at paras. 44-45:

> The fees in the present case were not attributed to the operations of the Department of Canadian Heritage at large nor even, more specifically, to the administration of the entire system of national parks. The licence fees paid by the appellants were attributed to the operating budget of the very park, Jasper, in which the appellants conducted their businesses. Any aspect of the operation of Jasper National Park which makes it more attractive to visitors, including on-site heritage presentations, visitor services and through highways, increases the

appellants' potential customer base.

In contrast, the appellants obtain only a very indirect benefit at best from the operation of other national parks and from the central administration of the responsible Department and the Parks Canada Agency. In my opinion, the analogies relied on by the appellants would be more persuasive if the Crown were arguing that the relevant regulatory scheme was the operation and administration of the national parks system as a whole.

36 The safeguard against an insufficient relationship can be found in this *Westbank* criterion: "[The] relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation." Here, there is a close relationship between the appellants' businesses and the regulation of Jasper National Park.

37 Since all four of the *Westbank* criteria are met, the regulation of Jasper National Park qualifies as a relevant regulatory scheme.

Step 2:

The Relationship Between the Business Licence Fees and the Regulation of Jasper National Park

38 In order for a regulatory charge intended to defray the costs of a regulatory scheme to be "connected", the fee revenue must be tied to the costs of the regulatory scheme. The trial judge, at para. 16, found that "[i]n general, the imposition of fees is designed to offset the costs of operating and [page149] administering each of Canada's national parks", and the policy of the government in 2003/2004 was to attribute revenue generated in a park back to that park (Affidavit of Doug Tapley, Manager of Business Innovations for the Parks Canada Agency, October 25, 2004, at para. 11, Appellants' Record, at p. 82).

39 Section 23 of the *Parks Agency Act* specifies that the Minister cannot set a user fee for services or facilities that is higher than the cost to the government of providing them. On the other hand, s. 24 of the Act pertaining to regulatory fees for rights or privileges granted by the government does not contain such a limit. Nonetheless, where fees generated under a regulatory scheme are to be used to defray the costs of the scheme, as in this case, the fee revenue generated cannot exceed the costs of the scheme. In referring to a comprehensive and integrated regulatory scheme in *Ontario Home Builders'*, Iacobucci J. states, at para. 85:

> The carefully designed mechanics of the scheme ensure that the power of indirect taxation will not extend beyond the regulatory costs; this is crucial in order to avoid rendering s. 92(2) of the *Constitution Act, 1867* meaningless.

In this case, it is equally necessary that the fee revenue not exceed the regulatory costs in order to

avoid rendering s. 53 of the *Constitution Act, 1867* meaningless.

40 However, as stated in *Allard*, at pp. 411-12, the government needs to be given some reasonable leeway with respect to the limit on fee revenue generation. While a significant or systematic surplus above the cost of the regulatory scheme would be inconsistent with a regulatory charge and would be a strong indication that the levy was in pith and substance a tax, a small or sporadic surplus would not, as long as there was a reasonable attempt to [page150] match the revenues from the fees with the cost associated with the regulatory scheme.

41 The total amount collected in licence fees from businesses selling alcohol in Jasper National Park in 2003/2004 was $87,625. It represents less than 0.5 percent of the total forecasted expenditures of Jasper National Park in 2003/2004 which amounted to $20.4 million. Obviously, the fees paid by the appellants did not exceed the costs of regulating Jasper National Park.

42 However, it is not sufficient that fees collected under one regulation that is part of an overall regulatory scheme constitute only a small fraction of the costs of the overall regulatory scheme. An "apples to apples" comparison requires that all fees collected in respect of the operation of Jasper National Park by the Agency must be taken into account to ensure that the total of such fee revenues did not exceed the cost of the operation of the park. However, there is no specific evidence of the total amount of such fees collected in Jasper National Park in 2003/2004.

43 In the corporate plan of the Parks Canada Agency for 2004/2005 to 2008/2009, fee revenue from all of Canada's national parks in 2003/2004 amounted to approximately $78 million against costs of $519 million or approximately 15 percent of the costs (Respondent's Record, at pp. 63-66). Although fee revenue as a percentage of cost is very low overall, considering the revenue/cost relationship for all of Canada's parks is a tenuous basis for inferring the revenue/cost relationship in one particular park. However, Mr. Alan Latourelle, Chief Executive Officer of the Parks Canada Agency, speaking to a Parliamentary Committee in 2005, testified that "[Parks Canada] generate[s] about $43 million in our [M]ountain [P]arks, and our actual expenditures -- total, including capital -- are about $60 million" (House of Commons, Standing Committee on Environment and Sustainable [page151] Development, *Evidence*, 1st sess., 38th Parl., May 19, 2005, at p. 7). Although not clearly stipulated in the minutes of the Committee, from the context of the discussion and the date of his appearance, it appears Mr. Latourelle was referring to the revenues and expenditures for 2003/2004.

44 As stated in *Allard*, at pp. 411-12, the government must be given some leeway, as long as there is a reasonable attempt to match the revenues from the fees with the cost of the regulatory scheme. In the Mountain Parks, there was a $17 million shortfall between the fees collected and the total expenditures in 2003/2004. Although the total fee revenue for Jasper National Park is not in evidence, I am prepared to infer from the information in the material before the Court relating to the Mountain Parks that the fee revenues from Jasper National Park likely did not exceed, and certainly did not significantly exceed, the cost of the regulatory scheme for the park. Accordingly, the

business licence fees are connected to the regulatory scheme governing the park.

45 Just as there had to be a relevant relationship between the regulatory scheme and the person being regulated under the first step of the *Westbank* approach, there must also be a relevant relationship at the second step, that is, between the fees paid by the persons being regulated and the regulatory scheme caused by those persons or from which those persons receive a benefit. The conditions were met in this case. However, I would note that if the fee revenues generated in Jasper National Park are not expended entirely within, or for the benefit of that park, the fees may well be "unconnected" and not in pith and substance a regulatory charge, but rather, a tax.

[page152]

46 Raising revenues is one of the most powerful tools of government. It involves the taking of property by the government. That is why taxes may be levied only by elected legislators in Parliament or the legislature of a province under the *Constitution Act, 1867*. Where the connection between the use of the revenues generated from a government levy and the persons being regulated is doubtful, the courts will scrutinize the facts to ensure that the Constitution is not circumvented by executive or bureaucratic edict.

47 In summary, the evidence discloses that the regulatory scheme governing the administration and operation of Jasper National Park is relevant to the appellants' businesses and that there is a relationship between the business licence fees paid by the appellants and that regulatory scheme. In the result, the pith and substance or dominant purpose of the business licence fees is as regulatory charges.

5. *Regulatory Charges to Proscribe, Prohibit or Lend Preference to Certain Conduct*

48 Whether the costs of the regulatory scheme are a limit on the fee revenue generated, where the purpose of the regulatory charge is to proscribe, prohibit or lend preference to certain conduct, is not an issue before the Court in this case, and it is not necessary to answer that question here.

6. *Proprietary Charges*

49 The intervener, the Attorney General of Ontario, says that a proprietary charge should be kept distinct from a regulatory charge or a tax. It was submitted that the Province of Ontario relies heavily on proprietary charges as a source of income and that certain fees on businesses in provincial parks are structured as proprietary charges. I agree that proprietary charges for goods and services supplied in a commercial context are distinct [page153] from either regulatory charges or taxes and may be determined by market forces. As explained by Professor Hogg in *Constitutional Law of Canada*, at pp. 870-71:

> ... [proprietary] charges are those levied by a province in the exercise of proprietary rights over its public property. Thus, a province may levy charges in the form of licence fees, rents or royalties as the price for the private exploitation of provincially-owned natural resources; and a province may charge for the sale of books, liquor, electricity, rail travel or other goods or services which it supplies in a commercial way.

There is some question as to whether a licence fee for the right to occupy land inside the park for premises in which to sell alcohol can be characterized as a proprietary charge. However, the government has not sought to justify the business licence fees in this case as proprietary charges. Whether they could be is better left to be decided at a time when it is properly raised and argued by the parties.

IX. Conclusion

50 In pith and substance, the business licence fees paid by the appellants in Jasper National Park in 2003/2004 are regulatory charges and therefore are *intra vires* the delegated power of the Minister of Canadian Heritage. The appeal should be dismissed with costs.

* * * * *

APPENDIX

Constitution Act, 1867

> **53.** Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

[page154]

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, --

...

1A. The Public Debt and Property.

92. 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, --

...

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

Canada National Parks Act, S.C. 2000, c. 32

4. (1) The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

16. (1) The Governor in Council may make regulations respecting

...

(*n*) the control of businesses, trades, occupations, amusements, sports and other activities or undertakings, including activities related to commercial ski facilities referred to in section 36, and the places where such activities and undertakings may be carried on;

...

(*r*) the determination of fees, rates, rents and other charges for the use of park resources and facilities, [page155] the provision of works and services referred to in paragraph (*i*) and improvements referred to in paragraph (*j*), and the issuance and amendment of permits, licences and other authorizing instruments pursuant to subsection (3);

...

(3) Regulations made under this section may authorize the superintendent of a park, in the circumstances and subject to the limits that may be specified in the regulations,

(*a*) to vary any requirement of the regulations for purposes of public safety or the conservation of natural resources in the park;

(*b*) to issue, amend, suspend and revoke permits, licences and other authorizations in relation to any matter that is the subject of regulations and to set their terms and conditions; and

(*c*) to order the taking of any action to counter any threat to public health or to remedy the consequences of any breach of the regulations in the park.

Parks Canada Agency Act, S.C. 1998, c. 31

20. ...

(2) Notwithstanding subsection 29.1(1) of the *Financial Administration Act*, the Agency may, for the purposes referred to in subsection 19(1), spend amounts equal to revenues resulting from the conduct of its operations in that or subsequent fiscal years, including

...

(*c*) proceeds from, including fees paid under any Act of Parliament in respect of, the provision by the Agency of a service, of the use of a facility or of a product, right or privilege;

23. (1) The Minister may, subject to any regulations that the Treasury Board may make for the purposes of this section, fix the fees or the manner of calculating the fees to be paid for a service or the use of a facility provided by the Agency.

(2) Fees for a service or the use of a facility that are fixed under subsection (1) may not exceed the cost to Her Majesty in right of Canada of providing the service or the use of the facility.

24. The Minister may, subject to any regulations that the Treasury Board may make for the purposes of this section, fix the fees or the manner of

> calculating [page156] fees in respect of products, rights or privileges provided by the Agency.

National Parks of Canada Businesses Regulations, SOR/98-455

> **3.** No person shall carry on, in a park, any business unless that person is the holder of a licence or an employee of a holder of a licence.
>
> **4.** ...
>
> (2) An application must be accompanied by the applicable fee fixed under section 24 of the *Parks Canada Agency Act*.

National Parks General Regulations, SOR/78-213

> 39. No person shall sell any intoxicating beverage in a Park unless he has obtained a licence for such a sale under the *National Parks Businesses Regulations* and the sale
>
> (*a*) is in accordance with the laws of the province in which the Park is situated; and
>
> (*b*) has been approved by the director-general.

Solicitors:

Solicitor for the appellants: Jack N. Agrios, Edmonton.

Solicitor for the respondents: Attorney General of Canada, Edmonton.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

cp/e/qllls

Indexed as:

Ontario Home Builders' Assn. v. York Region Board of Education

Ontario Home Builders' Association, Humber Green Estates Ltd. and Butternut Grove Homes Inc., appellants;
v.
The York Region Board of Education, the York Region Roman Catholic Separate School Board and the Attorney General for Ontario, respondents, and
The Attorney General of Quebec, the Attorney General of British Columbia, the Ontario Public School Boards' Association, the Ontario Separate School Trustees' Association, Carlota Guzman, Tony Ciccone, Charlotte Pope and Doris Seto, interveners.

[1996] 2 S.C.R. 929

[1996] S.C.J. No. 80

File No.: 24085.

Supreme Court of Canada

1995: October 10, 11 / 1996: August 22.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law -- Division of powers -- Charter of Rights -- Indirect taxation -- Regulatory scheme affecting land development in order to finance new capital costs for schools necessitated by new development -- Monies placed in common account and available to public and separate school boards -- Whether charges an indirect tax -- Whether charges prejudicially affecting a right or privilege with respect to denominational schools -- Whether impugned provisions infringing s. 2(a) Charter right to freedom of religion and s. 15(1) Charter right of equality -- If so, whether saved under s. 1 -- Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools, S. Prov. C. 1863, 26 Vict., c. 5 ("Scott Act"), ss. 14, 20 -- Canadian Charter of

Rights and Freedoms, ss. 2(a), 15(1) -- Constitution Act, 1867, ss. 91(3), 92(2), (9), (13), (16), 93(1) -- Development Charges Act, R.S.O. 1990, c. D.9, ss. 30(1), (3), 35 -- Education Act, R.S.O. 1990, c. E.2, s. 122(1) -- Education Development Charges, R.R.O. 1990, Reg. 268, ss. 1, 2, 3, 4, 5.

Trial -- Standing -- Application brought by association composed of builders -- Builders affected by legislation -- Whether appellants had standing.

By-laws passed by respondent school boards pursuant to the Development Charges Act required persons seeking building permits to pay an Educational Development Charge ("EDC") as a condition of obtaining the permit. The purpose of the EDC scheme was to permit school boards to raise the local share for the capital costs of new school construction on land undergoing residential and non-residential development when that development created the need for new schools. The legislation ensured that new land development bore the cost of infrastructure on its own, rather than imposing an additional burden on existing developments. Significantly, capital costs associated with existing schools, or the building of schools for existing pupils currently accommodated in portables or sent by bus to distant schools could not be defrayed through revenues raised by EDCs. The legislation made no distinction between public and separate school boards, or between public and separate school supporters.

The appellants initiated an application in Divisional Court for judicial review of by-laws passed by the respondent school boards. The Divisional Court found that the scheme created an indirect tax and was therefore ultra vires the province. The Court of Appeal considered the issue of standing and found that appellants indeed had standing. It ultimately found that the legislation, even though it created an indirect tax, did not impinge on the integrity of s. 92(2) (direct taxation within the province) of the Constitution Act, 1867 and that it was ancillary to a regulatory scheme clearly falling within provincial jurisdiction and justifiable under ss. 92(9) (licensing to raise revenue), (13) (property and civil rights) and (16) (matters of a local nature). At issue here was: (1) whether the appellants had standing; (2) whether the provisions of the Development Charges Act authorizing public and separate school boards to impose EDCs were ultra vires the province because (i) they imposed an indirect tax, or (ii) because they prejudicially affected a right or privilege with respect to denominational schools contrary to s. 93(1) of the Constitution Act, 1867; and (3) whether the impugned provisions were contrary to ss. 2(a) (freedom of religion) and 15(1) (the equality rights) of the Canadian Charter of Rights and Freedoms, and if so, whether they were saved under s. 1.

Held: The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.: Given the serious and complex nature of the issues, it was assumed, without deciding, that the appellants had standing. The interveners had no standing. This Court takes an unfavourable view of attempts to back up an appellant's lack of standing by way of interveners. Such efforts to bootstrap flawed standing are to be discouraged.

When determining the incidence of a tax, both the context within which the tax operates and its purpose should be considered. Land taxes are generally direct taxes imposed on land against the owner and assessed as a percentage of the value of the land, or as a fixed charge per acre. The tax may be an annual, recurring assessment, or a one-time charge. It may be enforced through the sale of the land. The desire or ability to pass on the tax or otherwise avoid taxation does not transform the direct nature of the tax into an indirect one. The jurisprudence does not prevent a tax on land by itself from being treated as an indirect tax.

EDCs are a tax on development using land as an instrument to achieve the desired end and involve features of both direct and indirect taxation. An EDC is characteristic of a land tax in that it is imposed on land undergoing residential and commercial development and failure to pay results in the charge's being placed on the tax roll. They are not, however, true land taxes in the traditional sense. Their purpose is not taxation of land, but rather, the defraying of the costs of infrastructure necessitated by new residential development. The "categories approach" (that the framers of the Constitution regarded taxes as divisible into two categories, direct and indirect, and that certain classifications of taxes were well known to the framers and fell into one or other category) was of no application here. Rather, the incidence of the EDCs must be determined according to Mill's formulation (that direct taxes are to be paid by the person taxed and the indirect taxes are not specific as to the ultimate incidence of the tax).

EDCs, since they are imposed in the course of manufacture on the commodity (a new building) to be sold and since most charge-payers intend to trade in the commodity, cling as a burden to new buildings when they are brought to market. They therefore constitute indirect taxation and are ultra vires provincial competence under s. 92(2).

However, the EDC scheme is ultimately intra vires the province as ancillary to a valid regulatory scheme for the provision of educational facilities as a component of land use planning, pursuant to ss. 92(9) (licences to raise revenue), (13) (property and civil rights) and (16) (matters of a local nature) of the Constitution Act, 1867. Since the power pursuant to s. 92(9) comprehends indirect taxation, this power is strictly limited to defray the costs of regulation. Significantly, funds can only be withdrawn when a specific project has been approved by the Minister and only in an amount equal to the actual local share of the project. The EDC scheme is appropriately limited in scope and operates only so as to defray the costs of regulation.

The EDCs are part of a comprehensive and integrated regulatory scheme, namely, the entirety of planning, zoning, subdivision and development of land in the province. Funding issues should be addressed through those aspects of the planning framework specifically designed to deal with those issues. While the regulatory scheme, of which EDCs are only a small part, is clearly very complex, the complexity is necessitated by the very scope of the matter regulated -- urban planning. The number of provincial actors involved in the various phases of the scheme's operation does not invalidate its regulatory nature. An artificial and rigid distinction should not be imposed between the school board and the municipality because such a distinction fails to reflect the true nature of the

regulatory framework. The construction of schools is a legitimate and crucial component of modern land use planning. The common theme underlying new development in the province is that it should bear the costs of infrastructure necessitated by it.

The EDC scheme does not prejudicially affect the denominational educational rights embodied in s. 93(1). Even if EDCs could be characterized as "grants", s. 20 of the Scott Act has never applied to capital grants. This section does not impose an obligation of proportionality in its strict terms. Proportionality is the means to a constitutional end which is equality of educational opportunity. Strict, formalistic proportionality was abandoned because it led to a serious inequality of educational opportunity. The principle in s. 122 of the Education Act, which is legally impressed upon the Development Charges Act, honours the obligation for a fair and non-discriminatory distribution and subsumes and supersedes any obligation of proportionality that might have been imposed by s. 20 of the Scott Act.

EDCs are a new source of funds, neither a rate nor a grant, that was not contemplated at the time of Confederation. Like other charges used to finance municipal infrastructure, they are a secular source of funds. Those paying EDCs are not identified by school support, and the proceeds are not identified as belonging to one school board or the other. The proceeds are commingled. This secular character is entirely appropriate, as money raised under the by-law of one school board may be used to build schools needed by the coterminous board.

The EDC scheme pursues the constitutionally required objective of providing separate schools with funding that is on par with the funding received by public schools. This form of legislation is required by the provisions of s. 93 of the Constitution Act, 1867 and accordingly is immune from Charter scrutiny.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The EDC scheme relates, in pith and substance, to taxation as contemplated by s. 92(2) of the Constitution Act, 1867. The legislation itself and the situation it was intended to remedy both support this conclusion. The EDC scheme gave to local school boards the means to raise the revenue taken away through cut backs in provincial grants. It revealed no feature other than the raising of a revenue in order to finance the local share of growth-related capital while providing for specific ways in which such revenues will be spent by school boards. The scheme cannot be found to be ancillary to a valid regulatory scheme to the point where it does not relate, in pith and substance, to taxation.

Courts have recognized that provinces can enact legislation providing for the imposition of levies which are indirect in their incidence where such levies cannot be characterized as "Taxation ... in order to the raising of a Revenue for Provincial Purposes" as contemplated by s. 92(2) of the Constitution Act, 1867 because they relate, in pith and substance, to another head of power granted exclusively to provincial legislatures by s. 92. When doing so, provinces are legislating under a different head of power than their s. 92(2) taxing power, and thus outside the scope of the limitation to direct taxation imposed by that provision.

The fact that the legislative scheme specifically provides for the use the school boards will make of the money levied and that the amount that can be levied is carefully limited to that purpose is not, in itself, determinative of the characterization of the matter of the legislation. "Costs of regulation" should not be defined in such a way that the legislation providing for a levy will necessarily relate, in pith and substance, to the matter to which its purpose relates as long as a province specifically provides for the use to be made of the funds levied, for the amount to be levied and for limitations carefully restricting its uses to its purpose. The adoption of such a position would be completely at odds with the structure of the Constitution and with the previous jurisprudence of this Court.

An EDC has all the earmarks of a tax -- a compulsory levy imposed by-law by a public body for a public purpose. It is, in pith and substance, a tax. It is not aimed at regulating the construction of houses or other buildings. It is not an integral part of the activity in which those engaged are regulated. Rather it is expressly aimed at raising a revenue for another purpose, building schools. Regulatory charges have thus far been tied, as they must constitutionally be, to the regulation of particular activities. The legislative choice of permitting local school boards to impose levies to pay these additional costs for schooling on landowners who construct residences in their area, rather than imposing the costs on taxpayers generally, is perfectly legitimate. And it is equally legitimate that the construction industry (which apparently owns the bulk of the land) should bear its share of the costs since it benefits economically from the development. They are not being regulated; they are being taxed.

Extending the concept of regulatory charges in the manner argued would virtually deprive the distinction between taxation and regulation of all meaning. The constitutional restriction to direct taxation represents an important component of the constitutional arrangements and the underlying policies that support them strongly militate against this Court's permitting provincial legislatures to impose levies that are in their incidence indirect through legislation cloaked as regulatory schemes that constitute in pith and substance taxation.

The EDC scheme is intra vires the province as a direct tax within the meaning of the Constitution Act, 1867. It is a tax on land, a type of tax that has always been regarded as a quintessential example of a direct tax. It bears all the usual hallmarks of a land tax: it is imposed on the owner and is collectable against the land itself. Land taxes have always been characterized as direct taxes for the purposes of s. 92(2) because they were so perceived by the framers of the Constitution. This tax imposed on a landowner and collectable against the land cannot be construed as an indirect tax simply because of a tendency for the incidence of the tax to be passed on to subsequent purchasers of the property given the fact that the land is taxed only on owners who engage in development of the land and that the majority of them are builders who are building for sale.

The primary, if not only, rationale now underlying the prohibition of indirect taxation imposed on the provinces by s. 92(2) of the Constitution Act, 1867 is that the direct effect of their taxation measures must be confined within their territory. This should be taken into account in considering the validity of a given tax by reference to its incidence. The type of taxes the framers of the

Constitution contemplated as direct taxes, land taxes for example, were seen to have predominantly local impact, while those seen as indirect, such as customs and excise, had an obvious tendency to have extraterritorial impact. Moreover, s. 92(2) expressly limited provincial taxes to the province and the limitation to direct taxation has prevented provinces from doing indirectly what they could not do directly. This approach is wholly consistent with the basic structure of the Constitution.

The framers of the Constitution considered that certain well-known categories of taxes would fall into the rubric of either direct or indirect taxes. The Mill's test, which was seen as being a refinement of the idea underlying the earlier categories approach, where certain taxes were categorized as being either direct or indirect, defined a direct tax as one demanded from the very person who it is intended or desired should pay it and an indirect tax as one demanded from one person in the expectation and intention that that person indemnify him- or herself at the expense of another. While never abandoning the "categories approach", the courts have moved to Mill's test when dealing with taxes that did not fit comfortably with the few categories specifically adverted to by the framers. Mill's test was found to permit the courts greater flexibility in accommodating the competing policies of according the provinces ample power to tax -- necessary to provide provinces with sufficient means to finance their legislative activities, which quickly turned out to be much more expensive than expected in 1867 -- while restraining them to their territorial scope. Thus, while EDCs might be indirect within the meaning of the definition proposed by Mill, ignoring the fact that they are land taxes -- the impact of which can only be confined to the territory of Ontario -- would disregard the important constitutional policies underlying the limitation to direct taxation provided for in s. 92 of the Constitution Act, 1867.

The use of Mill's test to transform what in all other respects falls within the category of a land tax is wholly inconsistent with the trend of the jurisprudence and the constitutional policies that underlie it. Clearly, it does not serve the major policy grounds today supporting the limitation of the provinces to direct taxes. There are no significant extraprovincial implications to land taxes. Nor does it serve the policy adopted by the courts of expansively interpreting the ambit of provincial taxing powers to meet the important legislative functions for which they now bear responsibility.

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By Iacobucci J.

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Co. v. Attorney General for Saskatchewan, [1952] 2 S.C.R. 231; Minister of Finance of New Brunswick v. Simpsons-Sears Ltd., [1982] 1 S.C.R. 144; Bank of Toronto v. Lambe (1887), 12 App. Cas. 575; Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario, [1897] A.C. 231; Cairns Construction Ltd. v. Government of Saskatchewan, [1960] S.C.R. 619; City of Montreal v. Attorney-General for Canada, [1923] A.C. 136; Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Co., [1950] A.C. 87; Rattenbury v. Land Settlement Board, [1929] S.C.R. 52; Reference re Validity of Section 31 of the Municipal District Amendment Act, 1941, [1943] S.C.R. 295; Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, [1932] 4 D.L.R. 750; Rural Municipality of Bratts Lake v. Hudson's Bay Co., [1918] 2 W.W.R. 962; Dufferin-Peel Roman Catholic Separate School Board v. Mississauga (City), [1994] O.M.B.D. No. 1093; Re Erin Mills Development Corp. and Peel Board of Education (1988), 22 O.M.B.R. 177; Etobicoke Board of Education v. Highbury Developments Ltd., [1958] S.C.R. 196; Greater Montreal Protestant School Board v. Quebec (Attorney General), [1989] 1 S.C.R. 377; Reference re Education Act (Que.), [1993] 2 S.C.R. 511; Re Scott and Ottawa (1856), 13 U.C.Q.B. 346.

By La Forest J.

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Conservation Authorities Act, R.S.O. 1990, c. C.27.
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APPEAL from a judgment of the Ontario Court of Appeal (1994), 17 O.R. (3d) 103, 69 O.A.C. 216, 109 D.L.R. (4th) 289, 19 M.P.L.R. (2d) 1, allowing an appeal from the Ontario Court (Divisional Court) (1993), 13 O.R. (3d) 493, 62 O.A.C. 321, 103 D.L.R. (4th) 55, 15 M.P.L.R. (2d) 1. Appeal

dismissed.

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The judgment of Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ. was delivered by

1 IACOBUCCI J.:-- This appeal involves a challenge to the constitutional validity of Part III of the Development Charges Act, R.S.O. 1990, c. D.9 (the "Act"), which authorizes Ontario public and separate school boards to impose so-called education development charges ("EDCs") on buildings that result from new development. The major issues involved are threefold: whether the Act is ultra

vires the province with respect to s. 92 of the Constitution Act, 1867; whether the Act violates the guarantees given to separate school supporters pursuant to s. 93(1) of the Constitution Act, 1867; and whether the Act is in violation of ss. 2(a) and 15(1) of the Canadian Charter of Rights and Freedoms. There is also a question with respect to the standing of several of the interveners.

2 I conclude that the education development charges constitute indirect taxation contrary to s. 92 of the Constitution Act, 1867. However, it is also my conclusion that Part III of the Act is intra vires the province as ancillary or adhesive to a valid regulatory scheme pursuant to ss. 92(9), (13) and (16). Further, in my view, the education development charge scheme is a legitimate component of an educational funding model that is fair and non-discriminatory, consonant with the rights and privileges granted in s. 93(1) of the Constitution Act, 1867. Finally, the legislation in question, falling as it does within the scope of s. 93(1), is immune from Charter scrutiny.

I. Background

3 The appellants develop land and build homes in Southern Ontario, including the York Region. In September 1992, the appellants initiated an application in Divisional Court for judicial review of by-laws passed by the respondents, York Region Board of Education and York Region Roman Catholic Separate School Board (the "School Boards"). The by-laws were passed pursuant to Part III of the Act, and require persons seeking building permits to pay an EDC as a condition of obtaining the permit. The purpose of the EDC scheme is to permit school boards to raise the local share for new school construction on land undergoing residential and non-residential development when that development creates the need for new schools.

The EDC scheme

4 Section 30 of the Act provides that if there is residential development that would increase education capital costs in the area of a school board's jurisdiction, that school board may pass by-laws imposing "education development charges" against the land undergoing residential and commercial development in the area. Such by-laws, pursuant to s. 30(3), must designate the categories of residential and commercial development upon which EDCs are to be imposed, and to designate "those uses of land, buildings or structures" upon which EDCs are to be imposed. Section 35 outlines the payment mechanism for the EDCs. The charge is payable to the municipality in which the development takes place on the date that a building permit is issued for a building or other structure to which an EDC applies. Section 35(3) provides that a municipality may withhold a building permit until the EDC has been paid. Section 35(4) states that, with the consent of the Minister of Education, a school board may accept the provision of school facilities from an owner in lieu of the payment of all or any portion of an EDC.

5 The legislation makes no distinction between public and separate school boards, nor between public and separate school supporters. Anyone applying for a building permit for development to which an EDC by-law applies must pay the charge, regardless of their support of the public or the separate school system. It is important to note that EDCs are designed to deal only with education

capital costs made necessary by new residential development. Capital costs associated with existing schools, or the building of schools for existing pupils currently accommodated in portables or sent by bus to distant schools cannot be included. The EDC legislation not only permits school boards to raise capital, but also ensures that new land development bears the cost of infrastructure on its own, rather than imposing an additional burden on existing developments.

6 The method for calculating the amount of EDC that is payable is set out in Education Development Charges, R.R.O. 1990, Reg. 268 ("Regulation 268"). The starting point for the calculation of the charge, under s. 3 of Regulation 268, is the estimated number of new dwelling units that will result from the development on the land subject to the EDCs. The number of estimated growth-related new school pupils is then determined, as well as the number of school projects needed to serve the new pupils. The next factor is the cost of site purchase and construction cost for all the required projects. The percentage of the construction cost to be financed by legislative grant under s. 11(3) of the Education Act, R.S.O. 1990, c. E.2, is factored in, in order to determine the net growth-related education capital cost that will flow from development. A certain percentage of this cost will be paid through EDCs in respect of commercial development. The commercial contribution is calculated by dividing the percentage of growth-related cost that is to be covered by commercial EDCs by the declared value of the commercial building permits issued during the term of the EDC by-law, and multiplying the quotient by 100 to express the EDC on commercial development as a percentage of declared value.

7 An EDC scheme established by a particular school board can only operate with the approval of the Minister of Education. Before passing an EDC by-law, a school board must refer its plans for school facilities that constitute an education capital cost to the Minister of Education for approval (Regulation 268, s. 2). The construction cost and cost of site figures used in calculating EDC must be approved by the Minister of Education, pursuant to Regulation 268, ss. 1, 3(9). The maximum amount of an EDC is limited by the level of provincial grant that will be made, as EDCs can only be used to fund the local share of education capital costs (Regulation 268, s. 5(7)). As well, a school board cannot withdraw funds from an EDC account for a capital project unless final approval for the project has been given by the Minister of Education making a capital grant under s. 11(3) of the Education Act. In this regard, the Minister is bound by s. 122 of the Education Act. As well, the Minister of Education has a general power to ensure compliance with the Education Act, as well as Part III of the Act, and legislation subordinate thereto.

8 This power flows from s. 6(1) of the General Legislative Grants, 1992 Regulation, O. Reg. 119/92 (the "GLG Regulation"), made pursuant to the Education Act:

> 6. -- (1) Where a board fails to comply with the Acts administered by the Minister or the Regulations thereunder, the Minister may withhold the whole or any part of a legislative grant payable until the board has taken the action necessary to correct the condition that caused the grant to be withheld.

9 The proceeds generated by an EDC by-law must be deposited in two interest-bearing accounts; the first account is for EDC revenue raised on account of residential development, and the second account is for EDC revenue raised on account of commercial development (Regulation 268, ss. 5(1)-(3)). If two or more coterminous school boards pass EDC by-laws, the proceeds are to be deposited into two commingled bank accounts (Regulation 268, s. 5(4)). Funds from these accounts may only be withdrawn with the signatures of the treasurers of all the coterminous boards on whose accounts the moneys have been deposited (Regulation 268, s. 5(6)).

II. Relevant Constitutional and Statutory Provisions

A. Constitution Act, 1867

> 92. 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,--
>
> . . .
>
> 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
>
> . . .
>
> 9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
>
> ...
>
> 13. Property and Civil Rights in the Province.
>
> . . .
>
> 16. Generally all Matters of a merely local or private Nature in the Province.
>
> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:--
>
> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union....

B. Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

. . .

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

C. An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools, S. Prov. C. 1863, 26 Vict., c. 5 ("Scott Act")

14. Every person paying rates, whether as proprietor or tenant, who, by himself or his agent, on or before the first day of March in any year, gives, or who, on or before the first day of March, of the present year, has given to the Clerk of the Municipality notice in writing that he is a Roman Catholic, and a supporter of a Separate School situated in the said Municipality, or in a Municipality contiguous thereto, shall be exempted from the payment of all rates imposed for the support of Common Schools, and of Common School Libraries, or for the purchase of land or erection of buildings for Common School purposes, within the City, Town, Incorporated Village or section in which he resides, for the then current year, and every subsequent year thereafter, while he continues a supporter of a Separate School; and such notice shall not be required to be renewed annually; and it shall be the duty of the Trustees of every Separate School to transmit to the Clerk of the Municipality or Clerks of Municipalities (as the case may be) on or before the first day of June in each year, a correct list of the names and residences of all persons supporting the Separate Schools under their management; and every ratepayer whose name shall not appear on such list shall be rated for the support of Common Schools.

20. Every Separate School shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools, and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities, according to the average number of pupils attending such school during the twelve next preceding months, or during

the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township.

D. Education Act, R.S.O. 1990, c. E.2

122. -- (1) Every separate school shall share in the legislative grants in like manner as a public school.

E. Development Charges Act, R.S.O. 1990, c. D.9

30. -- (1) If there is residential development in the area of jurisdiction of a board that would increase education capital costs, the board may pass by-laws for the imposition of education development charges against land undergoing residential and commercial development in that area....

. . .

(3) A by-law passed under subsection (1) shall,

(a) designate the categories of residential development and commercial development upon which an education development charge shall be imposed;
(b) designate those uses of land, buildings or structures upon which an education development charge shall be imposed;

35. -- (1) An education development charge is payable,

(a) to the municipality in which the development takes place on the date a building permit is issued in relation to a building or structure on land to which an education development charge applies; or
(b) if the development takes place in territory without municipal organization, to the board that imposed the education development charge thirty days after the board mails a notice to the owner setting out the amount of the charge.

(2) An education development charge imposed by a board in respect of commercial development is the amount determined in the manner prescribed or calculated using the formula prescribed.

(3) Despite any other Act, a municipality is not required to issue a building permit in relation to a building or structure on land to which an education development charge by-law applies unless the education development charge has been paid.

(4) Despite subsection (1), and subject to subsection (5) and the consent of the Minister of Education, a board may by agreement permit an owner to provide school facilities in lieu of the payment of all or any portion of an education development charge....

(5) If more than one board has jurisdiction in an area and one or more boards are to receive school facilities under subsection (4), all of the boards that have imposed an education development charge in that area are required to be parties to the agreement.

F. Education Development Charges, R.R.O. 1990, Reg. 268

1. ...

"declared value" means the cost on which the building permit fee is calculated;

"elementary rate of grant" means the percentage of the construction cost of an elementary school project or of the cost of site purchase of an elementary school project that may be financed by a legislative grant under subsection 11 (3) of the Education Act;

"elementary yield factor" means a board's per unit estimate of the number of elementary school pupils generated from net new units;

. . .

"secondary rate of grant" means the percentage of the construction cost of a secondary school project or of the cost of site purchase of a secondary school project that may be financed by a legislative grant under subsection 11 (3) of the Education Act;

"secondary yield factor" means a board's per unit estimate of the number of secondary school pupils generated from net new units;

3. A board shall calculate the amount of an education development charge on residential development according to the following procedures, that shall be applied in order beginning with paragraph 1:

1. For each year that the education development charge by-law imposing the education development charge is in force, estimate the number of new dwelling units on land subject to the education development charge.
2. Determine the elementary yield factor or secondary yield factor, or both, as the case requires, or determine the elementary yield factor or secondary yield factor, or both, for each type of dwelling unit distinguished by the board and represented in the net new units.
3. Multiply the net new units for each year by the elementary yield factor or, if the board has distinguished between types of dwelling units in arriving at its elementary yield factor, multiply the net new units of each type of dwelling unit represented in the net new units for each year by the appropriate elementary yield factor.
4. Multiply the net new units for each year by the secondary yield factor or, if the board has distinguished between types of dwelling units in arriving at its secondary yield factor, multiply the net new units of each type of dwelling unit represented in the net new units for each year by the appropriate secondary yield factor.
5. Add the products obtained under paragraph 3 to obtain the total number of estimated growth-related new elementary school pupils.
6. Add the products obtained under paragraph 4 to obtain the total number of estimated growth-related new secondary school pupils.
7. Determine the number of elementary school projects required to serve the estimated growth-related new elementary school pupils determined under paragraph 5.

8. Determine the number of secondary school projects required to serve the estimated growth-related new secondary school pupils determined under paragraph 6.
9. Determine the cost of site purchase and the construction cost for each project determined under paragraphs 7 and 8.
10. Add the cost of site purchases for the elementary school projects determined under paragraph 7 to the construction costs for the elementary school projects to obtain the growth-related capital cost elementary.
11. Add the cost of site purchases for the secondary school projects determined under paragraph 8 to the construction cost for the secondary school projects to obtain the growth-related capital cost secondary.
12. Multiply the growth-related education capital cost elementary by the elementary rate of grant.
13. Multiply the growth-related education capital cost secondary by the secondary rate of grant.
14. Add the products obtained under paragraphs 12 and 13.
15. Add the growth-related education capital cost elementary to the growth-related education capital cost secondary.
16. Subtract the sum obtained under paragraph 14 from the sum obtained under paragraph 15 to obtain the growth-related net education capital cost.
17. If less than 100 per cent of the growth-related net education capital cost is to be financed by education development charges, determine the portion thereof that will be so financed.
18. Subtract the commercial contribution determined under paragraph 2 of section 4 from the growth-related net education capital cost determined under paragraph 16, or the portion thereof determined under paragraph 17, as the case requires.
19. Subtract the amount of any local share that forms part of the adjusted growth-related net education capital cost determined under a prior education development charge by-law and remaining in an education development charges account referred to in subsection 5 (2) at the expiration of the term of the prior by-law from the balance in the account at the expiration of the term of the prior by-law.
20. Subtract the difference obtained under paragraph 19 from the difference obtained under paragraph 18 to obtain the adjusted growth-related net education capital cost.
21. Divide the adjusted growth-related net education capital cost by the net new units to obtain the amount of the education development

charge on residential development.

4. A board shall calculate the amount of an education development charge on commercial development, expressed as a percentage of the declared value, according to the following procedures, that shall be applied in order beginning with paragraph 1:

1. Establish a percentage that is greater than zero but does not exceed 40 per cent, that represents the portion of the growth-related net education capital cost determined under paragraph 16 of section 3, or the portion thereof determined under paragraph 17 of section 3, as the case requires, to be financed by the education development charge on commercial development.
2. Multiply the percentage determined under paragraph 1 by the growth-related net education capital cost determined under paragraph 16 of section 3, or the portion thereof determined under paragraph 17 of section 3, as the case requires, to determine the amount of commercial contribution.
3. Divide the amount of commercial contribution by the estimated declared value of all building permits to be issued during the term of the education development charge by-law imposing the charge in respect of commercial development on land subject to the education development charge imposed by the by-law.
4. Multiply the quotient obtained under paragraph 3 by 100 to obtain the amount of the education development charge on commercial development expressed as a percentage of the declared value.

III. Judgments Below

A. Ontario Court (General Division) (1993), 13 O.R. (3d) 493

10 A three-member panel heard the appellants' application for judicial review. McKeown J. (O'Driscoll J. concurring, White J. dissenting) found that EDCs are an indirect tax. White J. (O'Driscoll J. concurring, McKeown J. holding that the issue need not be decided) found that the EDC scheme is constitutionally invalid under s. 93 of the Constitution Act, 1867, and that laws in relation to education, including the EDC by-laws, are immune from Charter scrutiny.

(i) White J. (dissenting in part)

11 White J. first considered the Charter issue and concluded that the opening words of s. 93 of the Constitution Act, 1867 immunize a provincial statute relating to education from Charter scrutiny, citing Reference re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148.

12 White J. then turned to the question of whether the EDC scheme is indirect taxation by the province contrary to s. 92(2) of the Constitution Act, 1867. After referring to Mill's well-known definition of direct and indirect taxation, White J. considered, at p. 519, Professor La Forest's (as he then was) treatise, The Allocation of Taxing Power Under the Canadian Constitution (2nd ed. 1981), in which it was suggested that while the Mill test is the principal approach to interpreting s. 92(2), "there is a continued recognition and periodic application of the 'categories approach'", first enunciated in City of Halifax v. Estate of J. P. Fairbanks, [1928] A.C. 117 (P.C.). White J. noted, at p. 519, Professor La Forest's comment at p. 90 that "[i]t seems clear that any tax which the courts are willing to characterize as a tax on land is always a direct tax". White J. concluded that the EDC scheme is taxation in the province for the purpose of raising revenue for particular educational needs in accordance with s. 92(2) of the Constitution Act, 1867, for the following reasons at pp. 521-22:

1. The education development charge falls within the category of a tax that courts generally characterize as a direct tax because it is a land tax. Among the reasons for concluding that it is a land tax are the following:

    (a) The education development charge is imposed on "land undergoing residential and commercial development";
    (b) The land subject to the education development charge must be within the territorial jurisdiction of a school board, either public or separate, that passes the relevant by-law imposing the charge;
    (c) The failure to pay an education development charge results in that charge being added to the tax roll of the municipality or board in respect of a specific parcel of land, which parcel of land may be the subject of a forced sale to pay the education development charge just as that parcel of land may be subject to a forced sale if the local rates thereon are not paid.

2. The tax is demanded from the very person who it is intended should pay it....
3. The mere likelihood that following the basic rules of economics all costs including land costs incurred in the production of a finished building, be it

> residential or commercial, will be sought to be recouped from the purchaser of the building cannot convert a tax that, according to its enabling text, appears to be a direct tax into an indirect tax.
>
> 4. ...the economic evidence is compatible with the economic effect of the tax being diffused perhaps to some minor degree only among sellers of raw land, intermediate developers as well as home purchasers....
> 5. There is no proper analogy between the education development charge and a customs or excise tax or a commodity tax which, by its very nature, will tend to be passed on intact to the purchaser of the article taxed as an identifiable component of the price paid by the consumer.
>
> ...the education development charge is a land tax or a tax on property. It is, in my opinion, a tax on property regardless of who may have a legal interest in the property. The property is the economic thing against which the tax is aimed.

13 White J. then considered whether the EDC scheme constitutes a breach of s. 93 of the Constitution Act, 1867. He noted that the pre-Confederation law in effect at the time of the enactment of the Constitution Act, 1867 was the Scott Act. Section 20 of the Scott Act provided that every separate school was entitled to a share in the annual provincial grant for the support of "common schools", and to a share in all other "public grants, investments and allotments for Common School purposes". The appellants had argued that separate school supporters are entitled to a proportionate share of all public education funds apart from local assessment, pursuant to this provision. The respondents had argued that the Act and the EDC scheme do not prejudicially affect the rights and privileges of separate school supporters, as the legislation permits both separate and public school boards equal access to EDCs. White J. was of the view that the governing precedent was Attorney General of Quebec v. Greater Hull School Board, [1984] 2 S.C.R. 575, which he commented upon as follows at p. 527:

> I interpret this case as standing for the proposition that goodwill and benign treatment on the part of the school administration of the Ministry of Education to a separate school board is not enough. An ironclad explicit statutory protection is required in the legislation creating a new tax imposition or in parallel legislation applying to the new tax imposition. I regard the Greater Hull case as also standing for the proposition that the absence of an explicit safeguard is fatal to the scheme of the system and the provisions relating to the whole system. The absence of such an explicit safeguard undermines the system in both its collection phase and its payout phase as being constitutionally invalid in contemplation of s. 93(1).

White J. found, at p. 527, that the Act and the EDC scheme do not "establish any relation at all

proportionate or otherwise between what a separate school board claims as an education development charge and what a public school board receives as an education development charge". He concluded, at pp. 527-28, that the EDC scheme failed "to provide explicitly that education development charges be shared in like manner or proportionately as between public and separate schools". Further, he rejected, at p. 528, the respondents' assertion that s. 122 of the Education Act can be read with the provisions of the Act establishing the EDC scheme so as to "result in the deduction that separate and public school boards will be treated 'in like manner' in respect of education development charges". Accordingly, White J. held that Part III of the Act and its regulations were invalid as violating s. 93(1) of the Constitution Act, 1867.

(ii) McKeown J.

14 McKeown J. first reviewed the evidence that EDCs are passed on and ultimately borne by home purchasers, as a cost factored into the price of a new house. He noted that this evidence was consistent with the "user pay philosophy" behind the EDC scheme.

15 McKeown J. then considered whether EDCs should be viewed as charges or taxes. He noted, at p. 505, that if they were "a charge imposed to defray specific capital education expenditures rather than a tax within the meaning of s. 92(2), then a school board possesses the power within its jurisdiction to pass by-laws imposing such charges" (see Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 780 (P.C.)). McKeown J. concluded as follows at pp. 507-8:

> Revenue raised under the scheme of the Development Charges Act for the construction of schools is closer in nature to money raised to build other essential municipal buildings. While this charge may not be imposed to "raise revenue for general purposes" as conventionally understood, it is much closer in nature to a tax for raising revenue than it is to a charge to defray costs. Neither the municipality nor the school boards have any discretion over the use of these funds. These monies can only be used for capital expenditures approved by the Minister of Education pursuant to his authority under the Education Act. Although the charge is attached to the cost of purchasing a building permit, that appears to be for administrative convenience rather than any real connection to the construction of a house.
>
> Accordingly, we find that an education development charge is a tax for the purpose of s. 92(2) of the Constitution Act, 1867.

16 McKeown J. then turned to the incidence of EDCs. He noted that Fairbanks, supra, (relied on by White J.) did not apply Mill's test to taxes already categorized in 1867, for example, property and income taxes. McKeown J. stated that although he did not accept Fairbanks as the law, he would nevertheless determine whether EDCs could be defined as property taxes. He summarized the indicia of a property tax as follows, at p. 510: "the tax must be based on the value of the property....

[T]the property must be assessed without regard to exploration, production or any transactions". McKeown J. stated at p. 510 that:

> The form of the words used in s. 30 of the Development Charges Act, "land undergoing development", cannot change the real purpose of the tax which is a tax directed at the ultimate purchaser of a building or edifice. It cannot be a property tax just because the municipality has the same collection rights against the property when the education development charge is not paid as it has against arrears in property taxes. Thus this is not a property tax.

McKeown J., at p. 510, characterized EDCs as "an indirect tax on a product, i.e., the building of homes or offices or factories. It is a tax for the purpose of building schools". He concluded at p. 516 that:

> When one looks at the general tendency of the education development charges, in my view, the fact that in exceptional cases the tax may not be passed on does not matter. As Professor Fallis said, in 80 to 90 per cent of the cases, the education development charges will be passed on. This tax is not recouped by the taxpayer by more or less circuitous operation of economic forces. The education development charge clings to the product going to market in much the same way as a manufacturer's sales tax does. The key is whether it relates to trading transactions. The education development charge is a tax on land undergoing development, not on the land underlying the development. The Development Charges Act does not purport to tax the final consumer. Accordingly, this is not direct taxation within the province.
>
> As I am of the view that the education development charge is indirect taxation contrary to s. 92(2) of the Constitution Act, 1867, it is not necessary to determine the other issues relating to s. 93 of the Constitution Act, 1867 or ss. 2(a) and 15 of the Charter of Rights and Freedoms.

(iii) O'Driscoll J.

17 O'Driscoll J. agreed, for the reasons given by McKeown J. that the EDCs impose indirect taxation contrary to s. 92(2) of the Constitution Act, 1867. For the reasons given by White J., O'Driscoll J. agreed at p. 528 that the EDC by-laws "fail to guarantee proportionality ('in like manner') as between public school supporters and separate school supporters as demanded by s. 93 of the Constitution Act, 1867". Finally, on the Charter issue, O'Driscoll J. agreed with White J. that provincial statutes relating to education are immune from Charter scrutiny.

B. Ontario Court of Appeal (1994), 17 O.R. (3d) 103

18 Carthy J.A. (McKinlay and Goodman JJ.A. concurring) first dealt with the issue of standing. He found that the respondents (the appellants in the appeal before this Court) had standing to argue that the legislation in question amounted to unconstitutional indirect taxation. He noted that two of the respondents would face EDCs they should not have to pay if the EDC scheme were beyond provincial powers. With respect to the respondents' standing to argue the s. 93 proportionality issue, Carthy J.A. commented at p. 107 that the respondents' "sole interest is in the EDC and their obligation to pay it". After reviewing the relevant principles, as articulated in Hy and Zel's Inc. v. Ontario (Attorney General), [1993] 3 S.C.R. 675, he concluded as follows, at pp. 108-9, with respect to standing:

> The seriousness of the issue is obvious. The direct interest of the respondents is another question. Their interest is in not paying the EDC, but they have no direct interest in proportional allocation of funds to separate schools. Even less do they have an interest in the overall funding model which, in my view, is the subject which must be addressed to determine constitutionality. Their selective interest indicates why they should not have been granted status on a broad issue. Finally, there most certainly is another available means of bringing the issue to court. For one example, the York Region Roman Catholic School Board could have done so in these very proceedings had it decided not to defend the constitutionality of the funding scheme.
>
> For these reasons I would overrule the Divisional Court's grant of status to the respondents to argue the s. 93(1) issue. If the judgment quashing the by-laws is to be sustained, it must be on the division of powers argument.

19 After reviewing s. 92, Carthy J.A. noted at p. 109 that EDCs "are only a part of an overall education funding package". He stated that EDCs are an element of the planning process, replacing lot levies as a condition of subdivision approval under the Planning Act, R.S.O. 1990, c. P.13. Carthy J.A. stated that EDCs are imposed on land based on the number of housing units to be produced or based on the value of commercial buildings. While the charges are payable at the building permit stage, Carthy J.A. remarked at p. 109, that "[i]n many cases homes will be pre-sold at this stage, suggesting the likelihood that the charges will be passed on as part of the price of the lot and building". He also found it significant that the funds raised by the EDCs are placed in a bank account in the names of both school boards and can only be paid out to fund school construction approved by the Minister of Education. Carthy J.A. commented at pp. 109-10 as follows:

> Thus, while the charge may be characterized as indirect because it

> tends to cling to the housing commodity being developed, its purpose and application is specific to the provision of schools and cannot be a source of general revenue for the school board or the province.

20 Carthy J.A. then referred to Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371, which was released while the instant appeal was under reserve to the Court of Appeal. Carthy J.A. was of the view that the reasoning in Allard was particularly apposite to the issues at hand. Allard involved the regulation of gravel pits by local council by-laws under the British Columbia Municipal Act, R.S.B.C. 1979, c. 290. Municipalities issued permits for the removal of gravel, and charged an annual fee based upon the estimated amount of gravel to be removed from a site. The annual fee was not fixed, but varied according to the volume of gravel extracted. The by-laws were attacked as ultra vires provincial powers as granted by s. 92 of the Constitution Act, 1867. This Court, applying Mill's test, held that as the charge attached to a commodity in the course of production, the general tendency would be for the charge to be passed on to the consumer. Carthy J.A., at pp. 110-11, applied this reasoning with respect to the incidence of the EDCs:

> In my view, the same reasoning applies to the EDCs. They are imposed on land and some authorities could be called forth to say they are, on that account, direct taxes. Yet, the reality is that the charges are imposed as a fee for constructing buildings for sale. The amount charged relates to the number of units, or value in the case of commercial development, and common sense therefore says that the tendency will be to pass the cost along.
>
> I, therefore, have no hesitation in concluding on the basis of the reasoning in Allard, that the EDCs are also indirect charges within the meaning of s. 92 of the Constitution Act, 1867.

21 Carthy J.A. then turned to the issue of whether EDCs, as indirect taxation, could be justified under ss. 92(9), (13) and (16) of the Constitution Act, 1867, as the gravel fees in Allard had been justified. He noted the concern expressed in Allard that if these subsections are applied too generously in favour of the provinces, the s. 92(2) restriction may become meaningless. Carthy J.A., at p. 111, quoted this Court's description in Allard (at p. 402) of the nature of the provincial power that flows from ss. 92(9), (13) and (16):

> In the above cases, decided either by this Court or the Privy Council, one can discern a consistent treatment of the scope of s. 92(9) of the Constitution Act, 1867. Although somewhat broad language was used by Lord Atkin in Shannon, supra, it appears generally true that s. 92(9), in combination with ss. 92(13) and (16), comprehends a power of regulation through licences. It is a power which is not confined to the requirement of direct taxation in s. 92(2). However, in so far

> as it comprehends indirect taxation, these cases -- either explicitly or upon their facts -- have limited the power of indirect taxation such that it can only be used to defray the costs of regulation.

Carthy J.A., also quoted the test set out in Allard at p. 405, as follows: "can the variable fees be supported as ancillary or adhesive to a valid provincial regulatory scheme?" Carthy J.A. found, at p. 112, that the explicit purpose of the EDCs is to raise funds for school construction necessitated by new urban development, and that "[t]he charges are thus most certainly ancillary or adhesive to the production of new schools". He noted that there would be no excessive recovery under the scheme, as the amount charged is based on specific cost estimates, and only funds sufficient to meet actual costs are released. Carthy J.A., at p. 113, concluded as follows:

> Ours is a much easier case than Allard for finding that a regulatory scheme exists. The province administers and regulates land development. It exercises those powers through a variety of statutes. It recognizes that new development produces a need for new schools and that there may be inequity in visiting these costs on existing home-owners. It has already delegated to the school boards the responsibility for new school construction and now delegates to them the power to decide which of two sources, EDCs or local assessment, shall provide the funding. The municipality is obligated to collect the funds, regardless of source, and the province retains supervisory control over expenditure. That is surely a description of a regulatory scheme of land development and provision of associated educational facilities. The licensing body is the municipality issuing the building permit, and a condition of the issuance is payment of a charge which is specifically calculated to meet one cost which will inevitably flow from construction under the permit.
>
> In my view, this is a model for compliance with s. 92 of the Constitution Act, 1867 and does not in the slightest way impinge upon the integrity of s. 92(2). It is an indirect tax that is "ancillary or adhesive" to a regulatory scheme clearly falling within provincial responsibility, and is justifiable under one or more of s. 92(9), (13) and (16) of the Constitution Act, 1867. To me the overall constitutionality of this scheme is so clear that I find it unnecessary to consider each of those subsections individually.

IV. Issues

1. Do the appellants have standing to raise the issues in questions 2(i) and 3?
2. Is Part III of the Development Charges Act, R.S.O. 1990, c. D.9, which

authorizes public and separate school boards to impose education development charges, ultra vires the Legislature of Ontario in that it:

(i) authorizes the imposition of an indirect tax contrary to s. 92(2) of the Constitution Act, 1867; or

(ii) prejudicially affects a right or privilege with respect to denominational schools which any class of persons have by law in the province at the union contrary to s. 93(1) of the Constitution Act, 1867?

3.

(i) Is Part III of the Act contrary to ss. 2(a) and 15(1) of the Canadian Charter of Rights and Freedoms?

(ii) If the answer to question 2(i) is affirmative, is Part III of the Act saved by s. 1 of the Charter as a reasonable limit, prescribed by law as can be demonstrably justified in a free and democratic society?

V. Analysis

A. Historical and Current Legislative Context of Education Financing

22 It is important to consider both the historical and legislative context within which the EDC scheme is situated in order to resolve the issues at hand. At the time of Confederation, responsibility for the financing of education was shared by the state, local authorities, and parents of pupils. From expert evidence in the record, apparently schools were historically supported through five sources of revenue: provincial and municipal grant revenue, local taxation, rates (i.e., fees charged to property owners), parental support for items like textbooks, and voluntary subscriptions. Currently, grants and taxation based on local assessment, apart from EDCs, constitute the major sources of school revenues.

23 Generally, in 1867, the operating expenses of school boards were funded both locally and through provincial grants. By contrast, the capital expenditures of school boards were in large part financed only locally, with provincial grants for capital expenditures being made only in rare and unusual circumstances. Today, capital expenditures are financed both provincially, through capital grants, and locally, through rates on property. EDCs are imposed on designated land undergoing development without regard to the school support of the land owner. As well, rates can be used for operating and capital expenses, while EDCs can only be used to fund the local share of approved

capital expenditures required by the new development.

24 Historically, one-half of a teacher's salary was paid to both public and separate school boards by way of equal per-pupil grants. This was sometimes referred to as proportionality between public and separate school boards. However, this approach resulted in unequal funding as between urban and rural boards, owing to the differences in local assessment wealth. Accordingly, the province of Ontario moved toward a new funding scheme that emphasized equality of educational opportunity which looks to educational needs or requirements for the students involved, rather than simple equality in terms of financing. Today, those school boards with a richer assessment base, whether public or separate, receive a smaller provincial grant. This funding system strives to yield equitable financial resources for equal tax effort on a per-pupil basis and flows from s. 122 of the Education Act, which states that "Every separate school shall share in the legislative grants in like manner as a public school". Different boards, whether public or separate, receive different sized grants; however, the size of the grant is calculated "in like manner" for a separate school board as for a public school board, that is, according to need.

25 A school board has the authority to build a school on its own without ministerial approval or funding (Education Act, s. 170, paras. 6, 7; s. 171(1), para. 7; s. 195). However, if provincial grants are sought, the approval of the Minister is required. Provincial capital allocations, as discussed above, are based on need. This criterion applies equally and "in like manner" to both public and separate school boards. The amount of grant is determined pursuant to s. 51 of the GLG Regulation, on the basis of equalized assessment, adjusting grants according to the relative assessment wealth of a school board, whether public or separate. For example, the York Region Board of Education's provincial grant percentage of total capital costs was 33 percent in 1990 and 26 percent in 1991. The York Region Roman Catholic Separate School Board's provincial capital grant percentage of total capital costs was 82.7 percent for elementary schools, and 74.5 percent for secondary schools in 1990, and 67.4 percent and 60.5 percent, respectively in 1991.

26 It is interesting to note that before 1945 the cost of building schools was borne almost entirely through local rates. In 1945, the province began to pay 50 percent grants toward capital costs. By 1958, these grants were being made on an "equalized" basis, taking into account the assessment wealth of each board. The percentage of provincial grant increased to 75 percent, on average, although some boards received up to 90 percent and some boards received nothing. In 1989, while the average percentage of provincial grants for capital projects had dropped to 60 percent, the total amount of provincial grants needed to cover capital education costs in Ontario had grown because of an increasing school population.

27 With respect to the legislative context, the EDC scheme is, as noted above, set out in Part III of the Act. Part I of this Act authorizes municipalities to impose development charges in order to defray capital costs necessitated by municipal infrastructure for new development. This infrastructure includes water mains, sewers, roads, libraries, parks and recreational facilities. Before the enactment of this legislation, municipalities financed infrastructure solely through the

imposition of lot levies. However, the Act recognizes the principle that "new development should pay its own way", and should not impose further tax burdens on existing residents. The provision of adequate school facilities in a given residential development is an integral element of urban planning.

28 This is reflected in the Planning Act which explicitly states that the "adequate provision and distribution of educational... facilities" and the "adequacy of school sites" are important considerations that must be factored into land use plans (ss. 2(i), 51(24)(a) and (j), as am. by S.O. 1994, c. 23, ss. 5, 30). EDCs play a significant role in addressing this aspect of urban planning. The Act, including the EDC scheme, is one component of a complex regulatory framework governing land development in Ontario, comprised of at least nine different statutes: the Building Code Act, R.S.O. 1990, c. B.13, the Environmental Assessment Act, R.S.O. 1990, c. E.18, the Environmental Protection Act, R.S.O. 1990, c. E.19, the Fire Marshals Act, R.S.O. 1990, c. F.17, the Municipal Act, R.S.O. 1990, c. M.45, the Ontario Municipal Board Act, R.S.O. 1990, c. O.28, the Ontario Water Resources Act, R.S.O. 1990, c. O.40, the Planning Act, and the Conservation Authorities Act, R.S.O. 1990, c. C.27.

B. Standing

29 The Court of Appeal, at pp. 108-9, found that the appellants (the respondents before the Court of Appeal) lacked the standing to challenge the constitutionality of the EDC scheme on any basis other than s. 92(2) of the Constitution Act, 1867:

> ...we have had no argument pitting the entire funding scheme against s. 93(1) of the Constitution Act, 1867 and, therefore, cannot conclude for or against constitutionality. This unsatisfactory circumstance stems from the question of status.
>
> The Supreme Court of Canada has spoken at regular intervals on the subject of status concerning constitutional issues, most recently in Hy and Zel's Inc. v. Ontario (Attorney General). ... The three-part test is now well known: The court must consider the seriousness of the issue, the direct interest of the party requesting status, and the other available means of bringing the issue to court.
>
> The seriousness of the issue is obvious. The direct interest of the respondents is another question. Their interest is in not paying the EDC, but they have no direct interest in proportional allocation of funds to separate schools. Even less do they have an interest in the overall funding model which, in my view, is the subject which must be addressed to determine constitutionality. Their selective interest indicates why they should not have been granted status on a broad issue. Finally, there most certainly is another available means of bringing

> the issue to court. For one example, the York Region Roman Catholic School Board could have done so in these very proceedings had it decided not to defend the constitutionality of the funding scheme.
>
> For these reasons I would overrule the Divisional Court's grant of status to the respondents to argue the s. 93(1) issue. If the judgment quashing the by-laws is to be sustained, it must be on the division of powers argument.

30 Because of the serious and complex nature of the issues before this Court, I will assume, without deciding, that the appellants have standing. However, a brief comment is in order with respect to the role of the Interveners Guzman and Ciccone, and the Interveners Pope and Seto (the "standing interveners").

31 The standing interveners adopt the submissions of the appellants, saying that if the appellants do not have standing on the s. 93 issue and the Charter question, they themselves have standing to appeal on these grounds. In support of this submission, the standing interveners cite Switzman v. Elbling, [1957] S.C.R. 285. In that case, in which the plaintiff sued for cancellation of a lease, the parties' interest under the lease lapsed by the time the matter came before the Court. The only lis remaining was between the defendant (appellant) and the intervener the Attorney General of Quebec. The Court held that the presence of the intervener with an interest adverse to a principal party made the appeal properly constituted. That case is clearly distinguishable from the instant appeal. Simply put, the interests of the parties in this appeal have not lapsed under a contractual agreement.

32 The standing interveners also cite Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, and in particular the following passage at p. 360: "the presence of interveners who had a stake in the outcome supplied the necessary adversarial context to enable the Court to hear the cases". However, they overlook the passage at p. 359 where it is made clear that the Court is referring to the specific principle of "collateral consequences", which is not relevant to the facts at hand:

> [The requirement of an adversarial context] may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context.

. . .

> The principle that collateral consequences of an already completed cause of action warrant appellate review was most clearly stated in Sibron v. New York, supra. The appellant in that case appealed his conviction

> although his sentence had already been completed. [Emphasis added.]

33 The standing interveners, in my opinion, have no standing in the instant appeal. I would only add that this Court takes an unfavourable view of attempts to back up an appellant's lack of standing by way of interveners. Such efforts to bootstrap flawed standing are to be discouraged.

C. Section 92(2): Incidence of the EDC

34 As the Privy Council noted in Atlantic Smoke Shops, Ltd. v. Conlon, [1943] A.C. 550, at p. 563, the starting point in any discussion of incidence is Mill's seminal description of direct and indirect taxation:

> Their Lordships must first consider whether the tax in the form (a) is a valid exercise of provincial legislative powers. It has been long and firmly established that, in interpreting the phrase "direct taxation" in head 2 of s. 92 of the Act of 1867, the guide to be followed is that provided by the distinction between direct and indirect taxes which is to be found in the treatise of John Stuart Mill. The question, of course, as Lord Herschell said in Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario, is not what is the distinction drawn by writers on political economy, but in what sense the words were employed in the British North America Act. Mill's Political Economy was first published in 1848, and appeared in a popular edition in 1865. Its author became a member of parliament in this latter year and commanded much attention in the British House of Commons. Having regard to his eminence as a political economist in the epoch when the Quebec Resolutions were being discussed and the Act of 1867 was being framed, the use of Mill's analysis and classification of taxes for the purpose of construing the expression now under review is fully justified.

35 Mill's formulation (Principles of Political Economy (1893), vol. 2, Book V, c. 3, sec. 1) is as follows:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons 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.

36 The reasons for the constitutional prohibition of indirect taxation by the provinces are set out by Dickson J. (as he then was) in dissent in Canadian Industrial Gas & Oil Ltd. v. Government of

Saskatchewan, [1978] 2 S.C.R. 545, at pp. 582-83:

> There can be no doubt that by the words "direct and indirect taxation" the Fathers of Confederation contemplated certain distinct categories of taxation, as well as a general test of directness. Only certain of such categories, such as income and property taxes, were to be available to the Legislatures. There were two reasons for this. The first was based on arcane political economy. It was thought that a direct tax would be more perceived than an indirect tax. The effect was thought to provide for greater scrutiny and resistence by the electorate with a resulting parsimony in public expenditure. The second reason proved wrong from the start. It was thought that provincial activities would be limited and revenue needs would be slim; the Legislatures, therefore, would have no necessity to resort to most tax pools.

37 Professor La Forest, as he then was, explores these reasons in greater detail in The Allocation of Taxing Power Under the Canadian Constitution, supra, at pp. 2-4:

> The functions and responsibilities assigned to the provinces, though important, were not costly. The maintenance of a civil government, the administration of justice, education, local works and undertakings, welfare -- all these involved modest expenditures in 1867, and it was anticipated they would remain fairly static. The vast responsibilities now exercised by government in these fields could not be foreseen in the laissez faire era. In consequence the sources of revenue made available to the provinces under the Confederation agreements were either restricted or unattractive. The major sources of provincial revenue, in fact, were not intended to be taxation. Provision was made for payment of subsidies by the federal government to the provinces which, in the early years of Confederation, comprised nearly half the provincial revenues. Moreover, the public domain, excluding such items as canals, public harbours, railroads, military lands, and other assets required for the performance of federal functions, remained to the provinces. It was only as a last resort that the provinces were expected to levy taxation; and to curb any inclination the legislatures might have to embark on overly ambitious schemes, the major taxes allocated to them were the unpopular direct taxes. Any expansion of provincial governmental expenditures, it was thought, could be met by increased returns from the public domain. Thus Galt in discussing the sources of provincial revenues under the Quebec Resolutions had this to say:
>
> > We may, however, place just confidence in the development of our resources, and repose in the belief that we shall find in our territorial domain,

> our valuable mines and our fertile lands, additional sources of revenue far beyond the requirements of the public service. If, nevertheless, the local revenues become inadequate, it will be necessary for the local governments to have resort to direct taxation; and I do not hesitate to say that one of the wisest provisions in the proposed Constitution, and that which affords the surest guarantee that the people will take a healthy interest in their own affairs and see that no extravagance is committed by those placed in power over them, is to be found in the fact that those who are called upon to administer public affairs will feel, when they resort to direct taxation, that a solemn responsibility rests upon them, and that that responsibility will be exacted by the people in the most peremptory manner.

Reference to contemporary sources shows that the meaning of direct taxation, even during the period of Confederation, was quite broad, including in addition to property taxes, death duties and income taxes. It was not because of its narrow scope that politicians underrated direct taxation. It was because they felt that politically it would be extremely difficult to impose; hardly anything comes out more clearly in the debates of the legislatures of the time than the extreme unpopularity of direct taxation. Such taxes, as the name implies, are those imposed on the taxpayer directly, as compared with indirect taxation like customs duties which are concealed from the taxpayer in the price of some commodity or service.

38 Some commentators suggest another rationale for limiting the provinces to direct taxation; for example, Professor Hogg states in Constitutional Law of Canada (3rd ed. 1992), sec. 30.2(b):

> Why does s. 92(2) limit the provinces to direct taxation? The answer is that the limitation is a corollary to the general principle, discussed later in this chapter, that provincial taxing powers (like other provincial legislative powers) are confined to the territory of the province. The leading feature of an indirect tax is, as we have noticed, that it is likely to be passed on by the initial taxpayer through the incorporation of the tax into the price of goods or services provided by the initial taxpayer. What this means is that a tax that is initially levied on a taxpayer within the province could ultimately be borne by a consumer outside the province. If that occurred, the province would be taxing a person to whom it provided no governmental benefits and to whom it was not accountable. This result is avoided if the province is restricted to direct taxation, where the initial

taxpayer within the province is also the person who ultimately bears the tax.

As noticed earlier, even a direct tax will be circuitously recouped if it forms part of the overhead of a business. But it is obviously neither possible nor desirable to exclude from the provincial taxing power all taxes that are in fact recouped by the initial taxpayer. The test of directness is a justiciable means of excluding from provincial power at least those taxes that are most likely to be passed on, and thereby confining provincial power to those taxes the burden of which is most likely to remain within the province.

39 However, Professor La Forest comments, at pp. 111-12 as follows:

The limitation of the provinces under section 92(2) of the British North America Act to taxation "within the Province" has served the important function of dividing the available tax resources among the provinces. Perhaps the first point to note is that while a tax is, of course, always paid by a person, the limitation does not restrict the provinces to taxing persons in the province. A province may also levy taxes on property or transactions or benefits acquired in the province, so long as the taxes are direct. In such cases it is irrelevant that the tax may be borne by a person outside the province. Thus, no one has ever questioned the constitutional validity of ordinary municipal rates on real estate on the ground that a landowner (upon whom the tax will in practice usually fall) resides outside the province.

If such taxes were held unconstitutional for this reason, nonresidents would be permitted to exploit the resources of a province and take advantage of the protection afforded by its laws without contributing to the costs of its operations....

Though a province may impose taxes on persons, property, transactions, and benefits in the province, they must of course be properly framed to reach out to the permissible limits. Thus, a tax on a person, income, property, or transaction outside the province is invalid; but a tax on a person in the province in respect of his income or other benefit received outside the province, and a tax on income or property in the province owned by a nonresident are valid.

Professor La Forest also observes at p. 113 that:

It will be obvious from the foregoing that a taxpayer may, in practise, be taxed by several provinces in respect of the same economic interest. The courts

> could, of course, have held that a tax measured by an extraprovincial standard was in substance a tax on an asset in another province. But they have shown no disposition to police the provinces in this way and have left it to the legislatures to judge the soundness, wisdom or expediency of taxing measures. Only when a provincial tax amounts in substance to a regulation of a federal matter will the courts intervene. Mutual restraint based on political or economic considerations or interprovincial arrangements have, however, been sufficient until now to prevent the problem of multiple taxation from becoming acute.

40 Rand J. in Canadian Pacific Railway Co. v. Attorney General for Saskatchewan, [1952] 2 S.C.R. 231, at pp. 251-52 (see also Allard, supra, at p. 396, and Minister of Finance of New Brunswick v. Simpsons-Sears Ltd., [1982] 1 S.C.R. 144, at p. 162) elaborated helpfully upon the hallmarks of an indirect tax, as follows:

> If the tax is related or relateable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market.

41 Of course, it is the general tendency of the tax that is of concern, rather than the ultimate incidence of the tax in the circumstances of a particular case, Allard, supra, at p. 397:

> ...the court in Colpitts seems to suggest that an indirect tax involves a perfect correlation between a tax and the increased cost of a commercial item. I do not believe that the helpful approach of the Saskatchewan case is rendered sterile simply because certain units of a taxed commodity do not reach the market. While the tax imposed with reference to such units may indeed be absorbed into general "production costs", that does not prevent the tax from clinging as a burden to the vast majority of units which end up entering the market. To the extent that Colpitts denies this proposition, I would overrule it.

(See also Bank of Toronto v. Lambe (1887), 12 App. Cas. 575 (P.C.); Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario, [1897] A.C. 231 (P.C.); Cairns Construction Ltd. v. Government of Saskatchewan, [1960] S.C.R. 619.)

42 As Professor La Forest notes at p. 79, the test of incidence is based on a legal, rather than an economic distinction:

> Modern economic analysis has largely stripped Mill's distinction of meaning. But the courts have not abandoned it on that account. This has not been necessary because in their hands it is a legal, rather than an economic tool. From the beginning the Privy Council made it clear that its task was not to follow the burden of a tax in the manner of economists but

> to construe the term "direct taxation" as used in the British North America Act. Mill's definition as used by the courts required that the general incidence of a tax should be established in accordance with the general understanding of men, not its actual effect as traced by economists. Thus, a customs duty was in their view a classic instance of an indirect tax, since its general tendency was to be passed along, and it was nonetheless an indirect tax though private bargains or market conditions might compel importers to pay it themselves.

43 When determining the incidence of a tax, it is important to bear in mind the context within which the tax operates as well as the purpose of the tax. In the case at hand, the EDCs are a tax on development using land as an instrument to achieve the desired end. The purpose of the EDC scheme is to ensure that education capital costs made necessary by new residential development are borne by the new development itself, rather than imposing an additional burden on existing homeowners. Significantly, capital costs associated with existing schools, or the building of schools for existing pupils currently accommodated in portables or sent by bus to distant schools cannot be defrayed through revenues raised by EDCs.

44 White J. of the Divisional Court, relying on Fairbanks, supra, found at p. 521 that the "education development charge falls within the category of a tax that courts generally characterize as a direct tax because it is a land tax". In Fairbanks, the City of Halifax levied a business tax under its charter. The business tax was payable by every person occupying real property for the purpose of any trade, profession or calling for purposes of gain, and was assessed on 50 percent of the capital value of the property (Fairbanks, at pp. 120-21). A majority of the Supreme Court ([1926] S.C.R. 349) had found the incidence of the business tax to be indirect, as in the ordinary course of business the owner of the real property could be expected to pass the tax on to his or her tenant.

45 The Privy Council took a different approach, Viscount Cave, L.C., stating at pp. 124-25 that:

> ...their Lordships have primarily to consider... whether [the business tax] is in its nature a direct tax within the meaning of s. 92, head 2, of the Act of Union. The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories -- namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a Provincial government are made to extend. From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Thus, taxes on property or income were everywhere treated as direct taxes; and John Stuart Mill himself, following Adam Smith, Ricardo and James Mill,

> said that a tax on rents falls wholly on the landlord and cannot be transferred to any one else. "It merely takes so much from the landlord and transfers it to the State" (Political Economy, vol. ii., p. 416). On the other hand, duties of customs and excise were regarded by every one as typical instances of indirect taxation. When therefore the Act of Union allocated the power of direct taxation for Provincial purposes to the Province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the Provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. To hold otherwise would be to suppose that the framers of the Act intended to impose on a Provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the conclusion reached should afterwards be held to be wrong.
>
> What then is the effect to be given to Mill's formula above quoted? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed; but it cannot have the effect of disturbing the established classification of the old and well known species of taxation, and making it necessary to apply a new test to every particular member of those species. The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation; and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation.

46 I agree that the incidence of a land tax, in the traditional sense, will be direct. The hallmarks of a land tax are that the tax is, of course, imposed on land against the owner of the land, and that the tax is assessed as a percentage of the value of the land, or as a fixed charge per acre. The tax may be an annual, recurring assessment, or a one-time charge. In some cases, the tax may be enforced through the sale of the land. Although landowners, like everyone, may wish to pass on their tax burden to someone else or otherwise avoid taxation, this desire or ability does not transform the direct nature of the tax into an indirect one. I also accept that the case law reveals that land taxes are generally direct taxes; but I do not believe the case law prevents a tax on land by itself from being treated as an indirect tax. (See, in addition to Fairbanks, supra, City of Montreal v.

Attorney-General for Canada, [1923] A.C. 136 (P.C.); Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Co., [1950] A.C. 87 (P.C.); Rattenbury v. Land Settlement Board, [1929] S.C.R. 52; Reference re Validity of Section 31 of the Municipal District Amendment Act, 1941, [1943] S.C.R. 295; Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, [1932] 4 D.L.R. 750 (Alta. S.C., App. Div.); and Rural Municipality of Bratts Lake v. Hudson's Bay Co., [1918] 2 W.W.R. 962 (Sask. S.C.).)

47 In the case at bar, an EDC may at first blush seem to bear the characteristics of a land tax in that it is, in the words of the enabling legislation, imposed on "land undergoing residential and commercial development". Further, the failure to pay the EDC results in the charge being placed on the tax roll in respect of a specific parcel of land. In many respects, the EDC scheme is a novel scheme of taxation which involves features of both direct and indirect taxation.

48 However, in my view, EDCs are not true land taxes in the traditional sense. The purpose of the EDC scheme is not taxation of land, but rather, taxation imposed in order to defray the costs of infrastructure necessitated by new residential development. As McKeown J. of the Divisional Court noted at p. 510, "[t]he land can sit forever without attracting tax if no development is undertaken". While the EDC collection mechanism is linked to land, it is not the ownership of land qua land that is the object and purpose of the tax, but rather, the costs of infrastructure associated with new development upon land. The assessment of the tax is not based upon the value of the land, but rather, is based on the impact development will have in terms of creating a need for educational services. Although the "categories approach" articulated in Fairbanks may be of some relevance on other facts, it is my view that in the instant appeal, it is of no application. Rather, the incidence of the EDCs must be determined according to Mill's formulation, as discussed above.

49 As I see it, the general tendency of the EDCs is to be passed on to the ultimate purchaser of the new building. The vast majority of new development is undertaken by developers, who benefit from economies of scale when undertaking multi-unit building projects, and who have every intention of selling the new buildings and homes. As Carthy J.A. stated at p. 110 for the Court of Appeal below, "common sense therefore says that the tendency will be to pass the cost along". It is true that in certain instances, the ultimate owner of a new home will also have been the builder, and thus will have paid the EDC directly. However, this is not sufficient to dislodge the general tendency of the tax. Indeed, the legislation itself is indifferent as to who actually bears the cost of an EDC: it is the person applying for a building permit from whom the tax is collected, whether this be the developer or the ultimate homeowner. This is a further indication of indirectness, Professor La Forest, supra, at p. 86:

> There are situations where actual payment of a tax is required of one person for administrative convenience but where it is obvious that the tax is really directed at another ascertained person. These situations differ from traditional indirect taxes such as customs and excise where the ultimate incidence of the taxes is a matter of indifference to the legislature.

In a sense, EDCs are imposed in the course of manufacture on the commodity to be sold, that is, the new house or building. Most of the charge payers, the majority of whom are developers, intend to trade in the commodity, that is to sell the newly constructed buildings. It follows, in my view, that EDCs cling as a burden to new buildings when they are brought to market. Accordingly, EDCs constitute indirect taxation and are ultra vires provincial competence under s. 92(2).

50 However, it is my opinion that the EDC scheme is ultimately intra vires the province as ancillary to a valid regulatory scheme for the provision of educational facilities as a component of land use planning, pursuant to ss. 92(9), (13) and (16) of the Constitution Act, 1867, as interpreted by Allard, supra.

51 In Allard, a municipality passed a by-law prohibiting the removal of soil and other substances except as authorized by permit. A flat rate permit fee was instituted. This fee was then changed from a flat rate to one dependent on the volume of material being removed. The fees were intended to offset the costs of the regulatory scheme, which included road repair. While there was some evidence that more revenue would be generated by the volumetric fees than the amount necessary to defray the actual costs, the municipality did make reasonable attempts to match the fee revenues with the administrative costs of regulation. The fee was found to constitute indirect taxation that was ultra vires the province; however, the scheme was found to be supportable under ss. 92(9), (13) and (16). In Allard, the Court commented on pp. 402-5 on the scope of s. 92(9), as follows:

> In the above cases, decided either by this Court or the Privy Council, one can discern a consistent treatment of the scope of s. 92(9) of the Constitution Act, 1867. Although somewhat broad language was used by Lord Atkin in Shannon, supra, it appears generally true that s. 92(9), in combination with ss. 92(13) and (16), comprehends a power of regulation through licences. It is a power which is not confined to the requirement of direct taxation in s. 92(2). However, in so far as it comprehends indirect taxation, these cases -- either explicitly or upon their facts -- have limited the power of indirect taxation such that it can only be used to defray the costs of regulation.
>
> Since the time of Reference re Farm Products, supra, several lower courts have also considered the question of indirect taxation and s. 92(9). Particularly worthy of mention is the decision of the British Columbia Court of Appeal in Coquitlam v. LaFarge Concrete Ltd. ...
>
> ... Bull J.A. was most explicit in stating that he resolved the question [of whether the by-law was intra vires the province] through a pith and substance analysis. The relevant question was stated to be the following (at

p. 685):

> 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?
>
> . . .
>
> The three judgments in LaFarge, taken together, suggest to me that the validity of the by-law in question was linked to the costs of regulation by the court, and that the pith and substance analysis was not intended to convey more than this point. . . .
>
> My review of the case law thus leads me to suppose that it has yet to be determined whether s. 92(9) comprehends a power to levy indirect taxes in order to raise revenue in excess of regulatory costs....
>
> I am pressed, however, to mention that a power of indirect taxation in s. 92(9) extending substantially beyond regulatory costs could have the more serious consequence of rendering s. 92(2) meaningless.... [Emphasis in original.]
>
> In my opinion, therefore, it is unnecessary to examine further the jurisprudence associated with s. 92(9). The authorities establish to my satisfaction that the following question frames the relevant inquiry: can the variable fees be supported as ancillary or adhesive to a valid provincial regulatory scheme? [Emphasis added.]

52 Professor La Forest, supra, notes, at pp. 155-56, the potential conflict between ss. 92(2) and 92(9):

> If section 92(9) is limited to direct taxation, it adds nothing to section 92(2), for there is no doubt that direct taxation may be raised under section 92(2) even though it is framed in the form of a licence. On the other hand if section 92(9) permits a province to levy indirect taxation by means of a licence, there would seem to be no limit on provincial taxing power (there being no restriction on the

> types of licences falling within the section) so long as a tax is framed in the form of licensing provisions. Yet the British North America Act appears to contemplate that indirect taxation should be within the sole competence of the federal Parliament. It can, of course, be argued that the dilemma does not really exist, since a distinction may be drawn between true licences and colourable attempts to raise indirect taxation; and reference may be made to the Queen Insurance case where the Privy Council struck down a statute providing for licensing provisions that were a pure facade. But as the Reference re Farm Products Marketing Act indicates, situations can arise where the levying of indirect taxation by means of licences is not a mere sham and a different test will have to be employed if the provinces are to be prohibited from indiscriminate entry into the field of indirect taxation.

53 As the Court stated in Allard at p. 402, in so far as the power pursuant to s. 92(9) comprehends indirect taxation, this power is to be strictly limited "such that it can only be used to defray the costs of regulation". Any power of indirect taxation extending beyond regulatory costs would indeed render s. 92(2) meaningless. Such a result is clearly undesirable, and is avoided, in my view, as long as the province is limited to recoupment of only the actual costs of regulation.

54 I agree with the Court of Appeal's observation at p. 113 that the instant appeal "is a much easier case than Allard for finding that a regulatory scheme exists". Carthy J.A. for the Court of Appeal commented at p. 112 as follows:

> As stated earlier, it is my view that the reasons in Allard neatly and clearly embrace the question of the constitutionality of EDCs.
>
> There is no question as to excessive recovery. The fees are based on specific estimates of costs and can only be released to meet actual costs. The purpose of EDCs is explicitly stated to be school construction occasioned by new development (renovations of existing facilities cannot be supported by these charges). The charges are thus most certainly ancillary or adhesive to the production of new schools. The only real question is whether this is a regulatory scheme in itself or is part of a broader scheme.

55 Regulation 268, which sets out the mechanism for the calculation and disbursement of EDCs, is meticulous in its detail, and clearly operates so as to limit recoupment to the actual costs involved in providing educational facilities occasioned by new development. As Carthy J.A. stated, the fees are based on specific estimates of costs based on detailed and comprehensive calculations. (See ss. 3-4 of Regulation 268.) The construction cost and cost of site figures used in calculating EDCs are to be approved by the Minister of Education (ss. 1, 3(9) of Regulation 268). It is important to note

that EDCs can only be directed toward education capital costs made necessary by new residential development. EDC revenue cannot be used to defray capital costs associated with existing schools; this is another indication that the scheme is properly limited to the actual costs of regulation.

56 Further, EDC revenues are to be deposited in two accounts, one for revenue on account of residential development, and the second for revenue on account of commercial development (ss. 5(1)-(3)). Where two or more coterminous school boards generate EDC revenues, the proceeds are commingled in the two accounts (s. 5(4)). Significantly, funds can only be withdrawn when a specific project has been approved by the Minister of Education, and then only in an amount equal to the actual local share of the project:

> 5. ...
>
> (7) If a project is approved by the Minister of Education for the purposes of payment of a legislative grant under subsection 11 (3) of the Education Act, a board may withdraw from its education development charges accounts an amount up to or equal to the local share of the project for the purpose of applying the amount to the local share of the project.

This provision is another indication that the EDC scheme is appropriately limited in scope, and operates only so as to defray the costs of regulation.

57 It is my opinion that the EDCs are indeed part of a comprehensive and integrated regulatory scheme, namely, the entirety of planning, zoning, subdivision and development of land in the province. As the intervener the Ontario Public School Boards' Association submitted:

> The regulatory regime that deals with land development and school construction includes the Provincial Government, municipalities and the school boards which are directly responsible for the construction of schools. While neither the Provincial Government nor municipalities are involved in the operation of schools, nevertheless those bodies together with the school boards have each a role to play in the regulatory process of planning for the development and construction of schools which includes land use and planning as well as the schools themselves.

58 The appellants suggest that in order to meet the requirements in Allard the regulator and the body raising the revenues must be one and the same. The appellants submit that the instant appeal goes beyond Allard, as the school board, the body with the authority to raise the revenue, is entirely separate from the regulator of land development, the municipality. The appellants state that there is no element of land development regulation in the ability to impose EDCs, citing in this regard Dufferin-Peel Roman Catholic Separate School Board v. Mississauga (City), [1994] O.M.B.D. No. 1093.

59 In that case, a school board appealed zoning by-laws designed to facilitate residential development. The school board had adopted a "Residential Development Evaluation Policy Statement" for the purpose of evaluating residential development applications in light of the availability of adequate school accommodation. The school board's desire was to influence development to occur in areas of existing educational facilities. If a development application did not meet the criteria set out in the school board's policy, the board would request the municipality not to approve the application. The by-laws in question had been enacted to facilitate land development that did not meet the school board's criteria. The school board appealed the by-laws with a view to preventing the development.

60 As authority for the proposition that the power to pass EDCs does not bring school boards within the land development regulatory scheme, the appellants refer to the following passages from Dufferin-Peel:

> In order to assist in determining the merits of the school board appeals, a review of the [. . .] Planning Act is appropriate and specifically, the case of an official plan which is enacted by a Municipality. At the same time, one must always keep in mind that the school boards are autonomous bodies given certain jurisdictions and statutory obligations under the Education Act and other relevant statutes. Neither municipality or [sic] this Board has any jurisdiction over the operation of a school board under the Planning Act. Therefore this Board, as a result of dealing with a particular growth strategy has no jurisdiction to order a school board to build an educational facility or to build it by a certain date. Similarly, the municipality does not have such jurisdiction.
>
> . . .
>
> There is no question, however, that as money and funds became more limited, the Ontario Legislature enacted the Development Charges Act to assist the school boards as well as municipalities. With regard to the provision of schools, the school boards can, through passing a by-law under the Development Charges Act, apply a levy on a per unit basis which funds go towards the construction of future educational facilities. This is quite a separate and independent statute to the Planning Act.
>
> The Legislature, in the Planning Act, has set up a framework within which school boards can anticipate and plan for additional facilities. The Legislature, through other statutes deals with funding and the raising of capital to construct facilities and operate them.
>
> As the Board understands this matter, the fundamental issue behind these

> appeals is the lack of funds for the school board to construct the required schools not a site reservation problem. The Board then finds that the school boards should seek remedies through the Ministry of Education and ultimately the Legislature. Such change may fundamentally alter the operation, function and operating complexities of the various school boards. [Appellants' emphasis throughout.]

61 In my view, Dufferin-Peel does not stand for the proposition that funding issues with respect to the capital costs of educational facilities are not related to the planning process. Rather, the Board seems to be suggesting that the rezoning stage of the planning process is not the appropriate forum for the school board's expression of funding difficulties with respect to new development. It is implied that if funding were a concern, the school board could have availed itself of the EDC scheme. To say that the school board cannot prevent development owing to funding concerns at a particular stage of the planning process, and that the school board could have used another component of the planning scheme to deal with the funding issues does not mean that funding issues are not related to the planning process. Rather, the point is that the funding issues should be addressed through those aspects of the planning framework specifically designed to deal with those issues.

62 The appellants also cite Re Erin Mills Development Corp. and Peel Board of Education (1988), 22 O.M.B.R. 177, in support of their claim that there is a lack of integration between school construction and the regulation of land development. Erin Mills involved a scheme whereby the municipality required as a condition of a subdivision plan approval that developers convey school sites to the school boards, at a maximum of 75 percent of their market value. The applicant developer questioned the municipality's jurisdiction to impose restrictions with respect to the sale price of the school sites. The Ontario Municipal Board found that the municipality did not have the authority to impose a condition to subdivision plan approval relating to the selling price of school sites. The Board stated, at p. 192, that "the power impugned must be found within the words of the statute as there is no other source. That power must be explicitly stated or be capable of necessary implication from the words that are used". (See also Etobicoke Board of Education v. Highbury Developments Ltd., [1958] S.C.R. 196.)

63 The appellants rely upon the following passage, at p. 188:

> The board notes, however, that a school board and all of its facilities are quite distinct from the municipality and cannot be considered "municipal services". See Clarkson v. Town of Alliston, [1928] 2 D.L.R. 715 at p. 720, 62 O.L.R. 149, 10 C.B.R. 65 (Ont. S.C.) per Garrow J.:
>
> > One need not cite authorities to establish the proposition that the municipal corporation and the school boards are distinct and separate

> corporate bodies, each within its own field supreme. The earlier cases are all collected in Toronto Public Sch. Bd. v. Toronto (1901), 2 O.L.R. 727; affirmed (1902) 4 O.L.R. 468. [Appellants' emphasis.]

64 While the proposition expressed in this obiter passage may have been true historically, it is my view that it is no longer accurate. In fact, Erin Mills tends to support the respondents' view, rather than the appellants'. The impugned actions of the municipality in Erin Mills, by contrast, did not flow from any express statutory jurisdiction, and it was for this reason that the Ontario Municipal Board held that the conditions with respect to the sale price of school sites could not be imposed. In contrast, the power to enact EDC by-laws flows from explicit statutory language contained in the Act.

65 As noted above, the Act is one component of a comprehensive regulatory framework governing land development in Ontario, comprised of at least nine different statutes: the Building Code Act, R.S.O. 1990, c. B.13, the Environmental Assessment Act, R.S.O. 1990, c. E.18, the Environmental Protection Act, R.S.O. 1990, c. E.19, the Fire Marshals Act, R.S.O. 1990, c. F.17, the Municipal Act, R.S.O. 1990, c. M.45, the Ontario Municipal Board Act, R.S.O. 1990, c. O.28, the Ontario Water Resources Act, R.S.O. 1990, c. O.40, the Planning Act, R.S.O. 1990, c. P.13, and the Conservation Authorities Act, R.S.O. 1990, c. C.27. While the regulatory scheme of which EDCs are only a small part is clearly very complex, the complexity is necessitated by the very scope of the matter regulated -- urban planning. It is only to be expected that a variety of provincial actors would be involved in the various phases of the scheme's operation. However, this fact does not serve to invalidate the regulatory nature of the scheme. In my view, the appellants impose an artificial and rigid distinction between the school board and the municipality. This distinction fails to reflect the true nature of the regulatory framework.

66 The construction of schools is a legitimate and crucial component of modern land use planning, schools being an essential element in the creation of successful, dynamic and democratic communities. The legislature of Ontario clearly takes the view that the cost of educational facilities made necessary by new land development should be taken into account in the land development approval process. For example, the Planning Act expressly provides that the "adequate provision... of educational facilities" and the "adequacy of school sites" are factors to be taken into account in land use planning (see ss. 2(i), 51(24)(a) and (j)). The Act itself authorizes municipalities to impose development charges not only for education but also for water mains, sewers, roads, libraries, parks and recreational facilities. The common theme is that new development should bear the costs of infrastructure necessitated by the new development. Further, just as the gravel excavators in Allard benefitted from the regulatory scheme in terms of road improvements, so too do the developers receive a considerable benefit from the EDC scheme: a development with adequate amenities. The presence of adequate school facilities clearly contributes to the marketability of a new home.

67 For the foregoing reasons, it is my opinion that EDCs are properly adhesive to the province's planning and development regime, and accordingly, are intra vires the province of Ontario pursuant

to ss. 92(9), (13) and (16) of the Constitution Act, 1867.

D. Section 93(1): Denominational Rights and Privileges

68 As Part III of the Act is an education financing scheme, it is subject to s. 93(1) of the Constitution Act, 1867. Accordingly, nothing in Part III may "prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union". The appellants submit that the EDC scheme prejudicially affects the rights of separate school supporters (a) to a proportionate share of all public monies, apart from local assessments; and (b) to be exempt from paying assessments for public school purposes.

69 It is important at the outset to identify the constitutional value that s. 93(1) reflects as part of the constitutional fabric of our country. We heard much in argument about principles of equality, proportionality, fairness and discrimination. However, many of these submissions failed to articulate the perspective that needs to be borne in mind when considering s. 93(1).

Section 20 of the Scott Act

70 The appellants cite s. 20 of the Scott Act as the source of the right to a proportionate share of all public monies. But I reiterate that it is important to consider the purpose and history of s. 93, before considering the role of the Scott Act, the question of proportionality and the other arguments raised by the parties. In Reference re Bill 30, An Act to Amend the Education Act (Ont.), supra, beginning at p. 1173, Wilson J. for the majority outlined the background to s. 93. She noted the importance of denominational educational rights at the time of Confederation, and that the framers of the Constitution viewed s. 93 in terms of a guarantee of equality. The purpose of s. 93 was to ensure that the Roman Catholic minorities of Upper Canada and the Maritime Provinces, and the Protestant minority of Lower Canada would, in the words of Lord Carnarvon, "stand on a footing of entire equality". Wilson J. also referred to Sir Charles Tupper's comments to the House of Commons in 1896, to the effect that without s. 93, Confederation would not have been possible. At p. 1176 she emphasized that:

> While due regard must be paid not to give a provision which reflects a political compromise too wide an interpretation, it must still be open to the Court to breathe life into a compromise that is clearly expressed. The contextual background of s. 93 is being reviewed in these reasons not for the purpose of enlarging upon the compromise but in order to confirm its precise content. The contextual background suggests that part of the compromise was that future legislation on the part of the province with respect to separate denominational schools was permissible. The province was to be able to grant new rights and privileges to denominational schools after Union in response to new conditions but that subsequent repeal of those post-Union rights or privileges would be subject to an appeal to the Governor General in Council.

71 Wilson J. also observed at p. 1177 that, pursuant to the language of s. 93(1) itself, "the scope of the rights and privileges protected under the section must be determined by ascertaining the rights and privileges in existence at the time of the Union". The Scott Act, as Wilson J. noted, "was the last statute pertaining to separate schools enacted prior to Confederation" (p. 1186). She discussed the purpose of s. 20 of the Scott Act, and its relationship to s. 120 of the Common Schools Act of 1859, at pp. 1193-96:

> The whole purpose of these two sections was to preserve the separate school system. The security afforded the Roman Catholic minority through the tying of funding for its schools to a proportion of the funding for the common schools was in the certainty that the Legislature would never cut off funding for the common schools. There would therefore always be a grant in which the separate schools would be entitled to share. However, by interpreting "otherwise appropriated by law" as permitting appropriations to schools other than "common schools" serving the majority, the Privy Council created a result quite contrary to the one which seems to have been intended by the draftsmen of the Scott Act. It created a situation where the schools of the majority could be fully funded by the Legislature but the separate schools' funding was dependent upon the grace, generosity and good will of the Legislature. This hardly seems consonant with the purpose of the Scott Act, which, as stated in its preamble, was to:
>
> > ... restore to Roman Catholics in Upper Canada certain rights which they formerly enjoyed in respect to separate Schools, and to bring the provisions of the Law respecting Separate Schools more in harmony with the provisions of the Law respecting Common Schools....
>
> The view expressed by Anglin C.J. in this Court's decision in Tiny at pp. 678-79 seems apposite:
>
> > To exclude from the additional monetary benefits in which the right to "a share" was conferred on the separate schools in 1863 grants "for a common school purpose" ... would defeat the apparent intention of the Legislature in 1863 to put separate schools on a footing of absolute equality with common schools in regard to all grants, municipal or legislative, of public moneys.

. . .

> If, therefore, a grant of public moneys is made by the Legislature or by a municipal authority to aid or assist in the carrying out of what would in 1867 have been deemed a common school purpose, either it must be so made that it is apportionable between the common schools (or their present day successors) and the separate schools, or compensation to the latter for their proportion of such grant must be provided for.

> ... s. 93(1) of the Constitution Act, 1867 was intended to give constitutional value to the rights and privileges conferred in the Scott Act and the Common Schools Act of 1859. Section 93(1) should, in my view, be interpreted in a way which implements its clear purpose which was to provide a firm protection for Roman Catholic education in the Province of Ontario and Protestant education in the Province of Quebec. To interpret the provisions of the Scott Act and the Common Schools Act of 1859 in the way in which the Privy Council interpreted them in Tiny is to render this constitutionalized protection illusory and wholly undermine this historically important compromise.

. . .

> It is clear that if the foregoing right was to be meaningful an adequate level of funding was required to support it. This Court held unanimously in Attorney General of Quebec v. Greater Hull School Board, [1984] 2 S.C.R. 575, that the right of dissentient schools in Quebec to a proportionate share of government funding was a right protected by s. 93 of the Constitution Act, 1867. Likewise, in my view, the right of separate schools in Ontario. They were entitled to the proportionate funding provided for in s. 20 of the Scott Act. This conclusion, it seems to me, is fully consistent with the clear purpose of s. 93, namely that the denominational minority's interest in a separate but suitable education for its children be protected into the future.

72 Even if EDCs could be characterized as "grants", it should be noted that s. 20 has never applied to capital grants. As the respondents have submitted, "[t]he concept of equal per pupil local grants measured on an annual basis cannot be applied sensibly to capital grants for assets that are to be used over a number of years. It would be absurd to require the Province to fund the construction of an unneeded separate school simply because the local public school board needed and received provincial funding for a new school". The current education funding model in Ontario is in one

sense inconsistent with s. 20 of the Scott Act in that it operates on a provincial, rather than on a local basis to provide equal per pupil resources for a base level of education services, and in that it only considers local assessment wealth in fixing grants, but not the grant level enjoyed by the coterminous school board. However, recent jurisprudence, including Greater Montreal Protestant School Board v. Quebec (Attorney General), [1989] 1 S.C.R. 377, at p. 402, has continued to emphasize that a formalistic interpretation of s. 93(1) may not in fact protect the substance of the guarantee contained therein:

> It is true that the rights or privileges under ordinary law to which s. 93(1) refers have been frozen at Confederation. But just like the basic provincial power which, as Viscount Cave explained, was not "stereotyped" at the Union, the exception to that power has also matured over time through judicial interpretation. The approach courts have taken to the interpretation of the expression "with respect to Denominational Schools" in cases such as Hull, supra, ... demonstrates that the law in force "at the Union" cannot on its own set the content of the constitutional rights in s. 93(1).

73 Accordingly, I find myself in agreement with the respondents' submission that s. 20 of the Scott Act does not impose "a procrustean obligation of proportionality in its strict terms". In my view, when one reviews the history and purpose of s. 93(1), the principle of proportionality can be seen for what it really is, namely, the means to a constitutional end which is equality of educational opportunity. Moreover, as I have noted above, the entire system of provincial grants in Ontario has not been based on actual proportionality since early in the century. The departure from strict, formalistic proportionality was made because it had led to a serious inequality of educational opportunity. While the notion of proportionality contained in s. 20 of the Scott Act is a constitutional right embodied in s. 93(1), the substantive purpose of this notion must be borne in mind: the achievement of an educational system that distributes provincial funds in a fair and non-discriminatory manner to common and separate schools alike. This is the substantive guarantee offered by s. 93(1). As the Court per Gonthier J. stated in Reference re Education Act (Que.), [1993] 2 S.C.R. 511, at p. 567:

> When we speak of equality, this must be understood in the sense of equivalence and not that of strict quantitative identity, as Chouinard J. noted in Greater Hull, supra, at p. 591:
>
> > Proportionality is more significant. Whether on the basis of total population or that of school attendance, the principle of a fair and non-discriminatory distribution is recognized. [Emphasis added by Gonthier J.]

74 This guarantee has been embodied in the principle set out in s. 122 of the Education Act, the

successor of s. 20 of the Scott Act: "Every separate school shall share in the legislative grants in like manner as a public school". I agree with the respondents' submission that "[t]he principle in s. 122 of the Education Act, which is legally impressed upon the [Development Charges Act] ... honours the obligation for a fair and non-discriminatory distribution, and subsumes and supersedes any obligation of proportionality that might have been imposed by s. 20 of the Scott Act". The EDC scheme established by Part III of the Act is integrated with the funding model established by the Education Act. The scheme permits school boards to build schools without recourse to the local assessment base, recovering the financial resources needed on a per-pupil basis to build schools in areas of new growth. Provincial grants, combined with EDCs, ensure that all school boards, separate and public, can meet the demand for educational services and facilities. Part III of the Act treats public and separate boards and their respective supporters equally; both public and separate boards have an equal ability to enact EDC by-laws. The needs of both public and separate school boards are dealt with in a fair and non-discriminatory manner. Therefore, in my view, the EDC scheme cannot be said to affect prejudicially the denominational rights embodied in s. 93(1).

Section 14 of the Scott Act

75 The appellants cite s. 14 of the Scott Act as the source of the right of separate school supporters to be exempt from paying assessments for public school purposes. Section 14 provided that separate school supporters "shall be exempted from the payment of all rates imposed for the support of Common Schools, and of Common School Libraries, or for the purchase of land or erection of buildings for Common School purposes". However, it is my view that EDCs are not "rates" within the meaning of s. 14. A rate in this sense means the annual taxes payable by an individual on land, calculated by assessing the value of the land and applying to that value the "rate" established annually by the taxing authority (cf. Jowitt's Dictionary of English Law (2nd ed. 1977), vol. 2; and Re Scott and Ottawa (1856), 13 U.C.Q.B. 346 (C.A.)). A rate is a fixed percentage of value, applied equally to all properties within the jurisdiction, rather than a uniform charge applicable only to certain classes of property with no reference to property values. I agree with the respondents that EDCs are a new source of funds, neither a rate nor a grant, that was not contemplated by the legislation at the time of Confederation. EDCs, like other charges used to finance municipal infrastructure like sidewalks and sewers, are a secular source of funds. Those paying EDCs are not identified by school support, and the proceeds are not identified as belonging to one school board or the other. As noted above, the proceeds are commingled. Again, I agree with the submission of the respondents that this secular character is entirely appropriate, as money raised under the by-law of one school board may be used to build schools needed by the coterminous board. Further, the development from which EDCs flow will be owned and occupied by supporters of each system from time to time over the life of the new schools.

E. Sections 2(a) and 15 of the Charter

76 The intervener Seto challenges the validity of the EDC scheme on the basis that it violates her rights to equality under the law and to religious freedom under ss. 2(a) and 15 of the Charter. She

submits that as EDCs can be levied by Roman Catholic Separate School Boards on all new homes, whereas supporters of other religions do not have this ability to impose EDCs, the scheme is violative of the Charter. The intervener acknowledges that in so far as the EDC scheme falls within s. 93(1) of the Constitution Act, 1867, it is immune from Charter scrutiny.

77 It is my view, as set out above, that the EDC scheme, as established by Part III of the Act, pursues the constitutionally required objective of providing separate schools with funding that is on par with the funding received by public schools. As a right or privilege enjoyed by separate schools at Confederation, this form of legislation is required by the provisions of s. 93 of the Constitution Act, 1867. As such, the legislation is immune from scrutiny under the Charter. As Wilson J. stated in Reference re Bill 30, An Act to Amend the Education Act (Ont.), supra, at pp. 1197-98:

> I have indicated that the rights or privileges protected by s. 93(1) are immune from Charter review under s. 29 of the Charter. I think this is clear. What is less clear is whether s. 29 of the Charter was required in order to achieve that result. In my view, it was not. I believe it was put there simply to emphasize that the special treatment guaranteed by the constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the Charter because not available to other schools, is nevertheless not impaired by the Charter. It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise.

VI. Conclusions and Disposition

78 The following conclusions emerge from the foregoing analysis. First, owing to the serious and complex nature of the issues before the Court, I have assumed, without deciding, that the appellants have standing. However, I wish to be clear that efforts to bootstrap standing by way of interveners are to be discouraged. Second, Part III of the Act authorizes the imposition of an indirect tax contrary to s. 92(2) of the Constitution Act, 1867. However, the EDC scheme is intra vires the Legislature of Ontario as ancillary to a valid regulatory scheme of land use planning, pursuant to ss. 92(9), (13) and (16) of the Constitution Act, 1867. Third, the EDC scheme does not prejudicially affect a right or privilege with respect to denominational schools contrary to s. 93(1) of the Constitution Act, 1867. Finally, the EDC scheme is immune from Charter scrutiny, for the reasons articulated by Wilson J. in Reference re Bill 30, An Act to Amend the Education Act (Ont.).

79 Accordingly, I would dismiss the appeal. The parties have agreed that there should be no order as to costs.

Addendum

80 Since the preparation of the foregoing reasons, I have had the opportunity to read Justice La Forest's reasons in this case, which have prompted me to make the following additional comments.

81 First, I note that underlying my colleague's approach is an insistence upon categorizing the EDCs as "land taxes", while ignoring their true nature. What was said by Lord Simon in Atlantic Smoke Shops, Ltd., supra, is equally applicable here. He states, at p. 565:

> Their Lordships are of opinion that Lord Cave's reference in his judgment in the Fairbanks' case to "two separate and distinct categories" of taxes, "namely, those that are direct and those which cannot be so described", should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance, or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article.

82 La Forest J. takes issue with my general, descriptive discussion of the characteristics of land taxes. It is true, as I have stated, that not all taxes that have been held to be land taxes were "assessed as a percentage of the value of the land, or as a fixed charge per acre". However, this is a usual, but not necessary, characteristic. The point that the assessment of the tax is not based upon the value of the land is simply further illustration that in this case, while tied loosely to the land, the charges in question do not seek to tax land qua land. In characterizing EDCs as land taxes, my colleague has oversimplified the nature of the scheme, and overlooks the ways in which EDCs are novel and unlike any known form of taxation. Indeed, I note that, while La Forest J. states, at para. 91, that the EDCs are imposed "on the owner of land on which new dwelling units and commercial developments are constructed", the charges are not in fact imposed on the owner of the land per se; rather, the legislation is phrased so as to impose the charges on persons seeking building permits as a condition of obtaining a permit. The crucial inquiry is the object and purpose of the scheme, not simply its formal or superficial characteristics.

83 La Forest J. emphasizes that several of the cases have categorized taxes as land taxes even when it was clear that the incidence was indirect, the best example being the Fairbanks case. As I have stated, however, it is my opinion that, while the jurisprudence reveals that land taxes are generally direct taxes, the cases do not prevent a tax on land by itself from being treated as an indirect tax. To repeat, the EDCs are simply not true land taxes in the traditional sense. Rather, the EDC scheme is indirect taxation which is ancillary to a constitutionally valid provincial regulatory regime. My colleague's contention, at para. 139, that I have attempted "by the use of the Mill's test to transform what in all other respects falls within the category of a land tax, and so converts a direct tax into an indirect tax" is, therefore, beside the point.

84 Finally, I wish to address my colleague's concern with respect to the application of the Allard approach in this case. He seems to imply, at para. 93, that I have assumed that "the grant of a power to regulate, ipso facto, carries with it the power to levy the financial resources necessary to give

effect to a regulatory scheme". He also seems to be concerned that I have not used the words "pith and substance"; however, it is my opinion that the use of such terminology would not change the analysis or conclusion. Indeed, the "ancillary or adhesive to a valid regulatory scheme" approach won the unanimous support of this Court in Allard, and really is simply a different way of expressing the same concern, that is, to determine the pith and substance of the legislation in question.

85 In discussing the provincial power to levy a regulatory charge, and the EDC scheme, La Forest J. states, at para. 118, that the fact that the "scheme specifically provides for the use the school boards will make of the money levied and that the amount that can be levied is carefully limited to that purpose", is not, in itself, determinative in characterizing the matter of the scheme. I believe that my colleague has misunderstood my reasons. The key finding that I make is that the EDC scheme is part of a comprehensive and integrated regulatory scheme, namely, the entirety of planning, zoning, subdivision and development of land in the province. The fact that the scheme specifically provides for the use that will be made of the funds levied, and that the amount levied is carefully limited to such purposes, is mentioned as further support for the main finding, not as the only hallmarks, contrary to my colleague's interpretation. The carefully designed mechanics of the scheme ensure that the power of indirect taxation will not extend beyond the regulatory costs; this is crucial in order to avoid rendering s. 92(2) of the Constitution Act, 1867 meaningless.

86 My colleague obviously takes a much narrower view of what can be considered to be "regulatory activity" by a province. He simply does not see EDCs as part of a comprehensive land use planning scheme. With respect, however, I find his characterization of the EDC scheme is so narrow that he ultimately seems to deny the complexity that necessarily and appropriately exists within the realm of land use planning. Of course, housing development does not by itself dictate the building of schools. This is not what I have said in my reasons. Rather, I have recognized that the province has made a legislative, regulatory decision that new development is to pay its own way for the infrastructure, including schools, that the province considers necessary to successful communities. This legislative decision, as I have noted above, is made express in such legislation as the Planning Act, ss. 2(i), 51(24)(a) and (j). The regulatory aim is that new development should bear the cost of infrastructure occasioned by the new development.

The reasons of La Forest, L'Heureux-Dubé, Gonthier and McLachlin were delivered by

87 LA FOREST J.:-- This appeal raises the constitutional validity of Part III of the Development Charges Act, R.S.O. 1990, c. D.9, and related regulations, which enact a scheme empowering Ontario public and separate school boards to impose so-called education development charges ("EDCs") on owners of land based generally on a percentage of the construction costs of new dwelling units or commercial development.

88 The appeal raises a number of major issues respecting the interpretation of s. 92 of the Constitution Act, 1867, namely, whether the scheme is valid as direct taxation within the province

(s. 92(2)), or as a regulatory charge under the combined operation of s. 92(9), the provincial licensing power, s. 92(13), "Property and Civil Rights", and s. 92(16) "Matters of a merely local or private Nature". It also raises the issues whether the scheme violates the guarantees given private school supporters under s. 93(1) of the Constitution Act, 1867 or the guarantees of freedom of conscience and religion and the equality rights accorded by ss. 2(a) and 15(1) of the Canadian Charter of Rights and Freedoms.

89 I have had the advantage of reading the reasons of my colleague, Justice Iacobucci. I agree with his reasons as they pertain to s. 93 of the Constitution Act, 1867 and the Charter provisions. The major issues upon which I shall focus are those concerning the interpretation of s. 92 of the Constitution Act, 1867. While I agree with my colleague's conclusion that the EDCs are intra vires the province, I do so for quite different reasons. I respectfully disagree with him that the EDC scheme is valid as a regulatory charge under the combined operation of ss. 92(9), (13) and (16) of the Constitution Act, 1867. Rather, in my view, the scheme is valid as being in pith and substance "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes" within the meaning of s. 92(2) of that Act.

90 My colleague has set forth the legislation as well as the other relevant facts and the judicial history of the appeal and I shall not repeat them. However, since it is important to keep the central features of the EDC scheme firmly in mind, I shall briefly summarize it.

91 In essence, the impugned scheme empowers Ontario public and separate school boards to pass by-laws imposing so-called EDCs on the owner of land on which new dwelling units and commercial developments are constructed. These EDCs are intended to raise the monies such boards estimate will be necessary to defray the costs (above the provincial grants for the purpose) of new schools they may decide to construct to serve the needs of new pupils from the development. The EDCs are imposed at differential rates on dwelling units and commercial development. The former is based on a percentage of the construction costs of the unit. The commercial contribution is calculated by dividing the percentage of growth-related costs that is to be covered by commercial EDCs by the declared value of the commercial building permits issued during the term of the EDC by-law and multiplying the quotient by 100 to express the EDCs on commercial development as a percentage of declared value. The monies so collected are to be used solely for building schools by the school board subject to the approval of the Minister of Education.

General Constitutional Structure

92 The question whether the levy just described is a valid exercise of power under s. 92 raises fundamental issues about the basic structure and workings of the Constitution Act, 1867. Not only does it raise highly technical issues concerning the extent and manner in which a province is constitutionally permitted to finance its legislative measures; it also raises broad constitutional issues such as the extent to which such financial measures impact on the general structure of the Constitution and on the residents in other provinces who have little ongoing contact with the

province's imposing the levy. These issues can only be resolved by a careful examination of the cases, but it assists understanding to recall the basic structure of the division of legislative power under the Constitution and the rationale underlying the relevant powers.

93 The bulk of the legislative powers assigned to Parliament and the provinces under the Constitution are essentially of a regulatory nature. It cannot be assumed that the grant of a power to regulate, ipso facto, carries with it the power to levy the financial resources necessary to give effect to a regulatory scheme. As in the case of other federations, a sharp division is made between the power to regulate and the power to raise revenue. Specific provisions exist respecting the raising of revenue.

94 This generally poses little difficulty at the federal level. Section 91(3) gives Parliament authority for "The raising of Money by any Mode or System of Taxation". Though the raising of taxes may influence and sometimes seriously influence how people will regulate their behaviour, it is significant that the courts have respected the sharp divide created by the framers between taxes and other legislative powers by holding ultra vires schemes which, though couched in terms of taxes, were in pith and substance designed to regulate activities falling within the provincial legislative domain; see, for example, the Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 355 (the Unemployment Insurance Reference). To do otherwise would, as the Privy Council pointed out in that case, be to permit Parliament to enter fields assigned to the provinces contrary to the intention of the framers of the Constitution.

95 At the provincial level, this division between regulatory powers and the power to raise revenue has very important implications. As is the case with respect to legislation adopted by Parliament, courts have struck down provincial schemes which, though at first glance providing for the raising of revenue, in effect related in pith and substance to legislative powers vested in Parliament; see, for example, Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357. But more importantly, the division between the provincial taxing powers and other legislative powers is at the origin of the provincial power to levy what have come to be known as "regulatory charges". The courts have recognized that in certain circumstances a provincial levy may relate, in pith and substance, to the regulation of an activity falling within exclusive provincial legislative jurisdiction, and that such levy would not be subject to the requirement of directness provided for in s. 92(2), which can in all logic only apply to legislation enacted under the specific head of power provided for in s. 92(2), taxation. It will become obvious that differentiating a tax from a regulatory charge is -- as is so often the case in cases dealing with distribution of powers -- no easy task. But one thing seems clear from the sharp division made between regulation and taxation (and for good policy reasons) by the Constitution Act, 1867. The framers of the Constitution could not have intended by the simple grant of a regulatory power to have intended to in effect empower the imposition of a tax, an issue that will be given detailed attention later.

96 Understanding the basic structure of the division of legislative power under the Constitution and the rationale underlying the relevant powers is also necessary in order to properly trace the

limits of the directness requirement provided for in s. 92(2) of the Constitution Act, 1867. As is well known, the provinces were not given taxing powers as expansive as those assigned to Parliament. In a laissez faire era, the framers did not think the provinces would have need of much recourse to extensive taxation. They thought the revenues arising out of the public domain (which were assigned to them by s. 109 of the Constitution Act, 1867) would be sufficient to meet their financial needs in performing what were no doubt important, but not at the time expensive functions. But as they had with Parliament (to which they assigned a virtually unlimited taxing power even though they thought sufficient revenues to finance its functions would come from customs and excise), they accorded the provinces the power to levy direct taxation within the province, a field of taxation that "even in those days was theoretically broad, if unpalatable, and was to be expanded by the courts to include in fact, if not in form, almost every type of tax except customs duties and taxes having primary impact outside the taxing province". That at least was the view I arrived at after a review of all the cases in my book on the subject; see The Allocation of Taxing Power Under the Canadian Constitution (2nd ed. 1981), at p. 195. It was not because direct taxation was of a restrictive nature that the provinces were confined in raising revenues by way of taxes. Rather it was the nature of these taxes that dictated the choice. The framers rather optimistically believed the legislatures would be dissuaded from imposing indirect taxes because they were not of a kind that in John Stuart Mill's phrase (Principles of Political Economy (1893), vol. 2, Book V, c. 3, sec. 1, at p. 418) are "demanded from the very persons who, it is intended or desired, should pay it", like such taxes as customs and excise which are ordinarily imposed on persons other than those intended or expected to bear the burden.

97 As will become evident later, this concern of the framers became at best of secondary importance with the passage of the years. But a more fundamental difference between direct and indirect taxation was to have more enduring influence. There is a considerable difference in impact between direct taxes, like land taxes, which are directly felt locally, and indirect taxes like customs and excise, which inevitably affect trade throughout the country. This distinction was not lost on the framers of the Constitution. And this characteristic, inherent in the limitation to direct taxation, was used by the courts in the course of an organic interpretation of the Constitution to foster other objectives envisioned by the framers and incorporated in other provisions. Thus the restriction was used to confine the impact of taxes within the provinces consistent with the idea specifically expressed in s. 92(2). It was also used to prevent the provinces from creating tariff barriers, thereby supporting the national market which was clearly within the contemplation of the framers. Thus using one technique or another the courts have invariably held that export taxes, however framed, are indirect taxes. When such policies cannot really be served by some species of tax, such as notably those imposed on land or on its owner (which even at the time of Confederation were generally viewed as direct taxes), the courts have found no reason to restrict provincial taxing power, and have invariably categorized these as direct.

98 The preeminence of these national policies, grounded as they are in the very structure of the Constitution Act, 1867 and the stated views of the framers during the Confederation debates, has also come into play in the interpretation given by the courts to the other means of raising a revenue

accorded the provinces, s. 92(9), the power to raise revenue by means of licences. From the enumeration of shop, saloon, tavern, auctioneer, it seems clear enough that the provision was intended to have a narrow scope. Still it is not expressly provided that it is limited to direct taxation. However, the courts have resisted the notion of broadening it, and this possibility was firmly squelched in Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371. The obvious justification for this is that the debate regarding major provincial levies is more appropriately channelled to the major taxation provision intended by the framers to empower the provinces to levy a revenue, s. 92(2). The limitation to direct taxation is better geared to balance the tension between the policies of giving the provinces, consistent with their heavy responsibilities, the widest possible scope for raising necessary revenues while supporting the national and structural requirements I have earlier described.

99 Thus, as the following analysis will demonstrate, it is necessary to take into account the basic structure of the division of legislative powers under the Constitution and the rationale underlying the relevant powers to properly delineate the provincial power respecting regulatory charges as well as to correctly trace the limits of the directness requirement set forth in s. 92(2). In order to properly categorize the EDCs for constitutional purposes, it is first necessary to fully understand the nature, source and scope of the provincial power regarding what have come to be known as "regulatory charges" and their relationship to the power allocated to the provinces to levy direct taxation. To do so requires a detailed analysis of the cases to which I now turn.

EDCs Are Not Regulatory Charges

The Provincial Taxing Power and the Provincial Power to Impose "Regulatory Charges"

100 The first case to contemplate the existence of a provincial power to levy a regulatory charge by a higher court is the decision of the Judicial Committee of the Privy Council in Attorney-General for Quebec v. Reed (1884), 10 App. Cas. 141. At issue was the constitutionality of a Quebec statute imposing a duty of 10 cents on every exhibit filed in court in any action. The incidence of that duty, the Earl of Selborne, L.C. held, was indirect, since it would ordinarily be borne by the unsuccessful party -- not necessarily the party who initially paid it. The levy could, therefore, not be supported under s. 92(2) of the Constitution Act, 1867. The Privy Council then addressed the appellant's alternative argument that the provisions regarding the fee had, instead, been enacted under s. 92(14), as relating to the administration of justice. That argument was dismissed in the following terms (at pp. 144-45):

> Now it is not necessary for their Lordships to determine whether, if a special fund had been created by a provincial Act for the maintenance of the administration of justice in the provincial courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable. That may be an important question which will be considered in

> any case in which it may arise; but it does not arise in this case. This Act does not relate to the administration of justice in the province; it does not provide in any way, directly or indirectly, for the maintenance of the provincial Courts; it does not purport to be made under that power, or for the performance of that duty. The subject of taxation, indeed, is a matter of procedure in the provincial Courts, but that is all. The fund to be raised by that taxation is carried to the purposes mentioned in the 2nd subsection; it is made part of the general consolidated revenue of the province. It, therefore, is precisely within the words "taxation in order to the raising of a revenue for provincial purposes." If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more specially applicable for the administration of justice than any other part of the general provincial revenue. [Emphasis added.]

This case is interesting in many respects. Most notably, the Privy Council implied that had the nature of the impugned fee been somewhat different, it would have been supportable under the provincial legislative power over the administration of justice (s. 92(14)). This statement constituted an explicit recognition that provinces could impose certain levies which were indirect in their incidence when, in doing so, they were really legislating with respect to a head of power other than their taxing power. What later experience would reveal, however, was that, as in other situations, this was permissible only when a legislative provision was in pith and substance an exercise of that power, i.e. where, to use the phrase in some of the cases, it was "the dominant or most important characteristic of the challenged law"; see, for example, Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at p. 62.

101 For close to 50 years, there was little development on the subject in the higher courts. However, in the early 1930s the higher courts were again faced with the issue in a series of cases dealing with the constitutionality of levies imposed by the provinces in connection with marketing schemes. The first is Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, supra. There the respondent committee had been given the exclusive power to control and regulate the impugned marketing scheme, which included the power to impose on certain producers and shippers levies "for the purpose of defraying the expenses of operation" of the scheme, which were indirect in their incidence. The whole scheme was eventually struck down by this Court because in pith and substance it related to extraprovincial trade and commerce, a matter within exclusive federal legislative authority under s. 91(2) of the Constitution Act, 1867. However, Duff J., as he then was, writing for the majority, did address the appellant's argument relating to the nature of the levies. He characterized them as "taxes" according to four criteria (later generally accepted by the courts), namely: they were (a) enforceable by law, (b) imposed under the authority of the legislature, (c) levied by a public body and (d) intended for a public purpose. He then considered whether the levies could be characterized as having been enacted under the provincial power relating to licences under s. 92(9) of the Constitution Act, 1867. He had this to say, at pp. 363-64:

> The question has never yet been decided whether or not the revenue contemplated by this head can in any circumstances be raised by a fee which operates in such a manner as to take it out of the scope of "direct taxation". Prima facie, it would appear, from inspection of the language of the two several heads, 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. 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. Here, such is the primary purpose of the legislation. The imposition of these levies is merely ancillary, having for its object the creation of a fund to defray the expenses of working the machinery of the substantive scheme for the regulation of trade. [Emphasis added.]

In Lawson, this Court clearly recognized the existence of a distinction between levies imposed for the purpose of "raising a revenue" (whether under s. 92(2) or s. 92(9), in both of which the phrase is used) and those imposed as "instrumentalities" in connection with legislation enacted under other heads of power. On that point, this Court agreed with the approach adopted by the trial judge in that case, who, at [1930] 2 W.W.R. 23, at p. 24, was of the opinion that the true pith and substance of the subsection was not to raise revenue for public or governmental purposes. The scheme was nonetheless ultimately struck down, as I said, because it related, in pith and substance, to a head of power within exclusive federal legislative jurisdiction.

102 The second important case dealing with provincial marketing schemes is Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Ltd., [1933] A.C. 168 (P.C.), in which the constitutionality of a complex regulatory regime relating to the British Columbia milk market was at issue. A provincial statute provided for the creation of an Adjustment Committee which was responsible for imposing on farmers selling fluid milk a volumetric fee eventually redistributed to the farmers who had sold milk products (an "adjustment levy"). The general tendency of the fee was, of course, to be passed along to consumers, and it was, therefore, held to be indirect. The Adjustment Committee was also given the power to impose another type of fee to meet the expenses incurred in the administration of the scheme (an "expenses levy"). At p. 174, the Privy Council held that the substance of the scheme was "to transfer compulsorily a portion of the returns obtained by the traders in the fluid milk market". The appellant's main argument was that such levies fell within exclusive provincial legislative jurisdiction under ss. 92(13) (property and civil rights) and 92(16) (matters of a merely local or private nature in the province). The Privy Council rejected both arguments. It first held, at p. 175, that the adjustment levy was a tax according to the criteria laid down by Duff J. in Lawson. It arrived at the same conclusion with respect to the expenses levy since it was, in their Lordships' opinion, ancillary to the adjustment levy. The Privy Council did not specifically address the issue of whether either levy could be supported under

another head of power, as the appellant had argued. In this respect, the correctness of its conclusion was subsequently questioned (see Professor Bora Laskin, as he then was, "Provincial Marketing Levies: Indirect Taxation and Federal Power" (1959), U. of T. L.J. 1, at pp. 4 et seq.) and was ultimately overruled by this Court in Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, to which I shall refer later. The principal basis for the criticism was that the levies at issue in the Crystal Dairy case were not imposed for the purpose of "raising a revenue" under s. 92(2) of the Constitution Act, 1867, but rather related to intraprovincial trade or marketing, falling under exclusive provincial legislative authority under s. 92(13) (property and civil rights).

103 Six years later, the Privy Council had occasion to examine the constitutional validity of another British Columbia marketing scheme in Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708. The statute at issue provided for the creation of the respondent Board which was granted jurisdiction to establish and administer schemes relating to the control and trade of natural products. The statute also provided for the imposition of licence fees on all persons producing, packing, transporting, storing or marketing the regulated products needed to carry out the purposes of a given scheme and cover the expenses of the Board. Here again, the general tendency of the fee was to be passed along to consumers, but Lord Atkin, speaking for the Privy Council, dismissed the appeal and affirmed the constitutional validity of the impugned legislation. At pp. 720-22, he held that the fees in question fell within the exclusive provincial legislative power under s. 92(9) of the Constitution Act, 1867:

> The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the Province, and it is therefore intra vires of the Province.
>
> . . .
>
> If regulation of trade within the Province has to be held valid, the ordinary method of regulating trade, i.e., by a system of licences, must also be admissible. A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes. 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 and 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. [Emphasis added.]

Their Lordships were also of the view that such fees had been validly enacted under the provincial powers relating to property and civil rights (s. 92(13)) and matters of a merely local or private nature (s. 92(16)), at p. 722:

> The impugned provisions can also, in their Lordships' opinion, be supported on the ground accepted by Martin C.J. in his judgment on the reference -- namely, that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by s. 92 (13.) and (16.).

The Privy Council upheld the impugned fees because they were levied to cover the expenses incurred by the Board in administering the schemes, thereby furthering the objectives of the Act. It did so primarily, apparently, on the ground that it constituted a valid exercise of provincial legislative jurisdiction under s. 92(9) but also on the ground that the fees were instrumentalities to legislation which, in pith and substance, related to the regulation of particular businesses entirely within the province. It is noteworthy that Lord Atkin made no reference to the Crystal Dairy decision rendered only a few years earlier. The Privy Council therefore repeated what had been implied in Reed years before, namely that the imposition of a levy could constitute legislation under heads of jurisdiction other than ss. 92(2) or 92(9) if, in pith and substance, it related to any other legislative jurisdiction exclusively granted to the provinces at Confederation.

104 Shannon, supra, was followed by this Court in Ontario Boys' Wear Ltd. v. The Advisory Committee, [1944] S.C.R. 349. At issue was the constitutional validity of assessments imposed on employees through payroll deductions to finance a scheme for developing labour standards. Kerwin J., as he then was, wrote the Court's unanimous reasons. He found that should such assessments be characterized as taxes, they were direct in their incidence and thus supportable under s. 92(2) of the Constitution Act, 1867. He added, at p. 359:

> . . . in any event, it may be justified as a fee for services rendered by the Province or by its authorized instrumentalities under the powers given provincial legislatures by section 92 (13) and 92 (16) of the British North America Act. Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708.

It is noteworthy that the Court made no mention of s. 92(9), characterizing the fees as relating, in pith and substance, to property and civil rights or matters of a purely local or private nature in the province.

105 In Reference re Farm Products Marketing Act, [1957] S.C.R. 198, the Governor General in Council referred to this Court certain questions as to the validity of a marketing scheme similar to that at issue in the Crystal Dairy case, supra, in that it provided for expenses levies as well as adjustment levies. The details of the various sets of reasons rendered are summarized by Iacobucci J. in Allard, supra, at pp. 401-402, and I shall not repeat them. Suffice it to say that this Court upheld the validity of the expenses levies under ss. 92(9), 92(13) and 92(16) and, in doing so, referred to the Lawson and Shannon decisions. The adjustment levies, however, were struck down, the Court following in that regard the Privy Council's decision in Crystal Dairy.

106 Similar issues arose in subsequent cases before this Court, but with the exception of two, they contain no further insight into the nature, source and scope of the provincial power to levy "regulatory charges", whether direct or not. I shall, therefore, confine my discussion to the two cases mentioned.

107 In Reference re Agricultural Products Marketing Act, supra, this Court was asked to assess the constitutionality of a marketing scheme providing for expenses levies as well as adjustment levies that were very similar to those struck down by the Privy Council in the Crystal Dairy case. The crucial difference between the two schemes was that the former had been enacted by Parliament, and not by a province, as had been the case in Crystal Dairy. The relevant discussion appears in the reasons of Laskin C.J. Though he wrote minority reasons, his comments on this issue were concurred in by Pigeon J., who wrote for the majority. Laskin C.J. was of the view that the pith and substance of the impugned scheme related to intraprovincial trade and commerce, a matter within exclusive provincial legislative jurisdiction, and that both types of levies were consequently ultra vires Parliament. He wrote, at p. 1234:

> The authorization of levies in respect of local marketing purports to put in place a cardinal feature of the marketing plan as it operates intraprovincially. If the levies are to be characterized as taxes, they are being applied here not as having any integrity of their own, as is the norm in taxation (albeit there are eddying consequences of tax measures), but as elements of a marketing scheme which Parliament could not itself prescribe, namely, a scheme of intraprovincial marketing. In short, the so-called taxes do not themselves reflect the pith and substance of the marketing plan of which they are part but rather take their colour from the scheme. Beyond this, it 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. [Emphasis added.]

108 Laskin C.J.'s reasoning was as follows. First dealing with expenses levies, he held that the Privy Council's position in Crystal Dairy in this regard had been considerably qualified by the later

Privy Council decision in Shannon and this Court's decisions in Reference re Farm Products Marketing Act, supra, and Ontario Boys' Wear Ltd., supra. At p. 1238, he added:

> It is, at any rate, now clear not only from the Shannon case but from judgments of this Court, beginning with Ontario Boys' Wear Ltd. v. Advisory Committee, and extending through the Willis case, to Reference re Farm Products Marketing Act of Ontario, supra, that an expenses levy may validly be imposed by provincial legislation upon regulated producers and sellers to cover the cost of administering a provincial marketing scheme. It may be regarded as a "fee for services" to use the phrase of Kerwin J., as he then was, in the Ontario Boys' Wear case, supra, at p. 359 and supportable under s. 92(13)(16) of the British North America Act, that is as an element of a valid regulatory scheme. It is quite clear from all of this that the Crystal Dairy case has been effectively overruled in respect of the validity of provincially authorized expenses or administration levies. [Emphasis added.]

It is noteworthy that Laskin C.J. made no mention of the provincial licensing power under s. 92(9) of the Constitution Act, 1867. Rather, his conclusion was that expenses levies aimed at covering the expenses incurred in the administration of a given regulatory scheme were enacted under the provincial power under which such scheme was enacted. They were, therefore, not, in pith and substance, legislation aimed at raising revenue under s. 92(2), but rather legislation relating, in pith and substance, to the matter of the scheme itself.

109 Laskin C.J. then addressed the constitutionality of the adjustment levies. Adjustment levies had been struck down by the Privy Council in Crystal Dairy, supra, and its reasoning was subsequently applied by this Court in Reference re Farm Products Marketing Act, supra. After proceeding to a detailed analysis of the relevant cases on the issue, he decided that Crystal Dairy had been wrongly decided and that there were compelling reasons to overrule the Privy Council's decision. He had this to say, at p. 1256:

> I think it is time that there was an end to making the validity of intraprovincial marketing schemes turn on fine distinctions between what is truly price fixing and what are adjustment levies, when in both situations the thrust of the regulatory scheme is to provide for orderly marketing and to equalize the position and the returns of producers or vendors, or both, by pooling production and controlling marketing through licensing and through quotas. [Emphasis added.]

Here again, it is clear that Laskin C.J. was of the opinion that levies imposed in such a context were not, in pith and substance, of the nature of taxes imposed in order to the raising of a revenue within the meaning of s. 92(2) of the Constitution Act, 1867, but rather related, in pith and substance, to the regulation of trade and commerce.

110 Following upon these cases, Iacobucci J. in Allard, supra, held that provinces could validly impose charges which were indirect in their incidence if those were "ancillary or adhesive to a valid provincial regulatory scheme" (p. 405). That language was taken from the reasons of Bull J.A. in Coquitlam v. LaFarge Concrete Ltd., [1973] 1 W.W.R. 681, where the British Columbia Court of Appeal upheld a scheme similar to that at issue in Allard. The relevant passage from Bull J.A.'s reasons appears at p. 685:

> It appears to me that the principle that emerges from the authorities is that taxation which can be characterized as other than direct, and hence not falling within the ambit of provincial legislation by s. 92(2) of the B.N.A. Act, may still be within the scope of provincial competency if contemplated by, and fairly authorized under, another head such as here -- s. 92(9). 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? [Emphasis added.]

111 On reviewing the key cases on the matter, it is clear that the courts have, over the years, recognized the provinces' power to enact legislation providing for the imposition of levies which were indirect in their incidence when such levies could not be characterized as "Taxation . . . in order to the raising of a Revenue for Provincial Purposes" as contemplated by s. 92(2) because they related, in pith and substance, to another head of power granted exclusively to provincial legislatures by s. 92 of the Constitution Act, 1867. In that sense, I do not think that the Constitution specifically contemplates a provincial power regarding "regulatory charges". Provinces can impose indirect levies if, in doing so, they are legislating under a different head of power than their s. 92(2) taxing power -- for example, property and civil rights (s. 92(13)), the administration of justice (s. 92(14)) or matters of local or private nature (s. 92(16)) -- and, consequently, outside the scope of the limitation to direct taxes imposed by that provision. Thus, the analysis is no different from the traditional analysis courts have undertaken when dealing with judicial review on federal grounds. Courts will identify the pith and substance of a given piece of legislation providing for the imposition of a levy; they will seek to find its dominant purpose or true character. Legislation aimed, in pith and substance, at raising revenue, will be subject to the requirement of directness provided for in s. 92(2). Legislation not relating, in pith and substance, to taxation as contemplated by s. 92(2) of the Constitution Act, 1867, will therefore not be subject to the directness requirement provided for in that section.

112 Such an approach is also consistent with cases where federal legislation was challenged on the basis that the imposition of a levy -- that, the federal authorities submitted, had been enacted pursuant to s. 91(3) of the Constitution Act, 1867 -- amounted to regulation of a matter within exclusive provincial jurisdiction. Courts have always first identified what the federal legislation providing for the imposition of a levy related to, in pith and substance, and then concluded whether

it related to a head of jurisdiction within exclusive federal or provincial jurisdiction. Such is the approach adopted by Laskin C.J. in Reference re Agricultural Products Marketing Act, supra (see also, inter alia: Attorney-General of British Columbia v. Attorney-General of Canada, [1924] A.C. 222 (P.C.); Attorney-General for Canada v. Attorney-General for British Columbia, [1930] A.C. 111 (P.C.); and In re The Insurance Act of Canada, [1932] A.C. 41 (P.C.); also of relevance is Bank of Toronto v. Lambe (1887), 12 App. Cas. 575 (where the Privy Council upheld, as relating to taxation under s. 92(2) -- and not as relating to banks -- a provincial statute providing for a tax on banks)).

113 A similar approach was followed by this Court in Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004. That case involved a challenge by the province of Alberta to the constitutional validity of a levy Parliament sought to impose on certain natural gas owned, produced and exported by the Crown in right of Alberta. The Attorney General for Alberta argued that, pursuant to s. 125 of the Constitution Act, 1867, such natural gas was shielded from the impugned levy. This Court was of the view that the exemption provided for in s. 125 was limited to taxation, i.e., levies enacted pursuant to, in that case, Parliament's legislative authority under s. 91(3) of the Constitution Act, 1867. That prompted an analysis of the pith and substance of the legislation providing for the imposition of the levy. This Court disposed of the appeal in favour of the Attorney General for Alberta on the ground that the impugned legislation related, in pith and substance, to taxation. The majority wrote, at p. 1072:

> A tax on the transit of goods from inside to outside the country may be imposed for the purpose of raising money or for the purpose of regulating trade or both. Even if the tax is aimed at export, provincial property is protected under s. 125 unless the federal legislation is regulatory. Thus, if the levy here in question were regarded as aimed at exports it would be necessary also, for the appeal to succeed, to conclude that it not be "taxation" in the sense of the foregoing discussion. There is to the proposed tax no aspect of the regulation of trade and commerce that would support its imposition under head 2 of s. 91 of the B.N.A. Act. [Emphasis added.]

The majority further held (at pp. 1073-74):

> In cases considering tax measures, it may be difficult to find a single "pith and substance" of legislation. A fiscal instrument may be chosen precisely because it can kill two birds with one stone, regulating the industry while raising revenue. The legislation may have, in the argot of the cases, a "double aspect". A subject which in one aspect and for one purpose may fall within one constitutional head of power may in another aspect and for other purposes fall within another head: see Hodge v. The Queen (1883), 9 App. Cas. 117 (P.C.) at p. 130. This is perhaps just another way of saying that a measure is supportable under two different heads of power. In most cases, it is enough to place a matter

> within either s. 91 or s. 92. The concept of a "double aspect" therefore finds currency in cases dealing with a federal power on one hand, and a provincial power on the other; see for example cases on highway traffic offences: O'Grady v. Sparling, [1960] S.C.R. 804; Mann v. The Queen, [1966] S.C.R. 238. It is seldom necessary to assign a particular head of power if a matter clearly falls within several heads of s. 91 or s. 92. In the present case, however, a specific assignment is necessary....
>
> Such an analysis will not save a tax which is in pith and substance only a revenue-raising mechanism, but which may exhibit ancillary regulatory characteristics.

The majority then turned to an analysis of the levy at issue in that case and dealt with the argument of the Attorney General of Canada that it related, in pith and substance, to regulation of trade and commerce. It went on, at pp. 1074-76:

> The Shorter Oxford English Dictionary, 3rd ed., (1944 revised with corrections 1973) defines "to regulate" as "To control, govern, or direct by rule or regulations; to subject to guidance or restrictions. . . To adjust, in respect of time, quantity, etc., with reference to some standard or purpose". In relation to "regulation of trade and commerce", this definition and common sense would suggest a restraint upon or channelling of economic behaviour in pursuit of policy goals. The proposed tax in this case, when viewed in light of other legislation touching the natural gas industry, has no such regulatory effect on behaviour. By its very comprehensiveness, the tax belies any purpose of modifying or directing the allocation of gas to particular markets. Nor does the tax purport to regulate who distributes gas, how the distribution may occur, or where the transactions may occur.
>
> . . .
>
> The quantity, movement and price of natural gas are carefully regulated under the present legislation and remain unaffected by the tax. The Petroleum Administration Act, S.C. 1974-75-76, c. 47, and the National Energy Board Act, R.S.C. 1970, c. N-6, together provide a complete scheme for the regulation of the export of natural gas. The volume of gas authorized for export as well as its price are established by orders pursuant to those Acts. The National Energy Program 1980 notes that trade in the major forms of energy has been closely regulated by federal agencies for many years (No. 1). The effect of the tax is to reduce the revenue or "net backs" received by producers or marketers of natural gas.

114 The cases reviewed also demonstrate the uncertainty respecting the scope of the provincial

power regarding licences contemplated in s. 92(9) of the Constitution Act, 1867. However, I need not deal with this question extensively. As I mentioned earlier, this Court has accepted that s. 92(9) was somewhat redundant as not constituting a source of provincial legislative jurisdiction relating to regulatory charges truly independent of that ensuing from the other heads enumerated in s. 92 of the Constitution Act, 1867; see Allard, supra, at pp. 404-5.

115 In summary, the power of a province to adopt legislation providing for the imposition of levies which are indirect in their incidence stems from the other heads of power over which it has exclusive legislative authority under the Constitution Act, 1867. Where the adoption of a levy constitutes, in pith and substance, regulation of a matter falling within heads of jurisdiction other than taxation in order to the raising of revenue (s. 92(2)), the requirement that such levy be direct in its incidence will not apply. I now turn to the analysis of the pith and substance of the impugned legislation before us in this appeal, the EDC scheme.

The EDC Scheme Relates, in Pith and Substance, to "Taxation . . . in Order to the Raising of a Revenue" (Section 92(2))

116 My colleague Iacobucci J. has characterized the EDC scheme as "ancillary to a valid regulatory scheme for the provision of educational facilities as a component of land use planning" (see para. 50) and "part of a comprehensive and integrated regulatory scheme, namely, the entirety of planning, zoning, subdivision and development of land in the province" (see para. 57). He first emphasizes the fact that the scheme operates so as to "limit recoupment to the actual costs involved in providing educational facilities occasioned by new development" (see para. 55). He then deals with various arguments put forward by the appellants and comes to the conclusion that there was a sufficient relationship between school construction and the regulation of land development to characterize EDCs as "regulatory charges".

117 The identification of the pith and substance of a law involves an analytical process conducted according to the approach carefully described by Sopinka J. in R. v. Morgentaler, [1993] 3 S.C.R. 463, at pp. 481-88. As he explained, at p. 482, the analysis "necessarily starts with looking at the legislation itself, in order to determine its legal effect", but courts also "'will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve', its background and the circumstances surrounding its enactment . . . and, in appropriate cases, will consider evidence of the second form of 'effect', the actual or predicted practical effect of the legislation" (p. 483).

118 I have no doubt that the EDC scheme relates, in pith and substance, to "Taxation . . . in order to the raising of a Revenue" as contemplated by s. 92(2) of the Constitution Act, 1867. I come to this conclusion for two principal reasons: first, by inquiring into the impugned piece of legislation itself, and second by considering the mischief the scheme was intended to remedy. I also disagree with Iacobucci J. that it is "much easier" than in Allard, supra, to find that the EDC scheme is ancillary to a valid regulatory scheme to the point where it does not relate, in pith and substance, to

taxation. Finally, the fact that the legislative scheme specifically provides for the use the school boards will make of the money levied and that the amount that can be levied is carefully limited to that purpose is, in itself, irrelevant to the characterization of the matter of the legislation.

119 The EDC scheme was enacted by the Legislature of Ontario as Part III of the Development Charges Act, 1989, S.O. 1989. c. 58, and related regulations. It provides for delegation to school boards of the authority to enact by-laws providing for the imposition of EDCs in a carefully detailed manner and the spending of the money levied on the construction of new educational facilities in an equally detailed manner. The scheme itself reveals no feature other than the raising of a revenue in order to finance the local share of growth-related capital expenditures while providing for specific ways in which such revenues will be spent by school boards. This is consistent with the objective pursued by the Legislature of Ontario and the mischief it sought to remedy through the enactment of the EDC scheme. As all parties to this litigation acknowledged, the EDC scheme was enacted by the Legislature of Ontario as a consequence of the reduction made at the same time of provincial grants regarding growth-related capital expenditures. In sum, it gave to local school boards the means to raise the revenue taken away through cut-backs in provincial grants. Therefore, one easily understands that the scheme was aimed at filling the gap left in educational funding in Ontario as a result of the provincial government's decision.

120 The situation in this appeal is to be distinguished from that in Allard, supra. In that case, this Court unanimously found that volumetric gravel removal fees imposed by municipalities pursuant to ss. 930(1) and 930(2) of the British Columbia Municipal Act, R.S.B.C. 1979, c. 290, had been properly enacted under a combination of ss. 92(9), 92(13) and 92(16) of the Constitution Act, 1867. The enabling provisions could not, as Iacobucci J. noted, be dissociated from other provisions of the Municipal Act relating to roads, road repair and gravel removal and the whole of those provisions related, in pith and substance, to the regulation of roads, road repair and gravel removal in such a way that the impugned fees formed an integral part of the scheme. At p. 408, Iacobucci J. explained that this relationship was made even more evident by an examination of the impugned by-laws themselves. In this regard, this Court expressly adopted (see p. 409) the characterization proposed by the British Columbia Court of Appeal in LaFarge, supra, at p. 686, of predecessor provisions to the impugned by-laws as constituting '"a complete and detailed code for the regulation of the gravel and soil extraction and removal trade"'. It is thus necessary to refer to the reasoning adopted by the British Columbia Court of Appeal in that case to fully understand the position taken by our Court in Allard. At pp. 686-87, Bull J.A. referred to the objective pursued and the mischief the British Columbia legislature intended to remedy through the adoption of the provisions at issue and wrote:

> In order to determine the true pith and substance of the impugned enactment, it seems requisite to ascertain into which slot the bylaw falls, and this, in turn, involves consideration of the circumstances surrounding its enactment. The facts can be shortly summarized into two principal categories. The first is that the removal of gravel and other substances from the eight or nine quarries or gravel pits in the Municipality by a continuous train of ten-ton trucks raised not

> only the displeasure of the inhabitants in the affected neighbourhoods, but past and prospective outlays of large sums of public funds for road provision and maintenance as well as regulatory expenses. The second, the other side of the coin, is that 15cents imposed by way of permit fee for each cubic yard removed creates a heavy burden on permit holders, and greatly increases their costs of doing business. It comes down to a fee of one dollar for each loaded ten-ton truck removing gravel away from the pits through the appellant's thorough-fares.
>
> The bylaw being amended constitutes a complete and detailed code for the regulation of the gravel and soil extraction and removal trade, including the provision of the performance bonds and operational plans and surveys, obviously directed to safety and environmental control. In the light of the public problems and expenses resulting from the extended operation of the business in the Municipality, I am unable to conclude that the amending bylaw No. 2041, 1971, although completely changing, as it does, the basis of the permit fee and increasing it enormously, has become divorced from the licensing and regulatory concept and, in effect, has become a disguised taxation of an indirect nature. In my view, heavy as the fee may be, the levy is still ancillary and incidental, and intended so to be, to the regulatory licensing of a trade or business.

As was the case in Allard, the fee discussed by the British Columbia Court of Appeal in LaFarge formed an integral part of a legislative scheme aimed at regulating the gravel removing business in pursuance of various policy goals to the point where it had no integrity of its own, taking its "colour from the scheme" itself, to use Laskin C.J.'s words in Reference re Agricultural Products Marketing Act, supra, at p. 1234.

121 Finally, I emphasize that the fact that the Ontario Legislature specifically provided for the use that was to be made of the funds levied through EDCs and that the amount of money that could be levied and the way it could be spent were carefully restricted to that purpose, is not, in itself, determinative in characterizing the matter of the scheme. This issue necessitates a clarification of precisely what the "costs of regulation" -- a phrase used by my colleague Iacobucci J. in his reasons -- refers to. This Court's review of the cases in Allard, supra (see pp. 398 et seq.) demonstrates that the expression "costs of regulation" was developed and adopted in cases that dealt, in the context of the constitutional validity of provincial marketing schemes, with the constitutionality of "expenses levies" to describe the expenses incurred by marketing boards responsible for administering the scheme in issue. Such levies were consistently (the only exception is the Privy Council's decision in the Crystal Dairy case which, as we have seen, was finally overruled by this Court in 1978) characterized as being ancillary and adhesive to the marketing scheme they were aimed at financing to the point that they related, in pith and substance, to the same matter as that of the impugned schemes to which they related. However, I cannot agree that those authorities are to be interpreted, and the expression "costs of regulation" to be defined, in such a way that as long as a province

specifically provides for the use that will be made of the funds levied, and that the amount that will be permitted to be levied and the use that will be made of that money are carefully limited to such purposes and that this purpose is one of exclusive provincial legislative jurisdiction (such as the building of schools), the legislation providing for such levy will then necessarily relate, in pith and substance, to the matter to which such purpose relates.

122 The adoption of such a position would be completely at odds with the structure of the Constitution and with the previous jurisprudence of this Court. The general power for the raising of revenues for provincial purposes by taxation was accorded to provinces by s. 92(2) of the Constitution Act, 1867, which limits them to direct taxation. That limitation serves a number of fundamental constitutional policies already identified. The courts have, it is true, upheld levies of money under regulatory powers in s. 92 where these constitute, in substance, a manner of regulating a specific activity. Examples are pooling arrangements, which are obviously an integral aspect of some regulatory schemes, expenses levies imposed on persons engaged in a particular activity, as occurred in the provincial marketing cases, or charges for services rendered to persons specifically benefitting from a regulated activity and intended to pay the costs of such services, e.g., the type of fees envisaged by the Privy Council in Reed, supra. The Allard case falls within this general description, but as I elsewhere indicated in dealing with LaFarge, supra, on which Allard is based, the case lies at the outer edges of the concept of regulatory charges (see my book, supra, at pp. 159-60). It is important, however, to refer to a number of aspects in the scheme that underlined its regulatory aspects. Not only was the money levied to be used for purposes specifically provided for in the legislation; it was also required to pay the costs incurred in constructing and maintaining roads which were essential to the regulated activities and it was levied upon the persons who took part in those very activities. The imposition of fees to pay costs integral to this activity was in those circumstances viewed by this Court as being in essence regulatory charges. These fees did not amount to a mere cloak for raising money for other purposes.

123 What we have here is a quite different scheme, one that would extend the concept of regulatory charge beyond the limits of its logic. The persons called upon to pay the EDCs are owners of land upon which construction, mostly housing, is to be undertaken, the levies to be used to build schools the local school board may consider necessary for the children who will live in the houses. An EDC seems to me to have all the earmarks of a tax as identified by previous decisions of this Court -- a compulsory levy imposed by law by a public body for a public purpose. It is, as I earlier noted, in pith and substance, a tax. It is not aimed at regulating the construction of houses or other buildings. It is not an integral part of the activity in which those engaged are regulated. Rather it is expressly aimed at raising a revenue for another purpose, building schools. Regulatory charges have thus far been tied, as they must constitutionally be, to the regulation of particular activities. The levy certainly does not regulate those engaged in the construction of houses. Nor does it regulate the building of schools; it simply collects monies from those constructing houses for the purpose of building schools. I am not, of course, blind to the fact that housing developments will put pressure on school boards in the area to build new schools to accommodate the children who will come to these new areas, but that is a matter of legislative choice, a choice dictated by many

other considerations as well, such as the kind and quality of the educational services. This is not a case, like Allard, supra, where the activity engaged in by the persons against whom a levy was raised (operators of gravel pits), causes the community to incur additional expenditures in constructing and maintaining roads required by the performance of the activity regulated. What dictates the need for schools is not so much that there is construction, but that there are children who need to be educated. That does not result from the fact that residences are constructed -- rather construction of residences, like schools, result from the fact that an increasing population requires these facilities. The schools and residences would generally be required wherever they were built. All the construction dictates is where these residences are built. The legislative choice of permitting local school boards to impose levies to pay these additional costs for schooling on landowners who construct residences in their area, rather than imposing the costs on taxpayers generally, seems perfectly legitimate. And it is equally legitimate that the construction industry (which apparently owns the bulk of the land) should bear its share of the costs since it benefits economically from the development. That, in fact, is all the EDCs have done. A portion of the costs originally borne by taxpayers throughout the province are now being borne by the landowners in the area engaged in. They are not being regulated in doing so; they are being taxed.

124 To extend the concept of regulatory charges in the manner proposed would virtually deprive the distinction between taxation and regulation of all meaning. A skillful draftsman (or, in this case, counsel) could easily find ways to combine interrelated activities into global schemes and impose "regulatory charges" on a person engaged in any of these activities to pay for the costs of other activities. There is nothing necessarily pernicious about this as a policy choice, of course. This is not an uncommon way of imposing taxation. But when money is raised by provincial taxation it is subject to the limitation to direct taxation. Regulatory powers are not subject to this restriction. The many reasons already identified demonstrate that the restriction to direct taxation represents an important component of the constitutional arrangements agreed upon by the framers of the Constitution in 1867. This, and the underlying policies that support it, strongly militate against this Court permitting provincial legislatures imposing levies that are in their incidence indirect through legislation cloaked as regulatory schemes, which can only rest in pith and substance on taxation as contemplated by s. 92(2) as interpreted over the years by the Privy Council and this Court. The particular scheme with which we are here concerned does not, it is true, affect these policies. That is because it happens to relate to land, but I see no reason on the basis of the logic used to justify this scheme, why it should not be used in relation to other schemes, and thereby offend against the constitutional policies just mentioned.

125 Thus, I am of the view that the EDC scheme constitutes taxation. EDCs are not regulatory charges because they relate, in pith and substance, to "Taxation . . . in order to the raising of a Revenue" as contemplated by s. 92(2) of the Constitution Act, 1867. Consequently, it is necessary to now turn to the issue of direct taxation to determine whether the scheme is intra vires the Legislature of Ontario.

EDCs Are Direct Taxes as Contemplated by Section 92(2)

126 As I noted at the outset, I am of the view that the EDC scheme is intra vires the Legislature of Ontario as a direct tax within the meaning of the Constitution Act, 1867. I do so because it is a tax on land, a type of tax that has always been regarded as a quintessential example of a direct tax. It bears all the usual hallmarks of a land tax. It is imposed on the owner, and it is collectable against the land itself; see, for example, Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Co., [1950] A.C. 87.

127 The reason why land taxes have always been characterized as direct taxes for the purposes of s. 92(2) is, as the Privy Council noted in City of Halifax v. Estate of J. P. Fairbanks, [1928] A.C. 117, because they were so perceived by the framers of the Constitution. Viscount Cave, L.C., at pp. 124-25, made this very clear in a passage referred to by my colleague Iacobucci J., at para. 45:

> The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories -- namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a Provincial government are made to extend. From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Thus, taxes on property or income were everywhere treated as direct taxes; and John Stuart Mill himself, following Adam Smith, Ricardo and James Mill, said that a tax on rents falls wholly on the landlord and cannot be transferred to any one else. . . . When therefore the Act of Union allocated the power of direct taxation for Provincial purposes to the Province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the Provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. [Emphasis added.]

(See also Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan, [1978] 2 S.C.R. 545.)

128 My colleague Iacobucci J. acknowledges in his reasons that land taxes have consistently been considered as direct taxes within the meaning of s. 92(2) of the Constitution Act, 1867, regardless of their general incidence, since the Privy Council's decision in Fairbanks, supra. However, he finds that EDCs are not true or traditional land taxes. In his opinion, land taxes are (a) imposed on land, (b) against the owner of the land and (c) assessed as a percentage of the value of the land or as a fixed charge per acre. He finds that EDCs could not be characterized as land taxes for the following reasons (at para. 48). First, the purpose of the EDC scheme is "not taxation of land, but rather, taxation imposed in order to defray the costs of infrastructure necessitated by new residential development". Secondly, "it is not the ownership of land qua land that is the object and purpose of the tax, but rather, the costs of infrastructure associated with new development upon land". Finally,

"[t]he assessment of the tax is not based upon the value of the land, but rather, is based on the impact development will have in terms of creating a need for educational services". Once again, with respect, I must express my disagreement with the position adopted by my colleague.

129 My colleague's approach invites consideration on two different levels. The first involves the narrow question of what the courts have held to constitute a land tax over the years. I shall, for convenience, deal with this question on the basis of the authorities first. The issue cannot, however, be fully understood, without consideration of much broader issues. For what my colleague seeks to do is to construe a tax imposed on a landowner and collectable against the land as an indirect tax because there will be a tendency for the incidence of the tax to be passed on to subsequent purchasers of the property given the fact that the land is taxed only on owners who engage in development of the land and that the majority of them are builders who are building for sale. This raises the broader issues to which I have alluded. It invites consideration of the constitutional policies underlying the division of taxes into direct and indirect, and more specifically the circumstances in which it is appropriate simply to have recourse to the broad categories of taxes contemplated by the framers of the Constitution, rather than those where it may best serve their underlying purposes to apply Mill's test which is concerned with classifying direct and indirect taxation on the basis of the incidence of such taxes. As mentioned, I shall first deal with the narrow issue.

The Land Tax Cases

130 To begin with, the courts have invariably defined land taxes in a manner consistent with that set forth at the beginning of this section, i.e., one imposed on land or on the owner of land; see, for example, Rattenbury v. Land Settlement Board, [1929] S.C.R. 52, at p. 73; and Canadian Pacific Railway Co. v. Attorney General for Saskatchewan, [1952] 2 S.C.R. 231, at pp. 258-59. I have found no authority to support the other requirements added by my colleague Iacobucci J. While the best known examples of land taxes are the ordinary municipal rates and taxes, they are by no means confined to these, and a wide variety of taxes have been held to be taxes on land because they were imposed on land or its owner, whatever their ultimate incidence might be thought to be.

131 I shall mention only a few of the cases, beginning with the Fairbanks case itself. The tax there was a specific levy on land in respect of businesses conducted on the property by their tenants, although it was abundantly clear that the landlords would recoup themselves against the tenants. If my colleague's approach is correct, I do not see why the Privy Council would not have treated that tax as, in substance, a business tax which was intended ultimately to be paid by the tenants. That indeed is what this Court had done in that case; see [1926] S.C.R. 349. But the Privy Council reversed this decision. At p. 126, Viscount Cave, L.C., had this to say about the matter:

> The authorities cited by Newcombe J. show the use made by this Board of Mill's definition in determining whether a new or special tax, such as a stamp duty, a licence duty or a percentage on turnover, should be classed as direct or

> indirect; but, with the possible exception of Cotton v. The King, which seems to have turned on its own facts, they do not afford any instance in which a tax otherwise recognized as direct has been held to be indirect for the purposes of the British North America Act by reason of any theory as to its ultimate incidence. [Emphasis added.]

132 The Privy Council's approach in Fairbanks has been followed ever since. Thus, while this Court, in the Esquimalt and Nanaimo Railway Co. case, supra, held a tax on land essentially based on the market value of the timber thereon to be indirect because of the obvious tendency of the tax to be passed on to the purchasers of the timber, the Privy Council reversed that decision because it was a land tax. So too in Canadian Pacific Railway Co. v. Attorney General for Saskatchewan, supra, the Saskatchewan Mineral Taxation Act, 1948, S.S. 1948, c. 24, which imposed a tax on minerals in producing areas of the province at a rate based on the fair market value of the minerals, was held valid as a land tax. Again, in R. v. Churchill (1972), 29 D.L.R. (3d) 368 (B.C.S.C.), McIntyre J., later of this Court, held that a fee imposed on operators of mobile home parks calculated in terms of the number of units in a park was a tax on land and so historically a direct tax. That fee would clearly have a tendency to be passed on to the unit holders. It can scarcely be said, as my colleague does, that these are "traditional" land taxes. As in the present case, they are based on specific uses of the land that make it very likely that the taxes will be recouped by the landowner against others. Indeed, in all the cases I have examined, taxes against land or its owner have invariably been held to be direct. This approach was most recently confirmed by this Court in Canadian Industrial Gas & Oil Ltd., supra. There Dickson J., as he then was, dissenting but on this point speaking for a unanimous Court (see Martland J.'s reasons, at p. 558), had this to say, at p. 583:

> Clearly, direct and indirect taxation are terms of historical reference, and although there is no reason to believe that the B.N.A. Act is not a document of evolving meaning, not limited to its original inspiration, jurisprudence, in so far as concerns particular forms of taxation like income or property taxes, has captured the historical spirit of "direct" and "indirect" taxation and preserved it. [Emphasis added.]

133 The only taxes in the cases I have found that could arguably have been considered as land taxes that were held to be indirect were taxes that were viewed by the courts as being in substance export taxes or other taxes on commodities produced from the land and entering into the general stream of commerce; see Canadian Industrial Gas & Oil Ltd., supra; Texada Mines Ltd. v. Attorney-General of British Columbia, [1960] S.C.R. 713. The impact on interprovincial and international trade, and the extraterritorial implications generally, of such commodity taxes are obvious, a point that I find is telling, and I shall expand on it later. At this stage, I simply observe that that is not the case here; the burden of a land tax cannot be passed on to persons operating outside the province. I note parenthetically that I am using the word "commodity" here in its ordinary commercial sense of articles of trade (see The Concise Oxford Dictionary of Current

English (9th ed. 1995)) as it has invariably been used in this area of law, as contrasted with land; see, for example, Canadian Pacific Railway Co. v. Attorney General for Saskatchewan, supra, at p. 258.

The Purposes of Provincial Limitation to Direct Taxation

134 I mentioned earlier that the categorization of export taxes as indirect taxation was telling. That is because, in my view, it reflects a broader reality. As I see it, the primary, if not the only, rationale now underlying the prohibition of indirect taxation imposed on the provinces by s. 92(2) of the Constitution Act, 1867 is that the direct effect of their taxation measures must be confined within their territory, and in considering the validity of a given tax by reference to its incidence this should be taken into account. This may, at first blush, appear to ignore the insistence of many of the participants in the Confederation debates that the provinces, because of the revenues arising out of the public domain, would have little need to resort to taxation and that if they did, transparency and accountability would be promoted by their being confined to direct taxation. These protestations in an era of laissez faire should not, however, blind us to the manner in which the enactment was drafted and the nature of governmental bodies being established or, importantly, what the framers understood as being comprised within the term direct taxation. As I mentioned earlier, the type of taxes they contemplated as direct taxes, land taxes for example, were seen to have predominantly local impact, while those seen as indirect, such as customs and excise, had an obvious tendency to have extraterritorial impact. Moreover, s. 92(2) expressly limited provincial taxes to the province, and, as Professor Hogg (Constitutional Law of Canada (3rd ed. 1992)) explained in the passage of his treatise cited by my colleague, at para. 38, the limitation to direct taxation has prevented provinces from doing indirectly what they could not do directly, since an indirect tax, while being technically levied initially "within the province" as contemplated by s. 92(2), could ultimately be borne by persons outside the province. What is more, as I indicated earlier and will again discuss shortly, this approach is wholly consistent with the basic structure of the Constitution.

135 At all events, since 1867, the federation has evolved immensely on every level. In particular, provincial activities have expanded immeasurably, requiring the provinces to develop new sources of taxation, endeavours to which the courts responded favourably. In the course of this development, as everyone now agrees, some of the earlier rationales advanced by the framers have become obsolete and, in interpreting s. 92(2) and defining the scope of the prohibition of indirect taxation, courts have gradually become more and more conscious of this reality. First, social and political changes have greatly increased the role provinces had in the federation by rendering increasingly important -- and costly -- the exclusive legislative responsibilities conferred on them by the Constitution Act, 1867. Secondly, the negative perception towards indirect means of taxation has effectively disappeared over the years. Professor Magnet in "The Constitutional Distribution of Taxation Powers in Canada" (1978), 10 Ottawa L. Rev. 473, at p. 533, has this to say:

> 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.

To this effect, I would also refer to the passage from Dickson J. (as he then was) in Canadian Industrial Gas & Oil Ltd., supra, cited by my colleague, where he held, at pp. 582-83:

> There can be no doubt that by the words "direct and indirect taxation" the Fathers of Confederation contemplated certain distinct categories of taxation, as well as a general test of directness. Only certain of such categories, such as income and property taxes, were to be available to the Legislatures. There were two reasons for this. The first was based on arcane political economy. It was thought that a direct tax would be more perceived than an indirect tax. The effect was thought to provide for greater scrutiny and resistence by the electorate with a resulting parsimony in public expenditure. The second reason proved wrong from the start. It was thought that provincial activities would be limited and revenue needs would be slim; the Legislatures, therefore, would have no necessity to resort to most tax pools.

It is important to note that, a few paragraphs later, he added the following, at p. 584, which made clear that he was of the opinion that both rationales identified earlier had become obsolete in a modern Canada:

> 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.

136 More recently, in Reference re Quebec Sales Tax, [1994] 2 S.C.R. 715, my colleague Gonthier J., writing for the Court, emphasized the fact that limiting the provinces' available taxation means to direct taxes had the important effect of avoiding extraterritorial repercussions in language that left little doubt that this rationale had superseded other historical considerations, at pp. 727-28:

> In approaching new taxes, the constitutional fate of which is unknown, it is not without interest to refer to an important effect of the s. 92(2) limitation to direct taxation. In addition to the historical desire to promote transparency and accountability, one finds a concern in the case law and literature regarding taxation of persons outside the province by indirect means or taxation which interferes with interprovincial or international trade. The prohibition against excise taxes and customs duties clearly achieves this latter purpose. As my colleague La Forest J. noted in his study of the taxation power under the Canadian Constitution, "the person who ultimately pays an excise tax may have

> no other connection with the province benefiting from the tax than that the product was originally produced or manufactured there" (G. V. La Forest, The Allocation of the Taxing Power Under the Canadian Constitution (2nd ed. 1981), at p. 202).
>
> My review of the jurisprudence interpreting s. 92(2) has revealed that apart from excise taxes, import duties, or taxes of a similar nature and the two more general limitations highlighted in the preceding paragraph, the provinces have come to enjoy considerable freedom in constructing their tax systems.

137 Gonthier J.'s reference to interprovincial and international trade are linked to what I have said earlier about the relation of the provincial taxing power to the basic structure of the Constitution. The framers of the Constitution, no doubt, thought the provinces would have little need to resort to their taxing power, but they nonetheless accorded a power that, even in those days, was very broad. So when the provinces became far more important governmental entities than could have been anticipated in a laissez faire era, the courts quite naturally -- and consistently with both the Constitution, and social and political realities -- interpreted the scope of provincial taxing power expansively. But they were far from ignoring a number of basic policies flowing from the very structure of the federation which have to do with the extraterritorial application of provincial taxes. I elsewhere indicated how the courts had in their interpretation of direct and indirect taxation fostered the basic underpinnings of the federation. At p. 94 of my book, supra, I wrote:

> Generally, Mill's test in the hands of the courts is concerned with form, not substance. But it has nonetheless served a number of substantive functions. Through its use the courts have effectively prevented the provinces from erecting tariff barriers against one another; they have supported a national market. Section 121 of the British North America Act, which was intended by the draftsman, but not in the original Quebec scheme, to perform this function might, if broadly construed, have been too restrictive of federal and provincial power. The courts could afford to interpret it narrowly by using the limitation to direct taxation to achieve the same result. The limitation to direct taxation also has had the effect of prohibiting taxes whose object must be to tax persons who are outside the province and who have no economic interest in the province in respect of the activity or property taxed. This explains the courts' consistent attacks on export taxes, whatever form they might take. And it also explains the courts' persistence in striking down estate taxes making the executor primarily responsible. Finally, as the Fathers contemplated, a direct tax is often in such a form that it is clearly brought home to the taxpayer that he is being taxed.

138 In that passage, my remarks are expressed in terms of Mill's test. But the policies served are wholly consistent with what occurs in respect of the categories of taxes the framers had specifically

in mind. For example, property taxes have predominantly local impact, but customs and excise taxes have immediately obvious extraterritorial implications. Not surprisingly, then, when Mill's test proved unequal to the task of properly balancing the broad constitutional policies I have described, the courts returned to the less precise method of categorizing taxes the framers had contemplated. In an age when the courts (and notably the Privy Council) expressed their views in technical terms without reference to underlying policies, our Court was at times misled regarding the course it should follow (see, for example, the Fairbanks case, supra). Over time, however, the direction has become clear enough, and the time has now come when courts should no longer exercise similar reticence in describing policy directions that underlie constitutional interpretation.

The Interplay Between Mill's Test and the Categories Test

139 I noted earlier that the courts have not yet carefully examined the interaction between the "categories" approach and Mill's test. It is important to do so here because of my colleague's attempt by the use of Mill's test to transform what in all other respects falls within the category of a land tax, and so converts a direct tax into an indirect tax. With respect, this seems to me to be wholly inconsistent with the trend of the jurisprudence and the constitutional policies that underlie it. Clearly, it does not serve the major policy grounds today supporting the limitation of the provinces to direct taxes. Obviously, there are no significant extraprovincial implications to land taxes. Their impact is local. Nor does it serve the policy adopted by the courts of expansively interpreting the ambit of provincial taxing powers to meet the needs of the important legislative functions for which they now bear responsibility. If the provinces' legislative functions were not costly in 1867, that is certainly not the case today, and as will become apparent, the courts have striven to so interpret s. 92(2) as to afford them adequate sources of revenues to meet their needs.

140 As I mentioned earlier, the framers hoped that the provinces would have sufficient funds to perform their functions from revenues from the public domain. However (as they did in the case of Parliament, which they thought could raise sufficient funds from customs alone, but to which they accorded power to raise money by any mode or system of taxation), they gave to the provinces ample means of raising money by direct taxation. Contemporary sources reveal that even in those days the meaning of direct taxation was broad, including several categories of taxes comprising in addition to property taxes, death duties and income taxes within its compass. What it clearly did not include were customs duties and excise and other taxes that could in the course of trade virtually automatically be passed on to others. Such taxes would not only interfere with Parliament's major sources of revenue, but equally important would evidently have direct impact on taxpayers outside the province and have serious implications for interprovincial and international trade as well as generally on the national economic entity the framers had sought to create.

141 The concepts of direct and indirect taxation were familiar to statesmen of the day who considered certain well-known categories of taxes to fall within one or the other of these rubrics. These understandings were reflected by the courts in the earliest decisions on the subject; see Attorney-General for Quebec v. Queen Insurance Co. (1878), 3 A.C. 1090 (P.C.). However, the

courts did not confine themselves to these broad understandings but consulted the works of various economists whose works must have been familiar to the framers. Preeminent among these was John Stuart Mill, and beginning with the case of Bank of Toronto v. Lambe, supra, his formulation of the concepts was for a considerable period almost exclusively referred to. In Principles of Political Economy, supra, Mill wrote:

> sec. 1. Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons 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.

142 In Lambe, Lord Hobhouse made it clear that Mill's test should not be used to follow the incidence of a tax as economists do, but that this task should be pursued in accordance with the "common understanding of men" as sufficiently reflecting the views of the framers. But in Cotton v. The King, [1914] A.C. 176 (P.C.), it was categorically stated that the test to be used was substantially that of Mill and that test was generally regarded as the sole test until the late 1920s. It must be observed, however, that the courts were then engaged in dealing with new types of taxes that did not fit, or fit comfortably, within the few categories specifically adverted to by the framers. It would have been possible, no doubt, to invent new categories. But it was quite natural to rely on more refined formulations familiar to the framers, and notably those of Mill, as they had from the beginning. As the provinces' needs for revenues expanded, the courts responded favourably to the fiscal necessity this imposed on them. At the same time, it was essential that they confine the provinces' fiscal power as much as possible within their territory, as the broad categories of taxation contemplated by the framers had done.

143 The greater refinements of Mill's test permitted the courts greater flexibility in accommodating the competing policies of according the provinces ample power to tax while restraining them to their territorial scope. Thus a tax on an estate was indirect because it would be passed on to the beneficiary and could thus be effectively imposed on an extraprovincial taxpayer; see Cotton's case, supra. Placing all estate taxes in a single category would have brought the underlying policies of the courts into conflict. However, by using Mill's test to trace the incidence of a particular taxing scheme, the courts could work an accommodation between these policies. Thus a tax imposed on a beneficiary in the province (what we now call succession duty) was imposed directly on the taxpayer and would have no extraprovincial effect, so it was held to be a direct tax; see Alleyn v. Barthe, [1922] 1 A.C. 215. Similarly, commodity taxes which had previously been imposed on the manufacturer or seller, and so traditionally viewed as indirect, could be reframed as taxes on a purchaser to fall within Mill's test, and this too was accepted by the Privy Council; see Atlantic Smoke Shops, Ltd. v. Conlon, [1943] A.C. 550.

144 When, however, the Privy Council was faced with the tax in Fairbanks, a land tax, where the use of Mill's test would have served neither of the competing constitutional policies sought to be advanced by the courts, the Privy Council turned to the categories test to uphold the tax, and for some time afterwards the categories test appeared to be the sole test to identify whether a tax was direct or indirect. (The cases are collected in my book at pp. 89-90.) But this was an overreaction. Viscount Cave, L.C., in the passage from Fairbanks cited earlier, had indicated that Mill's test was appropriate for taxes falling outside the settled categories. Consequently, when the categories test again appeared to become too restrictive and served neither of the underlying but competing constitutional policies of providing the provinces adequate scope to raise revenue while preserving the essential structure of the federation, the Privy Council returned to Mill's formula; see ibid. But, the categories test was never abandoned, and, as the cases cited earlier demonstrate, this has been especially so of land taxes which this Court has in recent years frequently and invariably held to be direct. That is scarcely surprising. Given the broad and expansive activities now pursued by the provinces under the Constitution, it would be odd to restrict their power to raise revenues within the province where such taxes have no extraterritorial impact. Land taxes, which have always been looked upon as typically direct, are of this kind. To restrict their use by the device of applying Mill's formula to them would fly in the face of the cases to which I have already referred. In Canadian Industrial Gas & Oil Ltd., supra, Dickson J., at p. 583, indicated that the framers' views concerning these settled categories must be respected. There are sound policy grounds for doing so. The use of Mill's formula in cases falling outside the traditional categories serves the same underlying policies. Mill's formula and the categories test have both been used at various times to broaden provincial taxing power wherever this could be done without offending the other policies that underlie our constitutional structure. This is what Dickson J. had in mind in the passage from Canadian Industrial Gas & Oil Ltd., just mentioned, when he indicated that while the Constitution Act, 1867 should be an evolving document, the traditional categories of direct and indirect taxation had captured the meaning of direct and indirect taxation, and it has consequently been preserved.

145 I am of the view that courts should take into account the fact that the primary rationale underlying the limitation to direct means of taxation imposed on provinces now relates to the potentially extraterritorial effects of indirect taxation. Our Constitution, as Lord Sankey so eloquently described it in Edwards v. Attorney-General for Canada, [1930] A.C. 124, at p. 136, is a "living tree capable of growth and expansion within its natural limits". This well-known metaphor illustrates the principle recognized by this Court on many occasions that the interpretation of constitutional instruments, such as the Constitution Act, 1867 or the Charter, can and should be adapted to changes in Canadian society; see, inter alia, Estey J.'s comments in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, at pp. 365-66, and Attorney General of British Columbia v. Canada Trust Co., [1980] 2 S.C.R. 466, in the context of taxation powers. Professor Hogg, supra, has observed that this principle has permitted progressive constitutional development in the face of immense changes, without constitutional amendment. As he put it, at pp. 413-14:

> The doctrine of progressive interpretation is one of the means by which the Constitution Act, 1867 has been able to adapt to the changes in Canadian society.

> What this doctrine stipulates is that the general language used to describe the classes of subjects (or heads of power) is not to be frozen in the sense in which it would have been understood in 1867. . . . [T]he words of the Act are to be given a "progressive interpretation", so that they are continuously adapted to new conditions and new ideas.
>
> . . .
>
> The idea underlying the doctrine of progressive interpretation is that the Constitution Act, 1867, although undeniably a statute, is not a statute like any other: it is a "constituent" or "organic" statute, which has to provide the basis for the entire government of a nation over a long period of time. An inflexible interpretation, rooted in the past, would only serve to withhold necessary powers from the Parliament or Legislatures. It must be remembered too that the Constitution Act, 1867, like other federal constitutions, differs from an ordinary statute in that it cannot easily be amended when it becomes out of date, so that its adaptation to changing conditions must fall to a large extent upon the courts.

146 In this area, the courts were sometimes able to meet new challenges by using traditional formulas -- the categories test -- but where this proved impossible, they had no hesitation in bringing Mill's test into play. But this did not require them to abandon the traditional formulas where these more fully met constitutional requirements. Thus as my colleague Iacobucci J. explains in his reasons, the EDCs' incidence may well be indirect within the meaning of the definition proposed by John Stuart Mill and accepted in substance by the Privy Council and this Court over the years. However, it is clear that EDCs cannot have any extraterritorial effect, because the only persons to whom they can be passed on by the builders are the buyers of the newly built structures, and that, of course, will necessarily occur within the boundaries of the province of Ontario. It would be counterproductive to apply Mill's test to taxes of this kind, and the courts have consistently refused to do so. To do otherwise would fly against the purposive manner in which a Constitution must be interpreted. Determining the constitutional validity purely on the basis of pure technicalities or formalistic approaches must be avoided. One should not lose sight of the underlying reason why provinces are confined to having recourse to direct means of taxation. At the end of the day, this approach has the merit of focusing the constitutional analysis on substance rather than on form and furthering the constitutional values of the prohibition imposed on provinces regarding indirect taxation as they stand in a modern Canada.

Conclusion

147 It is for these reasons that I would dismiss the appeal. The parties have agreed that there should be no order as to costs.

cp/d/hbb

Indexed as:

Allard Contractors Ltd. v. Coquitlam (District)

Allard Contractors Ltd., Appellant;
v.
The Corporation of the District of Coquitlam, Respondent.
And between
Thornhill Aggregates Ltd., Appellant;
v.
The Corporation of the District of Maple Ridge, Respondent.
And between
Kirkpatrick Sand & Gravel Co. Ltd., Appellant;
v.
The Corporation of the District of Maple Ridge, Respondent.
And between
Allard Contractors Ltd., Appellant;
v.
The Corporation of the District of Coquitlam, Respondent.
And between
Kirkpatrick Sand & Gravel Co. Ltd., Appellant;
v.
The Corporation of the District of Maple Ridge, Respondent,
and
The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of British Columbia and the Attorney General for Alberta, Interveners.

[1993] 4 S.C.R. 371

[1993] S.C.J. No. 126

File No.: 22829.

Supreme Court of Canada

1993: May 26 / 1993: November 18.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law -- Statutes -- Validity -- Municipal Act purporting to authorize variable fees for soil removal permits -- Whether provision ultra vires province as authorizing levy in nature of indirect taxation -- Whether volumetric permit fees ancillary to genuine licensing scheme - - Municipal Act, R.S.B.C. 1979, c. 290, s. 930(2) -- Constitution Act, 1867, s. 92(9).

Municipal law -- Municipal by-laws -- Validity -- Municipalities adopting soil removal by-laws incorporating volumetric permit fees -- By-laws distinguishing between commercial and non-commercial use -- Whether by-laws discriminatory -- Whether volumetric permit fees authorized by Municipal Act -- Municipal Act, R.S.B.C. 1979, c. 290, s. 930(2) -- Coquitlam By-law No. 1841, 1988 -- Maple Ridge By-law No. 3957-1987.

Coquitlam passed a by-law prohibiting the removal of soil and other substances from land within the municipality except as authorized by permit and establishing a flat rate permit fee. It later changed the permit fee from a flat rate to one dependent on the volume of material removed. The natural consequence of this change to a volumetric fee was a great increase in fees paid by commercial extractors. Maple Ridge also passed a by-law incorporating a volumetric permit fee. Both by-laws made exceptions for certain persons and usages, including an exception for those removing less than specified volumes of soil. Constitutional challenges were mounted, and the provincial Supreme Court quashed the by-laws, but these judgments were reversed by the Court of Appeal. On appeal in the Maple Ridge case, the Supreme Court of Canada found that s. 930(d) of the Municipal Act did not authorize the imposition of volumetric fees. In response to that decision, the provincial legislature added s. 930(2), which authorized removal fees which impose "a charge for each volumetric unit . . . removed". Section 930(d) was renumbered s. 930(1)(d). In light of this amendment to the Municipal Act, the two municipalities re-enacted their by-laws. The provincial Supreme Court allowed the petitions brought by the appellant gravel pit operators seeking to have the by-laws quashed. It found that s. 930 authorizes both a flat rate permit fee and a variable rate volumetric removal charge, but that it does not authorize a variable rate volumetric permit fee for removal. The municipalities amended their by-laws to create separate flat rate permit fees and volumetric removal charges. The provincial Supreme Court upheld the amended by-laws. On appeal, the Court of Appeal held that these various by-laws were intra vires the respondent municipalities.

Held: The appeal should be dismissed.

The volumetric fees at issue are indirect in their general tendency, since they can be related to a

unit of the gravel commodity or its price. Section 92(9) of the Constitution Act, 1867, in combination with ss. 92(13) and (16), comprehends a power of regulation through licences which is not confined to the requirement of direct taxation in s. 92(2). In so far as it comprehends indirect taxation, however, the power has been limited such that it can only be used to defray the costs of regulation. The question to be asked is whether the variable fees can be supported as ancillary or adhesive to a valid provincial regulatory scheme.

The permit and removal fees at issue in this case were only intended to offset the costs of the regulatory scheme, including road repair. Section 930(2) of the Municipal Act is related to a system of road and gravel regulation, notwithstanding its statutory location and its lack of express reference to roads. This relationship is also evident in the by-laws themselves, which constitute a complete and detailed code for the regulation of the gravel and soil extraction and removal trade. The fee provisions are related to these regulatory by-laws. The purpose of the volumetric fees can be inferred from their statutory and by-law context, and the extrinsic affidavit evidence presented in this case is merely additional proof that there was an intention to raise sufficient revenue to cover the costs of the regulatory scheme and the building and maintenance of roads over which gravel trucks would pass. While there was some evidence that considerably more moneys would be received from this volumetric levy than the amount actually required, it is not for this Court to undertake a rigorous analysis of a municipality's accounts. A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme, which is what occurred in this case. In so far as the volumetric fee can be considered a form of indirect taxation, it is supportable as ancillary or adhesive to a valid regulatory scheme. Since the volumetric fees are supportable under the licensing power of s. 92(9) viewed in conjunction with other heads of regulatory power in s. 92, particularly ss. 92(13) and (16), it is not necessary to consider arguments relating to s. 92A(4) of the Constitution Act, 1867, dealing with the taxation of natural resources by the provinces.

The by-laws are discriminatory in that they distinguish between commercial and non-commercial use, but the discrimination is authorized by the Municipal Act. While s. 930(2) makes no explicit reference to discrimination based upon the commercial character of removal, authorization may be either express or implied as a necessary incident of powers delegated. Here s. 930(2) clearly authorizes discrimination based on volume, and it is implicit in this authorization that commercial and non-commercial users will be treated differently. Licensing schemes of this kind generally make two kinds of exceptions as a matter of administration: there are de minimis exceptions implicit in the regulation, and exceptions are made for non-profitable, incidental, or personal use. The concept of volumetric discrimination is a surrogate for discrimination based upon these considerations.

Finally, s. 930(2), together with s. 930(1)(d), is sufficient to authorize a volumetric permit fee.

Cases Cited

Distinguished: Canadian Pacific Air Lines Ltd. v. British Columbia, [1989] 1 S.C.R. 1133; disapproved: Colpitts Ranches v. Attorney-General of Alberta, [1954] 3 D.L.R. 121; considered: Coquitlam v. LaFarge Concrete Ltd., [1973] 1 W.W.R. 681 (B.C.C.A.), rev'g [1972] 3 W.W.R. 539 (B.C.S.C.); referred to: Kirkpatrick v. Maple Ridge (Corporation of the District), [1986] 2 S.C.R. 124, rev'g (1983), 49 B.C.L.R. 134 (C.A.), rev'g (1980), 119 D.L.R. (3d) 598 (B.C.S.C.); Lees v. West Vancouver (1979), 15 B.C.L.R. 233; Montréal (City of) v. Arcade Amusements Inc., [1985] 1 S.C.R. 368; Bank of Toronto v. Lambe (1887), 12 A.C. 575; Air Canada v. British Columbia, [1989] 1 S.C.R. 1161; Attorney-General for British Columbia v. Canadian Pacific Railway Co., [1927] A.C. 934; Canadian Pacific Railway Co. v. Attorney General for Saskatchewan, [1952] 2 S.C.R. 231; Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Co., [1950] A.C. 87; Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198; Reference re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004; Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357; Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708; Reference re Farm Products Marketing Act, [1957] S.C.R. 198; Nelson v. City of Dartmouth (1964), 45 D.L.R. (2d) 183; Re Falardeau and Town of Hinton (1985), 21 D.L.R. (4th) 477; R. v. Greenbaum, [1993] 1 S.C.R. 674; R. v. Sharma, [1993] 1 S.C.R. 650.

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District of Coquitlam By-law No. 2041, 1971.
District of Coquitlam Soil Removal Regulation Bylaw No. 1841, 1988, ss. 4, 5, 11.
District of Coquitlam Soil Removal Regulation Bylaw No. 1914, 1988, ss. 3, 4, 5(e), (f), 13(a), 14 to 18, 20, 23.
District of Coquitlam Soil, Sand, Gravel, Rock or Other Substances of Which Land is Composed Removal Bylaw No. 1489, 1967.
Maple Ridge Soil Removal By-law No. 2681-1979.
Maple Ridge Soil Removal By-law No. 3957-1987, ss. 3, 4, 8, 16, Schedule D.
Maple Ridge Soil Removal By-law No. 4109-1988, ss. 2, 3, 4, 6, 7, 8, 15, 17, 18 to 23, 24, 25, 29, 31, 33, 34, Schedule "D", s. 1.
Mines Act, S.B.C. 1980, c. 28.
Municipal Act, S.B.C. 1957, c. 42, s. 873.
Municipal Act, R.S.B.C. 1960, c. 255, s. 868(d) [am. 1962, c. 41, s. 48; am. 1964, c. 33, s. 70].
Municipal Act, R.S.B.C. 1979, c. 290, ss. 528(b), 578(2)(a), 581, 651, 668(1), 669, 930 [am. 1987, c. 38, s. 27; am. 1989, c. 33, s. 9], 930.1 [ad. 1989, c. 33, s. 10].
Municipal Amendment Act (No. 2), 1987, S.B.C. 1987, c. 38, s. 27.
Municipal Amendment Act (No. 2), 1989, S.B.C. 1989, c. 33, ss. 9, 10.

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Magnet, Joseph Eliot. "The Constitutional Distribution of Taxation Powers in Canada" (1978), 10 Ottawa L. Rev. 473.

APPEAL from a judgment of the British Columbia Court of Appeal (1991), 61 B.C.L.R. (2d) 299, 5 B.C.A.C. 241, 11 W.A.C. 241, 8 M.P.L.R. (2d) 313, 85 D.L.R. (4th) 729, reversing a decision of Trainor J. (1988), 31 B.C.L.R. (2d) 309, 40 M.P.L.R. 96, additional reasons (1988), 31 B.C.L.R. (2d) 319 quashing certain municipal by-laws, and affirming decisions of Paris J. (1989), 35 B.C.L.R. (2d) 386, 43 M.P.L.R. 201, and Callaghan J. upholding amended municipal by-laws. Appeal dismissed.

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Monique Rousseau, for the intervener the Attorney General of Quebec.
George H. Copley, for the intervener the Attorney General of British Columbia.
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The judgment of the Court was delivered by

1 IACOBUCCI J.:-- This appeal is another chapter in the apparently ongoing saga of constitutional litigation concerning sand and gravel excavation. More specifically, this appeal concerns the constitutionality of s. 930(2) of the Municipal Act, R.S.B.C. 1979, c. 290. The

principal issue to be addressed is whether s. 930(2), in so far as it purports to authorize variable fees, is ultra vires British Columbia as authorizing a levy in the nature of indirect taxation. Derivatively, the constitutionality of by-laws enacted by the respondent municipalities under the authority of the Municipal Act is at issue. In addition, two other issues relating to the by-laws arise. The first issue is whether the by-laws are discriminatory in the municipal law sense. The second is whether the by-laws, upon a true construction of the Municipal Act, are authorized by that statute.

I. Background

2 At first glance, the historical development of the statute and by-laws relevant to this appeal appears complex. However, this apparent complexity can be simplified if one realizes that the statute and by-laws have changed a number of times in response to judicial decisions. In order to demonstrate better the interrelationship between the process of amendment and events in the courts, I find it helpful to present an integrated picture of the two.

3 Although the original ancestor of s. 930(2) was s. 873 of the Municipal Act, S.B.C. 1957, c. 42, it was a later version of that provision which was the subject of the first relevant judicial comment. That later version came in the form of s. 868(d) of the Municipal Act, R.S.B.C. 1960, c. 255 (am. 1962, c. 41, s. 48; am. 1964, c. 33, s. 70), which stated:

> 868. The Council may by by-law regulate or prohibit
>
> ...
>
> (d) the removal of soil, sand, gravel, rock, or other substance of which land is composed from any lands within the municipality, or within any area or areas within the municipality, and require the holding of a permit for such purpose and fix a fee for such permit, and different regulations and prohibitions may be made for different areas.

4 In 1967, pursuant to this section of the Municipal Act, the respondent Municipal District of Coquitlam (Coquitlam) passed By-law No. 1489, 1967, The District of Coquitlam Soil, Sand, Gravel, Rock or Other Substances of Which Land is Composed Removal Bylaw. That by-law set forth a prohibition against the removal of named substances from land within the Municipality, subject to other provisions of the regulatory code which authorized removal by permit holders. Under that portion of s. 868(d) which authorized Council to "fix a fee" for permits, an initial flat rate permit fee of 50 dollars per year was established.

5 In 1971, Coquitlam changed the amount of the permit fee from a flat rate to one dependent upon the volume of material removed by the permit holder: Coquitlam amending By-law No. 2041, 1971. The natural consequence of this change to a volumetric fee was a great increase in fees paid by commercial extractors. Not surprisingly, a constitutional challenge to the by-law was mounted. In LaFarge Concrete Ltd. v. Coquitlam, [1972] 3 W.W.R. 539 (B.C.S.C.), Gould J. quashed the

by-law on the basis that the volumetric fee was a form of indirect taxation ultra vires the municipality. On appeal, however, in a judgment which will be the subject of further comment below, the decision of Gould J. was reversed and the volumetric fee was upheld: Coquitlam v. LaFarge Concrete Ltd., [1973] 1 W.W.R. 681 (B.C.C.A.).

6 In 1979, s. 868(d) of the Municipal Act was renumbered as s. 930(d) of the Municipal Act, R.S.B.C. 1979, c. 290 (the Municipal Act), but the subsection was otherwise left unaltered. Soon after, purporting to act under the authority of s. 930(d), the respondent Municipal District of Maple Ridge (Maple Ridge) passed By-law No. 2681-1979, Maple Ridge Soil Removal By-law. Like the Coquitlam by-law which had withstood challenge, the Maple Ridge by-law incorporated a volumetric permit fee.

7 Despite the similarity between the Maple Ridge by-law and the Coquitlam by-law, Murray J. in Re Kirkpatrick and District of Maple Ridge (1980), 119 D.L.R. (3d) 598 (B.C.S.C.), quashed the former on the basis that it involved a colourable attempt to levy indirect taxes. At the Court of Appeal, however, the finding of colourability was reversed, and Seaton J.A. for the Court refused to overrule the earlier LaFarge decision: Kirkpatrick v. Maple Ridge (1983), 49 B.C.L.R. 134 (C.A.). An appeal proceeded to this Court.

8 The same constitutional issues which arose in the LaFarge decision thus came before this Court in Kirkpatrick v. Maple Ridge (Corporation of the District), [1986] 2 S.C.R. 124. However, the constitutionality of the volumetric fee did not need to be determined in that case since this Court was of the opinion that s. 930(d) of the Municipal Act did not authorize the imposition of volumetric fees. In the words of La Forest J., this Court upheld the "notion that the power given by s. 930(d) to 'fix a fee for the permit' (or licence, which is synonymous) ordinarily refers to a flat fee of some kind, as opposed to an increasing amount based on the measure of activities conducted under the licence" (p. 128).

9 In response to the decision of this Court in Kirkpatrick, the legislature of British Columbia amended s. 930 of the Municipal Act: Municipal Amendment Act (No. 2), 1987, S.B.C. 1987, c. 38, s. 27. The effect of this amendment was twofold. First, s. 930(d) was renumbered s. 930(1)(d), but was otherwise left intact. Second, s. 930(2) -- the provision which is the principal target of this appeal -- was added. It is important to note here the nature of its response to Kirkpatrick. In part, s. 930(2) set out that "[t]he council may, by bylaw, impose a fee for the removal referred to in subsection (1) (d) ... and the fee may impose a charge for each volumetric unit ... removed". In light of the amendment to the Municipal Act, the two respondent municipalities re-enacted their by-laws: Coquitlam By-law No. 1841, 1988; Maple Ridge By-law No. 3957-1988 (I refer to By-law No. 3957-1988, as did the parties in their pleadings, and as did the order of Trainor J. below, although I recognize that, in an appendix to the pleadings of the petitioner Kirkpatrick, the impugned by-law appears and it may be properly cited as By-law No. 3957-1987).

10 The re-enacted by-laws very quickly became the subject of petitions by the three appellants,

each of whom operates a gravel pit. Thornhill Aggregates Ltd. (Thornhill) and Kirkpatrick Sand & Gravel Co. Ltd. (Kirkpatrick) are commercial extractors which operate in the District of Maple Ridge. Allard Contractors Ltd. (Allard) is a commercial extractor operating in the District of Coquitlam.

11 The appellants each brought separate petitions before Trainor J. of the British Columbia Supreme Court which sought to have the by-laws quashed. Thornhill and William Kirkpatrick (for whom the appellant Kirkpatrick was later substituted by order) each challenged Maple Ridge By-law No. 3957-1988. Allard challenged Coquitlam By-law No. 1841, 1988. A fourth petitioner, not before this Court, challenged the validity of a by-law passed by the District of Mission (Mission).

12 Trainor J. disposed of all four petitions in one judgment which will be described more fully below: (1988), 31 B.C.L.R. (2d) 309, 40 M.P.L.R. 96. Although he dealt in the alternative with arguments which are now before this Court, Trainor J. allowed the petitions on the ground that s. 930 of the Municipal Act had failed to respond adequately to the Kirkpatrick decision. Trainor J. stated (at p. 314 B.C.L.R.):

> Section 930(2) is remedial legislation. The history of the problems between municipalities and gravel operators and the result of Kirkpatrick v. Maple Ridge were before the legislature. They knew that s. 930(1)(d) authorized only a flat fixed permit fee. I have no doubt that the object of the legislation, what was intended, was to give municipalities the authority to impose a volumetric or variable permit fee. The subsection does not do this expressly. Rather it authorizes imposing a fee for the removal of soil and then goes on to allow a charge for each volumetric unit removed.

In other words, Trainor J. held that s. 930 authorizes both a flat rate permit fee and a variable rate volumetric removal charge, but that it does not authorize a variable rate volumetric permit fee for removal. I will discuss this aspect of his decision near the end of these reasons.

13 Coquitlam, Maple Ridge and Mission appealed the decision of Trainor J., but the appeal of Mission was later abandoned. The municipalities also amended their by-laws to create separate flat rate permit fees and volumetric removal charges, in order to overcome the drafting flaw perceived by Trainor J. Notably, since the judgment of Trainor J. must now be reviewed by this Court, the unamended by-laws which were before him are reproduced in part below. In commentary, however, reference may be made to the amended versions for convenience. Aside from the narrow interpretive question resulting from the decision of Trainor J., there is no reason to distinguish the amended and unamended versions.

14 Like Southin J.A. below, I infer that another response to the decision of Trainor J. came in the form of ss. 9 and 10 of the Municipal Amendment Act (No. 2), 1989, S.B.C. 1989, c. 33. Pursuant to those sections, ss. 930(1)(d), (e) and 930(2) of the Municipal Act were repealed and a new

provision, s. 930.1, was added. The general import of the new provision is that volumetric permit fees of the type quashed by Trainor J. are now specifically contemplated by the Municipal Act. Obviously, however, s. 930.1 does not resolve the question of whether such a fee is within the province's legislative competence, nor does it obviate the need to examine s. 930(2). In my view, nothing in the present appeal turns on the existence of s. 930.1.

15 As soon as they were in place, the by-laws enacted by the municipalities in response to the decision of Trainor J. were attacked. Allard brought a petition to quash Coquitlam's By-law No. 1914, 1988. That petition was dismissed by Paris J., for reasons described below: (1989), 35 B.C.L.R. (2d) 386, 43 M.P.L.R. 201. Allard appealed that dismissal. William Kirkpatrick brought a petition against Maple Ridge's By-law No. 4109-1988 which was heard by Callaghan J. Since the prior decision of Paris J. was acknowledged by counsel to govern the facts, Callaghan J. dismissed the petition. That dismissal was also appealed.

16 In the result, the Court of Appeal below faced five appeals, each of which raised substantially the same issues. Three of these were appeals from the decision of Trainor J., which decision had struck down both Coquitlam By-law No. 1841, 1988 at the instance of Allard, and Maple Ridge By-law No. 3957-1988 at the instance of Thornhill and William Kirkpatrick. The other two were appeals from the decisions of Paris and Callaghan JJ. which upheld the amended by-laws, Coquitlam By-law No. 1914, 1988 and Maple Ridge By-law No. 4109-1988. The British Columbia Court of Appeal held that these various by-laws were intra vires the respondent municipalities ((1991), 61 B.C.L.R. (2d) 299, 8 M.P.L.R. (2d) 313, 85 D.L.R. (4th) 729, 5 B.C.A.C. 241, 11 W.A.C. 241) and it is an appeal from that result which has proceeded to this Court.

II. Relevant Constitutional, Statutory, and By-law Provisions

A. Constitutional Provisions

Constitution Act, 1867, ss. 92 and 92A:

> 92. 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, --
>
> . . .
>
> 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
>
> . . .
>
> 8. Municipal Institutions in the Province.
> 9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

. . .

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

92A....

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom...

. . .

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

. . .

THE SIXTH SCHEDULE

. . .

1. For the purposes of section 92A of this Act,

(a) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state . . .

B. Statutory Provisions

Municipal Act, R.S.B.C. 1979, c. 290, s. 930, as amended by the Municipal Amendment Act (No.

2), 1987, S.B.C. 1987, c. 38, s. 27:

930. (1) The council may by bylaw regulate or prohibit
(a) the sale of wild flowers;
(b) sales by auction in a public market;
(c) boxing, wrestling, jujitsu and other professional athletic contests where an athletic commission has not been established;
(d) the removal of soil, sand, gravel, rock or other substance of which land is composed from any land in the municipality, or in any area in the municipality, and require the holding of a permit for the purpose and fix a fee for the permit, and different regulations and prohibitions may be made for different areas;
(e) the deposit of soil, sand, gravel, rock or other material on land in the municipality or in any area in the municipality, and require the holding of a permit for the purpose and fix a fee for the permit, and different regulations and prohibitions may be made for different areas....

. . .

(2) The council may, by bylaw, impose a fee for the removal referred to in subsection (1) (d) or for the deposit referred to in subsection (1) (e) and the fee may impose a charge for each volumetric unit, as provided in the bylaw, of soil, sand, gravel, rock or other substance removed or deposited and the volumetric fee may be different for different areas of the municipality.

C. By-laws

1. Maple Ridge Soil Removal By-law No. 3957-1987, ss. 3, 4, 8, 16 and Schedule D:

3. GENERAL

Soil removal from any lands within the Municipality is prohibited except from a designated area.

4. Soil removal from a designated area is prohibited until a permit for such soil removal is first had and obtained from the Engineer pursuant to the terms of this by-law.

...

8. EXEMPTIONS

Nothing in this by-law shall be construed so as to apply to:

a) Soil removal for other than commercial purposes where the amount thereof does not exceed seventy-five (75) cubic meters from any one parcel of land within the Municipality.
b) Any person lawfully engaged in the development or improvement of land within the Municipality or the construction of buildings on land within the Municipality where soil removal is necessary for such development, improvement or construction and where engineering drawings for such development or improvement have been approved by the Municipality or a building permit has been issued by the Municipality as the case may be.
c) Soil removal from any area within the Municipality by any florist, nurseryman or farmer for use by him on the same parcel of land from which the said soil was removed for the purpose of his bona fide business as a florist, nurseryman or farmer; provided however no soil removal shall be below the established grade of the street which abuts the area from which the soil is removed, or the established roadway from which access is provided from the area.
d) Soil removal required for the installation and maintenance of utilities or the construction of roads or other public works within public rights-of-way or registered easements.

...

16. FEES

The fee for each permit shall be fixed in accordance with Schedule "D" to this by-law and any such fee shall be payable to the Municipality.

SCHEDULE "D"

...

1. The permit fee shall be calculated on the basis of $0.20 for each cubic meter of soil estimated by the applicant to be removed from the designated area during the term of the permit; but in any event, the applicant's

estimate of the soil to be removed as aforesaid shall not be less than the volume of soil removed from the designated area during the previous year.

2. District of Coquitlam Soil Removal Regulation Bylaw No. 1841, 1988, ss. 4, 5 and 11:

4. No person shall remove any Soil Substance from lands within the District of Coquitlam unless:

a) the removal of Soil Substance is incidental to building construction or landscaping activities and the quantity of Soil Substance removed in any one year period is less than 300 cubic metres;
b) a valid Conservation Permit or other valid permit is issued by the District of Coquitlam and this permit allows the removal of Soil Substance incidental to preload or other construction activities involving earthworks;
c) a valid Soil Substance Removal Permit has been issued by the District of Coquitlam authorizing the removal of the Soil Substance; or
d) the Soil Substance removal is incidental to construction or other activities carried out by or on behalf of the District of Coquitlam.

5. No Soil Substance Removal Permit shall be issued unless:

a) the Lands are located within the area outlined in Schedule "C" of the Northwest Coquitlam Official Community Plan as depicted in Appendix I and made part of this Bylaw; or
b) the Lands are located within the area outlined in Schedule "D" of the Northwest Coquitlam Official Community Plan as depicted in Appendix II and made part of this Bylaw...

11. a) The fee payable to the District of Coquitlam for each Soil Substance Removal Permit shall be a combination of:

i) an examination fee of One Hundred Dollars ($100.00) for each and every Soil Substance Removal Permit application; and

ii) the sum of Twenty-Six Cents ($.26) for each and every cubic metre of Soil Substance removed from the Lands under each Soil Substance Removal Permit.

III. Judgments Below

A. British Columbia Supreme Court (1988), 31 B.C.L.R. (2d) 309 (Trainor J.)

17 As already noted, the decision of Trainor J. quashed the challenged municipal by-laws upon the basis that the language in s. 930(2) of the Municipal Act did not authorize a variable volumetric permit fee for removal. Trainor J. came to this result based upon consideration of the rules of statutory interpretation in general, and the decision of this Court in Kirkpatrick v. Maple Ridge, supra, in particular. He dealt with other arguments only in the alternative.

1. The Indirect Taxation Argument

18 With respect to the argument that the permit fees constituted a form of indirect taxation ultra vires British Columbia, Trainor J. began by describing the decision of the British Columbia Court of Appeal in Coquitlam v. LaFarge Concrete Ltd., supra. He then followed the decision of that court in Kirkpatrick, supra, stating that the incidence of a variable permit fee is indirect. He concluded that since the permit fees were linked to the costs of the regulatory scheme, they were truly ancillary to that scheme. On this point, he stated (at p. 318):

> Here the evidence indicates an intention to raise sufficient revenue to cover the costs of the regulatory scheme and the building and maintenance of roads over which gravel trucks would pass. Although there is some evidence that considerably more moneys would be received from this volumetric levy than the amount actually required for those purposes, it is not for me to attempt to measure those amounts with exactitude. My role is to determine whether this is a genuine licensing scheme regulating trade or a mere cloak for raising money for other purposes. The possibility of a surplus would not invalidate a scheme unless it is a colourable device for raising revenue by indirect taxation. There is no need to demonstrate how the moneys were used.

Although Trainor J. nowhere clearly stated his conclusion on this point, he would obviously have upheld the volumetric permit fees as ancillary to a genuine licensing scheme supportable by s. 92(9) of the Constitution Act, 1867.

2. The Discrimination Argument

19 It was also argued before Trainor J. that the by-laws in question were discriminatory in the municipal law sense, since gravel operators were singled out from all users of municipal roads and

required to pay the permit fees, and since this discriminatory treatment was not authorized by the Municipal Act. In response, Trainor J. indicated that the municipalities had been authorized by statute to regulate gravel deposit and removal, and he noted that the imposition of a permit fee is a recognized method of regulation. He then applied a test for discrimination derived from Lees v. West Vancouver (1979), 15 B.C.L.R. 233 (C.A.), drawing two relevant conclusions. First, he found that the by-laws did not discriminate in fact. Second, he denied that the municipalities had acted with an improper motive or without regard for the public interest.

20 Thus, although Trainor J. quashed the by-laws based upon his approach to the statutory interpretation issue, on the other issues before him, he would have found in favour of the municipalities.

B. British Columbia Supreme Court (1989), 35 B.C.L.R. (2d) 386 (Paris J.)

1. The Indirect Taxation Argument

21 The approach of Paris J. to the question of indirect taxation was more directly based upon the decision of the British Columbia Court of Appeal in Coquitlam v. LaFarge Concrete Ltd. than was that of Trainor J. After reviewing the LaFarge case, and quoting from cases cited therein, Paris J. stated (at p. 392):

> It seems to me that the effect of those various pronouncements is that even if the levy imposed by a by-law such as the present one can be said to have the quality of an indirect tax, it is nonetheless justified if it is ancillary or adhesive to the scheme licensing and regulating the activity, in this case, the removal of soil and gravel from municipal property.

Therefore, like Trainor J., Paris J. found support for the variable permit fee within s. 92(9) of the Constitution Act, 1867. Purporting to rely on the decision of this Court in Kirkpatrick, he held that "[a] levy which is a licensing fee may also have the quality of an indirect tax and still be valid by virtue of s. 92(9) so long as it is genuinely ancillary to a licensing or regulatory scheme" (p. 393).

22 Paris J. found further support for his conclusion on the indirect taxation issue from s. 92A(4) of the Constitution Act, 1867. With respect to this support, he noted simply that s. 92A(4) specifically grants indirect taxation powers relating to non-renewable natural resources, and pointed out that such resources would include gravel and soil. He concluded, finally, that the power granted by s. 92A(4) was delegable to municipalities.

2. The Discrimination Argument

23 Paris J. considered that the circumstances before him were "on all fours with the circumstances before Trainor J." (p. 389). He agreed that the by-laws were authorized by s. 930 of

the Municipal Act. Further, he found that there was no discrimination in the legal sense because the by-law before him applied equally to all members of the regulated group. Paris J. stated (at p. 389):

> The fact that it would generate funds from gravel pit operators which will be partly or mostly used for highway repair and maintenance, but would not charge a levy to other highway users, does not make it discriminatory in the legal sense expounded in the jurisprudence dealing with the validity of municipal by-laws. That is because, as I have said, it applies equally and without discrimination to the members of the group upon which the municipality has been authorized by the enabling provincial legislation to impose a levy, namely, those who remove soil and gravel from municipal land.

Since the interpretive difficulties which faced Trainor J. had been resolved in the amended by-law, Paris J.'s analysis of the indirect taxation and discrimination arguments led him to dismiss the petition to quash that by-law.

C. British Columbia Court of Appeal (1991), 61 B.C.L.R. (2d) 299 (Macdonald, Southin, Taylor, Proudfoot and Hinds JJ.A.)

1. The Indirect Taxation Argument

24 The Court of Appeal below sat in a panel of five since the petitioners who appealed the decision of Paris J. wished that court to overrule its earlier decision in Coquitlam v. LaFarge Concrete Ltd. Writing for the court, however, Southin J.A. indicated (at p. 301) that it was unnecessary to consider LaFarge since the case had "been overtaken by a constitutional event", namely, the introduction of s. 92A into the Constitution Act, 1867.

25 Southin J.A. proceeded to deal with the indirect taxation argument solely under s. 92A of the Constitution Act, 1867. In construing that provision, Southin J.A. rejected interpretive arguments said to be based upon differences between the French and English versions of s. 92A(4), at pp. 305-7; additional reasons (1991), 5 B.C.A.C. 241, at p. 252. In the result, s. 92A(4) was read to encompass a power of indirect taxation which is delegable to municipalities.

2. The Discrimination Argument

26 Using language from Montréal (City of) v. Arcade Amusements Inc., [1985] 1 S.C.R. 368 (at p. 405), Southin J.A. considered the relevant discrimination issue to be whether s. 930 authorized by-laws to be "partial and unequal in operation between different classes". As already noted, Southin J.A. was of the opinion that s. 930 established a form of indirect taxation. For this reason, she turned her attention to whether s. 930 authorized municipalities "to impose this taxation on one class of removers; i.e., commercial extractors, and to exempt others" (p. 311). Southin J.A. then

concluded that "[h]aving regard to the history of the legislation in question, I am of the opinion that the Legislature not only intended to authorize such imposition and exemption but also has used apt words for the purpose" (p. 311).

3. The Statutory Interpretation Argument

27 Southin J.A. spent little time determining whether the by-laws before Trainor J. were authorized by the unamended Municipal Act, such that they could validly impose a volumetric permit fee. She first suggested that it was clearly the intention of the Legislature to authorize a volumetric impost. She then simply asked whether the by-laws were authorized to impose such an impost by way of permit fee. On this latter point, she concluded as follows (at p. 310):

> On this point of construction, with the greatest respect, I do not agree with the learned judge. In this context, to say that the charge can be imposed but it cannot be imposed as part of the permit fee but only as a separate charge is to make a distinction without a difference.

28 The Court of Appeal thus reversed Trainor J. on the point of statutory interpretation, rejected the discrimination argument, and upheld s. 930 of the Municipal Act and the municipal by-laws under the indirect taxation power of s. 92A(4) of the Constitution Act, 1867.

IV. Issues

29 On November 10, 1992, the Chief Justice stated the following constitutional question:

1. Is s. 930(2) of the Municipal Act, R.S.B.C. 1979, c. 290, beyond the legislative competence of the province to the extent that it authorizes variable fees?

30 In argument before this Court, the parties addressed four separate issues as follows:

1. Is s. 930(2) of the Municipal Act, to the extent that it authorizes variable fees, within the legislative competence of the Province of British Columbia pursuant to s. 92(9) of the Constitution Act, 1867?
2. Is s. 930(2) of the Municipal Act, to the extent that it authorizes variable fees, within the legislative competence of the province by virtue of s. 92A(4) of the Constitution Act, 1867?
3. If s. 930(2) of the Municipal Act is within the legislative competence of the province to the extent that it authorizes variable fees, are the by-laws nonetheless discriminatory and therefore illegal?
4. If s. 930(2) of the Municipal Act is within the legislative competence of the province to the extent that it authorizes variable fees, does it, on its true construction, authorize variable permit fees?

31 At the outset, I should state that because of the conclusion I have reached on the first issue relating to s. 92(9) of the Constitution Act, 1867, I will find it unnecessary to consider arguments relating to s. 92A(4), which deals with the taxation of natural resources by the provinces.

V. Analysis

A. Is s. 930(2) of the Municipal Act, to the extent that it authorizes variable fees, within the legislative competence of the Province of British Columbia pursuant to s. 92(9) of the Constitution Act, 1867?

32 Later in these reasons, I will conclude that the variable fees at issue in this case are referable to an overall scheme of gravel and road regulation, and that s. 92(9), in conjunction with ss. 92(13) and (16), of the Constitution Act, 1867 validates those fees to the extent that they comprehend an element of indirect taxation. This final conclusion depends upon several layers of analysis. It rests most directly upon an analysis of whether the Municipal Act and by-laws create a regulatory scheme to which the fees can be related. That regulatory analysis, in turn, presupposes that s. 92(9) can support indirect licence fees as part of a regulatory scheme, in so far as such fees might otherwise be called indirect taxes. Finally, an allegation of indirect taxation is only relevant, and an analysis of s. 92(9) is only necessary, to the extent that the variable fees at issue can be considered indirect in their general tendency. I therefore begin by examining the general tendency of the variable licence fees. I will later proceed to examine case law on s. 92(9), to analyze the Municipal Act and by-laws for evidence of a regulatory scheme which is related to the variable fees, and to conclude in the manner indicated above.

1. The General Tendency of the Permit Fees

33 By virtue of s. 92(2) of the Constitution Act, 1867, the provinces are given the power to raise revenue for provincial purposes only by means of direct taxation. The existence of this power means that in the typical case of a flat rate licence fee, very little division of powers analysis is required. This is true because it has been generally accepted, since the classic decision of Bank of Toronto v. Lambe (1887), 12 A.C. 575 (P.C.), that a flat fee constitutes a form of direct taxation.

34 It is when courts are presented with variable licence fees that the question of indirect taxation can arise. Whereas Lambe, supra, determined that the general tendency of a flat fee is direct, in the case of a variable fee, no automatic conclusion as to general tendency can be drawn. Each case must be examined to determine whether a variable fee calculated according to the number or value of a licensee's transactions is direct or indirect in its general tendency.

35 On the facts of this case, I have no doubt that the volumetric fees at issue are indirect in their general tendency. Each of the respondent municipalities has created a fee which varies according to the volume of gravel removed by the appellants. For instance, Coquitlam By-law No. 1914, 1988, s. 13(a) establishes a fee of 26 cents per cubic meter of soil removed. That such a variable fee, imposed in relation to a commodity such as gravel which is intended for trade in the market, is legally indirect in its general tendency can be quickly demonstrated.

36 Although the question of whether a levy is direct or indirect is a legal one, it has been the practice of courts to adopt as their own the classic formulation of John Stuart Mill. As quoted in Lambe, supra, at p. 582, this formulation is the following:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons 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....

37 In some cases, such as where a tax is clearly levied only against an ultimate consumer, this definition is sufficient and complete: see, e.g., Air Canada v. British Columbia, [1989] 1 S.C.R. 1161, at p. 1186. In other cases, however, the one who must pay the tax may be in a position to either pass the tax along directly or recoup an equivalent sum less directly. In these latter circumstances, Mill's definition requires elaboration.

38 The required elaboration can be noticed as early as Lambe, supra, itself. In holding that a business tax on banks was properly characterized as direct, the Privy Council distinguished the tax from "a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers" (p. 583). This is a sentiment expanded upon in Attorney-General for British Columbia v. Canadian Pacific Railway Co., [1927] A.C. 934. In that case, the Privy Council faced a provincial statute which levied upon a purchaser a tax equal to one-half cent per gallon of fuel-oil purchased. The tax was to apply to the initial sale of fuel-oil following its manufacture or importation into the province, but the Council struck it down as indirect. Viscount Haldane stated (at p. 938): "Fuel-oil is a marketable commodity, and 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."

39 Both Lambe, supra, and Attorney-General for British Columbia, supra, therefore appear to recognize that a tax measured with reference to a marketable commodity is usually indirect in its general tendency. It remained for Rand J. in Canadian Pacific Railway Co. v. Attorney General for Saskatchewan, [1952] 2 S.C.R. 231 ("Saskatchewan"), to explain clearly why this might be so. In commenting upon Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Co., [1950] A.C. 87 (P.C.), Rand J. stated (at pp. 251-52):

> Lord Greene in the same case speaks of the "fundamental difference" between the "economic tendency" of an owner to try to shift the incidence of a tax and the "passing on" of the tax regarded as the hallmark of an indirect tax. In relation to commodities in commerce, I take this to lie in the agreed conceptions of economists of charges which fall into the category of accumulating items: and the question is, what taxes, through intention and expectation, are to be included in those items? If the tax is related or relateable, directly or indirectly, to a unit of the commodity or its

> price, imposed when the commodity is in course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market.

Although other approaches have been suggested (see the discussion in G. V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution (2nd ed. 1981), at pp. 88-92), I am of the opinion that an appropriate test for indirect taxation exists within the above quotation from Rand J., namely: is the tax related or relateable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in the course of being manufactured or marketed?

40 Notably, however, Maple Ridge argued before this Court to the effect that the volumetric fee could not be related to a unit of the gravel commodity nor to its price. It was suggested that gravel could be removed from the ground by the appellants -- i.e., excavated -- and yet not be of a saleable quality. Maple Ridge argued that the volumetric fee would thus apply to such removal notwithstanding that the low grade gravel might not enter into trade as a commercial commodity. I reject this argument for two reasons.

41 First, Maple Ridge placed emphasis upon the case of Colpitts Ranches v. Attorney-General of Alberta, [1954] 3 D.L.R. 121 (Alta. S.C.). In that case, a municipal tax was levied upon the plaintiff's fur farming business. The plaintiff raised foxes, and the amount of the tax was calculated with reference to the number of foxes the plaintiff owned. Although the court examined several of the cases which I have mentioned here, including Saskatchewan, supra, it held that the tax was not indirect. Cairns J. noted that not every fox would be sold nor otherwise become an article of commerce, and stated that "[t]he tax in question... is not specifically passed on to the purchaser" (p. 123). The tax was characterized as a cost of the plaintiff's production which could only be passed along like other production expenses.

42 I do not regard the Colpitts case as persuasive authority for Maple Ridge's position. Indeed, counsel for Maple Ridge conceded that Colpitts is rather extreme in its position. I cannot help but observe that the court in Colpitts seems to suggest that an indirect tax involves a perfect correlation between a tax and the increased cost of a commercial item. I do not believe that the helpful approach of the Saskatchewan case is rendered sterile simply because certain units of a taxed commodity do not reach the market. While the tax imposed with reference to such units may indeed be absorbed into general "production costs", that does not prevent the tax from clinging as a burden to the vast majority of units which end up entering the market. To the extent that Colpitts denies this proposition, I would overrule it.

43 A second reason for rejecting Maple Ridge's argument is fact-based. Counsel for Maple Ridge outlined the procedure for measuring gravel removal in the by-laws. According to that procedure, the volume of gravel removed from a designated area is calculated through the comparison of before and after aerial photographs. Therefore, in arguing that some gravel may be excavated but not sold, Maple Ridge is drawing too fine a distinction. While gravel may indeed be excavated but

not sold, such gravel will not be "removed from the designated area" (Maple Ridge By-law No. 4109-1988, Schedule "D", s. 1). I did not understand counsel for Maple Ridge to say that gravel unsuitable for sale would actually be trucked away from the gravel pits. Since such gravel would never leave the area targeted by the aerial photography, it would never become the subject of the volumetric fee. Upon this basis, the argument based upon Colpitts, such as it is, is without factual foundation.

44 For these reasons, I believe that it is the clear intention and expectation of s. 930(2) of the Municipal Act and the related by-laws that the volumetric fees are to be indirect in their general tendency. Since the fees are measured with reference to the volume of a commercial commodity headed for the marketplace, they obviously cling "as a burden to the unit or the transaction presented to the market" within the meaning of Saskatchewan, supra, at p. 252.

2. Section 92(9) and Indirect Taxation Arguments

45 The finding that the variable fees are indirect in their general tendency leads inevitably to the argument that such fees are ultra vires the province as being in relation to indirect taxation. I proceed, therefore, to consider those cases which have examined s. 92(9) and its capacity to embrace the concept of indirect taxation. I note that since I am attempting to determine the scope of s. 92(9) rather than to define "taxation" as such, I will find it unnecessary to consider either Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, or Reference re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004, both cited by the appellants, since neither case deals with s. 92(9) of the Constitution Act, 1867.

46 Prior to 1930, no case had addressed the question of whether s. 92(9) contemplated a taxation power which might extend beyond the direct taxation power of s. 92(2). In that year, however, this Court decided Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357. Although that case principally held that a provincial marketing scheme was unconstitutional since it regulated trade and commerce, Duff J. first considered the scope of s. 92(9) in relation to s. 92(2), and stated (at pp. 363-64):

> Prima facie, it would appear, from inspection of the language of the two several heads, 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.

Upon this basis, Duff J. considered (at p. 364) that certain provincial licensing levies were merely ancillary in nature, having as their object the "creation of a fund to defray the expenses" of the regulatory scheme. In the result, of course, the licences were nonetheless ancillary to an unconstitutional scheme, and they fell on that basis.

47 While Lawson, supra, gave a reading to s. 92(9) which opened up the possibility for indirect taxation within that section, it did so in the context of language suggesting that the possibility would be limited to the recoupment of regulatory expenses. In the next case to consider the matter, somewhat more expansive language was used. In Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708, the Privy Council was presented with a provincial marketing scheme confined to intraprovincial trade. Under that scheme, marketing boards could be invested with the power to fund expenses through licence fees obtained from persons involved in the producing, packing, transporting, storing, or marketing of the regulated natural products. Such boards could collect the fees yearly, half-yearly, quarterly, or monthly, could classify the licensees into groups, and could fix fees of different amounts for the different groups.

48 The Privy Council suggested that there were difficulties in classifying these licence fees as direct taxation, but found it unnecessary to consider the point. Sufficient legislative authority was located in other heads of provincial power, although no attempt was made to clarify the relationship between the heads discussed. The Council merely named s. 92(9), the licensing power, s. 92(13), "Property and Civil Rights in the Province", and s. 92(16), "Matters of a merely local or private Nature in the Province". Lord Atkin then discussed these grounds of support in the following terms (at p. 721):

> If regulation of trade within the Province has to be held valid, the ordinary method of regulating trade, i.e., by a system of licences, must also be admissible. A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes.

49 The breadth of this language might be taken to suggest that indirect taxation had been introduced into s. 92(9) without qualification, a result which would rob s. 92(2) of any independent meaning. However, it is important to underscore "that what was involved here was a regulatory scheme by way of licences otherwise within provincial competence, and that the licence fees were levied for the purpose of supporting the scheme": G. V. La Forest, supra, at p. 158.

50 The apparent breadth of the Shannon case is also narrowed when it is viewed in the light of Reference re Farm Products Marketing Act, [1957] S.C.R. 198. At issue in the latter case was the validity of another provincial marketing scheme, one aspect of which required peach and vegetable growers to pay licence fees, which fees were calculated with reference to the weight of regulated produce delivered to processors. Notwithstanding the potential for indirect taxation, the fees were upheld as intra vires the province.

51 It is interesting to note the approaches taken by various members of the Court in Reference re Farm Products. Kerwin C.J. was content simply to cite the Shannon case, supra, as authority for the licence fees. Cartwright J. was of the opinion that the specific terms of the marketing scheme were not properly before the Court, and for this reason, he was unable to reach a conclusion with respect to the licence fees. He noted, however, that had he been able to consider the terms of the scheme, he would have agreed with Rand J. Rand J. held that a licensing scheme would not be disqualified merely because it included an element of indirect taxation, and cited Lawson, supra, to state that fees levied incidental to the regulation of trade by means of licences would be considered without reference to the direct taxation power of s. 92(2). His judgment makes apparent that he considered ss. 92(9), (13), and (16) to collectively establish a power to regulate through licences which "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" (p. 219, emphasis added). For Fauteux J. (Taschereau and Abbott JJ. concurring), although the fees were principally justifiable as charges for services, the licensing power of the provinces "derived from heads 9, 13 and 16 of s. 92" could be used to "raise money to defray the costs of operation" of a valid regulatory scheme (at pp. 249-50, emphasis added). Finally, for Locke J. (Nolan J. concurring), s. 92(9) could authorize the imposition of a licence, the cost of which would vary with the quantity of regulated substance sold, notwithstanding that the effect of the licence would be to increase the sale price of regulated produce. Locke J. cited Shannon, supra, to suggest that a licence would not be objectionable simply because it both regulates trade and provides revenue. Notably, however, Locke J. operated upon the stated assumption that the licence fees in question were to be used to defray expenses.

52 In the above cases, decided either by this Court or the Privy Council, one can discern a consistent treatment of the scope of s. 92(9) of the Constitution Act, 1867. Although somewhat broad language was used by Lord Atkin in Shannon, supra, it appears generally true that s. 92(9), in combination with ss. 92(13) and (16), comprehends a power of regulation through licences. It is a power which is not confined to the requirement of direct taxation in s. 92(2). However, in so far as it comprehends indirect taxation, these cases -- either explicitly or upon their facts -- have limited the power of indirect taxation such that it can only be used to defray the costs of regulation.

53 Since the time of Reference re Farm Products, supra, several lower courts have also considered the question of indirect taxation and s. 92(9). Particularly worthy of mention is the decision of the British Columbia Court of Appeal in Coquitlam v. LaFarge Concrete Ltd., supra, a case already mentioned in my description of the background to this case. LaFarge involved facts substantially similar to those which now confront this Court, and, in particular, a municipal by-law which set out a volumetric fee for soil removal. The petitioner LaFarge had challenged the by-law upon the basis that it constituted indirect taxation and was therefore ultra vires the municipality and the province.

54 For Taggart J.A. in LaFarge, the by-law was valid since its real purpose was to "cover the cost incurred and to be incurred by the appellant Municipality in constructing and maintaining roads"

associated with the regulatory scheme (at p. 699). Taggart J.A. otherwise agreed with Bull and Branca JJ.A. For Branca J.A., the by-law was intra vires on "the basis that it is a genuine licensing tax which formed a part of a licensing and regulatory scheme" (at p. 698). Branca J.A. did not specifically relate this finding of validity to the costs of the scheme, although elsewhere in his reasons he reviewed evidence which could allow the inference of such a relationship. Finally, Bull J.A. was most explicit in stating that he resolved the question through a pith and substance analysis. The relevant question was stated to be the following (at p. 685):

> 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?

In answering this question, Bull J.A. had recourse to the facts surrounding the enactment of the by-law, which he noted to include the "prospective outlays of large sums of public funds for road provision and maintenance as well as regulatory expenses" (p. 686). On the whole, then, the volumetric fee provision was upheld as valid provincial licensing, but the court appears to have been influenced by the idea that the revenue raised was required to fund the regulatory scheme, including road repair.

55 I do not read LaFarge to have substantially altered the interpretation of s. 92(9) which existed following Reference re Farm Products, supra. The three judgments in LaFarge, taken together, suggest to me that the validity of the by-law in question was linked to the costs of regulation by the court, and that the pith and substance analysis was not intended to convey more than this point. Nor do I believe that the interpretation of s. 92(9) has been much affected by several other lower court decisions to which this Court was referred: Nelson v. City of Dartmouth (1964), 45 D.L.R. (2d) 183 (N.S.S.C.); Kirkpatrick v. Maple Ridge (1983), 49 B.C.L.R. 134 (C.A.), and Re Falardeau and Town of Hinton (1985), 21 D.L.R. (4th) 477 (Alta. C.A.). These cases, in my opinion, either fail to advocate clearly that a broader power of indirect taxation exists within s. 92(9), or they do so unnecessarily in light of their facts.

56 My review of case law thus leads me to suppose that it has yet to be determined whether s. 92(9) comprehends a power to levy indirect taxes in order to raise revenue in excess of regulatory costs. Likewise, the cases reviewed tend generally to consider s. 92(9) in combination with other s. 92 powers. I agree with the following statement made by my colleague La Forest J. in his book on the subject, supra, at p. 159:

> A close reading of the cases, therefore, indicates that the courts look upon heads (9), (13) and (16) as together giving the provinces power to regulate intraprovincial trade by means of a licensing scheme and to permit

the levy of fees for such licences to support the scheme even if the fees constitute indirect taxation. But they limit indirect taxation by licences to this purpose.

57 I note that the Attorneys General for Quebec, Ontario and British Columbia argued in favour of an interpretation for s. 92(9) which makes the licensing power clearly independent of other s. 92 heads: see also J. E. Magnet, "The Constitutional Distribution of Taxation Powers in Canada" (1978), 10 Ottawa L. Rev. 473, at pp. 522-27. In particular, it was said that the power to raise money to support a regulatory scheme through indirect taxation already resides in the heads of power noted by La Forest J., and that if licences are limited in this respect, s. 92(9) will be redundant. I am pressed, however, to mention that a power of indirect taxation in s. 92(9) extending substantially beyond regulatory costs could have the more serious consequence of rendering s. 92(2) meaningless. And, in any event, the facts of this case do not demand a final resolution of the point.

58 In my opinion, therefore, it is unnecessary to examine further the jurisprudence associated with s. 92(9). The authorities establish to my satisfaction that the following question frames the relevant inquiry: can the variable fees be supported as ancillary or adhesive to a valid provincial regulatory scheme? Bearing this question in mind, I will now consider several specific arguments of the appellants.

3. Can the Variable Fees be Supported as Ancillary or Adhesive to a Valid Provincial Regulatory Scheme?

59 The appellants make three related arguments which all purport to deny that the variable fees are associated with a regulatory scheme. First, they argue that the fees are not authorized by the Municipal Act in a way which connects them to the statutory regulation of road usage. Second, they point to the fact that there is no express requirement in the statute or by-laws for the funds raised to be used in road repair, and they argue that the absence of such a requirement is fatal. Finally, they argue that there is nothing in the statute or by-laws to limit the sums raised through licensing to the actual costs of an overall scheme; in other words, they argue that there is a potential for surplus funds which divorces the fees from a regulatory purpose. I will address each argument in turn.

60 The appellants' first argument invites this Court to consider the location of s. 930 within the Municipal Act. It was noted that, whereas other provisions of the Municipal Act deal extensively with roads and the raising of money for roads, s. 930 does not mention roads at all. On this basis, it is argued that the permit and removal fees authorized by that section were not intended by the British Columbia legislature to offset the costs of road repair. We are asked to take a restricted view of such fees in light of the decision of this Court in Kirkpatrick v. Maple Ridge (Corporation of the District), supra.

61 In my view, neither the Kirkpatrick decision nor the Municipal Act compels such a narrow view. While Kirkpatrick did, indeed, suggest that a restrictive interpretation is to be "given detailed municipal statutes like the one in question here" (p. 128), the approach to interpretation in that case

involved an analysis of the statutory context of the impugned provision. An analysis of context in this case suggests that s. 930 can be legitimately related to road costs, since statutory guidance respecting the regulation of roads is not confined to any one part of the Municipal Act.

62 In Part 13 of the Municipal Act, which is entitled "Public Works", Division (2) contains provisions relating to "Highways". For example, s. 578(2)(a) is a provision granting to municipalities the power to "lay out, construct, maintain and improve highways". Another very basic provision is s. 581, where municipal councils are empowered to "regulate extraordinary traffic". Other important provisions related to roads, however, are located in Part 16 of the Municipal Act, which is entitled "Local Improvements". In Division (1) of Part 16, s. 651 authorizes a municipal council to undertake improvement works relating to roads either upon a council's own initiative or following petition. In s. 668(1), municipalities are charged with the responsibility to keep a completed work "in repair by and at the expense of the municipality". In s. 669, provision is made for owners and occupiers to compel municipalities, by way of petition, to undertake required repairs. Finally, interspersed throughout the Municipal Act in divisions not otherwise related to roads are provisions which nonetheless affect road regulation. As an example, in Part 11, Division (4) relates to the "Regulation of Business", but that Part contains s. 528(b), which allows a municipality to "establish and alter routes to be taken by carriers of persons or chattels".

63 It is within this overall statutory environment that s. 930(2) is located. It is found in the untitled Part 28, and more particularly within Division (5), which is entitled "Sundry Regulations and Provisions". Given that provisions respecting roads and road repair are not localized in one part or division of the Municipal Act, this location does not, by itself, suggest that s. 930(2) is unrelated to roads as the appellants argue. In a statute as complex as the Municipal Act, I do not find it surprising that related provisions may become removed from one another as a matter of statutory organization and drafting preference.

64 That ss. 930(1)(e) and 930(2) are related to other road provisions in the Municipal Act appears clear to me. The appellants narrowly read these sections to refer only to gravel "removal". However, it is facile to suppose that gravel was intended by the legislature to be "removed" from designated areas of a municipality without use being made of roads. Surely, at least in the case of commercial extractors, such removal can be related both to the regulation of extraordinary traffic (s. 581), and to the municipal responsibility for road repair (s. 668(1)). Even further, accepting that the gravel removal regulated by s. 930(2) contemplates the use of roads, and accepting that such extraordinary use would necessarily cause damage, would it not be somewhat strange for a gravel operator to take advantage of s. 669 on the one hand in order to compel a municipality to undertake repairs, but then to disclaim that the gravel removal fees in s. 930(2) are related to roads on the other? In my view, it would be, given the structure of the Municipal Act. For these reasons, I consider that s. 930(2) is related to a system of road and gravel regulation, notwithstanding its statutory location and its lack of express reference to roads. This relationship is made even more evident by an examination of the by-laws themselves.

65 Maple Ridge By-law No. 4109-1988 is the clearer example of an overall scheme to regulate both gravel removal and roads. Certain of its provisions address the question of who can remove soil: in s. 3 there is a general prohibition against removal; in s. 4, that prohibition is made subject to removal by permit under s. 4; s. 8 sets out exceptions to the permit requirement. Other provisions incorporate the regulatory regime of another provincial statute: in s. 15, the requirement for a mines permit is found; s. 25 requires the filing of a mine working plan. A number of provisions prescribe certain terms to govern the removal of soil: in s. 6, removal on Sundays and statutory holidays is prohibited, and in s. 7, hours of operation are prescribed; noise level is regulated by s. 29, which can be related to the definition of a "berm" in s. 2 (a soil embankment acting as a noise buffer); drainage requirements are noted in s. 31. The fee provisions are located in s. 17 -- which establishes the volumetric fee - - and ss. 18 to 23, which deal with its calculation. Compliance provisions can also be noted: permit applicants are required by s. 24 to post security for their compliance with the by-law; in s. 33, permit holders are required to repair damage caused to adjacent properties; and, finally, s. 34 establishes an offence for violation.

66 Although Coquitlam By-law No. 1914, 1988 is less extensive, that it nonetheless provides for a regulatory scheme can be demonstrated by a number of provisions similar to those found in the Maple Ridge by-law. A general prohibition against removal subject to removal by permit is found in s. 4. Section 20 provides for inspection. Section 3 requires the by-law to be interpreted in a manner consistent with the Mines Act, S.B.C. 1980, c. 28, and s. 5(e) and (f) require proof of approved mining systems and reclamation plans. The volumetric fee is set out in s. 13(a) and calculation provisions are located in ss. 14 to 18. Section 23 establishes an offence for violation.

67 When considering an ancestor to these by-laws in LaFarge, supra, Bull J.A. described that ancestor as constituting "a complete and detailed code for the regulation of the gravel and soil extraction and removal trade" (p. 686). Based on the provisions outlined above, I believe that description can be equally applied to the by-laws now before this Court. I am also satisfied that the fee provisions are related to these regulatory by-laws. Neither by-law can be viewed in isolation from the Municipal Act, and an integrated view links the fees to a regime concerned with roads.

68 This conclusion essentially answers the second argument of the appellants. According to that argument, neither s. 930(2) nor the impugned by-laws are said to state expressly the purpose of the fees levied. It is argued that, in the absence of a statutory statement relating the fees to the costs of regulation, the fees could be levied for an unconstitutional purpose. As my review of the statute and by-laws demonstrates, however, the fees are impliedly linked to the costs of regulation. Further, at least one express purposive statement may exist. Although the point was not argued, the preamble to the Coquitlam by-law states that one of its purposes is "to encourage the safe orderly and economical exploitation of" soil substances. There is no reason to assume that the word "economical" here refers only to the interests of commercial extractors. In the absence of by-law provisions relating to road repair, such exploitation could hardly be considered economical from the municipal point of view.

69 Although I could, therefore, dismiss the appellants' second argument with little difficulty, I should respond to that aspect of the second argument which deals with the use of extrinsic evidence in this case. According to the appellants, the only clear evidence as to the purpose of the volumetric fees is contained in affidavit evidence presented to the courts below, and they argue that such evidence cannot validate the by-laws. I have already implicitly rejected that only extrinsic evidence can demonstrate the purpose of the volumetric fees. That purpose can be inferred from the statutory and by-law context of the fees. It is for this reason that I distinguish the result in Canadian Pacific Air Lines Ltd. v. British Columbia, [1989] 1 S.C.R. 1133, which was cited by the appellants to support their position. Whereas extrinsic evidence in Canadian Pacific was offered to contradict the interpretation of a taxing provision which resulted from an analysis of statutory context, in this case, extrinsic evidence is merely additional proof that the contextual analysis already undertaken is correct.

70 In Maple Ridge's case, for example, there is the affidavit evidence of Thomas Gardner, the municipal Director of Engineering. That evidence sets forth how Mr. Gardner went about calculating Maple Ridge's 20 cent per cubic meter volumetric fee. His affidavit states: "My purpose in calculating the recommended permit fee was to have it represent as accurately as possible the costs accruing to Maple Ridge as a result of the soil removal operations in Maple Ridge". In Coquitlam's case, there is affidavit evidence from Municipal Engineer Neil Nyberg which suggests that a special Soil Removal Permit Fee Reserve fund was used to gather permit fees for later use in meeting regulatory costs. This was evidence before Trainor J. below, and not only should I rely on his interpretation of the facts, but I am also content to do so. Trainor J. stated (at p. 318): "Here the evidence indicates an intention to raise sufficient revenue to cover the costs of the regulatory scheme and the building and maintenance of roads over which gravel trucks would pass".

71 I do not wish to be taken to suggest that the position of the municipalities would not improve if the by-laws contained an express reference as to the purpose of the fees. Indeed, during oral argument, a question on this point was directed toward counsel for Maple Ridge, and I infer from the nature of counsel's response that the municipalities are aware that the absence of such a reference is a weak point in their licensing argument. Properly framed, a purpose statement could provide valuable assistance to a court charged with determining whether an otherwise indirect tax could be considered ancillary to a regulatory scheme. On the other hand, this should not be taken as an invitation to insert self-serving statements in by-laws which do not contain such regulatory schemes, because it is always possible to look behind such statements as part of a colourability analysis.

72 Finally, the appellants argued that the volumetric fees at issue had the potential to raise funds substantially in excess of the amounts required to cover the costs of regulation, including road repair. Although the point was again disputed in this Court, Trainor J. below suggested that there "is some evidence that considerably more moneys would be received from this volumetric levy than the amount actually required" (p. 318). Like Trainor J., however, I would state that it is not for this Court to undertake a rigorous analysis of a municipality's accounts. A surplus itself is not a problem

so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme, which is what occurred in this case. It is easy to imagine reasons for the existence of a so-called "surplus" at any given time. For example, changes in forecasted prices might lead to road repair being over-budgeted, or a municipality might choose not to repair a certain road in order to undertake more extensive repairs or reconstruction at a later date.

73 Although it might be possible to attack a fee structure demonstrably intended to raise revenue in excess of regulatory needs on constitutional grounds, in this case no evidence of such intention has been proved. On this point, therefore, the municipalities may be given reasonable leeway. In the result, I am of the view that the volumetric levy in this case was intended only to cover the costs of the regulatory scheme, including road repair.

4. Conclusion on Section 92(9) and Indirect Taxation

74 I conclude that in so far as the volumetric fee can be considered a form of indirect taxation, it is supportable as ancillary or adhesive to a valid regulatory scheme. The financial incidents of that scheme are supportable under the licensing power of s. 92(9) viewed in conjunction with other heads of regulatory power in s. 92, particularly ss. 92(13) and (16). On the facts of this case, it is unnecessary to decide whether s. 92(9) would support a power of indirect taxation independent of these other provisions, or whether it would support a similar power capable of raising funds in excess of regulatory expenses. The volumetric fees in s. 930(2) of the Municipal Act and the derivative by-laws are intra vires the province of British Columbia and the respondent municipalities, respectively.

B. Is s. 930(2) of the Municipal Act, to the extent that it authorizes variable fees, within the legislative competence of the province by virtue of s. 92A(4) of the Constitution Act, 1867?

75 This Court has repeatedly stated that it is preferable not to engage issues in constitutional cases which do not squarely arise for decision. In Canadian Pacific Air Lines Ltd., supra, La Forest J. stated that this approach is "particularly apt in an area as intricate and so fraught with consequences as the constitutional power of taxation" (p. 1154). Since I have found that the volumetric fees are supportable within s. 92 of the Constitution Act, 1867 without making reference to s. 92A(4), I find it unnecessary to consider arguments relating to that provision, as I mentioned above.

C. If s. 930(2) of the Municipal Act is within the legislative competence of the province to the extent that it authorizes variable fees, are the by-laws nonetheless discriminatory and therefore illegal?

76 In two recent decisions, this Court has had occasion to consider the question of what constitutes discrimination in the municipal law sense: R. v. Greenbaum, [1993] 1 S.C.R. 674, and R.

v. Sharma, [1993] 1 S.C.R. 650. I do not find it necessary to re-examine the approach taken in those cases. It is sufficient to note that a by-law discriminates illegally when such discrimination is not authorized by enabling legislation. As stated in Sharma (at p. 668): "discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province". In a phrase, discrimination may be either expressly or impliedly authorized: see Montréal (City of) v. Arcade Amusements Inc., supra, at p. 414.

77 The appellants argue that s. 930(2) of the Municipal Act speaks only to the imposition of volumetric fees. In imposing permit requirements and volumetric fees, however, the appellants argue that the by-laws single out commercial extractors for discriminatory treatment. In each by-law, they point to exceptions made for certain persons and usages. For instance, each by-law makes exceptions for removal which is incidental to development, improvement, or construction activities: Maple Ridge By-law No. 3957-1988, s. 8(b); Coquitlam By-law No. 1841, 1988, s. 4(b). Similar exceptions are made for removal which is incidental to public projects: Maple Ridge s. 8(d); Coquitlam s. 4(d). A particularly significant type of exception is made for those removing less than certain specified volumes of soil: Maple Ridge s. 8(a); Coquitlam s. 4(a). Finally, in Maple Ridge, exceptions are made for any "florist, nurseryman or farmer for use by him on the same parcel of land": s. 8(c).

78 Counsel for the municipalities made a valiant attempt to link the exception provisions in the by-laws to that part of s. 930(2) of the Municipal Act which authorizes the levying of different fees in "different areas of the municipality". In other words, all of the exceptions were alleged to constitute authorized discrimination based upon area rather than upon a distinction between commercial and non-commercial use. This argument has some appeal and may be adequate to support certain exceptions. For example, when considering the exception for florists, farmers, and nurserymen, the exception is linked to the parcel of land upon which the business is operated. In the case of the development, improvement or construction exceptions, it might be similarly possible to link the exceptions to lands specified in relevant permits.

79 The argument of the municipalities faces serious difficulties, however, with respect to the exception for removing less than specified volumes of soil. In the case of Maple Ridge By-law No. 3957-1988, it was argued that the exception for removing less that 75 cubic meters of soil was an exception based on area since it is stated in terms relating the removal to "any one parcel of land within the Municipality": s. 8(a). Notwithstanding that the Coquitlam by-law contains no similar reference to municipal land, I see two serious problems with this argument. First, it entirely ignores that s. 8(a) makes the exception for "Soil removal for other than commercial purposes" (emphasis added). This explicit reference to commercial purposes makes it rather difficult to argue that only area-based discrimination is at issue. Second, accepting that counsel accurately described the practical operation of these by-laws, it is not possible to take advantage of the small-volume exceptions outside a designated area. In other words, the general prohibition against removal of soil from other than designated areas overrides the exception for small-volume removal. The necessary

consequence is that commercial and small-volume removers must both operate within designated areas, and it is not possible, for this reason, to argue that any discrimination is area-based.

80 Although I therefore accept that the by-laws are discriminatory with respect to commercial use rather than with respect to area alone, I nonetheless believe that the discrimination is authorized by the Municipal Act. While s. 930(2) makes no explicit reference to discrimination based upon the commercial character of removal, Sharma, supra, makes clear that authorization can be either express or implied as a necessary incident of powers delegated. In this case, as the appellants acknowledge, s. 930(2) clearly authorizes discrimination based on volume. In my view, it is implicit in this authorization that commercial and non-commercial users will be treated differently. I believe that licensing schemes of this kind generally make two kinds of exceptions as a matter of administration. First, there are de minimis exceptions implicit in the regulation; neither the province nor the municipalities are properly concerned with every clod of earth lifted by a spade. Second, exceptions are made for non-profitable, incidental, or personal use.

81 It is my view that the concept of volumetric discrimination is a surrogate for discrimination based upon these other considerations. In enacting s. 930(2), the principal target of the legislature was undoubtedly commercial removal. I believe it is appropriate to consider the rather turbulent history of the Municipal Act and by-laws in coming to this conclusion. So doing, like Southin J.A. below, I am led to believe that "the Legislature not only intended to authorize such imposition and exemption but also has used apt words for the purpose" (p. 311). The by-law discriminates based upon the commercial or non-commercial character of removal, but it does so as a necessary incident of the volumetric fee authorization in s. 930(2). Illegal discrimination in the municipal law sense is not present in the by-laws of Maple Ridge or Coquitlam.

D. If s. 930(2) of the Municipal Act is within the legislative competence of the province to the extent that it authorizes variable fees, does it, on its true construction, authorize variable permit fees?

82 As noted already, Trainor J. decided that the unamended version of s. 930 which confronted him was an incomplete response to the decision of this Court in Kirkpatrick, supra. Taking a strict approach to construction, he held that s. 930(1)(d) authorizes a permit fee for removal, and that s. 930(2) authorizes a volumetric charge for removal. Although he had "no doubt that the object of the legislation ... was to give municipalities the authority to impose a volumetric or variable permit fee" (p. 314), he found that the contrast between these two provisions meant that the object had not been achieved.

83 In my opinion, it is not necessary to go much beyond what was stated by the British Columbia Court of Appeal in its review of the Trainor J. decision. Southin J.A. stated (at p. 310) that "to say that the charge can be imposed but it cannot be imposed as part of the permit fee but only as a separate charge is to make a distinction without a difference". In agreeing with this point, I do not mean to suggest that the trial judge wrongly interpreted Kirkpatrick, supra, since that case did

advocate a restrictive approach to the interpretation of a municipal licensing provision. However, as Trainor J. acknowledged, s. 930(2) was a legislative attempt to ensure the municipalities obtained the power which was denied to them as a result of Kirkpatrick. Although s. 930(2) may not be a model of responsive drafting, I believe that together with s. 930(1)(d), it is sufficient to authorize a volumetric permit fee.

VI. Conclusion

84 For the foregoing reasons, I conclude that s. 930(2) of the Municipal Act is intra vires the province of British Columbia. I further conclude that the by-laws enacted under that section are properly authorized by it. Accordingly, I would dismiss the appeal with costs.

Indexed as:

Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)

Between
Cape Breton Beverages Limited and Burt Stonehouse, plaintiffs,
and
The Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the Province of Nova Scotia, defendant

[1997] N.S.J. No. 108

144 D.L.R. (4th) 536

158 N.S.R. (2d) 132

23 C.E.L.R. (N.S.) 29

69 A.C.W.S. (3d) 837

S.H. No. 238607

Nova Scotia Supreme Court
Halifax, Nova Scotia

Hall J.

Heard: November 18, 1996.
Judgment: March 6, 1997.

(21 pp.)

Pollution control -- Environmental legislation, purpose -- Interpretation -- Land -- Waste disposal -- Legislation -- Authority, jurisdiction.

Application for a declaratory order. On February 6, 1996, the Governor in Council approved the Solid Waste Management Regulations which, among other things, provided that all beverage containers sold in the Province of Nova Scotia shall be either refillable or recyclable and be subject

to a deposit-refund system established under the Regulations. According to the Regulations, a retailer, dealing in the sale of beverages, was obliged to collect from the purchaser the prescribed deposit. The purchaser in turn was expected to take the empty beverage container to a registered depot where he or she was entitled to receive a refund of ten cents on refillable containers and five cents on recyclable containers. The plaintiffs applied for an order declaring that the Solid Waste Management Regulations were of no force and effect in that they created an indirect tax and were therefore ultra vires the Legislature of the Province of Nova Scotia under section 92 of the Constitution Act.

HELD: Application dismissed. The deposit-refund scheme was ancillary to a valid regulatory scheme for the control and management of solid waste within the Nova Scotia pursuant to sections 92(13) and 92(16) of the Constitution Act. Alternatively, if the deposit ought to be classified as a tax, it was not an indirect tax but a direct tax which the Province may levy under section 92(2) of the Act.

Statutes, Regulations and Rules Cited:

Constitution Act, 1867, ss. 92(2), 92(9), 92(13), 92(16), 98, 100.
Solid Waste Management Regulations, Reg. 2, 4(1), 5(2), 6(1), 8(1), 14, 15, 16.

Counsel:

Joel Fichaud Q.C., for the plaintiffs.
Louise Walsh Poirier, for the defendant.

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1 **HALL J.**:-- The plaintiffs have applied for an order declaring that Regulations 15 and 16 and Schedule C of the Solid Waste Management Regulations made pursuant to the Environment Act, S.N.S. 1994 - 1995, C. 1, are of no force and effect in that they create an indirect tax and are therefore ultra vires the Legislature of the Province of Nova Scotia under s. 92 of the Constitution Act, 1867.

2 Ms. Walsh Poirier, counsel for the defendant, acknowledged that the deposit was not justified as a proprietary fee or license under s. 92(9) of the Constitution Act thereby reducing the issues to the following:

1. Is the deposit charged pursuant to ss. 15 and 16 of the Regulations a regulatory charge, intra vires the Province under ss. 92(13) and (16) of the Constitution Act, 1867?
2. If not, is the deposit charged pursuant to ss. 15 and 16 of the Regulations

an indirect tax and ultra vires s. 92(2) of the Constitution Act, 1867?

3 The facts are set out in the affidavits of A. David Howell and Michael LeBlanc presented by the defendant and the affidavit of Greg Lynch presented by the plaintiffs as well as a case of documents which included background materials respecting the deposit refund system. The facts are not in dispute and were summarized by counsel in their written submissions substantially as set out in the following paragraphs.

4 On January 9, 1995, Royal assent was given to the new Environment Act which had been passed by the Legislature of the Province of Nova Scotia. The purpose of the Act was described as being "to support and promote the protection, enhancement and prudent use of the environment ..." Included among the provisions of the statute was the creation of a "Resource Recovery Fund". As well, the Governor In Council was authorized to make regulations under specific heads and to make regulations "necessary or advisable to effectively carry out the intent and purpose of this Part", viz. Part IX.

5 On February 6, 1996, the Governor In Council approved regulations entitled "Solid Waste - Resource Management Regulations made pursuant to Part IX of the Environment Act, S.N.S. 1995, C. 1. Among other things these regulations established the Resource Recovery Fund Board, which was charged with the responsibility of administering the fund. The Regulations also provided that all beverage containers sold in the Province of Nova Scotia shall be either refillable or recyclable and be subject to a deposit-refund system established under the Regulations.

6 According to the Regulations, a retailer dealing in the sale of beverages is obliged to collect from the purchaser the prescribed deposit. The purchaser in turn is expected to take the empty beverage container to a registered depot where he or she is entitled to receive a refund of fifty percent of the deposit paid on recyclable beverage containers and 100 percent with respect to refillable containers. The refund that the consumer is entitled to receive is ten cents on refillable containers and five cents on recyclable containers.

7 Under s. 16 of the Regulations, distributors or wholesalers of beverages are required to collect from the retailers and submit to the Board the cash deposits that are payable under the provisions of the Regulations. In other words, the retailer collects from the purchaser or consumer a deposit of ten cents when a beverage is sold to the consumer and the retailer in turn pays that amount to the distributor when he pays for the beverages that had been supplied by the distributor. The distributor in turn remits the deposit to the Board within the time specified in the Regulations.

8 In practical terms it seems that the system worked in the following manner, and I am paraphrasing from the submissions of Mr. Fichaud, counsel for the plaintiffs and Ms. Walsh Poirier. When a distributor of beverages sells soft drinks to a retailer the distributor must collect the deposit of ten cents per container from the retailer at the time of the sale. The distributor must remit the amount of the deposit to the Board within thirty days after the end of the distributor's accounting period, which is the "time period determined by the Board" under Regulation 16(5). All such

remittances from distributors are placed by the Board into a bank account which is the "Resource Recovery Fund" owned by the Province. The amount of these payments are used for the purposes of the funds as outlined in s. 98 of the Environment Act and Regulation 4(1) of the Regulations to promote recycling, environmental awareness and value-added manufacturing in Nova Scotia. After the retailer has purchased the beverages from the distributor, the retailer offers the beverages for sale. When the retailer resells to a consumer the retailer collects ten cents per container from the consumer. The consumer then recovers five cents per container from the depot when the consumer returns the empty container. The Board then reimburses depot operators for the amounts refunded by the depot operators to the consumers pursuant to Regulation 15(5). If the retailer is unable to resell the beverage product to a consumer, then the retailer returns the product to the distributor after the so-called "stale-date" of the product. The distributor then credits the retailer with the amount of the price of the product and the GST which the retailer had previously paid to the distributor. There is no express provision in the Regulations for refunds to be made by the Board of any amounts paid previously by a distributor with respect to beverage containers which have been returned as being stale-dated, damaged, or otherwise. The Board, however, has attempted to address this problem by authorizing the giving of credits for such unsold products against deposits on future sales.

9 The motive for providing the deposit refund system was to provide an economic incentive to encourage consumers to divert beverage containers from the litter and waste streams and to promote reuse or recycling of such containers. Consumers are made aware of the fact that they are required to pay a deposit on beverage containers by the fact that the retailer is required to display a notice to that effect and as well, to show the amount of the deposit on the purchaser's cash receipt. In addition, all beverage containers are required to include on the label "Return for refund" or words to that effect.

10 Deposits remitted to the Board are part of the Resource Recovery Fund and are used by the Board to cover the Board's costs in providing service to those who consume the products covered by the Deposit Refund Program. If any monies are remaining after administration of the system they go toward other waste diversion objectives of the Fund such as education and awareness and developing value-added manufacturing.

11 Distributors of beverage containers in the Province are required under the Regulations to register with the Board. Distributors are also obliged to collect the deposit when the product is sold to the retailer. Depending on the accounting and business practices of the distributors and retailers and on how quickly the product moves through the system, which generally takes between two to eight weeks, retailers may pay the required deposits on certain product before it is sold to a consumer.

12 The plaintiff acknowledges that the Province has constitutional competence to legislate with respect to environmental matters and to impose a deposit refund system such as the one that has been established by the Regulations. The dispute from the plaintiff's perspective is only with respect

to the manner in which the deposit is being collected.

13 The relevent legislative provisions are the following:

Constitution Act, 1867

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

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
13. Property and civil Rights in the province.
16. Generally all Matters of a merely local or private Nature in the Province.

Environment Act, Part IX

92 The Minister shall establish a solid-waste-resource management strategy for the Province.

98 There is hereby established in accordance with the regulations the Resource Recovery Fund.

100 (1) The Minister may designate materials the use of which is to be banned, reduced, composted or recycled.

(2) A person who manufactures or distributes a designated material for sale in the Province and a retailer of a designated material shall, in accordance with the regulations,

(a) collect the surcharge prescribed for the designated material in accordance with the regulations;

(b) where the regulations require, deposit the surcharge in the Resource Recovery Fund.

(3) A person who manufactures or distributes a designated material for sale in the Province and a retailer shall, in accordance with the regulations, provide in the Province depots and other methods for the collection and recovery of the designated material.

(4) No person shall sell or use, for a purpose beyond the purpose designated under subsection (1), a designated material the use of which has been banned, reduced or requires recycling under subsection (1).

Solid Waste-Resource Management Regulations

2. In these regulations,

(n) "distributor" means the last person in Nova Scotia to supply, sell or offer for sale by wholesale or other means a beverage in a beverage container to a retailer in the province and, in the event that there is no supply, sale or offer to sell by a person in Nova Scotia to a retailer in the Province, distributor means the retailer;
(y) "redeemable beverage container" means a [beverage] container on which a deposit has been paid;
(z) "redeemed beverage container" means an empty beverage container accepted by a depot for refund, or collected as part of a private or municipal collection program;
(aa) "retailer" means a person who sells a beverage in a beverage container to the public for consumption off the premises or a person who sells a beverage in a beverage container by a coin-operated vending machine;

4.

(1) Pursuant to Section 98 of the Act, the Resource Recovery Fund is established

(a) to develop and implement industry stewardship programs;
(b) to fund municipal or regional diversion programs;
(c) to develop and operate a deposit-refund system for beverage container;

(d) to develop education and awareness of source reduction, reuse, recycling and composting; and
(e) to promote the development of value-added manufacturing in the Province

5

(2) The Board shall

(d) administer and operate a deposit-refund system for beverage containers; and

6

(1) Pursuant to Section 98 of the Act, the Fund shall consist of

(b) revenues generated from the deposit-refund system on beverage containers;

8

(1) Subject to the provisions of these regulations, the terms of any agreement between the Minister and the Board, and in accordance with the Provincial Finance Act, the Board shall provide funding for municipal solid waste diversion by

(a) paying a minimum of 50% of the net revenues in the Fund to provide financial support, to be divided between or among municipalities or regions based on the solid waste diverted by the municipality or region;
(b) paying out of the Fund money to provide financial assistance and incentives under an approved program;
(c) paying out of the Fund any costs, charges, audit and other fees and expenses involved in the administration of the Fund;
(d) investing money in the name of the Fund in any manner in which trustees are authorized by law to invest trust funds; and
(e) doing any other matter or thing which relates to, or is incidental to, the purposes of the Fund

(2)

(a) Funding shall be provided by the Board pursuant to clauses 8(1)(a) and (b) on

the bais of an agreement executed between the Board, and a municipality, a region or a person.

(b) Clause (a) is subject to existing agreements signed by a municipality or a region and a person before the effective date of these regulations.

(3) Copies of any agreement executed under clause 2(a) shall be filed with the Minister within 30 days of signing.

14

(1) All beverage containers sold in the Province shall be either refillable or recyclable as determined by the Administrator;

(2) All beverage containers shall be subject to a deposit-refund system as described in these regulations

15

(1) The minimum cash deposit and cash refund on approved redeemable beverage containers shall be as prescribed in Schedule "C".

(2) a retailer shall collect from the purchaser the cash deposit prescribed in subsection (1) for each beverage sold to the purchaser in a redeemable beverage container and shall show the amount of the deposit on a cash receipt

(3) A depot operator shall immediately provide a cash refund of 50% of the full cash deposit to a person who presents a redeemable recyclable beverage container at their depot.

(4) a depot operator shall immediately provide a cash refund of 100% of the full cash deposit to a person who presents a redeemable refillable beverage container at their depot.

(5) Within 30 days of collection of redeemable beverage containers by the Board or its agent from a depot operator, the Board or its agent shall reimburse the depot operator the minimum cash refund prescribed in Schedule 'C' plus a handling fee determined by the Board.

16

(1) A distributor of beverage containers in the Province shall register with the Board within 60 days of the effective date of these regulations.

(2) No distributor shall sell or offer for sale a beverage container in the Province unless that person is registered with the Board under subsection (1).

(3) A distributor of beverage containers shall register with the Board all beverage containers distributed and shall designate each container registered by beverage product, container size and container type.

(4) No person shall sell or offer for sale a beverage in a beverage container which is not registered with the Board under subsection (3).

(5) A distributor shall collect and submit to the Board any cash deposits required under these regulations within the time periods determined by the Board.

Schedule 'C'

Sets out deposit/refund on beverage containers. Provides a ten cent deposit on refillable and non-refillable containers with a refund of ten cents on refillable containers and five cents on non-refillable containers.

14 The plaintiff contends that the portion of a deposit that is retained by the Board is an indirect tax which the Province is not entitled to levy, being limited to levying direct taxes under s. 92(2) of the Constitution Act. Mr. Fichaud says that the way the system works, simply put, is that the distributor pays the tax to the Board and then passes it on to the retailer, who in turn passes it on to the consumer. He said that this is a clear case of an indirect tax as set forth by John Stuart Mills in his classical definition of direct and indirect taxes.

15 Mr. Fichaud maintained that it was not merely a question of the method of collection as in the tobacco cases which will be referred to later. Here, there was no question of the levy being paid - the deposit could be and should be collected from the consumer by the retailers and remitted to the Board by the retailers. It is not a question of necessity but one of convenience for the government.

16 Mr. Fichaud argued, as well, that the deposit is not a regulatory charge because the person paying it, that is the retailer, is not getting the benefit of it. Instead the people of Nova Scotia are the beneficiaries. He took the position that the deposit could be allowable as a regulatory charge only if it was levied as a license fee under s. 92(9) of the Constitution Act and the Province acknowleges that it is not a license fee or a proprietary charge. He says, as well, that the levy is not truly a deposit

because the retailer can get stuck with it on stale-dated and damged products and so forth. He also submitted that the revenue retained by the Board from the deposits will exceed the amount of money required to administer the program set up under the Regulations. Thus, he says that ss. 15 and 16 of the Regulations are ultra vires the Legislature of this Province, as they are outside the legislative competence of the Province pursuant to s. 92 of the Constitution Act.

17 On the other hand, Ms. Walsh Poirier, on behalf of the defendant, the Province of Nova Scotia, says that the deposit is not a tax but a charge in pursuance of a regulatory scheme where the payor receives something in return for the payment of the charge or fee. Here, she says, it is the consumer who pays and the consumer who reaps the benefit by the elimination of beverage containers from the waste chain and thus removing the containers from landfills and incinerators, which cause environmental pollution. She maintains, as well, that the manufacturers, distributors and retailers also benefit because if it were not for this program a much more onerous obligation would be placed on them requiring them to make provision for waste minimization, recycling and so forth. Ms. Walsh Poirier argues that such a charge or deposit may be imposed by the Province in pursuance of its powers under ss. 92(13) and (16) of the Constitution Act independently of s. 92(9).

18 Ms. Walsh Poirier says that in the event that the Court does not accept the foregoing position and finds that the deposit is in pith and substance a tax, the Court should find that it is a direct tax and not an indirect tax. She says that the charge is aimed at and levied on the ultimate consumer and that the retailers and distributors are merely collectors in a "double collection" process, which the courts have held to not displace the direct nature of the tax.

19 It would be useful to first determine whether the deposit in question is a tax or a regulatory charge. In order to do so one must determine what constitutes a regulatory charge and what distinguishes a regulatory charge from a tax. To this end, one must look at the overall purpose and scheme of the program of which the charge or deposit forms a part.

20 The leading authorities in this area of the law are two recent decisions of the Supreme Court of Canada, Ontario Home Builders Association et al v. The York Region Board of Education et al [1996] 2 S.C.R. 929 and Allard Contractors v. Coquitlam [1993] 4 S.C.R. 371.

21 In Ontario Home Builders one of the major issues was whether the Development Charges Act of the Province of Ontario which authorized school boards to impose so-called education development charges (EDCs) on buildings that result from new development was ultra vires the Province with respect to s. 92 of the Constitution Act. It appears that, pursuant to provisions in the Act, certain Ontario School Boards passed by-laws which required persons seeking building permits to pay an EDC as a condition of obtaining the permit. The purpose of the EDC scheme was to permit school boards to raise the local share for new school construction on land undergoing residential and non-residential development where that development created the need for new schools. The amount of the EDC that would be payable was calculated by first estimating the number of new dwelling units that would result from the development and then determining the

number of new pupils that would result from development and the number of school projects that would be needed to serve the new pupils. The cost of the new schools would then be determined and the percentage of the cost that would be paid by the Province would be factored in in order to determine the net growth related education capital cost that would flow from the development. A contribution from commercial development would also be calculated and factored in in determining the amount of the EDC. The legislation provided that the revenue raised by this means could be used only for the construction of schools in new developments and could not be used with respect to existing schools or the replacement of existing schools. The appellant, Home Builders Association, challenged the legislation on the ground that it was an indirect tax and therefore ultra vires the Legislature of the Province of Ontario under s. 92 of the Constitution Act. The respondents defended the legislation on the ground that it was a valid license fee pursuant to ss. 92(9), 13 and 16 of the Constitution Act, or alternatively that it was not an indirect tax but a direct tax.

22 A full Court decided that the legislation was intra vires the Province but for different reasons. A majority of five judges, in reasons written by Iacobucci, J., concluded that as a tax the EDC was an indirect tax and therefore ultra vires the Province. However, it held that the EDC scheme was ultimately intra vires the Province "as accilliary to a valid regulatory scheme for the provision of educational facilities as a component of land use planning pursuant to ss. 92(9) 13 and 16 of the Constitution Act". The minority in reasons written by La Forest, J., held that the EDC was not a regulatory charge but rather was a tax. It concluded, however, that it was a direct tax since it related to land and therefore intra vires the Province under s. 92(2) of the Constitution Act.

23 La Forest, J., discussed the nature of direct and indirect taxation and regulatory charges in the course of his decision. He said at page 1003 after referring to Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R.357:

> ... the division between the provincial taxing powers and other legislative powers is at the origin of the provincial power to levy what have come to be known as "regulatory charges". The courts have recognized that in certain circumstances a provincial levy may relate, in pith and substance, to the regulation of an acitivity falling within exclusive provincial legislative purisdiction, and that such levy would not be subject to the requirement of directness provided for in s. 92(2), which can in all logic only apply to legislation enacted under the specific head of power provided for in s. 92(2), taxation. It will become obvious that differentiating a tax from a regulatory charge is -- as is so often the case in cases dealing with distribution of powers -- no easy task.

24 At page 1008, after referring to the decision of the Court in Attorney-General for Quebec v. Reed (1884) 10 A.C. 141, he said:

> This case is interesting in many respects. Most notably, the Privy Council implied that had the nature of the impugned fee been somewhat different, it

> would have been supportable under the provincial legislative power over the administration of justice (s. 92(14)). This statement constituted an explicit recognition that provinces could impose certain levies which were indirect in their incidence when, in ndoing so, they were really legislating with respect to a head of power other than their taxing power. What later experience would reveal, hwoever, was that, as in other situations, this was permissible only when a legislative provision was in pith and substance an exercise of that power, i.e. where, to use the phrase in some of the cases, it was "the dominant or most important characteristic of the challenged law"; see, for example, Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, AT P. 62.

25 He continued at page 1008 after having referred again to Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, supra:

> ... There the respondent committee had been given the exclusive power to control and regulate the impugned marketing scheme, which included the power to impose on certain producers and shippers levies "for the purpose of defraying the expenses of operation" of the scheme, which were indirect in their incidence. The whole scheme was eventually struck down by this Court because in pith and substance it related to extraprovincial trade and commerce, a matter within exclusive federal legislative authority under s. 91(2) of the Constitution Act, 1867. However, Duff J., as he then was, writing for the majority, did address the appellant's argument relating to the nature of the levies. He characterized them as "taxes" according to four criteria (later generally accepted by the courts), namely: they were (a) enforceable by law, (b) imposed under the authority of the legislature, (c) levied by a public body and (d) intended for a public purpose.

26 La Forest, J., then went on to consider other leading cases in this area of the law including: Lower Mainland Dairy Products Sales Adjustment Commitee v. Crystal Dairy, Ltd., [1933] A.C. 168, Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708, Ontario Boys' Wear Ltd. v. The Advisory Committee, [1944] S.C.R. 349, Reference re Farm Products Marketing Act, [1957] S.C.R. 198, and Coquitlam v. LaFarge Concrete LtdU., [1973] 1 W.W.R. 681. At pages 1017 - 1018 he had the following to say:

> On reviewing the key cases on the matter, it is clear that the courts have, over the years, recognized the provinces' power to enact legislation providing for the imposition of levies which were indirect in their incidence when such levies could not be characterized as "... Taxation ... in order to the raising of a Revenue for Provincial Purposes" as contemplated by s. 92(2) because they related, in pitch and substance, to another head of power granted exclusively to provincial

> legislatures by s. 92 of the Constitution Act, 1867. In that sense, I do not think that the Constitution specifically contemplates a provincial power regarding "regulatory charges". Provinces can impose indirect levies if, in doing so, they are legislating under a different head of power than their s. 92(2) taxing power -- for example, property and civil rights (s. 92(13)), the administration of justice (s. 92(14)) or matters of local or private nature (s. 92(16)) -- and, consequently, outside the scope of the litigation to direct taxes imposed by that provision. Thus, the analysis is no different from the traditional analysis courts have undertaken when dealing with judicial review on federal grounds. Courts will identify the pith and substance of a given piece of legislation providing for the imposition of a levy; they will seek to find its dominant purpose or true character. Legislation aimed, in pith and substance, at riasing revenue, will be subject to the requirement of directness provided for in s. 92(2). Legislation not relating, in pith and substance, to taxation as contemplated by s. 92(2) of the Constitution Act, 1867, will therefore not be subject to the directness requirement provided for in that section.

27 As to the Provincial power regarding licences he concluded at page 1021:

> The cases reviewed also demonstrate the uncertainty respecting the scope of the provincial power regarding licences contemplated in s. 92(9) of the Constitution Act, 1867. However, I need not deal with this question extensively. As I mentioned earlier, this Court has accepted that s. 92(9) was somewhat redundant as not constituting a source of provincial legislative jurisdiction relating to regulatory charges truly independent of that ensuing from the other heads enumerated in s. 92 of the Constitution Act, 1867; see Allard, supra at pp. 404-405.
>
> In summary, the power of a province to adopt legislation providing for the imposition of levies which are indirect in their incidence stems from the other heads of power over which it has exclusive legislative authority under the Constitution Act, 1867. Where the adoption of a levy constitutes, in pith and substance, regulation of a matter falling within heads of jurisdiction other than taxation in order to the raising of revenue (s. 92(2)), the requirement that such levy be direct in its incidence will not apply.

28 The majority appears not to have taken issue with Mr. Justice La Forest's general statements as set forth above, but disagreed with his conclusion that the levy was a land tax. Iacobucci, J., at page 976 of his decision stated however:

> ... I also accept that the case law reveals that land taxes are generally direct taxes;

> but I do not believe the case law prevents a tax on land by itself from being treated as an indirect tax.

29 He went on at pages 977 - 979:

> However, in my view, EDCs are not true land taxes in the traditional sense. The purpose of the EDC scheme is not taxation of land, but rather, taxation imposed in order to defray the costs of infrastructure necessitated by new residential development ....
>
> As I see it, the general tendency of the EDCs is to be passed on to the ultimate purchaser of the new building. The vast majority of new deveopment is undertaken by developers, who benefit from economies of scale when undertaking multi-unit building projects, and who have every intention of selling the new buildings and homes. As Carthy J.A. stated at p. 110 for the Court of Appeal below, "common sense therefore says that the tendency will be to pass the cost along". It is true that in certrain instances, the ultimate owner of a new home will also have been the builder, and thus will have paid the EDC directly. However, this is not sufficient to dislodge the general tendency of the tax. Indeed, the legislation itself is indifferent as to who actually bears the cost of an EDC: it is the person applying for a building permit from whom the tax is collected, whether this be the developer or the ultimate homeowner. This is a further indication of indirectness: ...
>
> ... It follows, in my view, that EDCs cling as a burden to new buildings when they are brought to market. Accordingly, EDCs constitute indirect taxation and are ultra vires provincial competence under s. 92(2).
>
> However, it is my opinion that the EDC scheme is ultimately intra vires the province as ancillary to a valid regulatory scheme for the provision of educational facilities as a component of land use planning, pursuant to ss. 92(9), (13) and (16) of the Constitution Act, 1867, as interpreted by Allard, supra.

30 Iacobucci, J., stated at page 981:

> I agree with the Court of Appeal's observation at p. 113 that the instant appeal "is a much easier case than Allard, for finding that a regulatory scheme exists". Carthy J.A. for the Court of Appeal commented at p. 112 as follows:

> As stated earlier, it is my view that the reasons in Allard neatly and clearly embrace the question of the constitutionality of EDCS.
>
> There is no question as to excessive recovery. The fees are based on specific estimates of costs and can only be released to meet actual costs. The purpose of EDCs is explicitly stated to be school construction occasioned by new development (renovations of existing facilities cannot be supported by these charges). The charges are thus most certainly ancillary or adhesive to the production of new schools. The only real question is whether this is a regulatory scheme in itself or is part of a broader scheme.

31 After noting that the Regulations setting out the mechanism for calculation and disbursement of the EDCs was "meticulous in its detail and clearly operates so as to limit recoupment to the actual cost involved in providing educational facilities occasioned by new development.", and that the EDC revenue cannot be used to defray the capital cost associated with existing schools, which he said was another "indication that the scheme was properly limited to the actual cost of Regulation.", he commented that these factors were indications that the scheme was properly limited to the actual costs of regulation. As well he noted that the EDC revenues were to be deposited in two accounts, one for revenue on account of residential development and the other for revenue on account of commercial development and that the funds could be only withdrawn when a specific project had been approved by the Minister of Education of the Province of Ontario. As well he noted that the EDC scheme was appropriately limited in scope and operated only so as to defray the costs of regulation. As a result he said at page 983:

> It is my opinion that the EDCs are indeed part of a comprehensive and integrated regulatory scheme, namely, the entirety of planning, zoning, subdivision and development of land in the province.

32 He concluded at pages 987 - 988:

> The construction of schools is a legitimate and crucial component of modern land use planning, schools being an essential element in the creation of successful, dynamic and democratic communities. The legislature of Ontario clearly takes the view that the cost of educational facilities made necessary by new land development should be taken into account in the land development approval process. For example, the Planning Act expressly provides that the "adequate provision. . . of educational facilities" and the "adequacy of school sites" are factors to be taken into accound in land use planning (see ss. 2(i), 51(24)(a) and (j)). the Act itself authorizes municipalities to impose development charges not only for education but also for watr mains, sewers, roads, libraries, parks and

> recreational facilities. The common theme is that new development should bear the costs of infrastructure necessitated by the new development. Further, just as the gravel excavators in Allard benefitted from the regulatory scheme in terms of road improvements, so too do the developers receive a considerable benefit from the EDC scheme: a development with adequate amenities. The presence of adequate school facilities clearly contributes to the marketability of a new home.
>
> For the foregoing reasons, it is my opinion that EDCs are properly adhesive to the province's planning and development regime, and accordingly, are intra vires the province of Ontario pursuant to ss. 92(9), (13) and (16) of the Constitution Act, 1867.

33 In the present case s. (4) of the Regulations sets out the purposes or objects of the Fund into which the deposits are paid. It is not disputed that these objectives are within Provinical legislative competence under ss. 92(13) or (16). Under s. 6(1)(b) of the Regulations revenue from the deposit refund system on beverage containers is to be paid into the Fund. Under s. 8 the revenue accruing to the Fund shall be expended only in carrying out the purposes of the Fund as described in s. 4 of the Regulations and with respect to other solid waste management programs. Thus, any revenue raised through the deposit refund scheme would be used for valid provincial objectives within the meaning of s. 92 of the Constitution Act. It would, therefore, be intra vires the provincial legislature as being ancillary to a valid regulatory scheme for the provision of a service within provincial jurisdiction under s. 92 of the Constitution Act, namely, the elimination of a significant form of waste from the environment.

34 In my opinion, the scheme meets all of the other criteria necessary to qualify as a constitutionally valid regulatory scheme. The amount of revenue raised by the scheme would not be substantially in excess of the amount required to fund the scheme. In other words, it appears that there would not be a significant surplus of revenue generated. However, any surplus that may arise from time to time would remain in the fund and may not be used for ulterior or oblique purposes. In any event, as Iacobucci, J., said in Allard supra at page 411:

> ... I would state that it is not for this Court to undertake a rigorous analysis of a municipality's accounts. A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme, which is what occurred in this case.

35 Furthermore, I find that the payors are the beneficiaries of the scheme although in fact all members of the public benefit including manufacturers, distributors and retailers, as well as consumers. Furthermore, I find that it is not a colourable attempt at raising revenue for purposes other than the designated regulatory scheme. Accordingly, I conclude that it is not a tax but a valid

regulatory charge for the purpose of raising revenue in pursuance of and to fund a valid regulatory scheme within provincial legislative competence under s. 92 of the Constitution Act.

36 If I should not be correct in this respect, however, and the deposit refund scheme should properly be treated as a tax, I am satisfied that it is a direct tax and not an indirect tax. In order to make a proper assessment with respect to this issue one may start by reviewing the scheme as a whole and the manner in which it functions. In essence it works this way. The Regulations stipulate that a deposit is to be paid by the purchaser of a beverage to the retailer from whom it is purchased. After consumption of the product the purchaser may take and indeed is encouraged to take the empty container to a depot where he or she will receive a refund of fifty percent of the deposit on recyclable container and 100 percent on refillable containers. The portion retained by the Board will be used by it in pursuance of its functions and objectives under the Regulations as outlined above. It is this portion of the so-called deposit that may be considered to be a tax.

37 Under s. 15(2) a retailer is obliged to collect the deposit from the purchaser. In turn the retailer must pay to the distributor from whom he purchased the product for resale the cash deposits that theoretically he has collected from the consumer. The distributor then remits the deposits to the Board.

38 In point of fact, however, in many cases, if not in the majority of cases, the payment order will be reversed. The distributor will collect the deposit from the retailer at the time of sale to the retailer and in turn remit it to the Board within the time determined by the Board. The retailer will have to in turn collect the deposit from the consumer, which in point of time may occur after the retailer has already paid the deposit to the distributor.

39 This process is analagous to the double collection procedure applied in the case of collection of tobacco tax in this Province and approved by the Nova Scotia Court of Appeal in R. v. Johnson (S.G.), (1993) 120 N.S.R.(2d) 414 and R. v. Murdock and Johnson, (1996) 154 N.S.R.(2d) 1, following the initiative of the British Columbia Court of Appeal in Chehalis Indian Band v. B.C. (1988) 53 D.L.R. (4th) 761, and Tseshaht Indian Band v. British Columbia (1992) 94 D.L.R (4th) 97. In those cases the intermediary parties, that is, wholesalers and distributors, were found to be agents for the Province in the collection of the tax. Thus, the tax did not become an indirect tax by the mere fact that initially the wholesaler or retailer had to pay the tax in advance or up front so to speak. With deference, I do not accept the argument put forth by Mr. Fichaud that the basis for the ruling in the so-called tobacco cases was founded on necessity. As Hallett, J.A., described the scheme in Murdoch, it was "an effective method of tobacco tax collection."

40 The same can be said of the system established by the Board in the present case. Instead of the Board receiving remittances from 15,000 odd retailers, it receives the entire revenue generated by the deposit refund system from 63 registered distributors, thus avoiding the necessity (with resultant inconvenience and expense) of registering the retailers, auditing them from time to time and maintaining accounting control over the collection and remittances of the deposits by the retailers

and so forth. Indeed the system established by the Board may be described as an efficient and effective method of collection, convenient for all concerned with no unreasonable or significant inconvenience, that I was able to discern, to anyone including the plaintiffs.

41 The plaintiffs raised a very valid point with respect to the product on which the deposit was not ultimately paid by or recovered from the consumer, for example, returned stale-dated or damaged products. Counsel for the defendant acknowledged that appropriate adjustments would have to be made to relieve the intermediary parties, that is, the distributors and wholesalers, from being saddled with the payment of these deposits, or the Province would run the risk of having them declared to be indirect taxes and ultra vires the Province.

42 It seems to me that the Board acknowledged the correctness of this position as evidenced by its response to the stale-dated products issue when brought to its attention. It immediately developed a policy to relieve the distributor-retailer from assuming the loss resulting from unpaid deposits with respect to stale-dated product. Accordingly, where it occurs that, for whatever legitimate reason, whether stale-dated, damaged product, or a bad debt, the deposit is not paid by the purchaser-consumer, the Board must develop policies to relieve the distributors and retailers from liability for payment of the deposit. After all, it is the consumer and the consumer alone who has the ultimate obligation for payment of the deposit. If it were otherwise it would not be a direct tax.

43 In summary then, I conclude that the deposit-refund scheme is ancilliary to a valid regulatory scheme for the control and management of solid waste within the Province of Nova Scotia pursuant to ss. 92(13) and (16) of the Constitution Act, or alternatively, if the deposit ought to be classified as a tax that it is not an indirect tax but a direct tax which the Province may levy under s. 92(2) of the Constitution Act.

HALL J.

qp/d/bfd/mjb/DRS/DRS

Indexed as:

Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)

Between
Cape Breton Beverages Limited and Bert Stonehouse, appellants,
and
The Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the Province of Nova Scotia, respondent

[1997] N.S.J. No. 267

151 D.L.R. (4th) 575

161 N.S.R. (2d) 71

24 C.E.L.R. (N.S.) 319

72 A.C.W.S. (3d) 842

Docket: C.A. 137130

Nova Scotia Court of Appeal
Halifax, Nova Scotia

Hallett, Chipman and Pugsley JJ.A.

Heard: June 9, 1997.
Oral judgment: June 9, 1997. Released: June 12, 1997.

(1 pp.)

Statutes -- Operation and effect -- Delegated legislation -- Regulations -- Validity of.

Appeal by Cape Breton and Stonehouse from a decision finding that the beverage container refund scheme, created by Regulations under the Environment Act, was intra vires the provincial Legislature.

HELD: Appeal dismissed. The scheme was valid.

Statutes, Regulations and Rules Cited:

Constitution Act, 1867, ss. 13, 16, 92. Environment Act, S.N.S. 994-95, c. 1. Environment Act Regulations.

Counsel:

Joel E. Fichaud, Q.C., for the appellant.
Louise Walsh-Poirier, for the respondent.

THE COURT: Appeal dismissed per oral reasons for judgment of Hallett J.A., Chipman and Pugsley JJ.A. concurring.

1 HALLETT J.A. (orally):-- This is an appeal from a decision of Justice Hall. In our opinion Justice Hall did not err in concluding that the deposit refund scheme created by Regulations made pursuant to the Environment Act, S.N.S. 1994-95, chapter 1 of this Province is intra vires the provincial Legislature as being ancilliary to a valid regulatory scheme within provincial legislative competency under ss. 92, 13 and 16 of the Constitution Act, 1867.

2 We dismiss the appeal without costs.

HALLETT J.A.
Concurred in:
CHIPMAN J.A.
PUGSLEY J.A.

qp/d/bfd/DRS/DRS

Case Name:

Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)

Cape Breton Beverages Ltd. and Bert Stonehouse
v.
The Attorney General of Nova Scotia, representing Her Majesty
The Queen in Right of the Province of Nova Scotia

[1997] S.C.C.A. No. 403

File No.: 26148

Supreme Court of Canada

Record created: August 19, 1997.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Status:

Application for leave to appeal dismissed (without reasons) December 18, 1997.

Catchwords:

Constitutional law -- Division of powers -- Environmental law -- Taxation -- Whether the deposit refund scheme created pursuant to the Environment Act, S.N.S. 1994-95, ch.1 created "regulatory charges"? -- In particular, if these are not "licence fees" under Section 92(9) of the Constitution Act, 1867, what is the distinction between an intra vires "regulatory charge" and an ultra vires indirect tax? -- If these are taxes, are they indirect? -- What is the distinction between an ultra vires indirect tax and an intra vires direct tax which is "collected" indirectly?

Counsel:

Joel E. Fichaud, Q.C. (Patterson Palmer Hunt Murphy), for the motion.
Louise Walsh-Poirier (Department of Justice), contra.

Chronology:

1. Application for leave to appeal:

FILED: August 19, 1997. S.C.C. Bulletin, 1997, p. 1411.
SUBMITTED TO THE COURT: October 31, 1997. S.C.C. Bulletin, 1997, p. 1968.
Before: Sopinka, Iacobucci and Major JJ.
DISMISSED: December 18, 1997 (without reasons). S.C.C. Bulletin, 1997, p. 2246.
Before: Cory, Iacobucci and Major JJ.

Procedural History:

Judgment at first instance: Application for order declaring Regulations made pursuant to the Environment Act, S.N.S. 1994-1995, c.1 ultra vires the Province of Nova Scotia dismissed.
Nova Scotia Supreme Court, Hall J., March 6, 1997. 144 D.L.R. (4th) 536; 158 N.S.R. (2d) 132; [1997] N.S.J. No. 108.

Judgment on appeal: Appeal dismissed.
Nova Scotia Court of Appeal, Hallett, Chipman and Pugsley JJ.A., June 9, 1997.
[1997] N.S.J. No. 267.

ver/rpl

Indexed as:

Fulton v. Alberta (Energy Resources Conservation Board)

Robert Fulton, Carl Friesz and Lance Wheeler, Appellants; and Energy Resources Conservation Board and Calgary Power Ltd., Respondents; and The Attorney General of Alberta, the Attorney General of Canada, the Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of New Brunswick, the Attorney General of British Columbia, the Attorney General of Manitoba and the Attorney General of Newfoundland, Interveners.

[1981] 1 S.C.R. 153

Supreme Court of Canada

1980: November 24 / 1981: January 27.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Constitutional law -- Jurisdiction -- Application by power company for approval by provincial board of construction of transmission line within province to point near provincial border -- Connection to power system of another province proposed -- Whether or not the project a work or undertaking connecting the provinces and therefore within area of exclusive federal legislative competence -- British North America Act, s. 92(10)(a) -- The Hydro and Electric Energy Act, 1971 (Alta.). c. 49, ss. 14(2)(b), 14(2.1).

This appeal concerned a constitutional question engaging s. 92(10)(a) of the British North America Act. Calgary Power Ltd. applied under Alberta's Hydro and Electric Energy Act to the Alberta Energy Resources Conservation Board for approval of the construction and operation of an electrical transmission line to a point near the Alberta-British Columbia border where it would interconnect with one to be built in British Columbia. The application was opposed by landowners in the area of the project and, unless the Board had the jurisdiction to entertain and act upon the application, the expropriations necessary to the project could not be realized. No federal regulatory

agency embraced the situation. Respondent company did not challenge Parliament's regulatory power, at least at the point of interconnection, should Parliament choose to act. Further, the Alberta Energy Resources Conservation Board did not purport to exercise any regulatory control over the relations between respondent and B.C. Hydro under their agreement.

Appellants appealed from a decision of the Alberta Court of Appeal confirming the Board's assertion of jurisdiction, contending that the application was one to approve and permit an undertaking within exclusive federal legislative authority by reason of the contemplated interprovincial connection.

Held: The appeal should be dismissed.

An electrical distribution system could competently be within s. 92(10)(a). In the absence of federal legislation, the provincial legislature's authorization of a provincial statutory board to entertain applications for the construction of intraprovincial facilities and to empower an applicant to connect its local facilities with those of an agency in an adjoining province but without presuming to regulate the interconnection fell within the provincial authorization in relation to local works and undertakings. There was no operative federal legislation to underscore federal exclusiveness or to support federal paramountcy. Although exclusiveness could arise even in the absence of federal legislation, the present situation did not provide a basis for its assertion. There was no single promoter in a position to effect on his own an interprovincial connection and the proposed works in Alberta, ninety-nine per cent of whose output was to be delivered to customers within the Province, could properly be regarded as local or intraprovincial for the purposes of the application that was before the Energy Resources Board.

The prospect of a federal legislative interest when an interconnection was made with the facilities in British Columbia was not enough to bring this case within s. 92(10)(a) when there was no applicable federal legislation. The decision of the Board, in so far as it approved interconnection with British Columbia facilities, was merely permissive. The application was merely to enable Calgary Power Ltd. to reap the benefits of interconnection when made, as it saw fit, with the Board, for the present, being asked to approve the construction and operation of facilities wholly within Alberta.

Cases Cited

Quebec Railway Light & Power Co. v. Beauport, [1945] S.C.R. 16, considered; Hewson v. Ontario Power Company of Niagara Falls (1905), 36 S.C.R. 596; Campbell-Bennett Ltd. v. Comstock Midwestern Ltd., [1954] S.C.R. 207; Saskatchewan Power Corp. et al. v. TransCanada Pipelines Ltd., [1979] 1 S.C.R. 297; Kootenay and Elk Railway Company and Burlington Northern, Inc. v. Canadian Pacific Railway Company, [1974] S.C.R. 955; Ottawa Valley Power Co. v. Attorney-General of Ontario et al., [1936] 4 D.L.R. 594; Luscar Collieries, Limited v. McDonald and Others, [1927] A.C. 925; Attorney-General of Ontario v. Winner, [1954] A.C. 541,

distinguished; Toronto v. Bell Telephone Co., [1905] A.C. 52, referred to.

APPEAL from a judgment of the Court of Appeal of Alberta [(1980), 109 D.L.R. (3d) 189, [1980] 3 W.W.R. 176, (1980), 19 A.R. 616], confirming the jurisdiction asserted by the Alberta Energy Resources Conservation Board. Appeal dismissed.

L.M. Sali and A.S. Hollingworth, for the appellants.
Michael J. Bruni, for the respondent Energy Resources Conservation Board.
D.O. Sabey, Q.C., and H.M. Kay, for the respondent Calgary Power Ltd.
William Henkel, Q.C., for the Attorney General of Alberta.
T.B. Smith, Q.C., for the Attorney General of Canada.
John Cavarzan, Q.C., for the Attorney General of Ontario.
Henri Brun and André Beaulieu, for the Attorney General of Quebec.
Alan D. Reid and Bruce Judah, for the Attorney General of New Brunswick.
E. Robert A. Edwards, for the Attorney General of British Columbia.
N.D. Shende and R. Perozzo, for the Attorney General of Manitoba.
James A. Nesbitt, Q.C., for the Attorney General of Newfoundland.

Solicitors for the appellants: McLaws & Company, Calgary.
Solicitors for the respondent Energy Resources Conservation Board: M.J. Bruni, Calgary.
Solicitors for the respondent Calgary Power Ltd.: Bennett Jones, Calgary.
Solicitor for the intervener the Attorney General of Alberta: Ross Paisley, Edmonton.
Solicitor for the intervener the Attorney General of Canada: Roger Tassé, Ottawa.
Solicitor for the intervener the Attorney General of Ontario: H. Allan Leal, Toronto.
Solicitor for the intervener the Attorney General of Quebec: Daniel Jacoby, Quebec.
Solicitor for the intervener the Attorney General of New Brunswick: G.F. Gregory, Fredericton.
Solicitor for the intervener the Attorney General of British Columbia: Richard Vogel, Victoria.
Solicitor for the intervener the Attorney General of Manitoba: Gordon F. Pilkey, Winnipeg.
Solicitor for the intervener the Attorney General of Newfoundland: G.B. Macauley, St. John's.

The judgment of the Court was delivered by

LASKIN C.J.:-- This appeal from a judgment of the Alberta Court of Appeal dated January 22, 1980, is here by leave of this Court given on April 22, 1980, and concerns a constitutional question which in an amended form, fixed by an order of September 8, 1980, reads as follows:

> Does the Province of Alberta have constitutional power to authorize its Energy

> Resources Conservation Board to entertain an application authorizing the construction and operation of transmission lines intended to interconnect or tie in with electrical facilities operated in another Province and to serve any or all of the following purposes, as set out in the Agreed Statement of Facts:
>
> (I) to provide generation capacity reserve;
> (II) mutual assistance for emergencies in either system;
> (III) mutual overall operating economies by energy-capacity interchange;
> (IV) sale or exchange of surplus power or energy between Alberta and British Columbia;
> (V) mutual assistance in meeting reserve and reliability requirements;
> (VI) 500 kV back-up transmission in Alberta and British Columbia;
> (VII) to allow for the export of electrical power to the United States of America;
> (VIII) to form part of a 500 kV Transmission Network within Alberta.

The issues in this case engage s. 92(10)(a) of the British North America Act and arise out of an application to the Alberta Energy Resources Conservation Board by the respondent Calgary Power Ltd., a federally incorporated company, for certain permits. The application, made on December 12, 1978, under The Hydro and Electric Energy Act, 1971 (Alta.), c. 49, sought approval of the Board for the construction and operation of a new substation in the Langdon area near Calgary and a 500 kV electrical transmission line from Langdon to a point in Phillips Pass, Alberta, near the Alberta-British Columbia border.

Section 92(10)(a) of the British North America Act exempts from exclusive provincial legislative authority in relation to local works and undertakings such as are in the class of "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province". This class (as well as those in s. 92(10)(b) and (c), which are not relevant here) is by force of s. 91(29) of the British North America Act brought within the exclusive competence of the Parliament of Canada.

It is clear from the facts in this case that the only concern is whether the concluding words of s. 92(10)(a) ("other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province") apply here to exclude jurisdiction in the Alberta Energy Resources Conservation Board to entertain and act upon the respondent Calgary Power Ltd.'s application. There is no challenge here to the power of the Board to entertain and act upon the application under relevant authorizing legislation. The admitted purpose of the application is to provide a transmission line to interconnect with a line to be built by British Columbia Hydro and Power Authority from Cranbrook in that Province to the border point.

There is an agreed statement of facts in this case, of which the following paragraphs are

relevant:

2. The purpose of the subject transmission line and the interconnection with British Columbia Hydro and Power Authority is stated by Calgary Power Ltd. to be to provide generation capacity reserve required in 1983 and beyond. In addition, both Calgary Power Ltd. and British Columbia Hydro and Power Authority derive a number of other benefits identified in the Application as including:

(a) mutual assistance for emergencies in either system;

(b) overall operating economics by energy-capacity interchange, that is, either utility can rely upon and use the other utility so as to help minimize the cost of building addition [sic] facilities;
(c) sale or exchange of surplus power or energy, that is, for example, if British Columbia Hydro and Power Authority has an excess amount of water in its hydro reservoirs which it is spilling (not using to generate power) it can generate power and sell it to Calgary Power, presumably at a cost less than Calgary Power could generate power at that point in time;
(d) mutual assistance in meeting reserve and reliability requirements, particularly during periods when for example new power plants are delayed;
(e) 500 KV back-up transmission in Southern Alberta and South-eastern British Columbia.

In addition, Calgary Power Ltd., 500 KV line facilitates the export of power ultimately destined for utilities in the United States. An application to export has not been filed for this purpose by Calgary Power Ltd., although it is being prepared, and there are no existing approvals from the National Energy Board. The proposed transmission line is not dependant in any way upon such use, and it is Calgary Power Ltd.'s position that it intends to construct the line whether or not export approval is obtained.

3. Calgary Power Ltd. is interconnected with the other electric utilities in Alberta at many locations throughout Alberta and has had interconnection with utilities in British Columbia since 1929. Interconnections are generally recognized in the electric utility industry as a way to provide large scale low cost diversity, to share reserve generating capacity and to most efficiently utilize existing generating capacity.

4. Calgary Power Ltd. and British Columbia Hydro and Power Authority will separately construct their transmission lines in their respective Provinces and will connect the two transmission lines at the British Columbia-Alberta border by means of what is known as a "dead-end" tower, that is one which can withstand the mechanical tension of a line connected to one side only and does not need the support of a line on the opposite side. Calgary Power Ltd. will construct its line up to the Alberta side of the dead end tower and British Columbia Hydro and Power Authority will construct its line up to the British Columbia side. And, either utility could remove its line from the tower without forcing the other to remove or reinforce its line.
5. Calgary Power Ltd. will retain control of, and responsibility for, its transmission line constructed in Alberta and will retain the ability to connect or disconnect the line to the rest of its system by a breaker at the proposed Langdon substation at will. B.C. Hydro and Power Authority will have similarly retained control over and responsibility for its transmission line in British Columbia, at its Cranbrook substation. Calgary Power Ltd. will be able to connect generation and load to its line in Alberta at its sole discretion. The two parties will not make any agreement which would deprive either of this unfettered control.

...

8. Calgary Power Ltd.'s operations and customers are almost exclusively within the Province of Alberta. From time to time, it serves customers outside of the Province of Alberta where it is more economical and convenient for it to provide the service than adjacent utilities. At present of Calgary Power Ltd.'s approximately Two Hundred and Twenty-Eight Thousand (228,000) customers, less than ten are located outside the Province of Alberta, and represent less than 0.1% of the utility's peak load.
9. British Columbia Hydro and Power Authority is the major electric utility in the Province of British Columbia, serving most of that Province. It holds a National Energy Board Licence or licences to export electric energy to the United States. It exports and imports electrical energy to and from the United States of America through electrical transmission interconnections with members of Northwest Power Pool along the international border.
10. The Northwest Power Pool is a mutually co-operative, unincorporated body set up by electric utilities in the northwestern United States. There are presently 20 participating utilities in the Pool, including three Canadian utilities. British Columbia Hydro and Power Authority, East Kootenay Power and Calgary Power Ltd.

As part of its application, Calgary Power Ltd. filed a letter of agreement between it and British Columbia Hydro which states that the proposed interconnection will allow for

(a) mutual assistance for emergencies in either system
(b) overall operating economics by energy-capacity interchange.
(c) sale or exchange of surplus power or energy
(d) mutual assistance in meeting reserve and reliability requirements particularly during periods when new plant is delayed for reasons beyond the utilities' control
(e) 500 kV transmission backup.

The application of Calgary Power Ltd. was opposed by farmers and landowners in the area of the proposed construction of the power substation and electrical transmission line. It is obvious, of course, that unless there is jurisdiction in the Alberta Energy Resources Conservation Board to entertain and act upon the application, the necessary expropriations of land to enable the project to proceed could not be realized. The Board asserted jurisdiction in a decision of June 18, 1979 and on an appeal to the Alberta Court of Appeal that Court confirmed the jurisdiction. Subsequently, the Board proceeded with the application during the pendency of the appeal to this Court and in a decision in early July, 1980 it granted Calgary Power Ltd.'s application for

(1) a substation near Langdon
(2) a 500-Kilovolt transmission line from the substation to Phillips Pass on the Alberta-British Columbia border, and
(3) the interconnection of the transmission line and substation with Calgary Power's existing transmission system and with the system of B.C. Hydro.

The submission of the appellants is that a provincial board is being asked to entertain an application to approve and permit an undertaking which is within exclusive federal legislative authority by reason of the contemplated interprovincial interconnection. At most, according to the appellants, it might be open to the Board to authorize the intraprovincial construction but not the inter-provincial connection. Moreover, so the contention went, it was not open to the provincial legislature to vest the Board with jurisdiction to deal with the application of Calgary Power Ltd. in the terms in which it was made. Reliance is placed by the appellants on the pipeline cases: e.g. Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. [[1954] S.C.R. 207] and Saskatchewan Power Corp. et al. v. Trans Canada Pipelines Ltd. [[1979] 1 S.C.R. 297], on Hewson v. The Ontario Power Company of Niagara Falls [(1905), 36 S.C.R. 596], at pp. 608-9, on certain observations in Ottawa Valley Power Co. v. Attorney-General of Ontario [[1936] 4 D.L.R. 594], and in the reasons of Martland J. in Kootenay and Elk Railway Company and Burlington Northern, Inc. v. Canadian Pacific Railway Company [[1974] S.C.R. 955]. Invoked as well were the judgments of the Privy Council in Luscar Collieries, Limited v. McDonald and Others [[1927] A.C. 925] and Attorney-General of Ontario v. Winner [[1954] A.C. 541].

There are a number of important background facts which are relevant to the proper disposition of this appeal. First, it is conceded that there is no existing federal regulatory authority that embraces the situation that is presented here. Second, the respondent Calgary Power Ltd. does not challenge the regulatory power of Parliament, at least at the point of interprovincial

interconnection, if Parliament should choose to act. At the present time, however, the federal National Energy Board is not vested with regulatory authority that would bring the project in this case within its regime of control. Third, it does not appear that the Alberta Energy Resources Conservation Board purports to exercise any regulatory control over the relationship between Calgary Power Ltd. and the British Columbia Hydro and Power Authority under their agreement. The situation, apart from the intraprovincial construction and operation of the power substation and the electrical transmission line and apart from the permission to interconnect with a line extending from within British Columbia to the Alberta border, seems to me to have some similarity to that considered by this Court in Quebec Railway Light & Power Co. v. Beauport [[1945] S.C.R. 16]. There it was decided that there was a gap in regulatory authority respecting tolls of an autobus service operated by an undertaking within federal jurisdiction, such tolls being at the same time not within provincial competence to prescribe. I appreciate that in the Beauport case there was actual federal regulatory authority but, as in the present case, it did not extend to the matter directly in issue. Unexercised federal authority may give leeway to the exercise of provincial authority in relation to local works and undertakings, and that is how I assess the situation here.

One matter lightly touched on by counsel for Calgary Power Ltd. but not pressed was whether an electrical distribution system could competently be within s. 92(10)(a). I do not doubt that it can be and the matter, in my view, is laid to rest by the judgment of this Court in Hewson v. Ontario Power Co., supra. That was a case, however, which, unlike the present one, turned on the existence of affirmative federal legislation. The same factor distinguishes, in my opinion, the pipeline cases. It is one thing for the Parliament of Canada to legislate affirmatively for the creation and regulation of an interprovincial pipeline, as in the Campbell-Bennett Ltd. and Saskatchewan Power Corp. cases. The position is quite different where, absent superseding federal legislation, a provincial legislature authorizes a provincial statutory board to entertain applications for the construction of intraprovincial facilities and also to empower an applicant to connect its local facilities with those of an agency in an adjoining province but without presuming to regulate the interconnection. I regard this as falling within provincial authority in relation to local works and undertakings.

A relevant comparison may be made with the judgment of this Court in the Kootenay and Elk case, supra. There, a provincially incorporated c company was authorized to build a railway line in a British Columbia to extend to a point just within that Province at a fraction of an inch from the United States border. It was part of a scheme for junction with a line of railway to be built on the United States' side of the border and to come within a fraction of an inch thereat. It was conceded that the lack of actual physical interconnection would not prevent trains from running effectively over the two lines. The purpose of the two lines was to permit the transport of coal from British Columbia through the United States and thence to a British Columbia port for shipment to Japan. Although federal railway legislation was involved in the case and a number of issues therein concerned the scope of the powers of the Canadian Transport Commission under that legislation, the important point for present purposes was the view of the majority of this Court (confirming in this respect the position taken by the Canadian Transport Commission) that at the particular stage of the project it could not be said that the provincial company was operating an extraprovincial

undertaking. In the course of his reasons, Martland J. said this (at pp. 979-80):

> The respondent contends, however, that, while Kootenay's works do not extend beyond the province, its undertaking was not local in character. But in determining the legislative power of the British Columbia Legislature to incorporate Kootenay we are concerned with the nature of the undertaking which it authorized. That undertaking is one which is to be carried on entirely within the province. I do not overlook the fact that its undertaking when coupled with that of Burlington would provide a means of transport of goods from British Columbia into the United States. It may be, as is pointed out in the reasons of the Commission, that when the two lines are joined an overall undertaking of international character will emerge. But in my opinion that possibility did not preclude the British Columbia Legislature from authorizing the incorporation of a company to construct a railway line wholly situate within the borders of the province.

And, again (at p. 982):

> In summary, my opinion is that a provincial legislature can authorize the construction of a railway line wholly situate within its provincial boundaries. The fact that such a railway may subsequently, by reason of its interconnection with another railway and its operation, become subject to federal regulation does not affect the power of the provincial legislature to create it.

There was a cogent dissent in the Kootenay and Elk case, but even accepting its merit by reason of the existence of federal railway legislation the present case is an important step removed, there being here no operative federal legislation to underscore federal exclusiveness or to support federal paramountcy. Although exclusiveness may arise even in the absence of federal legislation, I do not regard the situation presented here as providing a basis for its assertion.

Nor do I think that the appellants can find any comfort in the Hewson case, supra, for their attack on the jurisdiction of the provincial Board or on the authority conferred upon it under relevant provincial legislation. That case involved the validity of a federal incorporating statute respecting the generation of electricity by the incorporated company which was given expropriation powers in connection with its undertaking. Although the actual works of the company were to be in Ontario, the Court construed the statute as embracing the extension of the company's operations beyond the Province (per Davies J., Sedgewick J. concurring) or as involving federal power in relation to navigation (per Taschereau C.J.) or as being, by virtue of an assertion to that effect in the preamble, works for the general advantage of Canada under s. 92(10)(c) of the British North America Act (per Girouard and Idington JJ.). The appellants rely on certain observations of Davies J., such as the statement on p. 606 that "The objects of the company as defined by the Act contemplated ... possible extension beyond the limits of one Province, and it is therefore just as

much within the express exception of the British North America Act, 1867, as a telegraph or telephone company with like powers of extension", citing Toronto v. Bell Telephone Co. [[1905] A.C. 52], and, again, on similar observations at p. 607.

It seems to me, however, that for present purposes the relevant observation of Davies J. is at p. 609, where he says this:

> It is not necessary, however, for me to decide whether a grant by the legislature of the province to a company created by it to connect its wires with those of a foreign corporation, at the frontier, would be necessarily beyond its powers or would invalidate the charter altogether or simply in part. That question was not argued excepting incidentally because the validity of a provincial charter was not an issue on this appeal. Whether there exists a concurrent jurisdiction in the Dominion and the province to confer such a power I am not called upon now to decide. I do hold the power to exist in the Dominion Parliament; and that, because of its exercise with respect to this special corporation and also because of the general extent of the powers granted, the Act of incorporation here in question is legal and valid.

The recognition by him of a constitutional difference where there is affirmative federal legislation is pertinent here where there is no such affirmative legislation and where, in my opinion, the field is open for valid provincial legislation of the kind under which the Board has acted in this case, that is, legislation in relation to intraprovincial local works and undertakings.

It is true that in the Winner case, supra, provincial legislation was blunted notwithstanding that there was no existing federal legislation governing interprovincial and international motor bus service. However, that was because a provincial motor carrier board purported to regulate the operations of an international bus carrier which provided service from Boston into the Province (New Brunswick) and into an adjoining Province (Nova Scotia). It was held to be beyond the competence of the New Brunswick Motor Carrier Board, in purporting to license a foreign bus carrier to operate from Boston into the Province and on to Glace Bay in Nova Scotia, to forbid the carrier from embusing or debusing passengers in New Brunswick. As a fully operating interprovincial and international bus carrier, it was entitled to carry passengers from points outside New Brunswick to points within and vice versa without being subject to provincial regulation. The contrast between the Winner case and the present case is obvious. There the "work" was an indivisible operation in the transportation of persons internationally and along the same routes intraprovincially; and in that situation, the Court found that such a system could not be segmented into provincial and interprovincial components.

There are observations in the Privy Council's reasons in the Winner case, as at pp. 574-5 of [1954] A.C. 541, that suggest that an intention to operate interprovincially may be sufficient to take a work or undertaking outside of provincial regulatory authority or, if not intention alone, then by

the taking of all necessary steps to interprovincial operation. That may be so where the interprovincial operation is in the hands of one promoter, as was the case in Winner and also in Toronto v. Bell Telephone Co., supra, cited in the Winner case, and which, however, turned on the presence of federal legislation. Here, however, there is no single promoter who is in a position to effect on his own an interprovincial connection and, in my view, the proposed works in Alberta may properly be regarded as local works for the purposes of the application that was before the Energy Resources Conservation Board.

Again, there is nothing in the Luscar Collieries case, supra, that assists the contentions of the appellants. The principal issue in that case was whether the federal Board of Railway Commissioners had jurisdiction over certain intraprovincial railways, constructed pursuant to provincial legislative authority, which were not only interconnected but were operated by the Canadian National Railways pursuant to certain agreements and in such a way as to enable traffic to pass over them to such parts of Canada as were served by the C.N.R. system. Again, the "work" which was the subject of the proceedings was a single indivisible transportation system engaged in interprovincial transport and, in connection therewith, there was some intraprovincial transport as well. In contrast, the "work" here is, in essence, an intraprovincial one, ninety-nine per cent of whose output is to be delivered to customers within the Province.

It was the view of the Privy Council in the Luscar Collieries case that in the circumstances of the case the two provincial railways were part of a continuous system of railways operated by the C.N.R. and connecting the province with other provinces. The Privy Council assessed the constitutional position as follows (at pp. 932-3):

> Their Lordships agree with the opinion of Duff J. that the Mountain Park Railway and the Luscar Branch are, under the circumstances hereinbefore set forth, a part of a continuous system of railways operated together by the Canadian National Railway Company, and connecting the Province of Alberta with other Provinces of the Dominion. It is, in their view, impossible to hold as to any section of that system which does not reach the boundary of a Province that it does not connect that Province with another. If it connects with a line which itself connects with one in another Province, then it would be a link in the chain of connection, and would properly be said to connect the Province in which it is situated with other Provinces.
>
> In the present case, having regard to the way in which the railway is operated, their Lordships are of opinion that it is in fact a railway connecting the Province of Alberta with others of the Provinces, and therefore falls within s. 92, head 10(a), of the Act of 1867. There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the Province of Alberta. If

> under the agreements hereinbefore mentioned the Canadian National Railway Company should cease to operate the Luscar Branch, the question whether under such altered circumstances the railway ceases to be within s. 92, head 10(a), may have to be determined, but that question does not now arise.

Finally, I wish to refer to a number of observations in the Ottawa Valley Power Co. case, supra. The case itself is at a considerable distance from the present one, involving statutory invalidation by Ontario of certain electric power contracts between two companies, one in Ontario and the other in Quebec. In consequence, the Courts were concerned with whether Ontario was purporting to legislate in relation to civil rights outside the Province and a majority of the Ontario Court of Appeal so held. In the course of his reasons, Masten J.A., one of the majority, with whom Middleton J.A. agreed, commented as follows on the contractual relationship between the two companies and their interwoven operations (at pp. 613-4):

> ... I assume without so determining that the undertaking in question falls within the provisions of Head 10(a) and that the Dominion could by appropriate legislation assume control of it and regulate or prevent its operation. But it has not done so, and on the contrary it has by Order in Council passed under and in pursuance of s. 4 of the Navigable Waters' Protection Act, R.S.C. 1927, c. 140, approved of the site of the works and of the plans under which such works were built and placed and of the plans under which they are now maintained. Under such circumstances is it possible to say that the contracts in question, though made by corporations fully empowered and duly authorized by both the Provincial Governments which incorporated them, are void? It seems to me that even if the Dominion were held entitled to assume exclusive control of the construction and operation of these works yet the contracts in question must under existing circumstances remain valid and effective as between the parties to them. In other words, legislative authority for the construction and operation of the works is one thing and the contracts in question between two private corporations not being inherently illegal are quite another thing.

There are statements in the reasons of Fisher J A., also one of the majority, which may be properly questioned today as they relate to the scope of federal power but, that apart, he says this (at p. 623):

> The Dominion has not entered the field and therefore cannot see how the grant of the power to contract for the transmission of power from one Province to another falls outside the provincial power or in any way impinges upon the Dominion power, which has not in fact been exercised.

In short, I see nothing in the Ottawa Valley case that lends support to the appellant's submissions.

An unusual feature of the proceedings in thin Court is the position taken by the intervening

Attorney General of Canada. Counsel for the Attorney General supported the jurisdiction of the Alberta Energy Resources Board on the particular facts and by reason of the majority decision of this Court in the Kootenay and Elk case. The support was limited to the Board's authority to permit the construction and operation of the substation and the transmission line and with a caveat if the Board's decision imposes a requirement of inter-connection. Reference was made to s. 14(2)(b) of The Hydro and Electric Energy Act which empowers the Board, with the authorization of the Lieutenant-Governor in Council, to require connection or interconnection with other existing or proposed electrical distribution systems. Under s. 14(2.1), an interconnection may be directed by the Board without the authorization of the Lieutenant-Governor in Council "where the interconnection is not for the purpose of interprovincial or international transmission of electrical energy".

This Court is not called upon in this appeal to consider the validity of ss. 14(2)(b) and 14(2.1) of The Hydro and Electric Energy Act. I take the decision of the Board, so far as it approves inter-connection with British Columbia facilities, as being merely permissive, this being reflected in the agreed statement of facts set out above. In the result, the application is one to enable Calgary Power Ltd. to reap the benefits of interconnection when made, as it may see fit, in the interests of its customers in Alberta, but for the present the Board is being asked to approve the construction and operation of facilities which are wholly within Alberta. The prospect of a federal legislative interest when an interconnection is made with facilities in British Columbia is not enough to bring this case within s. 92(10)(a) when there is no applicable federal legislation.

I would, accordingly, dismiss the appeal with costs to the respondent Calgary Power Ltd. I would answer the constitutional question posed in this case in the affirmative, subject, of course, to the prescription of federal legislation, especially as it may relate to export of electrical power, and subject to construction of the provincial legislation as being permissive only in its reach. There will be no order as to costs with respect to the Board or any of the interveners.

Appeal dismissed with costs.

Indexed as:

Ontario Hydro v. Ontario (Labour Relations Board)

Ontario Hydro, appellant;
v.
Ontario Labour Relations Board, Society of Ontario Hydro Professional and Administrative Employees, Canadian Union of Public Employees -- C.L.C. Ontario Hydro Employees Union, Local 1000, Coalition to Stop the Certification of the Society on Behalf of Certain Employees, Tom Stevens, C. S. Stevenson, Michelle Morrissey-O'Ryan and George Orr, respondents, and The Attorney General of Canada, respondent, and The Attorney General for Ontario, the Attorney General of Quebec and the Attorney General for New Brunswick, interveners.
And between
Canadian Union of Public Employees -- C.L.C. Ontario Hydro Employees Union, Local 1000, appellants;
v.
Ontario Hydro, Ontario Labour Relations Board, Society of Ontario Hydro Professional and Administrative Employees, Coalition to Stop the Certification of the Society on Behalf of Certain Employees, Tom Stevens, C. S. Stevenson, Michelle Morrissey-O'Ryan and George Orr, respondents, and
[page328]
The Attorney General of Canada, respondent, and The Attorney General for Ontario, the Attorney General of Quebec and the Attorney General for New Brunswick, interveners.

[1993] 3 S.C.R. 327

[1993] S.C.J. No. 99

File Nos: 22355, 22387

Supreme Court of Canada

1992: November 9 / 1993: September 30.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (191 paras.)

Constitutional law -- Distribution of legislative powers -- Works for general advantage of Canada -- Works and undertakings constructed for the production, use and application of atomic energy declared to be works for the general advantage of Canada -- Validity and effect of declaration -- Whether federal labour relations legislation applicable to employees working at provincial nuclear electrical generating stations -- Constitution Act, 1867, ss. 91(29), 92(10)(c), 92A(1)(c) -- Atomic Energy Control Act, R.S.C., 1985, c. A-16, preamble, s. 18.

Constitutional law -- Distribution of legislative powers -- Peace, order and good government -- Atomic energy -- Whether federal labour relations legislation applicable to employees working at provincial nuclear electrical generating stations -- Constitution Act, 1867, s. 91 -- Atomic Energy Control Act, R.S.C., 1985, c. A-16, s. 18.

Ontario Hydro, a provincially owned corporation, produces electric power through electrical generating stations, five of which are nuclear generating stations. These stations fall within the ambit of s. 18 of the federal Atomic Energy Control Act, which provides that all works and undertakings "constructed for the production, use and application of atomic energy" are works for the [page329] general advantage of Canada. Each of Ontario Hydro's nuclear reactors is covered by a licence issued pursuant to regulations made under the Act. The respondent Society applied for certification pursuant to the Ontario Labour Relations Act as exclusive bargaining agent for a unit of employees of Ontario Hydro, including those employed at the nuclear plants. The respondent Coalition challenged the application on the ground that the employees who worked at the nuclear generating stations fell within the jurisdiction of the Canada Labour Code. The Coalition claimed that the declaration in s. 18 of the Act, combined with ss. 91(29) and 92(10)(c) of the Constitution Act, 1867, brought Ontario Hydro's nuclear generating stations within exclusive federal jurisdiction with respect to labour relations. The Ontario Labour Relations Board found that it had no jurisdiction to deal with the proposed unit since it included employees who worked at the nuclear facilities and were governed by the Canada Labour Code. The Ontario Divisional Court quashed the Board's decision. A majority of the Ontario Court of Appeal set aside the judgment of the Divisional Court and reinstated the Board's decision.

Held (Sopinka, Cory and Iacobucci JJ. dissenting): The appeals should be dismissed. The Canada Labour Code applies to employees of Ontario Hydro who are employed on or in connection with

those nuclear facilities that come under s. 18 of the Atomic Energy Control Act.

Per La Forest, L'Heureux-Dubé and Gonthier JJ.: Section 92(10)(c) of the Constitution Act, 1867 authorizes Parliament to declare local works to be for the general advantage of Canada. When such a declaration is made, any work subject to the declaration falls, by virtue of s. 91(29), within the legislative jurisdiction of Parliament as if such work was expressly enumerated in s. 91. The legislative jurisdiction conferred over a declared work refers to the work as a going concern or functioning unit, which involves control over its operation and management. Labour relations are vital parts of the operation of a work and an integral part of Parliament's exclusive powers to legislate in relation to declared works. A province has power by general legislation to affect the operation of a declared work, but it cannot legislate respecting that work qua work. Legislation governing labour relations on such works is legislation in relation to that work and therefore falls outside provincial legislative competence. The current goals of labour relations have nothing to do with the source of the legislative power. Finally, it is unnecessary to consider [page330] the possible difference in scope between "undertakings" and "works" for the purposes of the various items in s. 92(10). A work under s. 92(10)(c) means a work as a going concern, and to manage that going concern Parliament must have power to regulate the labour relations between management and labour engaged in operating the work. There is thus no logical or practical difference in the need for control of the labour relations in the management of an undertaking and in the management of a work.

The declaratory power should not be narrowly construed to conform to theoretical principles of federalism. The Constitution must be read as it is, and it expressly provides for the transfer of provincial powers to the federal Parliament over works declared to be for the general advantage of Canada. Further, in this case, the preamble of the Atomic Energy Control Act does not restrict the federal power to safety and security considerations only. While the preamble may set forth the purpose for which Parliament declared works for the development of atomic energy to be for the general advantage and may give at times some clue as to what works were intended to be covered by the declaration, once a work falls within the ambit of a declaration, the legislative power flowing therefrom is governed by the Constitution.

Section 92A(1)(c) in the Constitution Act, 1867 does not affect Parliament's authority to legislate with respect to nuclear electrical generating stations. Section 92(10)(c) extends to works created under other headings in s. 92, and s. 92A is not different in that respect. The danger to provincial autonomy over the generation of electrical energy lay in the possible transformation of these enterprises into purely federal undertakings under s. 92(10)(a) by reason of their connection or extension beyond the province. Section 92A ensures the management by the provinces, including the regulation of labour relations, of the sites and facilities for the generation and production of electrical energy that might otherwise be threatened by s. 92(10)(a). But it was not meant to interfere with the paramount power vested in Parliament by virtue of the declaratory power (or for that matter Parliament's general power to legislate for the peace, order and good government of Canada) over [page331] "[a]ll works and undertakings constructed for the production, use and

application of atomic energy".

Parliament's exclusive jurisdiction over nuclear electrical generating stations is also founded on its power to legislate over matters of national concern under the peace, order and good government clause in s. 91 of the Constitution Act, 1867. There is no doubt that the production, use and application of atomic energy constitute a matter of national concern, which is predominantly extra-provincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power. What was said in the context of a work subject to the declaratory power applies equally to a work over which Parliament has jurisdiction under its general power in relation to matters of national concern. Labour relations are an integral part of that jurisdiction.

Ontario Hydro was not immune from the operation of the Canada Labour Code on the basis that it was a provincial instrumentality set up to advance provincial purposes.

Per Lamer C.J.: The federal legislative jurisdiction over works such as nuclear generating stations, whether it arises pursuant to Parliament's declaratory power under s. 92(10)(c) of the Constitution Act, 1867 or pursuant to Parliament's power under s. 91 of that Act to make laws for the peace, order and good government of Canada (the "p.o.g.g." power), must be carefully described to respect and give effect to the division of legislative authority. Accordingly, Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures while remaining consistent with the appropriate recognition of the federal interests involved. The p.o.g.g. power is similarly subject to balancing federal principles, limiting in this case the p.o.g.g. jurisdiction to the national concern aspects of atomic energy (namely, the fact of nuclear production and its safety concerns).

The power to regulate the labour relations of Ontario Hydro's employees involved in the production of nuclear energy is an integral and essential part of Parliament's [page332] declaratory and p.o.g.g. jurisdictions. Parliament's interest as set out in the preamble of the Atomic Energy Control Act to control and supervise the application and use of atomic energy reveals its interest in regulating labour relations matters at nuclear facilities. This compelling interest is made clear by the Act's regulations dealing with health, safety and security, which include a strong employment and labour relations component, and by the conditions of the licences. While none of the regulations seek to regulate the collective bargaining process, or refer explicitly to terms or conditions which must be included in collective agreements, the matters of concern to management and labour in drafting and negotiating a collective agreement are reflected in the regulations. The federal interest in the employees working on or in connection with facilities for the production of nuclear energy extends where those employees are unionized to the labour relations regime which governs the relationship between the employer and the employees, through their bargaining agent. On the international level, there is also a consistent recognition that supervising employment on or in connection with facilities for the production of nuclear energy is an integral part of assuring the safety of nuclear facilities and materials.

Further, Parliament's declaratory jurisdiction under s. 92(10)(c) extends not only to the work but also to the integrated activity carried on therein. No convincing distinction can be drawn between what is called the "undertaking" of the work and the "integrated activities related to" that work. The jurisdiction to regulate a work and its related integrated activity prima facie includes jurisdiction to make laws respecting its labour relations. Here, the employees involved in the production of nuclear energy at Ontario Hydro's nuclear facilities clearly fall within Parliament's jurisdiction over labour relations. Their "normal or habitual activities" are intimately related to the federal interest in nuclear energy, since the extent of the federal government's interest in nuclear power production is its interest in health, safety and security, matters completely within the daily control of those operating nuclear facilities. The provincial trappings of Ontario Hydro's nuclear facilities should not mask their essentially federal operational nature.

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The federal jurisdiction over labour relations does not apply to all Ontario Hydro's employees. Only those actually employed on or in connection with facilities for the production of nuclear energy are federally regulated. The others remain under provincial jurisdiction pursuant to s. 92A(1)(c) of the Constitution Act, 1867.

Parliament is not precluded from exercising its labour relations jurisdiction over Ontario Hydro employees involved in the production of nuclear energy by the fact that the province has exercised that jurisdiction for a long period. There is no doctrine of laches in the context of constitutional division of powers.

Per Sopinka, Cory and Iacobucci JJ. (dissenting): Parliament may, under its declaratory power, decide as a matter of policy to withdraw a work or an undertaking linked to a work from what would normally be provincial jurisdiction by declaring the work or undertaking to be a work for the general advantage of Canada, or of two or more provinces. Parliament's jurisdiction over a declared work, however, is not plenary and extends only to those aspects of the work which are integral to the federal interest in the work. This limit is consistent with the traditional approach to division of powers. The Constitution Act, 1867 set up a federalist system of government for Canada and should be interpreted so as not to allow the powers of either Parliament or the provincial legislatures to subsume the powers of the other. The federal declaratory power applies to works which fall within any of the categories assigned to the provinces under ss. 92 and 92A of the Constitution Act, 1867. Parliament did not give up its declaratory power over nuclear electrical generating stations when s. 92A was added to the Constitution in 1982.

While the valid declaration in s. 18 of the Atomic Energy Control Act brought Ontario Hydro's nuclear electrical generating stations as works within Parliament's exclusive jurisdiction, control over labour relations at these facilities is not integral to Parliament's effective regulation of its interest in nuclear plants. The preamble to the Act provides a statement of the federal interest in

atomic energy and the parameters of that interest in the operations of the nuclear electrical generating facilities. The federal interest in these facilities is the fact of nuclear production and all its attendant [page334] safety, health and security concerns. Nothing in the Act, the regulations or the licences reveals any interest in labour relations. Labour relations legislation is generally concerned with regulating the process of industrial relations and aims at securing both industrial peace and better working conditions for workers. The two potential labour relations concerns which could impact on the safe operation of a nuclear plant -- staffing and work stoppages -- are tempered by the conditions of the licences issued under the Act. Moreover, if specific safety issues were of concern to Parliament, it could legislate with respect to those issues under its valid interest in safety flowing from its jurisdiction over the declared works. This necessary trenching on provincial jurisdiction is more in harmony with the principles of federalism than is the wholesale withdrawing of labour relations from provincial jurisdiction. The conclusion that labour relations is not integral to the exercise of federal jurisdiction is strengthened by s. 92A of the Constitution Act, 1867. This section expressly provides for provincial jurisdiction over the management of electrical generating sites, including those fuelled by nuclear reactors. Further, Ontario Hydro as a whole is a provincial undertaking. Provincial control over labour relations thus appears to be integral to provincial jurisdiction over the nuclear electrical generating facilities. Finally, for the same reason that labour relations of a federal undertaking must be regulated federally, labour relations of a provincial undertaking should be regulated provincially.

Like its jurisdiction under the declaratory power, Parliament's jurisdiction over atomic energy under the national concern branch of the p.o.g.g. power is not plenary and does not extend to the labour relations between Ontario Hydro and those of its employees employed in the nuclear electrical generating stations. Absent special circumstances, the same balancing principles of federalism apply to both the p.o.g.g. power and the declaratory power. Federal control over labour relations at Ontario Hydro's nuclear facilities is simply not required for the exercise of Parliament's jurisdiction over atomic energy. The labour relations at issue in this case are not part of [page335] the single, distinctive and indivisible matter identified as atomic energy.

It follows that it is the Ontario Labour Relations Act which constitutionally applies to the labour relations between Ontario Hydro and those of its employees at its nuclear electrical generating facilities. Had the Canada Labour Code been applicable, however, Ontario Hydro would not have been immune from the operation of federal labour legislation by virtue of interjurisdictional Crown immunity.

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By La Forest J.

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By Lamer C.J.

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By Iacobucci J. (dissenting)

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APPEALS from a judgment of the Ontario Court of Appeal (1991), 1 O.R. (3d) 737, 43 O.A.C. 184, 77 D.L.R. (4th) 277, 91 CLLC para. 14,014, setting aside a judgment of the Divisional Court (1989), 69 O.R. (2d) 268, 33 O.A.C. 302, 60 D.L.R. (4th) 542, 89 CLLC para. 14,044, quashing a decision of the Ontario Labour Relations Board, [1988] OLRB Rep. Feb. 187. Appeals dismissed, Sopinka, Cory and Iacobucci JJ. dissenting.

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The following are the reasons delivered by

LAMER C.J.:--

I. Introduction

1 I have read with interest the thorough and thoughtful reasons of my colleague, Justice Iacobucci, and although I agree with much of his analysis of the law applicable to these appeals, I cannot, with respect, agree with his disposition of these appeals. Although there are two appeals before the Court, they are in substance one, and I shall refer to the proceedings herein as "the appeal".

2 I agree with Iacobucci J. that Parliament's legislative jurisdiction over works such as nuclear generating stations, whether it arises pursuant to a declaration under s. 92(10)(c) of the Constitution Act, 1867, or pursuant to Parliament's power under s. 91 of that Act to make laws for the peace,

order [page340] and good government of Canada (the "p.o.g.g." power), is not "plenary". Rather, federal jurisdiction over such works must be carefully described to respect and give effect to the division of legislative authority on which our federal constitutional scheme is based. Under s. 92(10)(c), I fully agree with Iacobucci J. that "Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved" (p. 404). The p.o.g.g. power is similarly subject to balancing federal principles, limiting the federal government's p.o.g.g. jurisdiction to "the national concern aspects of atomic energy ... namely the fact of nuclear production and its safety concerns" (p. 425).

3 However, I cannot agree with Iacobucci J.'s assessment of how this balance ought to be struck; specifically, I am of the view that the power to regulate the labour relations of those employed on or in connection with facilities for the production of nuclear energy is integral to Parliament's declaratory and p.o.g.g. jurisdictions. I reach this conclusion through an examination of the national and international regulatory framework applicable to the production of nuclear energy, previous decisions of this and other courts respecting constitutional jurisdiction over labour relations, and the effect of s. 92A(1)(c) of the Constitution Act, 1867.

II. Analysis

A. Regulatory Framework

(a) The Atomic Energy Control Act

4 The production of nuclear energy in Canada is regulated by legislation (the Atomic Energy Control [page341] Act, R.S.C., 1985, c. A-16 (the "AECA")), regulations made under that Act, and licences granted by the Atomic Energy Control Board pursuant to that Act and the regulations.

5 The declaration in s. 18 AECA, that "[a]ll works and undertakings constructed (a) for the production, use and application of atomic energy ... are, and each of them is declared to be, works or a work for the general advantage of Canada" is the primary indication of Parliament's interest in the production of atomic energy. The scope of that interest is suggested by the preamble to the AECA, which states:

> WHEREAS it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in measures of international control of atomic energy that may hereafter be agreed on;

6 I cannot, with respect, agree that the preamble does not reveal a federal interest in regulating labour relations. Rather, I think that stating Parliament's interest in the "control and supervision of the ... application and use of atomic energy" directly implicates regulation of the activities involved in that application and use, which in turn involves the regulation of those employed in producing

nuclear power. In fact, Iacobucci J. agrees at p. 416 that "the uniquely federal aspect of Ontario Hydro's nuclear electrical generating stations is the fact of nuclear production, with all its attendant safety, health and security concerns" (emphasis added). With respect, I believe that all of the concerns attendant on the production of nuclear energy arise in the regulation of labour relations at nuclear production facilities, as is shown by the way in which the general content of the preamble is particularized in the AECA and its regulations.

7 As the discussion below of the regulations made under the AECA makes clear, the Atomic Energy Control Board is given broad regulation-making power, through which the production of nuclear [page342] energy is primarily controlled and supervised. Section 9(b) AECA, for example, allows the Board to make regulations "for developing, controlling, supervising and licensing the production, application and use of atomic energy". It is through this regulation-making power that the Board has made clear the federal government's interest in labour relations matters affecting nuclear energy, and to which I shall now turn.

(b) The Atomic Energy Control Regulations

8 The Atomic Energy Control Regulations, C.R.C. 1978, c. 365, evince a strong federal interest in the employment of the men and women who operate Ontario Hydro's nuclear production facilities. Although none of the provisions seek to regulate the collective bargaining process, or refer explicitly to terms or conditions which must be included in collective agreements covering such workers, the regulations do show in a more general way that Parliament's interest in health, safety and security at nuclear production facilities is in large part an interest in the employment of those persons who operate such facilities.

9 An application made to the Atomic Energy Control Board, under s. 7(2) in Part I of the regulations, for a licence to, inter alia, use any prescribed substance must, if the Board so requires, set out "(g) a description of the qualifications, training and experience of any person who is to use the prescribed substance". The licence granted by the Board may include conditions respecting measures to be taken to protect against excessive doses of radiation (s. 7(3)(a)), instruction to be given to workers respecting radiation hazards and procedures (s. 7(3)(c)), measures to be taken against theft, loss or unauthorized use of prescribed substances (s. 7(3)(f)), and the qualifications, training [page343] and experience of anyone who is to use or supervise the use of prescribed substances (s. 7(3)(g)).

10 Similar provisions govern the licensing procedure for operating a nuclear facility described in Part II of the regulations.

11 Where a licence has been issued, records must be kept of the names of all persons involved in the use and handling of prescribed substances, doses of radiation received by any person, and medical examinations required under the regulations (Part III, s. 11(1)).

12 Part IV of the regulations concerns security, and prohibits unauthorized disclosure of various

types of information about prescribed substances and nuclear facilities (s. 13(1)). Furthermore, the Board may designate "protected places" for secrecy into which unauthorized persons may not enter.

13 Part V of the regulations concerns health and safety, and s. 17 requires radiation dosage notification and examination procedures for atomic radiation workers, as well as prohibiting some persons from working as atomic radiation workers. Indeed, Part V is almost exclusively concerned with employees at nuclear facilities such as Ontario Hydro's.

14 Part VI, the general part of the regulations, imposes several employment-related obligations on licensees, including providing appropriate safety equipment and clothing, and providing adequate warning to any person (which would include employees) who may be affected by an escape of radioactive material. Employees are under similar obligations to observe safety procedures and use safety equipment and clothing.

15 I think that it can be foreseen how these stringent and detailed obligations of licensees such as Ontario Hydro might be reflected in collective agreements between the management and employees [page344] of nuclear facilities, especially where dosage monitoring, notification, and protection are concerned. The various restrictions on who may be employed at the facility might be incorporated into the collective agreement. The Atomic Energy Control Board's training and experience requirements might influence the negotiation and drafting of promotion and seniority clauses. An employee's failure to use the required safety equipment, or to observe required safety procedures, could be the subject of discipline governed by the collective agreement. The labour relations board might have to distinguish between a legitimate plant shut-down and an illegal lock-out during a labour dispute. The requirement that the collective agreement conform to the regulatory requirements of the statute, regulations and licence might be relevant to proceedings to determine whether the parties were bargaining in good faith. Other examples of the mutual concerns in the regulations and most collective agreements are not difficult to anticipate.

16 I draw these parallels not to suggest that the regulations will dictate the substantive content of collective agreements for those employed on or in connection with nuclear energy production facilities, but rather to show that the matters of concern to management and labour in drafting and negotiating a collective agreement are reflected in the regulations, and that the interests in both cases are quite similar. As is the case with the AECA, Parliament's regulation of nuclear facilities, under the concerns of health, safety and security, includes a strong employment and labour relations component.

(c) Licences

17 One of the licences described in the AECA and the regulations has been put before this Court [page345] (Reactor Operating Licence No. 10/86, for the Bruce Nuclear Generating Station "A").

18 Article A.A.3 sets out detailed staffing requirements, including written Atomic Energy Control Board approval of certain employees, minimum staffing requirements, and notice of

staffing changes. Article A.A.19 requires the prompt reporting of any attempted or actual breaches of security, threats or sabotage (sub-article (iv)), and of "actual or impending instances of industrial disputes or civil demonstrations which could affect the safety or security of the nuclear facility" (sub-article (v)), and "any event which constitutes or reveals a violation of the conditions of this licence, the Physical Security Regulations or the Atomic Energy Control Regulations" (sub-article (ix)). This last sub-article covers all of the personnel requirements of the regulations and licence described above.

19 It is said that the lack of any imposition of federal control over labour disputes in the licence indicates that such control is not integral to federal jurisdiction. However, with respect, I believe that what demonstrates that jurisdiction over labour relations is integral to federal jurisdiction over the production of energy power is not an actual exercise of that jurisdiction (indeed, no such jurisdiction has been exercised in this case, as I discuss below), but a commonality of interests and concerns between the existing federal regulatory framework, and the matters to which labour relations legislation is addressed. The licence provisions do indicate a strong and compelling federal interest in labour relations matters at nuclear facilities, not the least of which is the reporting of potential labour disturbances because of their serious health, safety and security implications. It appears to me that the reporting of labour disturbances to the Atomic Energy Control Board, mandated by the licence, in fact dovetails neatly with [page346] federal regulation and supervision of the disturbance itself.

20 Therefore, I think that the domestic regulation of the production of nuclear energy demonstrates a strong federal interest in the employment of those employed on or in connection with facilities for the production of nuclear energy. Where those employees are unionized, that federal interest extends to the labour relations regime which governs the relationship between the employer and the employees, through their bargaining agent.

(d) International Regulation

21 The production of nuclear energy is also closely monitored and regulated at the international level, primarily by the International Atomic Energy Agency ("IAEA") and the treaties and agreements negotiated through the IAEA to which Canada is a party. The IAEA is mainly concerned with the promotion of the peaceful and safe use of atomic energy, and the prevention of the diversion of nuclear materials to non-peaceful uses.

22 Many of the security provisions affecting employees in the regulations described above (especially those in Part IV), and the licences under which nuclear facilities operate, can be traced to Canada's international obligations in the field of nuclear energy. Canada is a "non-nuclear weapon" party to the Treaty on the Non-Proliferation of Nuclear Weapons, Can. T.S. 1970 No. 1, which in Article III imposes "safeguards" on such parties to prevent the diversion of nuclear materials to other than peaceful purposes.

23 Other IAEA activities demonstrate the vital link between the safe production of nuclear

energy and the persons employed in that enterprise. For example, in the IAEA Yearbook 1992, at p. D25, the [page347] development of a concept called "safety culture" is discussed. Recognizing that (at p. D49) "[a] principal root cause of failures is human error, which is often the initiator of incidents", safety culture, the Yearbook explains, directs individuals, managers, and policy makers to implement strategies and organizational structures to prevent and detect such errors.

24 A paper presented to an international symposium on the operational safety of nuclear power plants organized by the IAEA also warned against treating employees engaged in the production of nuclear energy like other utility employees. B. J. Csik of the IAEA, in "International Guidance on the Qualifications of Nuclear Power Plant Operations Personnel" (Operational Safety of Nuclear Power Plants (1984), vol. II, 315) noted with disapproval (at p. 323) that:

> Some utilities maintain the attitude in their personnel management policy that a nuclear power plant is just another electric generation plant, even though they are fully aware of the differences between nuclear and fossil-fuelled units for all other purposes.

25 On the international level, then, there is a consistent recognition that supervising employment on or in connection with facilities for the production of nuclear energy is an integral part of assuring the safety of nuclear facilities and materials. The question remains whether the jurisprudence of this and other courts supports the strong practical reasons in favour of placing the responsibility for both matters with the federal government.

B. Labour Relations Jurisprudence

26 The trilogy (Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749; Canadian National Railway Co. v. [page348] Courtois, [1988] 1 S.C.R. 868; and Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board), [1988] 1 S.C.R. 897), with the cases Beetz J. relied upon in the trilogy, emphasize the intimate link between the power to regulate an industrial activity like producing nuclear energy, and the authority to make laws respecting the management of that activity, which authority usually extends to making laws respecting labour relations. For example, Beetz J. described (at p. 825) the following passage (from Reference re Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529 (the Stevedoring case), at p. 592, per Abbott J.) as "a classic statement on point":

> The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion, a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures.

27 My colleague distinguishes this and other such general statements by observing that Ontario Hydro as a whole is a "provincial", rather than a "federal" "undertaking", so that these passages in fact demonstrate the necessity of provincial control over labour relations at Ontario Hydro. Federal jurisdiction over Ontario Hydro's nuclear facilities, it is suggested, extends only so far as the "work" and the "integrated activities related to the work". However, with respect, the description of Ontario Hydro as a provincial undertaking to limit federal jurisdiction under s. 92(10)(c) to the work alone proves too much; a scrupulous application of the works/undertakings distinction relied upon by Iacobucci J. would leave Parliament jurisdiction over nothing more than the physical shell of the nuclear generating facilities, a result which none of [page349] the parties supporting provincial jurisdiction go so far as to assert.

28 To avoid finding such an empty and ineffective jurisdiction over the work alone, commentators and courts have accepted that Parliament's jurisdiction over a work subject to a declaration includes some level of control over the activities which occur on or in connection with it; such activities have often been described as the "undertaking" connected with the work, although the strict terms of s. 92(10)(c) would seem to limit Parliament's jurisdiction to the work only. For example, the author of Laskin's Canadian Constitutional Law (5th ed. 1986), vol. 1, asserts (at p. 629) that the effect of a declaration "must surely be to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character". My colleague holds that this latter authority does not include labour relations. However, if federal jurisdiction applies to the "integrated activities related to the work", I see no convincing distinction between what is called the "undertaking" of Ontario Hydro's nuclear facilities (which must be distinguished from the "undertaking" of Ontario Hydro's non-nuclear facilities and operations) and the "integrated activities related to" those nuclear facilities. With respect, I think further that the trilogy suggests the same parallel.

29 Bell Canada, the subject of the lead judgment in the trilogy, is itself the subject of a declaration by S.C. 1987, c. 19, s. 5, which is confined to the strict limits of s. 92(10)(c): "The works of the Company are hereby declared to be works for the general advantage of Canada." At the time the trilogy was decided, a declaration to the same effect was contained in S.C. 1882, c. 95, s. 4. While Bell Canada was also within federal jurisdiction under s. 92(10)(a), the declaration, if it is not completely redundant, must have been seen as necessary to complete Parliament's control over the enterprise. [page350] In the trilogy, Beetz J. used Bell Canada as the paradigm of a "federal undertaking", the labour relations of which would be federally regulated, notwithstanding that Parliament's jurisdiction was at least partly founded under s. 92(10)(c). I would therefore not interpret Beetz J.'s references in the trilogy to "federal undertakings" as restrictively as is suggested, but rather would rely on those cases for the simple but compelling proposition that jurisdiction to regulate a work and its related integrated activity, here the production of nuclear energy, prima facie includes jurisdiction to make laws respecting its labour relations.

30 The special problems raised by such divided activities within a single enterprise were

canvassed by this Court in Northern Telecom Canada Ltd. v. Communication Workers of Canada, [1983] 1 S.C.R. 733. Most of Northern Telecom's employees were subject to provincial labour law. However, some employees were "installers", who installed telephone equipment in Bell Canada's telephone network. The Canada Labour Relations Board determined that the installers were not employed on or in connection with the federal enterprise that was Bell Canada, and so were outside of its jurisdiction. This Court held that the installers were sufficiently integrated into the operations of Bell Canada to fall within federal labour relations jurisdiction. Writing for the majority of this Court, Estey J. described the inquiry before the Court, as it had been outlined by Dickson J. (as he then was) in an earlier incarnation of the litigation (Northern Telecom Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115). Dickson J. wrote (at p. 133):

> In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at [page351] the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.

Estey J. found that the installers were an integral part of the core federal undertaking, so that they fell under federal jurisdiction.

31 Applying the same test to employees involved in the production of nuclear energy at Ontario Hydro's nuclear facilities, I think it is clear that their "normal or habitual activities" are intimately related to the federal interests in nuclear energy, since the extent of the federal government's interest in nuclear power production is its interests in health, safety and security, matters completely within the daily control of those operating nuclear facilities. The IAEA materials make this clear.

32 Therefore, I would conclude under both the declaratory jurisdiction and the p.o.g.g. jurisdiction, that the labour relations of Ontario Hydro's employees involved in the production of nuclear energy, related as it is to the federal interest in atomic energy, is an integral and essential part of Parliament's jurisdiction, as it was found to be in previous cases like the trilogy in connection with other integrated activities connected to federally declared works.

33 The courts below, and the parties in this appeal supporting federal jurisdiction over labour relations, relied on the decision of the Ontario High Court of Justice in Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board, [1956] O.R. 862. My colleague fully reviews the facts and result in this decision, which upheld federal p.o.g.g. jurisdiction over atomic energy and a resulting jurisdiction over labour relations, but seeks to limit its persuasive authority on four bases: (i) it was decided before this Court's decision in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; (ii) its conclusion is not supported by any reasons; (iii) [page352] the issue of jurisdiction over labour relations was conceded by the parties; and (iv) it does not accord with decisions of this Court which have indicated that federal and provincial powers must accommodate one another to the

extent possible.

34 Responding to the first ground of distinction, with respect, I see nothing in Pronto which is inconsistent with this Court's decision in Crown Zellerbach. While I agree that Crown Zellerbach set a high threshold for finding jurisdiction under the national concern branch of p.o.g.g., I think that atomic energy meets that threshold, as does Iacobucci J. when he states at p. 425 that "there is no dispute that Parliament has jurisdiction over atomic energy under the national concern branch of the p.o.g.g. power". Where I understand my colleague to disagree with the holding in Pronto, based on the subsequent jurisprudence of this Court, is the question of whether labour relations are integral to a great enough extent to Parliament's p.o.g.g. jurisdiction to merit recognition. If they are not, then the p.o.g.g. jurisdiction cannot be allowed to so entrench on provincial jurisdiction. I do not understand my colleague to claim that where such jurisdiction is integral, the scale of impact must nevertheless be reconcilable with provincial jurisdiction. Given my position that labour relations are integral to Parliament's p.o.g.g. jurisdiction, I do not see that anything in Pronto fails to satisfy the high threshold in Crown Zellerbach.

35 On the second and third grounds, the fact that the parties did not dispute the issue, and that [page353] McLennan J. did not, therefore, need to detail his reasoning does not mean that the decision is wrong: McLennan J. could not have accepted the parties' concessions on the very question before him (the jurisdiction of the Ontario Labour Relations Board) if he was of the view that Parliament did not have jurisdiction over labour relations as part of its p.o.g.g. jurisdiction. In fact, his concise reasoning with respect to what must necessarily be included in Parliament's jurisdiction over labour relations over atomic energy was based on the Stevedoring case, and McLennan J. even expressed his holding in a paraphrase of the words of Rand J. in that decision.

36 Finally, on the fourth ground, the precise accommodation to be worked out between the federal and provincial governments is the issue in this appeal, and in my view, the division of authority I arrive at, which is the same as that found by McLennan J., respects this accommodation, for the reasons I have outlined above.

37 Therefore, while this Court is by no means bound by the decision in Pronto, the judgment is not entirely without persuasive force, presaging as it does the close link between Parliament's interests in regulating nuclear energy and its interest in regulating the labour relations of those involved in the production of nuclear energy.

38 An instructive contrast is provided by this Court's decision in Four B Manufacturing Ltd. v. United Garment Workers of America, [1980] 1 S.C.R. 1031. Four B was an Ontario corporation operating a factory on a Mohawk Indian reserve, pursuant to a licence issued by the Minister of Indian Affairs and Northern Development under the Indian Act, R.S.C. 1970, c. I-6. The company was privately owned and operated by four members of the Band, in a building leased from the Band Council. Of Four B's 68 employees, 48 were Band members, 10 were former Band members, and 10 were non-Indians. The respondent union [page354] was certified as the bargaining agent for the

employees under the Ontario Labour Relations Act, R.S.O. 1970, c. 232, but Four B objected to the jurisdiction of the Ontario Labour Relations Board to make the certification order. Four B asserted that labour relations at the company were within the exclusive jurisdiction of Parliament, pursuant to s. 91(24) of the Constitution Act, 1867.

39 Beetz J., for the majority of the Court, rejected Four B's submission. He began by stating the principles applicable in Four B, based on the jurisprudence of this Court (at p. 1045):

> With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses... .

Applying these principles to Four B, Beetz J. concluded (at p. 1046):

> There is nothing about the business or operation of Four B which might allow it to be considered as a federal business: the sewing of uppers on sport shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations. Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. [Emphasis added.]

40 This focus on the nature of the activity involved and the operational nature of the business, instead of on the external trappings of the business, is equally apt in the case of Ontario Hydro's nuclear facilities. With respect, Iacobucci J.'s reliance on the fact that Ontario Hydro, as a whole, is a provincial undertaking fails to appreciate the nature of the activity involved in, and the operational nature [page355] of, Ontario Hydro's nuclear facilities in particular. Unlike the situation in Four B, producing nuclear energy is not an "ordinary industrial activity" which is only incidentally carried on by federally regulated persons. Instead, the activity itself is within the federal legislative domain. Similarly, the "operational nature" of the business of producing nuclear energy directly engages Parliament's interest in controlling and supervising the application and use of atomic energy. As in Four B, then, the provincial trappings of Ontario Hydro's nuclear facilities should not mask their essentially federal operational nature.

C. The Effect of Section 92A(1)(c)

41 Ontario Hydro and the intervenors supporting its position argue as if the federal government were seeking jurisdiction over the labour relations of all Ontario Hydro employees, simply because

some Ontario Hydro employees are engaged in the production of nuclear energy. If this were the case, I would agree that Ontario Hydro's status as "a provincial undertaking" was relevant, and that s. 92A(1)(c) operates to foreclose such a result. Provincial jurisdiction over all aspects of the majority of Ontario Hydro's operations, pursuant to s. 92A(1)(c), remains undisturbed by my holding in this case that the labour relations of those employed on or in connection with facilities for the production of nuclear energy are federally regulated.

42 This is how I would respond to concerns that s. 92A(1)(c) be given some meaning in this case. Only those employees actually employed on or in connection with facilities for the production of nuclear energy are federally regulated. In his affidavit, Arvo Niitenberg, Ontario Hydro's Senior Vice-President of Operations, explains that generating electricity requires a source of energy, a turbine, and a generator. The source of energy at nuclear facilities is a nuclear fission reaction, which generates heat energy, which is then used to [page356] turn water into steam. That steam drives the turbine, which spins the generator, which produces the electricity by means of an electromagnet and wire coils. The affidavit makes it clear that, once the steam is produced, there is no difference between thermal (i.e., fossil-fuel) and nuclear electrical generation. Although I would leave it to the Ontario Labour Relations Board to exclude those particular employees from its jurisdiction who are covered by the Canada Labour Code, in general terms I am of the view that it is only those employees involved in the first of the three parts of the generation phase who would be federally regulated. That is, those employees engaged in using nuclear reactors to generate heat energy would be covered by the federal legislation, while those who are involved with using that heat energy to run the turbine, which in turn runs the generator, would be provincially regulated. The former employees are employed in the production of nuclear (heat) energy, and come under federal jurisdiction under both the declaratory and p.o.g.g. powers; the latter employees are employed in the production of electricity, and the management of their activities falls to the provinces under s. 92A(1)(c).

43 It appears to me that Ontario Hydro's facilities where nuclear power is used actually involve two plants: one for the production of nuclear (heat) energy, and another for the generation of electricity using that heat energy. Once the heat energy is produced, it matters little how it was produced for the rest of the generation phase. As the parties have not, unfortunately, presented detailed evidence of job classifications and descriptions at Ontario Hydro's nuclear facilities, I would leave the precise details to the appropriate Labour Relations Boards. The Ontario Labour Relations Board in this case did not indicate that it foresaw any difficulty in making such a determination, should its [page357] decision as to its jurisdiction be upheld on judicial review.

D. Other Factors

(a) Laches

44 It was suggested by parties and interveners supporting provincial jurisdiction in this appeal

that the failure of the federal government to actually regulate the labour relations of Ontario Hydro employees involved in the production of nuclear energy should weaken its present claim that federal jurisdiction over labour relations is integral to the federal regulation of atomic energy.

45 There is no doctrine of laches in constitutional division of powers doctrine; one level of government's failure to exercise its jurisdiction, or failure to intervene when another level of government exercises that jurisdiction, cannot be determinative of the constitutional analysis. In this respect, I would adopt the statement of Reed J. in Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission, [1985] 2 F.C. 472 (T.D.), at p. 488:

> The fact that constitutional jurisdiction remains unexercised for long periods of time or is improperly exercised for a long period of time, however, does not mean that there is thereby created some sort of constitutional squatters rights. (Refer: Attorney General of Manitoba v. Forest, [1979] 2 S.C.R. 1032 for a case in which unconstitutional action had remained unchallenged for ninety years.)

46 I do not understand any of the parties or interveners to suggest that any form of the doctrine of laches applies. At best, the failure of the federal government to exercise its jurisdiction weakens the factual argument that such federal jurisdiction is necessary, but does not dispose of it.

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47 However, just because labour relations have been successfully regulated under provincial law up to this challenge does not mean that authority to regulate them should be left there for the sake of expediency. Similarly, the hypothesis that a provincial labour relations regime could respond to safety concerns as well as a federal regime, does not dispose of the question of which level of government should respond to such concerns.

(b) Problems of Divided Jurisdiction

48 It is important to remember the words of Estey J. in the 1983 Northern Telecom decision, supra, at p. 760, that this Court is not concerned "with the question of relative efficiency as between the assignment of the labour relations here in question to the federal or the provincial jurisdiction". To similar effect are the comments of McIntyre J., for the Court, in Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297, at p. 334: "... it is not for this Court to consider the desirability of legislation from a social or economic perspective where a constitutional issue is raised". McIntyre J. also quoted Laskin C.J. in Central Canada Potash Co. v. Government of Saskatchewan, [1979] 1 S.C.R. 42, who wrote at p. 76:

> They [governments] are entitled to expect that the Courts, and especially this Court, will approach the task of appraisal of the constitutionality of social and

> economic programmes with sympathy and regard for the serious consequences of holding them ultra vires. Yet, if the appraisal results in a clash with the Constitution, it is the latter which must govern.

49 In this case, Galligan J.A., and the parties and interveners supporting provincial jurisdiction, argued that "it would make no labour relations sense" to divide Ontario Hydro's labour relations between those employees engaged in the production of nuclear energy, and those employed in the other aspects of the generation phase, as well as the transmission and distribution phases. While [page359] this is no doubt a concern, given my finding that Parliament has jurisdiction over the labour relations of these employees, it cannot be allowed to be a determinative one.

50 I am confident that the Ontario Labour Relations Board is capable of determining which employees fall under its jurisdiction, as was the Board itself. Labour lawyers have worked out much more complicated matters than divided jurisdiction within Ontario Hydro's nuclear generating facilities.

III. Disposition

51 I would dismiss the appeals, and confirm the order of the Court of Appeal reinstating the decision of the Ontario Labour Relations Board, and declaring that the Canada Labour Code does apply to employees of Ontario Hydro who are employed on or in connection with those nuclear facilities that come under s. 18 AECA. I would make no order as to costs.

The judgment of La Forest, L'Heureux-Dubé and Gonthier JJ. was delivered by

52 LA FOREST J.:-- The issue in these appeals is whether the Ontario Labour Relations Act, R.S.O. 1990, c. L.2, or the federal Act, the Canada Labour Code, R.S.C., 1985, c. L-2, constitutionally applies to govern the labour relations between Ontario Hydro and its employees at Hydro's nuclear electrical generating stations.

Background

53 Ontario Hydro, a provincially owned corporation established for the purpose of generating and distributing electric power, produces electric power through 81 electrical generating stations of which five are nuclear generating stations. The Society of Ontario Hydro Professional and Administrative Employees applied for certification pursuant to the Ontario Labour Relations Act as exclusive [page360] bargaining agent for a unit of employees of Ontario Hydro, including those employed at the nuclear plants. Another group of employees, the Coalition to Stop the Certification of the Society, challenged the application on the ground that the employees who worked at the nuclear generating stations fell within the jurisdiction of the Canada Labour Relations Board established under the Canada Labour Code. The Ontario Labour Relations Board held it had no jurisdiction to certify the bargaining unit in the Society's application because the unit included employees who worked at the nuclear generating station, which in its view were governed by the

Canada Labour Code: [1988] OLRB Rep. Feb. 187. This decision was quashed by the Ontario Divisional Court (1989), 69 O.R. (2d) 268, 33 O.A.C. 302, 60 D.L.R. (4th) 542, 89 CLLC para. 14,044, but was reinstated by a majority of the Ontario Court of Appeal (1991), 1 O.R. (3d) 737, 43 O.A.C. 184, 77 D.L.R. (4th) 277, 91 CLLC para. 14,014. Leave was sought and granted to appeal to this Court, [1991] 3 S.C.R. x. The Chief Justice stated the following constitutional question:

> Does the Labour Relations Act of Ontario, R.S.O. 1980, c. 228 [now R.S.O. 1990, c. L.2], or the Canada Labour Code, R.S.C., 1985, c. L-2, constitutionally apply to the matter of labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro's nuclear electrical generating stations which have been declared to be for the general advantage of Canada under s. 18 of the Atomic Energy Control Act, R.S.C., 1985, c. A-16?

54 As in the courts below, those who supported federal jurisdiction relied on Parliament's power to declare works, although wholly situate within a province, to be for the general advantage of Canada (ss. 92(10)(a) and 91(29) of the Constitution Act, 1867), and its general power to legislate for the peace, order and good government of Canada in the opening words of s. 91 of that Act. I note that all works and undertakings constructed "for the production, use and application of atomic energy" were declared works for the general advantage of Canada by s. 18 of the Atomic Energy Control Act, R.S.C., 1985, c. A-16, and none of the parties contests that Ontario Hydro's nuclear facilities [page361] fall within the ambit of the declaration. The appellants argue, however, that this does not bring within Parliament's jurisdiction the labour relations at those facilities, about which it has purported to legislate under the Canada Labour Code, which by the combined effect of ss. 2(h) and 4 applies to works and undertakings within the legislative authority of Parliament, including works declared to be for the general advantage of Canada.

55 Those who supported provincial jurisdiction relied on the province's traditional power under s. 92 of the Constitution Act, 1867 to exclusively make laws in relation to local works and undertakings (s. 92(10)), property and civil rights (s. 92(13)), and matters of a merely local or private nature (s. 92(16)), but they placed especial reliance on s. 92A(1) (enacted by the Constitution Act, 1982, s. 50), which empowers the provinces to exclusively make laws in relation to non-renewable natural resources, forestry resources, and electrical energy, and specifically on s. 92A(1)(c), which reads as follows:

> 92A. (1) In each province, the legislature may exclusively make laws in relation to
>
> ...
>
> (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Ontario Hydro, while conceding that it was not a Crown agent, also argued that it should be immune

from federal regulation because it was a provincial instrumentality set up to advance provincial purposes.

56 Justice Iacobucci (who fully sets forth the facts, judicial history and relevant legislation) is of the view that Parliament has exclusive jurisdiction under its declaratory power and the general power [page362] under s. 91 of the Constitution Act, 1867 over some aspects of the nuclear generating facilities, but that the control of labour relations at these facilities is not integral to Parliament's effective regulation of these facilities, and in consequence are governed as a provincial matter under the Labour Relations Act. The Chief Justice, on the other hand, is of the view that the power to regulate the labour relations of those employed at these facilities for the production of nuclear energy is integral to Parliament's declaratory and general power. For the reasons that follow, I agree with the conclusion reached by the Chief Justice. In my view, the regulation of the labour relations of employees engaged in the production of nuclear energy falls within the exclusive powers granted to Parliament under the combined effect of the opening and closing words and head (29) of s. 91, and s. 92(10)(c) of the Constitution Act, 1867. I shall first discuss the declaratory power.

The Declaratory Power

57 Section 92(10)(c) of the Constitution Act, 1867 authorizes Parliament to declare local works (which by s. 92(10) would otherwise fall within provincial power) to be for the general advantage of Canada. When such a declaration is made, any work subject to the declaration falls, by virtue of s. 91(29), within the legislative jurisdiction of Parliament. The effect of the declaration is the same as if such work was expressly enumerated in s. 91; see City of Montreal v. Montreal Street Railway Co., [1912] A.C. 333, at p. 342. This is scarcely surprising. The opening and closing words of s. 91 make it clear that (notwithstanding anything in the Act) Parliament's exclusive legislative authority extends to such classes of subjects as are expressly excepted from the provincial enumeration of powers, including, of course, those specified in s. 92(10)(c); see also Commission du salaire minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767 (Bell Canada 1966), at pp. 771-72, per Martland J. for the Court. A work subject to a declaration [page363] thus falls within the exclusive legislative power of Parliament, and provincial jurisdiction over the work is ousted; see Wilson v. Esquimalt and Nanaimo Railway Co., [1922] 1 A.C. 202, at p. 207. Laws of general application in the province (such as taxation) will, of course, apply to the work, but these cannot touch an integral part of Parliament's jurisdiction over the work. The province cannot legislate respecting the work qua work. As early as 1899, the Privy Council made it clear that classes of subjects expressly excepted from the enumeration of provincial subjects of provincial legislative power (which, of course, includes works subject to a declaration) included the power not only to construct, repair and alter such a work but its management as well; see Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours, [1899] A.C. 367, at pp. 372-73.

58 The law on the matter has not really changed since then, though it has been subjected to considerable elaboration. Thus, as Iacobucci J. notes, recent authorities underscore that federal

jurisdiction over declared works includes jurisdiction to regulate their operations; see Chamney v. The Queen, [1975] 2 S.C.R. 151, at p. 159; see also The Queen v. Thumlert (1959), 20 D.L.R. (2d) 335 (Alta. S.C., App. Div.), at p. 341. A declaration incorporates a work as a functioning unit; in Laskin's words, the declaration "must surely be to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character"; see Laskin's Canadian Constitutional Law (5th ed. 1986), vol. 1, at p. 629. For my part, I am at a loss to see how one can have exclusive power to operate and manage a work without having exclusive power to regulate the labour relations between management and the employees engaged in that enterprise. That is what this Court has repeatedly stated; see Bell Canada 1966, supra, and Bell [page364] Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749 (Bell Canada 1988), esp. at pp. 839-40. As Beetz J. put it in the latter case, "these are two elements of the same reality" (p. 798).

59 In my view, most of the issues raised in this case have been fully disposed of by Beetz J. in his characteristically clear and thorough manner in the Bell Canada 1988 case and its companion cases in the 1988 trilogy (Canadian National Railway Co. v. Courtois, [1988] 1 S.C.R. 868, and Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board), [1988] 1 S.C.R. 897), but it seems necessary, in light of the argument, to draw attention to those parts of his analysis specifically relevant here. I begin by noting that in the Bell Canada 1988 case, at p. 825, he approved what he described as the classic statement on the subject by Abbott J. in Reference re Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529 (the Stevedoring case), at p. 592, which reads as follows:

> The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures. [Emphasis added by Beetz J.]

60 I should observe that Beetz J. had earlier very generally described "working conditions" for the purposes of the trilogy as including the conditions of work settled by contracts of employment or collective agreements. As he put it, at pp. 798-99: "working conditions are conditions under which a worker or workers, individually or collectively, [page365] provide their services, in accordance with the rights and obligations included in the contract of employment by the consent of the parties or by operation of law, and under which the employer receives those services".

61 It is argued, however, that Bell Canada 1988 and other earlier cases were confined to "undertakings" in s. 92(10)(a) and (b) and not to works in s. 92(10)(c). Simply put, I cannot accept this. I have already observed that the Bonsecours case in its terms applied to all the exceptions in s.

92(10). And that is true of several of the cases relied upon by Beetz J. in Bell Canada 1988. Thus in Letter Carriers' Union of Canada v. Canadian Union of Postal Workers, [1975] 1 S.C.R. 178 (cited in Bell Canada 1988, at p. 820), Ritchie J. stated at p. 181 that "it has been established that it is not within the competency of a provincial legislature to legislate concerning industrial relations of persons employed in a work, business or undertaking coming within the exclusive jurisdiction of the Parliament of Canada" (emphasis added). Similar statements may be found in the Stevedoring case, supra. Thus Fauteux J., at p. 585 (cited in Bell Canada 1988, at p. 825) spoke of "labour operations within this limited field of works, undertakings and businesses as to which the regulation by law is, under the B.N.A. Act, committed to the legislative authority of Parliament". Beetz J. in Bell Canada 1988, at pp. 830-31, like Martland J. before him in Bell Canada 1966, at pp. 774-75, also relied on Duff J.'s statement in Reference re Legislative Jurisdiction over Hours of Labour, [1925] S.C.R. 505, at p. 511, regarding the federal powers of regulation touching the employment of persons on works or undertakings.

62 Beetz J. himself makes it clear on at least three occasions (pp. 761-62, 816-17 and 820) that despite the fact that labour relations ordinarily fall within s. 92(13) of the Constitution Act, 1867 (his [page366] "proposition two") that is not so of works or undertakings legislative jurisdiction over which is vested in Parliament. He says at pp. 761-62:

> Notwithstanding the rule stated in proposition two, Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10)a., b. and c. of the Constitution Act, 1867, that is undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada. It follows that this primary and exclusive jurisdiction precludes the application to those undertakings of provincial statutes relating to labour relations and working conditions, since such matters are an essential part of the very management and operation of such undertakings, as with any commercial or industrial undertaking... . [Emphasis added.]

I emphasize that Beetz J. there includes s. 92(10)(c), i.e., declared works, among those undertakings subject to exclusive federal power. And he continues in the next paragraph (at p. 762):

> It should however be noted that the rules stated in this third proposition appear to constitute only one facet of a more general rule: works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws

> does not bear upon those subjects in what makes them specifically of federal jurisdiction... . [Emphasis added.]

I underline that in the last line of this statement Beetz J. explains that provincial laws cannot apply to matters specifically of federal jurisdiction, and that in the previous paragraph he had unequivocally asserted that labour relations are an integral part of Parliament's primary and exclusive jurisdiction [page367] over matters covered by, inter alia, s. 92(10)(c) "declared works".

63 These statements are scarcely surprising. As I noted earlier, the legislative jurisdiction conferred over a declared work refers to the work as a going concern or functioning unit, which involves control over its operation and management. And as I recently noted in Re Canada Labour Code, [1992] 2 S.C.R. 50, at p. 78, inevitably "labour relations tribunals impinge upon powers that have traditionally been considered to be management prerogatives". Labour relations are integral and vital parts of the operation of a work. There is no room for mutual modification of federal and provincial power. A province undoubtedly has power by general legislation to affect the operation of a declared work, but legislation governing labour relations on such works is legislation in relation to that work and falls outside provincial legislative competence; see the reasons of Pratte J.A. (Stone J.A. concurring) in Shur Gain Division, Canada Packers Inc. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, [1992] 2 F.C. 3, at pp. 35-37, and the other Federal Court of Appeal cases there cited. Labour relations are an integral part of Parliament's exclusive power to legislate in relation to declared works. No evidence is required to establish this.

64 I add in passing that the current goals of labour relations, upon which my colleague Iacobucci J. places considerable stress, have nothing to do with the source of the legislative power. As I understand it, he argues for provincial power over labour relations from what he perceives to be the primary purpose of labour relations, i.e., the preservation of industrial peace and empowerment of workers. The provinces undoubtedly have a direct interest [page368] in such goals in furtherance of their general jurisdiction over property and civil rights, but this general power must give way in specific areas exclusively assigned to the federal Parliament, specifically in relation to federal works, i.e., works falling within federal legislative competence. In legislating on labour relations in this area, Parliament is engaged in regulating the work. In doing so, it may adopt, and indeed, has adopted legislation similar to provincial legislation. But this it does under its legislative power to manage and control the work, and this, of course, affects property and civil rights. The fact that Parliament in operating and controlling federal works adopts labour relations policies that are similar to policies adopted by the provinces does not make these policies fall within property and civil rights within s. 92(13). Beetz J. made it clear that the regulation of labour relations in the exercise of a federal power constitutes an exception to the general provincial power to legislate on the matter as property and civil rights in the province.

65 It is not necessary for me to engage in a consideration of the possible difference in scope between "undertakings" and "works" for the purposes of the various items in s. 92(10). I mentioned

earlier that a work under s. 92(10)(c) means a work as a going concern, and to manage that going concern Parliament must have power to regulate the labour relations between management and labour engaged in operating the work. I see no logical or practical difference in the need for control of the labour relations in the management of an undertaking and in the management of a work as so understood. In that sense, a work is an undertaking, an undertaking, however, that must include a work. Rand J. in the Stevedoring case, supra, at p. 553, appears to have had this idea in mind in the following statement:

[page369]

> The former [i.e., declared works], so far as the works themselves are likewise undertakings, would be such as yield some mode of service of a public or quasi-public nature. I see no distinction to be made between them and dominion works and undertakings generally. Undertakings, existing without works, do not appear in 92(10)(c) and cannot be the subject of such a declaration.

This would appear to have been the sense in which Beetz J., in Bell Canada 1988, referred to undertakings in s. 92(10)(c) because he knew, of course, that that provision referred to works only. As well, we saw, he relies on numerous statements that refer to both works and undertakings.

66 In this context, I note that s. 18 of the Atomic Energy Control Act, inter alia, makes both "works and undertakings ... for the production, use and application of atomic energy" subject to the declaration. This probably was meant to include matters necessary to the operation of a nuclear facility, and as such would be superfluous. Certainly, it was not meant to cover the whole of the undertaking of Ontario Hydro. The declaration is confined to facilities constructed for the production, use and application of atomic energy, not to those constructed for the production of electrical energy by other means. The precise determination of which persons are employed in one type of facility or the other may, no doubt, give rise to problems of categorization. That issue is not, however, before us, we have no evidence on it, and I refrain from commenting on the matter.

Specific Arguments

67 What has already been said is sufficient to dispose of this aspect of the case but I shall attempt to respond to a number of specific arguments made by the appellants.

[page370]

68 It was argued that the declaratory power must be read narrowly to make it conform to

principles of federalism. There is no doubt that the declaratory power is an unusual one that fits uncomfortably in an ideal conceptual view of federalism. But the Constitution must be read as it is, and not in accordance with abstract notions of theorists. It expressly provides for the transfer of provincial powers to the federal Parliament over certain works. That is clearly set forth in the statement of Duff J. in Reference re Waters and Water-Powers, [1929] S.C.R. 200, at p. 220, cited by Iacobucci J. at pp. 397-98. This is scarcely an isolated statement. Mignault J. had expressed the same thought in at least as strong terms in the following passage in Luscar Collieries Ltd. v. McDonald, [1925] S.C.R. 460, at p. 480:

> The power conferred on Parliament to declare that works wholly situate within the province are for the general advantage of Canada or for the advantage of two or more of the provinces, is obviously a far-reaching power. Parliament is the sole judge of the advisability of making this declaration as a matter of policy which it alone can decide. And when the power is exercised in conformity with the grant, it vests in Parliament exclusive legislative authority over the local work which it removes from the provincial to the federal field of jurisdiction.

69 There is no authority supporting the view that the declaratory power should be narrowly construed. Quite the contrary. It might, I suppose, have been possible to interpret s. 92(10)(c) so as to confine it to works related to communications and transportation such as those specifically listed in s. 92(10)(a) and (b) but the courts, including this Court, have never shown any disposition to so limit its operation, and a wide variety of works -- railways, bridges, telephone facilities, grain elevators, feed mills, atomic energy and munition factories -- have been held to have been validly declared to be for the general advantage of Canada. I note that neither the Chief Justice nor Iacobucci J. have any doubt about this.

[page371]

70 The restricted view advanced here for the first time appears to be based on the danger thought to be posed to the structure of Canadian federalism if the courts do not confine federal power in this area. To begin with, I fail to see how abstracting from Parliament the power to regulate labour relations (which I have observed is necessary for the proper management of a work), while leaving all other regulation of the work to the federal government, does much to advance the federal principle. And I scarcely see the logic of having labour relations in federal undertakings fall within federal legislative power, but not labour relations in federal works. But more fundamentally I think the argument evinces a misunderstanding of the respective roles of law and politics in the specifically Canadian form of federalism established by the Constitution.

71 I should first of all observe that the declaratory power is not the only draconian power vested in the federal authorities. The powers of disallowance and reservation accorded the federal

government by ss. 55-57 and 90 of the Constitution Act, 1867 give it unrestricted authority to veto any provincial legislation; see Wilson v. Esquimalt and Nanaimo Railway Co., supra, at p. 210; see also Reference re Disallowance and Reservation, [1938] S.C.R. 71. The exercise of this authority is wholly a matter of discretion for the federal government, and in the Reference case just noted, it was stated that the courts are not constitutionally empowered to express an opinion about its exercise (see p. 95); for a similar statement regarding the declaratory power, see The Queen v. Thumlert, supra. The declaratory and veto powers were frequently used in tandem in the early years following union to accomplish the original constitutional mandate by establishing the authority of the central government and its policies, and in particular to ensure the construction of the intercontinental railway. Later, the declaratory power was effectively used as a tool to regulate the national grain market in [page372] the pursuit of the constitutional vision of integrating the western region of Canada into the country.

72 But even in the heady early days when the exercise of these powers was commonplace because of the constitutional mandate to create a single country, their use for other purposes was firmly, and ultimately successfully, challenged. Both powers faded almost into desuetude when these large constitutional and national tasks had been accomplished. The power of disallowance, which had long been in decline, has not been used since 1942. The declaratory power has suffered a similar fate and has been used only twice since the 1960s. It is the very breadth of these powers that protects against their frequent or inappropriate use. It was not the courts but political forces that dictated their near demise. They are, as was said of the power of disallowance, "delicate" and "difficult" powers to exercise and "will always be considered a harsh exercise of power, unless in cases of great and manifest necessity ..."; see Severn v. The Queen (1878), 2 S.C.R. 70, per Richards C.J., at p. 96, and Fournier J., at p. 131. Their inappropriate use will always raise grave political issues, issues that the provincial authorities and the citizenry would be quick to raise. In a word, protection against abuse of these draconian powers is left to the inchoate but very real and effective political forces that undergird federalism.

73 I see nothing in the statement in Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, to the effect that a substantial measure of provincial consent was required before the Constitution could be amended that is in any way at odds with this. For the Court in that case made it clear that it was not within its province to enforce this requirement. It was, it noted, a convention. The enforcement of conventions lies in the political, not the legal field. They can be broken, and the courts have no power to prevent this, but there is a political price to pay. The courts have not engaged in the task of defining the manner in which these broad political bases of Canadian federalism [page373] should be protected. The Constitution has not accorded them that mandate. These are matters for the people. This is not to say that the courts do not have an important, indeed essential, role in balancing federalism as they go about their task of defining the nature and effect of those great but more subtle powers, not susceptible of definition and direction by those elemental political forces that undergird Canadian federalism. Finally I should add that Dickson C.J.'s description in General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641, at p. 671, of federal power under s. 92(10) as "narrow and distinct" has nothing to do with the present

case at all. He was there comparing this and other particularized powers with broadly described powers, such as trade and commerce, and the extent to which incidental exercises of jurisdiction could be "tacked-on" to these various powers.

74 I next note the argument that the declared nuclear facilities fall to be regulated by federal authorities but only in relation to their safety and security aspects not labour relations generally. This approach is supported by reliance on the preamble to the Atomic Energy Control Act. The preamble may set forth the purpose why Parliament declared works for the development of atomic energy to be for the general advantage. But once the declaration is made the legislative power flowing therefrom is governed by the Constitution. As noted earlier, the work subject to the declaration is in the same position as if it were expressly mentioned in the Constitution. At best, the preamble might give some clue as to what works were intended to be covered by the declaration; it cannot, however, define the scope of legislative power to be exercised by Parliament in respect of a work, once it is determined that it falls within the ambit of a declaration. I should add that I find difficulty in understanding the argument because safety and security are as much in jeopardy from the manner [page374] in which employees do their work as in the manner in which a facility is constructed, and, as the Chief Justice points out, many of the regulations of the Atomic Energy Control Board have to do with labour relations. The fact that these are established by one federal organism rather than another does not affect their character.

75 In truth, I find that this attempted restriction of federal power to health and security considerations flies in the face of the Act. What the declaration there gives Parliament is jurisdiction, inter alia, over works constructed for the production, use and application of atomic energy. In making legislation to that end, I fail to see how one can logically limit it to health and security concerns.

76 Again, there is the argument that for many years the parties resorted to the Ontario Labour Relations Act rather than the Canada Labour Code. But this, as I see it, is of no moment. The case is not dissimilar in that respect from Attorney-General for Ontario v. Winner, [1954] A.C. 541, where the province had exercised jurisdiction over interprovincial motor transportation for an even longer period.

77 Finally there is the argument based on inconvenience. Bifurcating legislative power over labour relations in Ontario Hydro, a single enterprise, would, it is said, create practical difficulties. Two sets of rules would apply to different employees and, of course, there is the difficulty of drawing the line between federal matters and provincial matters. These problems are not really new. The interrelationship between Parliament's power over federal works and closely related provincial activity has always raised practical difficulties. Even the present type of difficulty is not unique. In Shur Gain Division, supra, the Federal Court of Canada [page375] had occasion to deal with a similar situation. Again, it is obvious from a close reading of the Stevedoring case, supra, that had the shipping company there been engaged solely in intraprovincial shipping (as opposed to interprovincial as was assumed), stevedores could not have been combined in a unit comprising

office employees or other workers engaged in matters not related to navigation. Similar views are expressed in other cases; see, for example, R. v. Picard, Ex parte International Longshoremen's Association, Local 375 (1967), 65 D.L.R. (2d) 658 (Que. Q.B.), and Northern Telecom Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115. Various techniques of administrative inter-delegation have been developed to deal with problems of conjoint interest following upon the case of Winner, supra. If the problems here are sufficiently acute, and Parliament deems it appropriate to do so, resort could be had to such techniques.

Other Provincial Powers Over Works -- Section 92A

78 The appellants also sought to argue that the works described in s. 92(10)(c) did not extend to works specifically mentioned in other provisions of the Constitution. As Iacobucci J. has observed, this involves interpreting the Constitution as consisting of logic type compartments. The Constitution must, rather, be interpreted as an organic instrument. I accept my colleague's conclusion that s. 92(10)(c) extends to works created under other headings in s. 92, and s. 92A cannot be considered any different in this respect. Provisions granting legislative powers placed in separate sections to provide for qualifications to those powers should be treated, subject of course to those qualifications, in the same way; see Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, per Estey J. (Beetz J. concurring), at p. 1201. As will be seen, I agree with Iacobucci J. as well that s. 92A does not have the effect of removing from the ambit of Parliament's [page376] authority works declared to be for the general advantage of Canada. Where I differ from my colleague is with his view of the nature of the power accorded to the provinces by s. 92A(1)(c) to legislate in relation to the development, conservation and management of sites and facilities in the province for the generation of electrical energy.

79 It must be confessed that s. 92A(1), including para. (c), do not, at least at first sight, appear to add much to the broad and general catalogue of provincial powers; see P. W. Hogg, Constitutional Law of Canada (3rd ed. 1992), vol. 1, at p. 29-19. So it is tempting to seek additional meaning from the provision. It may be, however, that s. 92A(1) is merely preliminary to the provisions that follow, although, as I will indicate, it, at a minimum, fortifies the pre-existing provincial powers. There is reason to think this was one of its major goals.

80 To understand the situation, it is useful to examine the backdrop against which s. 92A was passed. In a general sense, the interventionist policies of the federal authorities in the 1970s in relation to natural resources, particularly oil and other petroleum products, were a source of major concern to the provinces. These concerns were by no means minimized by cases such as Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan, [1978] 2 S.C.R. 545, and Central Canada Potash Co. v. Government of Saskatchewan, [1979] 1 S.C.R. 42, which underlined the severe limits on provincial power over resources that are mainly exported out of the province, as well as on the provincial power to tax these resources.

81 It was to respond to this insecurity about provincial jurisdiction over resources -- one of the

mainstays of provincial power -- that s. 92A was enacted. Section 92A(1) reassures by restating this [page377] jurisdiction in contemporary terms, and the following provisions go on, for the first time, to authorize the provinces to legislate for the export of resources to other provinces subject to Parliament's paramount legislative power in the area, as well as to permit indirect taxation in respect of resources so long as such taxes do not discriminate against other provinces.

82 Most commentators mention only these issues in describing the background against which s. 92A was enacted, but there were others, specifically in relation to the generation, production and exporting of electrical energy, that must have been seen as a threat to provincial autonomy in these areas. In most of the provinces, at least, the generation and distribution of electrical energy is done by the same undertaking. There is an integrated and interconnected system beginning at the generating plant and extending to its ultimate destination. There was authority that indicated that even an emergency interprovincial grid system might effect an interconnection between utilities sufficient to make the whole system a work connecting or extending beyond the province, and so falling within federal jurisdiction within the meaning of s. 92(10)(a) of the Constitution Act, 1867; see British Columbia Power Corp. v. Attorney-General of British Columbia (1963), 44 W.W.R. 65 (B.C.S.C.). More important, provincial power commissions supply electrical energy to other provinces and the United States on "a regular and continuing basis", which a number of cases in other areas have held to be sufficient to make an integrated undertaking fall within federal legislative competence; see, for example, Re Tank Truck Transport Ltd. (1960), 25 D.L.R. (2d) 161 (Ont. H.C.), aff'd [1963] 1 O.R. 272 (C.A.). There was danger, then, that at least the supply system and conceivably the whole undertaking, from production to export, could be viewed as being a federal undertaking. For a discussion of these problems as they appeared in the period preceding the enactment of s. 92A, see G. V. La Forest and Associates, Water Law in Canada (1973), at pp. 46 et seq., esp. at pp. 50-51, 53-56. While a number of commentators, including myself, did not share this [page378] view of the law, the result on the authorities was by no means certain. The express grant of legislative power over the development of facilities for the generation and production of electrical energy (s. 92A(1)(c)), coupled with the legislative power in relation to the export of electrical energy offers at least comfort for the position that, leaving aside other heads of power, the development, conservation and management of generating facilities fall exclusively within provincial competence. The nature of provincial electrical generating and distribution systems at the time of the passing of s. 92A must have been appreciated.

83 What is important to note is that the danger to provincial autonomy over the generation of electrical energy did not arise out of the discretion Parliament had or might in future exercise under its declaratory power. The danger, rather, lay in the possible transformation of these enterprises into purely federal undertakings by reason of their connection or extension beyond the province. Section 92A ensures the province the management, including the regulation of labour relations, of the sites and facilities for the generation and production of electrical energy that might otherwise be threatened by s. 92(10)(a). But I cannot believe it was meant to interfere with the paramount power vested in Parliament by virtue of the declaratory power (or for that matter Parliament's general power to legislate for the peace, order and good government of Canada) over "[a]ll works and

undertakings constructed for the production, use and application of atomic energy". This, as already seen, comprises the management of these facilities, displacing any management powers the province might otherwise have had under s. 92A. And a vital part of the power of management is the power to regulate labour relations.

[page379]

Peace, Order and Good Government

84 This case can equally well be disposed of under Parliament's power to legislate over matters of national concern under the peace, order and good government clause in s. 91 of the Constitution Act, 1867. There can surely be no doubt that the production, use and application of atomic energy constitute a matter of national concern. It is predominantly extra-provincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power; see Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373, and R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401. No one seriously disputed this assertion, and my colleagues both agree that this is so. The view of the Attorney General of Canada is supported by authority in the lower courts; see Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board, [1956] O.R. 862 (H.C.), at p. 869; and Denison Mines Ltd. v. Attorney-General of Canada, [1973] 1 O.R. 797 (H.C.), at p. 808. The strategic and security aspects of nuclear power in relation to national defence and the catastrophe and near catastrophe associated with its peaceful use and development at Chernobyl and Three Mile Island bespeak its national character and uniqueness.

85 The appellants, we saw, argue, however, that the distinct aspects over which atomic energy rises to the national level are those concerned with health and safety. But this very argument is self-defeating. With the inherent potential dangers associated with nuclear fission, industrial safety -- indeed the safety of people hundreds of miles from a nuclear facility -- is necessarily dependant on the personnel who operate the facility. A strike, and indeed mere carelessness, could invite disaster. As the Attorney General of Canada put it: "The whole purpose of federal regulation of nuclear electrical generating plants would be frustrated if Parliament could not govern the standards and conditions for employment of the individuals who operate the [page380] plant, both for their own safety, and for that of the general public."

86 Quite apart from this doomsday scenario, what was said in the context of a work subject to the declaratory power applies equally to a work over which Parliament has jurisdiction under its general power in relation to matters of national concern. Labour relations are an integral part of that jurisdiction. I observe that this approach had been adopted in Pronto, supra.

87 I add that what I have had to say about the relationship of nuclear facilities to various provincial legislative powers, including those arising out of s. 92A of the Constitution Act, 1867, fully applies here.

Provincial Instrumentality

88 Finally, the appellant Ontario Hydro advanced the notion that federal legislation should be so interpreted as not to apply to corporations set up to advance a provincial purpose. It conceded, however, that it was not a Crown agent and so not entitled to Crown immunity in the traditional sense. The Attorney General for New Brunswick did, however, argue that Crown immunity should apply where Crown agency is established. It is, therefore, right to say that the latter argument cannot stand in view of my holding that provincial laws regarding labour relations are inapplicable to works falling within the exclusive legislative jurisdiction of Parliament, since such legislation falls within the core of that jurisdiction.

89 Turning to Ontario Hydro's argument about provincial instrumentalities, I note that a similar argument was advanced by Alberta in relation to a "provincial project", the Oldman River Dam; see Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at pp. 63, 68-69. The Court rejected this contention, [page381] which it branded as not particularly helpful in sorting out constitutional authority over the work and as positing a type of interjurisdictional immunity that had earlier been rejected in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225, at p. 275. Similar considerations apply here. The fallacy in this context appears to result from the failure to recognize labour relations as vital aspects of the management of nuclear facilities, for no similar argument is made in respect of regulations under the Atomic Energy Control Act.

Disposition

90 I would dismiss the appeals and confirm the order of the Court of Appeal reinstating the decision of the Ontario Labour Relations Board, and declaring that the Canada Labour Code applies to employees of Ontario Hydro who are employed on or in connection with nuclear facilities that come under s. 18 of the Atomic Energy Control Act. I would make no order as to costs.

The reasons of Sopinka, Cory and Iacobucci JJ. were delivered by

91 IACOBUCCI J. (dissenting):-- The question in these appeals is whether the Ontario Labour Relations Act, R.S.O. 1990, c. L.2, or the Canada Labour Code, R.S.C., 1985, c. L-2, constitutionally applies to govern labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro's nuclear electrical generating stations. Although technically there are two appeals involved, in substance there is only one and so I refer herein to both as "the appeal".

I. Facts

92 Ontario Hydro is a corporation owned by the province of Ontario and no one disputes that it is [page382] not a Crown agent. Its affairs are governed by the Power Corporation Act, R.S.O. 1990, c. P.18. Ontario Hydro has 81 electrical generating stations of which five are nuclear electrical

generating stations. These five nuclear plants provide roughly 48 percent of Ontario Hydro's total electrical power generating capacity. Power is generated in the nuclear stations by way of CANDU reactors which, through the process of nuclear fission, produce enough energy to drive the facilities' turbines. Once generated, this power (along with that originating from thermal and hydraulic generating stations) is distributed throughout the province by way of a network of transformer and distribution stations. Plutonium, deuterium and deuterium oxide, cobalt-60, and tritium and tritium oxide are produced during the electricity generating process: these substances are all prescribed under the Atomic Energy Control Act, R.S.C., 1985, c. A-16.

93 The operation of a nuclear reactor is heavily regulated by federal legislation. Section 18 of the Atomic Energy Control Act declares that all works and undertakings constructed for the production of atomic energy and the production of prescribed substances are works for the general advantage of Canada. Each of Ontario Hydro's CANDU reactors is covered by a licence issued by the Atomic Energy Control Board ("AECB") under the regulations made under the Atomic Energy Control Act. These licences impose requirements with respect to the way Ontario Hydro operates the facilities, Ontario Hydro's radiation protection measures and emergency procedures, and the measures taken regarding the physical security of fissionable prescribed substances and of the facilities themselves. The licences also dictate minimum staffing levels in the control rooms, require written AECB approval of certain staff positions in the facilities (including those in positions affected by the application for certification which initiated the present action), and prescribe that significant staffing and organizational changes in the facilities require prior notice to and the written permission of the AECB. Notwithstanding the declaration in s. 18 of [page383] the Atomic Energy Control Act, some employees at Ontario Hydro's Bruce nuclear plant have been unionized under provincial labour legislation since 1973.

94 This case arose when the Society of Ontario Hydro Professional and Administrative Employees ("Society") applied under the Ontario Labour Relations Act to the Ontario Labour Relations Board ("OLRB") for certification as the exclusive bargaining agent for a unit of administrative, scientific and professional engineering employees of Ontario Hydro, including those employed at Ontario Hydro's nuclear plants. The application was challenged by a group of employees calling themselves the Coalition to Stop the Certification of the Society. One of the grounds for the challenge was that the OLRB was without jurisdiction to certify the proposed bargaining unit because some of the employees within the proposed unit, viz. those who worked at Ontario Hydro's nuclear generating stations and at the construction site for the nuclear generating station at Darlington, fall under the jurisdiction of the Canada Labour Code. The Coalition claimed that the declaration in s. 18 of the Atomic Energy Control Act, combined with ss. 91(29) and 92(10)(c) of the Constitution Act, 1867, brought Ontario Hydro's nuclear generating stations within exclusive federal jurisdiction with respect to labour relations because s. 4 of the Canada Labour Code declares the Code applicable to all persons employed on or in connection with a federal work.

95 The OLRB held hearings to determine whether or not it had jurisdiction to include in the proposed bargaining unit a category of employees definable by reference to s. 18 of the Atomic

Energy Control Act. The Attorneys General of Canada and Ontario declined to participate in these hearings but the Canadian Union of Public Employees ("CUPE"), which was then certified as the bargaining agent for all unionized employees of Ontario Hydro [page384] including employees at the Bruce nuclear plant, participated with the consent of the parties. The OLRB held that it had no jurisdiction to certify the bargaining unit in the Society's application because the proposed unit included employees, employed on or in connection with the nuclear generating stations, who fell under the jurisdiction of the Canada Labour Code: [1988] OLRB Rep. Feb. 187.

96 Ontario Hydro, supported by the Society and CUPE, applied to the Ontario Divisional Court for judicial review by way of an order in the nature of certiorari quashing this decision of the OLRB; the Attorney General of Canada intervened at this stage of the proceedings in support of the OLRB. The Divisional Court granted the application for certiorari, quashed the OLRB's decision, and issued mandamus ordering the OLRB to deal with the Society's certification application: (1989), 69 O.R. (2d) 268, 33 O.A.C. 302, 60 D.L.R. (4th) 542, 89 CLLC para. 14,044.

97 The Attorney General of Canada appealed that decision to the Ontario Court of Appeal. The Court of Appeal, Galligan J.A. dissenting, allowed the appeal, set aside the decision of the Divisional Court and ordered that the decision of the OLRB be reinstated: (1991), 1 O.R. (3d) 737, 43 O.A.C. 184, 77 D.L.R. (4th) 277, 91 CLLC para. 14,014 (hereinafter cited to O.R.). This Court granted leave to appeal, [1991] 3 S.C.R. x, and the Chief Justice stated the following constitutional question:

> Does the Labour Relations Act of Ontario, R.S.O. 1980, c. 228 [now R.S.O. 1990, c. L.2], or the Canada Labour Code, R.S.C., 1985, c. L-2, constitutionally apply to the matter of labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro's nuclear electrical generating stations which have been declared to be for the general advantage of Canada under s. 18 of the Atomic Energy Control Act, R.S.C., 1985, c. A-16?

[page385]

II. Relevant Legislation and Constitutional Provisions

98

Atomic Energy Control Act, R.S.C., 1985, c. A-16

> WHEREAS it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in measures of international

control of atomic energy that may hereafter be agreed on;

...

18. All works and undertakings constructed

(a) for the production, use and application of atomic energy,
(b) for research or investigation with respect to atomic energy, and
(c) for the production, refining or treatment of prescribed substances,

are, and each of them is declared to be, works or a work for the general advantage of Canada.

Canada Labour Code, R.S.C., 1985, c. L-2

2. In this Act,

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, and

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces;

...

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

[page386]

Constitution Act, 1867

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,--

...

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

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

92. 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,--

...

10. Local Works and Undertakings other than such as are of the following Classes:

...

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

...

13. Property and Civil Rights in the Province.

...

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

[page387]

92A. (1) In each province, the legislature may exclusively make laws in relation to

...

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

...

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

III. Judgments Below

Ontario Labour Relations Board

99 The OLRB held that by virtue of ss. 92(10)(c) and 91(29) of the Constitution Act, 1867, Parliament has exclusive legislative authority over local works it declares to be to the general advantage of Canada. Such a declaration, applicable to Ontario Hydro's nuclear generating stations, had been made in s. 18 of the Atomic Energy Control Act. Counsel for Ontario Hydro argued that Ontario Hydro was an undertaking and not a work constructed for any of the purposes set out in s. 18. The OLRB held that a work used by and forming part of an undertaking can be the object of a declaration under s. 92(10)(c). When Parliament makes such a declaration, its jurisdiction over the work extends to the regulation of the use and management of the work forming part of the undertaking (relying on The King v. Eastern Terminal Elevator Co., [1925] S.C.R. 434).

100 The OLRB rejected Ontario Hydro's argument that Parliament only has jurisdiction to make laws with respect to matters of national interest in a work declared to be to the general advantage of

Canada: Ontario Hydro's position on this matter was inconsistent with the preamble to s. 91 of the Constitution Act, 1867 which expressly gives Parliament legislative jurisdiction to all matters in the enumerated classes of subjects, including s. 91(29). Ontario Hydro argued that s. 92A excludes [page388] federal jurisdiction over labour relations because such jurisdiction would conflict with the power of the provinces to "manage" electrical generating facilities: the OLRB held that s. 92A has no special place in the Constitution Act, 1867 and accordingly must be read in light of s. 91 which gives Parliament exclusive jurisdiction over matters coming within the classes of subjects enumerated in s. 91 "notwithstanding anything in this Act".

101 The OLRB held that the declaration made in s. 18 of the Atomic Energy Control Act was valid and proper with respect to Ontario Hydro's nuclear generating facilities. There was no basis for Ontario Hydro's argument that s. 92(10)(c) declarations cannot extend to matters within s. 92A(1), or that a declaration may only be made with respect to matters falling solely within s. 92(10)(c): given the wide scope of matters within s. 92, such as property and civil rights, this argument would totally neutralize the s. 92(10)(c) declaratory power. Further, nothing in s. 92A(1) repealed or neutralized the declaration in s. 18 of the Atomic Energy Control Act. Accordingly, the federal government had authority to legislate with respect to Ontario Hydro's labour relations with persons employed on or in connection with the nuclear generating facilities. The OLRB declared that it did not have jurisdiction to deal with the Society's application for certification since the proposed unit included employees who fell within federal labour law jurisdiction.

Divisional Court (per Steele, Montgomery and White JJ.)

102 The Divisional Court held that the special provision for electrical generating facilities in s. 92A removed those facilities from the category of works contemplated by s. 92(10)(c). "Such Works" in s. 92(10)(c) can only refer to local works and undertakings contemplated to be within s. 92(10). [page389] This expression cannot refer to a power specifically granted to a province in s. 92A. Section 92A(1)(c) was enacted after the Atomic Energy Control Act and Parliament must be deemed to have known that it was placing the generation and production of electrical energy within the jurisdiction of the provinces. Therefore, s. 18 of the Atomic Energy Control Act is inapplicable in so far as it purports to declare Ontario Hydro's works to be totally for the general advantage of Canada.

103 The Divisional Court held that Parliament had the jurisdiction to enact the Atomic Energy Control Act in the national interest under the peace, order and good government power ("p.o.g.g. power") in the opening words of s. 91 of the Constitution Act, 1867. Parliament's p.o.g.g. power is residuary in nature and should be read together with the specific power in s. 92A(1)(c) not to exclude provincial jurisdiction except where absolutely necessary. Even where there is a conflict between s. 91 and s. 92, the doctrine of mutual modification holds that the general power should be narrowed to exclude the narrower class of subjects.

104 The Divisional Court also held that, under the double aspect doctrine, the federal p.o.g.g.

power does not necessarily exclude provincial power over labour relations. The pith and substance of the Atomic Energy Control Act and the regulations passed under it, is not the management or labour relations of a facility. Section 92A(1)(c) gives the provinces the exclusive power to manage facilities for electrical energy; the provinces therefore have the power to legislate with respect to labour relations at those facilities. The Atomic Energy Control Act imposes aspects of Parliament's concerns that must be obeyed with respect to the works but this does not totally exclude provincial jurisdiction where the core undertaking is clearly provincial. The Divisional Court distinguished the decision of this Court in Bell Canada v. Quebec (Commission [page390] de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749 ("Bell Canada"), since that case concerned a federal undertaking. Accordingly, under the double aspect doctrine, provincial labour legislation is applicable to the employees who work at the sites in question.

105 The Divisional Court held that Ontario Hydro is not a federal work or undertaking; therefore the Canada Labour Code does not apply according to the scope of the statute set out in s. 4. Further, Ontario Hydro is a "provincial public policy instrument" to which the statute should not be interpreted to apply. Only if Parliament validly amended the Atomic Energy Control Act to provide that it was in the national interest that all labour relations at nuclear generating sites be governed by federal legislation would provincial labour legislation be supplanted. The Divisional Court noted finally that the licence for the Bruce nuclear facility, which is representative of the licences issued to all of Ontario Hydro's nuclear generating sites, indicates that all general laws of the province are applicable to the facility, subject to the conditions of the licence. The Ontario labour legislation is a law of general application in the province and can stand together with the federal requirements for health, safety and security.

106 The Divisional Court ordered that the decision of the OLRB be quashed and directed the OLRB to deal with the Society's certification application.

Ontario Court of Appeal

Tarnopolsky J.A. (Lacourcière J.A. concurring)

107 Tarnopolsky J.A. indicated that there were two issues before the court. First, did the enactment of s. 92A remove electrical facilities from the category [page391] of works contemplated by s. 92(10) of the Constitution Act, 1867, rendering the declaration in s. 18 of the Atomic Energy Control Act inapplicable to Ontario Hydro's nuclear generating facilities? Second, even if s. 18 does apply to Ontario Hydro's nuclear generating facilities, does Parliament's power extend to the labour relations of the employees of those facilities?

108 With respect to the first issue, Tarnopolsky J.A. held that the provincial legislative powers in s. 92A cannot be exercised to the exclusion of other federal powers. This view was supported by academic commentators and the pertinent proceedings of the Special Joint Committee on the Constitution. The Divisional Court erred in not distinguishing between activities concerning facilities for the generation of electricity (i.e., development, conservation and management) and the

character or nature of those facilities (i.e., being local works). The wording of s. 92A fails to support the conclusion that electrical facilities were removed from the category of works contemplated by s. 92(10)(c).

109 Further, Tarnopolsky J.A. held that to accept that the federal declaratory power is an exception only to the provincial legislative authority over local works and undertakings in s. 92(10) would result in an absurdity. The jurisdictional basis of a matter over which a province has legislative competence may arise from any number of heads of power; there is no authority for the claim that legislative competence over a particular subject matter must be founded on or restricted to one head of provincial power. Tarnopolsky J.A. continued (at p. 760):

> ... I would endorse the finding of the OLRB that, if the declaratory power refers to local works or undertakings only, then s. 92 para. 16 -- "Generally all Matters of a merely local or private Nature in the Province" -- would neutralize Parliament's power to declare anything to be for the general advantage of Canada, for undoubtedly [page392] a local work could reasonably be found to be a matter of a local or private nature in the province. It is that absurdity which must be avoided. [Emphasis in original.]

110 Section 92A must be read in light of s. 91 using the doctrine of mutual modification, i.e., the provincial power in s. 92A should not be read to exclude the federal power in s. 92(10)(c) and s. 91(29) where the two powers can co-exist. Moreover, Parliament may touch on those classes of subjects assigned exclusively to the provinces under a valid exercise of its legislative powers.

111 Works or undertakings declared to be to the general advantage of Canada are withdrawn from provincial legislative competence through the operation of s. 92(10)(c) and s. 91(29). Since there is nothing to indicate that works within s. 92A were removed from the class of works in s. 92(10), there is nothing to preclude the declaration in s. 18 of the Atomic Energy Control Act from applying to Ontario Hydro's nuclear facilities. The declaration has the effect of granting Parliament control over these works. That control includes the power to regulate the operation of the work, including the employment of persons employed on such works (in this regard, Tarnopolsky J.A. relied on the decision of this Court in Bell Canada, supra).

112 Even if s. 92A removed electrical generating works from s. 92(10), Parliament could validly exercise jurisdiction over Ontario Hydro's nuclear generating facilities using its p.o.g.g. power from the opening words of s. 91. Section 92A does not detract from the scope of Parliament's authority under the p.o.g.g. power. Tarnopolsky J.A. held that "the regulation of atomic energy, as a matter of national concern, must include the labour relations of Ontario Hydro's nuclear facilities, in spite [page393] of the practical difficulties that may be encountered as a result of this decision" (p. 764).

113 Tarnopolsky J.A. concluded (at p. 768):

> In conclusion, Ontario Hydro's nuclear facilities are works that, although

> wholly situate within a province, are declared by Parliament to be for the general advantage of Canada within the meaning of s. 2(h) of the Labour Code. As indicated above, by s. 4 Parliament has expressly made the Labour Code applicable to all employees who are employed upon or in connection with such works as defined in s. 2. Ontario Hydro's nuclear workers, accordingly, must be governed by the federal Labour Code.

Galligan J.A., dissenting

114 Galligan J.A. felt that, according to the testimony of Arvo Niitenberg, Ontario Hydro's Senior Vice-President of Operations, the division of labour relations between two separate jurisdictions would cause Ontario Hydro serious practical difficulties. This result was to be avoided unless the Constitution required it. Galligan J.A. held that it was not necessary to decide whether federal jurisdiction over the nuclear generating sites arose from the federal declaratory power or from the federal p.o.g.g. power. He set out the issue in the case as follows (at p. 771):

> Because Parliament has exclusive authority to regulate atomic energy it is not contested that it has power to regulate Hydro's five nuclear generating sites. The issue is whether, because of that authority it also has power, to the exclusion of the province, to regulate Hydro's labour relations with its employees working on or in connection with those generating stations.

115 Galligan J.A. distinguished this Court's trilogy on the interrelation of provincial statutes of general application with federal statutes regulating enterprises which come within Parliament's exclusive legislative sphere (Bell Canada, supra; Canadian National Railway Co. v. Courtois, [1988] 1 S.C.R. 868, and Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board), [1988] 1 S.C.R. 897) on the ground that the undertakings in those cases were truly federal while Ontario Hydro is a [page394] provincial undertaking: "Only part of one of its many activities is within the federal sphere of legislative competence" (p. 772). He continued (at p. 773):

> I think the principle to be drawn from the treatment of this subject in the trilogy is that a class of subject-matter within the exclusive legislative competence of Parliament will be held to include labour relations if labour relations is an integral part, an essential part or a vital part, of the exercise of that jurisdiction. To apply that principle to this case, I think that, if labour relations is an integral, essential or vital part of the power to regulate atomic energy at Hydro's nuclear generating sites, then the exception to the general rule of provincial power over labour relations would apply.

116 Galligan J.A. concluded that no evidence had been led to demonstrate that labour relations were such an integral part of the regulation of atomic energy. Indeed, since the federal government had not controlled labour relations at Ontario Hydro's nuclear generating sites to date, there was evidence that labour relations were not such an integral part of the regulation of atomic energy. For

the same reason that labour relations of a federal undertaking must be regulated federally, the labour relations of a provincial undertaking should be regulated provincially. Therefore there was no reason to apply the exception to the general rule that labour relations fall within the exclusive jurisdiction of the provincial legislatures: "... if the provincial law does not bear on the specifically federal nature of the federal exercise of power the rule excluding application of the provincial law does not apply" (pp. 774-75).

117 The doctrine of federal paramountcy does not apply where there is no conflict between the two statutes (Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission), [1990] 2 S.C.R. 838). Galligan J.A. was disinclined to interpret the statutes [page395] so as to create a conflict where they had been applied together without conflict for 25 years. While the licences issued by the AECB to Ontario Hydro's nuclear generating facilities contained provisions relating to the staffing of those stations, there was no demonstrated conflict between these provisions and Ontario Hydro's labour relations with its employees. Galligan J.A. would have dismissed the appeal and affirmed the order of the Divisional Court.

IV. The Constitutional Question

> Does the Labour Relations Act of Ontario, R.S.O. 1980, c. 228 [now R.S.O. 1990, c. L.2], or the Canada Labour Code, R.S.C., 1985, c. L-2, constitutionally apply to the matter of labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro's nuclear electrical generating stations which have been declared to be for the general advantage of Canada under s. 18 of the Atomic Energy Control Act, R.S.C., 1985, c. A-16?

V. Issues

118 The constitutional question raises the following issues:

1. What are the nature and effect of the federal declaratory power?
2. May Parliament validly make declarations under s. 92(10)(c) of the Constitution Act, 1867 with respect to nuclear electrical generating stations over which the provinces enjoy jurisdiction in the areas of development, conservation and management by virtue of s. 92A(1)(c) of the Constitution Act, 1867?
3. Does a valid declaration by Parliament under s. 92(10)(c) of the Constitution Act, 1867 over nuclear electrical generating stations give Parliament jurisdiction over the labour relations of employees employed in those stations?
4. If Parliament's jurisdiction over nuclear electrical generating stations derives solely from the peace, order and good government clause of s. 91

of the Constitution Act, 1867, does that jurisdiction [page396] include the labour relations of employees employed in those stations?

5. Is Ontario Hydro immune from the operation of the Canada Labour Code by virtue of interjurisdictional Crown immunity?

VI. Analysis

1. What are the nature and effect of the federal declaratory power?

(a) History of the Declaratory Power

119 The first appearance of a declaratory power that was to be given to the federal government was in the final Resolutions of the Quebec Conference of 1864. The power was listed with the other specific heads of power of the federal government and was worded as follows:

> 29. The General Parliament shall have power to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England), and especially Laws respecting the following subjects: --
>
> ...
>
> 11. All such works as shall, although lying wholly within any Province, be specially declared by the Acts authorizing them to be for the general advantage.

In the final version of the Constitution Act, 1867, the declaratory power appeared as an exception to the provincial power over local works and undertakings:

> 92. 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,--
>
> ...
>
> 10. Local Works and Undertakings other than such as are of the following Classes:
>
> ...

[page397]

> c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

120 In its early years, the declaratory power was used almost exclusively in relation to local railways. The federal government began to make declarations regarding electricity companies as well as telegraph and other communications companies in the 1880s. The frequency of declarations, which was at its peak in the late 19th century, began to drop off in the early 20th century. The declaration over atomic energy at issue in this case was passed in 1946. Since the 1960s, the federal government has used the declaratory power only twice although old declarations are still reenacted along with the originating legislation (see P. W. Hogg, Constitutional Law of Canada (3rd ed. 1992), vol. 1, at pp. 22-15 to 22-16, and A. Lajoie, Le pouvoir déclaratoire du Parlement (1969), at pp. 123-51).

(b) Nature of the Declaratory Power

121 The federal declaratory power, which is found in the combined operation of s. 92(10)(c) and s. 91(29) of the Constitution Act, 1867, is unique in the constitutional division of powers. As Duff J. wrote for this Court in Reference re Waters and Water-Powers, [1929] S.C.R. 200, at p. 220:

> The authority created by s. 92 (10c) is of a most unusual nature. It is an authority given to the Dominion Parliament to clothe itself with jurisdiction -- exclusive jurisdiction -- in respect of subjects over which, in the absence of such action by Parliament, exclusive control is, and would remain vested in the provinces. Parliament is empowered to withdraw from that control matters coming within such subjects, and to assume jurisdiction itself. It wields an authority which enables it, in effect, to rearrange the distribution of legislative powers effected directly by the Act, and, in some views of the enactment, to bring about changes of the most radical import, in that distribution; and the basis and condition of its action must be the decision by Parliament that the "work or undertaking" or class of works or undertakings [page398] affected by that action is "for the general advantage of Canada," or of two or more of the provinces; which decision must be evidenced and authenticated by a solemn declaration, in that sense, by Parliament itself.

122 Professor Hogg, supra, has also noted the exceptional nature of the federal declaratory power (at p. 22-17):

> [T]he federal Parliament's power under s. 92(10)(c) is in conflict with classical principles of federalism because it enables the federal Parliament, by its own

> unilateral act, to increase its own powers and diminish those of the provinces.

123 Former Chief Justice Bora Laskin referred to the federal declaratory power as "extraordinary" (see Laskin's Canadian Constitutional Law (5th ed. 1986), vol. 1, at p. 627). The uniqueness of the federal declaratory power lies in Parliament's ability to decide to assume jurisdiction over a work which would normally be within exclusive provincial jurisdiction.

124 How is this extraordinary power to be exercised by the federal Parliament? First, Parliament must make an explicit declaration that the work is for the general advantage of Canada, or of two or more provinces. Whether or not a work is for the general advantage of Canada is a policy decision of Parliament which will not normally be reviewed by the courts.

125 In The Queen v. Thumlert (1959), 20 D.L.R. (2d) 335, the Alberta Court of Appeal indicated that the doctrine of colourability provides a limitation to the exercise of the declaratory power. However, as one commentator has argued:

> [B]ecause of the very nature of the declaratory power, it is doubtful whether the doctrine of colourability would apply to it. The very purpose of s. 92(10)(c) is to extend federal jurisdiction into what otherwise would be the provincial field. Therefore the mere fact that by the declaration the federal Parliament intends to vest in itself jurisdiction over works which otherwise would be [page399] within provincial jurisdiction cannot itself be cause for complaint ... .
>
> (K. Hanssen, "The Federal Declaratory Power Under the British North America Act" (1968-69), 3 Man. L.J. 87, at p. 103.)

126 Hanssen suggested that the only limit on Parliament's exercise of the declaratory power would be a narrow version of colourability, namely proof that Parliament had acted in bad faith in making a declaration. However, the Court does not need to decide for the purposes of the present appeal whether or not some form of the doctrine of colourability provides a limit on the federal declaratory power.

127 What may Parliament make the subject of a declaration under s. 92(10)(c) of the Constitution Act, 1867? Section 92(10)(c) refers to "Works" which stands in contrast to the reference in s. 92(10)(a) to "Works and Undertakings". This distinction would appear on its face to limit the federal declaratory power to works or tangible things and to exclude undertakings from the operation of the power. However, Parliament has on occasion declared undertakings to be works for the general advantage of Canada. This Court upheld one such declaration in Quebec Railway Light & Power Co. v. Town of Beauport, [1945] S.C.R. 16, which concerned a federal declaration that the undertaking of a company was a work to the general advantage of Canada. Both Rand J. and Hudson J. (who dissented in the result) recognized the validity of the declaration without any explicit discussion thereof. Rinfret J. was of the opinion that the declaration was meant to bring "the

whole of the works of the company" within the declaration (p. 24). Davis J., who dissented in the result of the case, agreed with Rinfret J. and wrote as follows (at p. 29):

> It seems to me that the word "undertaking" there used involves the totality of the works of the company and that the effect of the statute was that they were declared to be for the general advantage of Canada. Such a declaration [page400] was within the competence of the Dominion Parliament when the meaning and scope of the statute is fairly construed.

Kerwin J. held at p. 32 that "no more extended meaning than the word 'works' [in s. 92(10)(c)] bears on its proper construction may be ascribed to the word 'undertaking' in section 1 of the 1895 Act".

128 The line of reasoning that "undertaking" in a federal declaration refers only to the totality of a company's works is thrown into doubt by other federal declarations, such as that found in s. 35 of the Cape Breton Development Corporation Act, R.S.C., 1985, c. C-25, which declared the "works and undertakings operated or carried on" by various coal mining and railway companies on Cape Breton Island to be works for the general advantage of Canada. Decisions of this Court such as Commission du salaire minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767, have assumed that the federal government can declare undertakings as undertakings to be works for the general advantage of Canada.

129 Thus, Parliament may validly declare an undertaking to be a work for the general advantage of Canada. The outer limit of Parliament's power to declare undertakings to be works for the general advantage of Canada is that the undertaking must be linked to a work. As Rand J. stated in his partially dissenting opinion in Reference re Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529, at p. 553, "Undertakings, existing without works, do not appear in 92(10)(c) and cannot be the subject of such a declaration".

130 In my view, "undertaking" refers to the whole of the enterprise within which a work or works is or are situated. In this case, the undertaking is Ontario Hydro. The undertaking is to be distinguished from the set of integrated activities related directly to the work (here, the production of electricity using nuclear power) and from the work itself (the electrical nuclear generating facilities). In some [page401] respects, all undertakings for the purposes of s. 92(10)(c) involve works but not all works may involve undertakings.

131 As I discussed above, the declaratory power has been used most often with respect to local railways. Other typical subjects of federal declarations include canals, bridges, harbours, telephones, grain elevators and factories of various kinds. Parliament has also made declarations with respect to national battlefields. As Professor Hogg, supra, has noted (at p. 22-18):

> It appears, however, that the federal government and Parliament are sensitive to the anomalous character of the power and are now inclined to use the power only sparingly. It has been used very rarely in recent times.

(c) The Effect of a Declaration

132 Having briefly considered the background to and nature of the federal declaratory power and how that power is exercised, one must deal with the most obvious question as to the effect of a declaration that a work is to the general advantage of Canada. To begin with, the Court has rejected the proposition that Parliament gains jurisdiction over no more than the physical shell of a work when it makes a declaration that a work is for the general advantage of Canada. In several cases involving grain elevators, the Court has held that jurisdiction over declared works includes jurisdiction to regulate the operations of declared works. One example of this is Chamney v. The Queen, [1975] 2 S.C.R. 151, where Martland J. stated for the Court (at p. 159):

> Having concluded that the premises in question here are works declared to be for the general advantage of Canada, it is clear that Parliament could control the quantities of grain which could be received into an elevator and could enact s. 16(2) of the Canadian Wheat Board Act as a means of exercising control over the work and that the appellant could properly be convicted of an offence under that subsection.

[page402]

133 Laskin, supra, has described federal jurisdiction over declared works as follows (at pp. 628-29):

> [T]he result of a declaration of a "work" to be for the general advantage of Canada must surely be to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character.

134 Contrary to the holding of Desjardins J.A. in her concurring reasons in Shur Gain Division, Canada Packers Inc. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, [1992] 2 F.C. 3, at p. 34, Parliament's legislative jurisdiction over a declared work is not "plenary". As Beetz J. said for the Court in Bell Canada, supra, at p. 762:

> [W]orks, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them

> specifically of federal jurisdiction ... .

135 The Court reaffirmed this principle in Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission), supra, where Gonthier J. wrote for the Court (at p. 853):

> The immunity pertaining to federal status applies to things or persons falling within federal jurisdiction, some specifically federal aspects of which would be affected by provincial legislation. This is so because these specifically federal aspects are an integral part of federal jurisdiction over such things or persons and this jurisdiction is meant to be exclusive.
>
> It is the fundamental federal responsibility for a thing or person that determines its specifically federal aspects, [page403] those which form an integral part of the exclusive federal jurisdiction over that thing or person.

136 As a result, when the federal government makes a declaration under s. 92(10)(c) of the Constitution Act, 1867, that a work is to the general advantage of Canada, Parliament obtains jurisdiction not only over the physical parts of the work but also over those aspects of the operation of the work which makes the work specifically of federal jurisdiction, i.e., those aspects of the work which make the work one for the general advantage of Canada.

137 This limit on Parliament's jurisdiction over a declared work is consistent with the interpretation of the declaratory power as a "narrow and distinct" power in order that the power not seriously encroach on provincial jurisdiction (per Dickson C.J. in General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641, at p. 671).

138 This limit is also consistent with the traditional approach to division of powers questions which has been one of balancing federal and provincial powers through the application of doctrines such as mutual modification, double aspect and pith and substance. The Constitution Act, 1867 set up a federalist system of government for Canada and should be interpreted so as not to allow the powers of either Parliament or the provincial legislatures to subsume the powers of the other. As Henri Brun and Guy Tremblay have written:

> [TRANSLATION] The history of the birth of the federation, the first "whereas" in the preamble to the Constitution Act, 1867 and, in particular, the usually exclusive division of powers contained therein show clearly that the purpose of this Act was to establish a federal system.
>
> That is why, in numerous decisions, the courts have tried to protect the federal foundations of the Canadian system. They have sought the maintenance

> of a certain balance between the federal government and the provinces.
>
> (Droit constitutionnel (2nd ed. 1990), at p. 402.)

[page404]

139 This Court recognized the primacy of the balance between federal and provincial powers in Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, where the Court held that a substantial measure of provincial consent was required by convention before the Canadian Constitution could be amended. The majority held that the reason for the convention was the federal principle (at pp. 905-6):

> The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.

While the use of the declaratory power is not as dramatic as the unilateral amending of the Constitution, in my view the federal principle should be respected nonetheless. Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved.

140 Confining Parliament's jurisdiction over declared works within the sphere of those aspects of the work which make the work of federal jurisdiction accords with the jurisprudence on Parliament's other unusual power, the power to legislate for the peace, order and good government of the country found in the preamble to s. 91 of the Constitution Act, 1867. The cases concerning the p.o.g.g. power have developed a set of strict criteria which the federal government must meet before it can exercise its residual authority. This prevents the p.o.g.g. power from being abused to disturb the balance of federalism. See, for example, the decision of this Court in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, which I will discuss below.

141 To summarize, the federal declaratory power is unique in that under it, Parliament may decide as a matter of policy to withdraw a work or an undertaking [page405] linked to works from what would normally be provincial jurisdiction by declaring the work or undertaking to be a work for the general advantage of Canada, or of two or more provinces. Parliament's jurisdiction over a declared work is not plenary, but extends only to those aspects of the work which make the work specifically of federal jurisdiction. Put another way, Parliament obtains exclusive jurisdiction to regulate those aspects of the work that are integral to the federal interest in the work.

> 2. May Parliament validly make declarations under s. 92(10)(c) of the Constitution Act, 1867 with respect to nuclear electrical generating stations over which the provinces enjoy jurisdiction in the areas of development, conservation and

management by virtue of s. 92A(1)(c) of the Constitution Act, 1867?

142 The parties do not dispute that the combined effect of s. 92(10)(c) and s. 91(29) of the Constitution Act, 1867 is to give the federal government the power to declare works to be for the general advantage of Canada and to bring those works within the exclusive jurisdiction of Parliament. Parliament has made an express declaration in s. 18 of the Atomic Energy Control Act that all works and undertakings constructed for the production, use and application of atomic energy are works to the general advantage of Canada. It is not contested that Ontario Hydro's nuclear electrical generating stations are works which by definition fall within Parliament's declaration. However, Ontario Hydro and CUPE submit that Parliament's declaration is not valid with respect to nuclear electrical generating stations.

143 The argument of Ontario Hydro and CUPE, which was accepted by the Divisional Court, is that where identified types of works (such as electrical generating facilities) are specifically assigned to the exclusive jurisdiction of the provinces, the federal declaratory power cannot operate with respect to those works for two reasons. First, [page406] the federal declaratory power is authorized only with respect to local works under s. 92(10) which does not include local works which fall under another head of s. 92. Second, the federal declaratory power is a general power which must be read narrowly to exclude those classes of subjects which are assigned exclusively to the provincial legislatures.

144 With respect to the first reason, the Ontario Court of Appeal rejected Ontario Hydro and CUPE's argument that the declaratory power applies only to works which do not fall within the terms of any other subject matter enumerated in s. 92. The basis on which the Ontario Court of Appeal rejected this argument was that it would result in an absurdity since, for example, s. 92(16) gives the provinces exclusive jurisdiction over all matters of a merely local or private nature in the province. This would mean that the declaratory power could never be exercised because s. 92(16) would prohibit its exercise. I find the response of the Court of Appeal persuasive on this point. I would also point out that the argument of Ontario Hydro and CUPE depends on construing the various heads of power as mutually exclusive watertight compartments and on slotting every matter into one and only one head of power. The watertight compartments approach to the interpretation of ss. 91 and 92 of the Constitution Act, 1867 has often been rejected by the courts, and rightly so (see, for example, Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, at pp. 180-81).

145 Ontario Hydro refined its argument before this Court to claim in the alternative that the federal declaratory power applies only to works which do not fall within a category specifically assigned to the provinces, such as electrical generating facilities under s. 92A(1)(c). However, this argument has no merit since under s. 92A(1)(c), it is not the works themselves which are given to provincial jurisdiction, but the conservation, development and management of those works. As the Court of [page407] Appeal held, it is an error not to distinguish between activities concerning facilities for the generation of electricity (i.e., development, conservation and management) and the character or nature of those facilities (i.e., being works). It is still open to the federal government to

make a declaration that a work of a type specifically mentioned in s. 92A(1)(c) is to the general advantage of Canada, bringing the work under federal jurisdiction. The question, which will be addressed below, is what sort of jurisdiction does the federal government gain over a work mentioned in s. 92A(1)(c) through the operation of such a declaration, given that the provinces have explicitly been assigned the exclusive jurisdiction over the management of those works.

146 As I mentioned above, Ontario Hydro and CUPE argued that the second reason why works which are specifically identified in s. 92 are not subject to the declaratory power is that the federal declaratory power is a general power which must be read narrowly to exclude those classes of subjects assigned exclusively to the provinces. This argument refers to the interpretative process known as the doctrine of mutual modification which was established by the Privy Council in Citizens Insurance Co. of Canada v. Parsons (1881), 7 App. Cas. 96, where the Privy Council said at pp. 108-9:

> With regard to certain classes of subjects, therefore, generally described in sect. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this [page408] way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

147 This method of balancing the provisions in ss. 91 and 92 of the Constitution Act, 1867 was adopted by this Court in Reference re Waters and Water-Powers, supra, where Duff J. wrote for the Court (at p. 216):

> There is nothing more clearly settled than the proposition that in construing section 91, its provisions must be read in light of the enactments of section 92, and of the other sections of the Act, and that where necessary, the prima facie scope of the language may be modified to give effect to the Act as a whole.

148 However, as already mentioned, since the works themselves have not been specifically assigned to the provinces under s. 92A(1)(c), there is no apparent conflict between the federal

declaratory power and the provincial jurisdiction over management which would require a reading down of the federal declaratory power. Further, given that the very nature of the declaratory power is to enable Parliament to assume jurisdiction over a work which would otherwise be within provincial jurisdiction, it is arguable that the doctrine of mutual modification is of little application to the determination of what works are subject to the federal declaratory power.

149 Despite the lack of conflict between the federal declaratory power and the provincial power over management, Ontario Hydro argued that Parliament gave up its declaratory power over nuclear electrical generating stations when s. 92A was added to the Constitution Act, 1867 in 1982. I note that Ontario Hydro, as well as the Ontario Court of Appeal, placed some emphasis on what Parliament [page409] must have intended when s. 92A was ratified as part of the Constitution Act, 1867. In my view, CUPE is correct in indicating that Tarnopolsky J.A. should not have relied so heavily on the Minutes of the Special Joint Committee on the Constitution in concluding that s. 92A was not meant to diminish the federal declaratory power. However, neither can Ontario Hydro claim that Parliament must be deemed to have known that it was neutralizing its past declarations or its future declaratory power with respect to nuclear electrical generating stations.

150 This Court has indicated that the Minutes of the Special Joint Committee on the Constitution carry limited weight in the arena of constitutional interpretation (see Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 509, where Lamer J., as he then was, held with respect to interpreting the Canadian Charter of Rights and Freedoms that "it would in my view be erroneous to give these materials anything but minimal weight"). This Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution. Rather, in Canada, constitutional interpretation rests on giving a purposive interpretation to the wording of the sections. As Professor Hogg notes in "The Charter of Rights and American Theories of Interpretation" (1987), 25 Osgoode Hall L.J. 87, at pp. 97-98:

> The principle of progressive interpretation of the constitution is as firmly established in Canada as is the principle of minimal reliance on legislative history. The Supreme Court has repeatedly asserted that the language of the constitution is not to be frozen in the sense in which it would have been understood in 1867. Rather, the constitution is to be regarded as "a living tree capable of growth and expansion within its natural limits".

151 While the wording of s. 92A is unambiguous that management of electrical generating facilities is within the exclusive jurisdiction of the province, the section does not indicate that any special reservation from the federal declaratory power was [page410] made. In my opinion, Parliament did not give up its declaratory power over nuclear electrical generating stations when s. 92A of the Constitution Act, 1867 was added to the Constitution in 1982.

152 I would add that these conclusions accord with academic writings on s. 92A which have indicated that the resource amendment, as the section is called, increased provincial power with

respect to the raising revenues from resources and to regulating the development and production of resources without diminishing Parliament's pre-existing powers. See R. D. Cairns, M. A. Chandler and W. D. Moull, "Constitutional Change and the Private Sector: The Case of the Resource Amendment" (1986), 24 Osgoode Hall L.J. 299, at p. 300; and W. D. Moull, "The Legal Effect of the Resource Amendment -- What's New in Section 92A", in J. P. Meekison, R. J. Romanow and W. D. Moull, Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources (1985), 33, at pp. 53-54.

153 As I noted above, the scope of federal jurisdiction over the works it makes subject to declarations is not absolute in the context of traditional interpretations of federalism and the declaratory power. Therefore, Ontario Hydro's exhortation that this Court must, by removing certain classes of works from the ambit of the declaratory power, stand firm against the onslaught of federal gutting of all provincial power through the declaratory power loses its force.

154 The declaration in s. 18 of the Atomic Energy Control Act is therefore valid with respect to Ontario Hydro's nuclear electrical generating stations which are works within the definition of that section. This declaration brought Ontario Hydro's nuclear electrical generating stations as works within the jurisdiction of Parliament which, according to the opening words of s. 91 of the Constitution Act, 1867, is exclusive jurisdiction. The next question to be addressed is whether or not Parliament's exclusive jurisdiction over Ontario [page411] Hydro's nuclear generating facilities as works includes the labour relations of employees employed in those stations.

> 3. Does a valid declaration by Parliament under s. 92(10)(c) of the Constitution Act, 1867 over nuclear electrical generating stations give Parliament jurisdiction over the labour relations of employees employed in those stations?

155 To answer this question, one should begin with the proposition that, generally speaking, labour relations are a matter falling under the provincial jurisdiction over property and civil rights found in s. 92(13) of the Constitution Act, 1867. This was the conclusion of the Privy Council in Toronto Electric Commissioners v. Snider, [1925] A.C. 396, when they struck down the federal Industrial Disputes Investigation Act, 1907, S.C. 1907, c. 20, which purported to regulate industrial disputes in the mining industry as well as public utilities.

156 Beginning with the decision of the Court in Reference re Industrial Relations and Disputes Investigation Act, supra, there came to be recognized a principle that, despite jurisdiction over labour relations being normally a matter under provincial jurisdiction, where federal undertakings were concerned Parliament obtained legislative authority over labour relations. The rationale behind this principle is that labour relations are an integral part of an undertaking and Parliament cannot effectively regulate an undertaking without control over labour relations. Martland J. held for the Court in Commission du salaire minimum v. Bell Telephone Co. of Canada, supra, at p. 772:

> In my opinion all matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to

> the exclusive legislative control of the federal parliament within s. 91(29)... . Similarly, I feel that the regulation and control of the scale of wages to be paid by an interprovincial [page412] undertaking, such as that of the respondent, is a matter for exclusive federal control.

157 This theme was taken up in Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754, which was the first of the cases in this area to articulate the rules by which the sharing of jurisdiction over labour relations is to be achieved. Construction Montcalm concerned the issue of whether provincial minimum wage laws were applicable to the labour relations of a construction company involved in the construction of Mirabel airport on federal Crown land. Beetz J. wrote the reasons for the majority and made the following statement of the law (at pp. 768-69):

> The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: Toronto Electric Commissioners v. Snider. By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: In re the validity of the Industrial Relations and Disputes Investigation Act (the Stevedoring case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one... .

The Court held that there was nothing specifically federal about Construction Montcalm's business simply because it was building an airport. Therefore Construction Montcalm was not immune from [page413] the operation of provincial laws regarding minimum wages and other conditions of employment.

158 The Court reaffirmed the principles of Construction Montcalm in Northern Telecom Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115, where Dickson J. stated since labour relations are integral to the operation of an undertaking, service or business, labour relations will be removed from provincial jurisdiction where federal undertakings are concerned. Northern Telecom was appealing the decision of the Canada Labour Relations Board certifying the respondent union as the bargaining agent for a unit of Northern Telecom's installation supervisors. The Court was unable to determine the nature of Northern Telecom's business on the evidence before the Court, and dismissed Northern Telecom's appeal on the ground that Northern Telecom had failed to show

reversible error by the Canada Labour Relations Board.

159 The most recent series of cases in this area is the trilogy of Bell Canada, Courtois and Alltrans Express, supra. Again, these decisions emphasized that, where a federal undertaking is concerned, jurisdiction over labour relations will fall to the federal government. As Beetz J. held in the lead case of the trilogy, Bell Canada, supra, at pp. 761-62:

> ... Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10)a., b. and c. of the Constitution Act, 1867, that is undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada.

160 Although these cases concluded that federal jurisdiction over labour relations automatically flows from federal jurisdiction over an undertaking because labour relations are an integral part of the management of an undertaking, they are not dispositive [page414] of the case at bar for two reasons. First, we are concerned here with works and not undertakings, and the parties have conceded that Ontario Hydro is a provincial undertaking. Second, the Court must consider the effect of the explicit grant of authority to the provinces in s. 92A over management of electrical generating facilities.

161 However, the cases I have just discussed do provide the general analytic framework within which to determine who has jurisdiction over labour relations at Ontario Hydro's nuclear electrical generating facilities. The question to be answered is whether or not federal authority over labour relations is integral to the exercise of federal competence over the nuclear electrical generating plants as works declared to be to the general advantage of Canada. As I see it, answering this question in turn raises three additional questions. In the first place, what is the character of labour relations, both generally and in the context of nuclear generating of electricity? Secondly, what is the nature of Parliament's competence over Ontario Hydro's nuclear electrical generating stations? And finally, what is the effect of s. 92A?

162 As to the first question, I note at the outset that the Ontario and federal labour codes are substantially similar. Indeed, labour codes across Canada largely correspond to one another. As George Adams (now Mr. Justice Adams) has noted:

> Obviously not all provisions are identical; each jurisdiction has included in its own legislation measures which reflect or are designed to respond to the economic, political and cultural forces peculiar to it. Nevertheless, the over-all tenor of the legislative enactments throughout Canada remains remarkably similar.

(Canadian Labour Law (2nd ed. 1993), at p. 2-94.)

163 Canadian labour legislation is concerned with developing procedures for the interaction between management and employees. Each code governs the rules under which unions are certified as bargaining agents, under which collective agreements [page415] are negotiated, and under which strikes and lockouts may proceed legally. There is usually no prescribed content to collective agreements, except that the agreement be for a definite term and that it contain a method for settling disputes during the life of the agreement.

164 Of course, the form that Canadian labour legislation has taken is only one consideration in describing the character of labour relations as a matter for constitutional purposes. It may be said that labour relations law is generally concerned with the regulation and control of industrial disputes, and not with the unique concerns of individual industries except where industry-specific measures have been enacted. It is also apparent that Canadian labour law is concerned with the equalization of power between workers and employers to protect workers from the arbitrary exercise of authority. Professor David M. Beatty has asserted that this latter goal of labour legislation has become paramount in Canadian labour law:

> Whereas the earlier regulation was directed primarily to securing a balance of interests favourable to employers and consumers, in our own time legislators have been more concerned to promote and protect the interests a worker has in his or her job. Instead of procuring labour peace in the community by legal sanctions of criminal and civil liability, in more recent times it has been purchased by legislation aimed at enhancing the opportunity for self-control.
>
> Taken together, all the laws we have come to rely upon to regulate and coordinate work activities in our community, can be seen as providing more extensive forms of protection for workers against arbitrary authority.

(Putting the Charter to Work (1987), at p. 41.)

165 Thus, there are two primary features to labour relations: the preservation of industrial peace and the empowerment of workers. It remains to be seen whether or not these features make the legislative control of labour relations integral to Parliament's [page416] effective exercise of its jurisdiction over the nuclear plants of Ontario Hydro.

166 The second question is the nature of Parliament's competence over Ontario Hydro's nuclear electrical generating stations. When Parliament made the declaration in s. 18 of the Atomic Energy Control Act the federal government obtained exclusive jurisdiction over the specifically federal aspects of nuclear electrical generating stations such as those owned and operated by Ontario Hydro. The preamble to the Atomic Energy Control Act provides a statement of the federal interest in atomic energy. That statement also provides the parameters of the federal interest in the

operations of the nuclear electrical generating facilities since the preamble effectively defines what Parliament determined to be to the general advantage of Canada with respect to the means of production of atomic energy. I reproduce the preamble for convenience:

> WHEREAS it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in the measures of international control of atomic energy that may hereafter be agreed on;

There is nothing in this statement, nor in the rest of the Act, that explicitly or implicitly reveals a federal interest in regulating labour relations. It is apparent from the Atomic Energy Control Act that the uniquely federal aspect of Ontario Hydro's nuclear electrical generating stations is the fact of nuclear production, with all its attendant safety, health and security concerns.

167 The terms of the Atomic Energy Control Act are relevant to determining what Parliament itself determined was integral to the exercise of its jurisdiction over atomic energy. So too are the terms of the regulatory scheme put in place under the Act. Nothing in these regulations indicates any interest in labour relations. Indeed, the mandatory licences for facilities which use nuclear fuel to produce electricity contemplate reporting labour disturbances, but are silent on the need for federal control over labour disputes. Of course, with respect to [page417] Parliament's intent, it may be argued that s. 4 of the Canada Labour Code proclaims all works declared to the general advantage of Canada to be subject to federal labour laws. Obviously a more detailed inquiry into the relationship between Parliament's jurisdiction over the works in question and the matter of labour relations must be undertaken.

168 This inquiry must proceed in the light of the third question, namely what is the effect on this issue of s. 92A of the Constitution Act, 1867. This section of the Constitution grants to the provinces the exclusive jurisdiction over the "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy" (emphasis added). Ontario Hydro's nuclear electrical generating facilities fall within this provision of the Constitution Act, 1867. Past jurisprudence, such as Bell Canada, supra, has held that regulation of labour relations are integral to the regulation of the management of an undertaking. This strengthens the presumption of provincial jurisdiction over labour relations in the specific context of this case since Ontario has been given constitutional jurisdiction over the management of works such as Ontario Hydro's nuclear electrical generating sites.

169 I emphasize that the province's jurisdiction over the management of the nuclear electrical generating stations does not come by way of a unilateral statutory assertion. Section 92A of the Constitution Act, 1867 is an explicit constitutional statement of jurisdiction, and not a self-serving assertion of jurisdiction. There is no higher authority for the interpretation of the federal declaratory power in the specific circumstances of this case than another provision of the Constitution, namely s. 92A. The specific constitutional grant to the provinces of jurisdiction over the management of

electrical generating stations combines with both the presumption that labour relations fall to the provinces and the fact that Ontario Hydro as a whole is a provincial undertaking to weigh heavily against a finding [page418] that the federal government exercises the type of jurisdiction over the nuclear electrical generating plants such that control over labour relations is federal.

170 In view of the answers to these three questions, can control of labour relations be said to be integral to the effective exercise of federal jurisdiction over Ontario Hydro's nuclear electrical generating stations? Unfortunately, the record is almost non-existent on the practical necessity of control by one jurisdiction or the other over labour relations in this particular case. Provincial labour laws have been applied to some of the employees at one of Ontario Hydro's nuclear plants without any problem for 25 years. However, that evidence cannot be conclusive in determining constitutional jurisdiction over the labour relations of all the employees employed at the nuclear plants, including the scientific and engineering employees. The Attorney General of Canada has filed no evidence on this point since its position is that it need not justify its control over labour relations at a federally declared work. Ontario Hydro filed several affidavits from company officials purporting to address the problems that divided jurisdiction over labour relations within the company would raise. But again, these affidavits are not dispositive of the issue, particularly since the officials' only complaint is that divided jurisdiction would create uncertainty.

171 I am therefore faced with the difficult task of determining jurisdiction over labour relations in this case with the help of very little evidence. I stated above that the federal interest in Ontario Hydro's nuclear electrical generating stations is the fact of nuclear production and its attendant health and safety concerns. I also concluded that labour relations legislation is generally concerned with regulating the process of industrial relations and aims at securing both industrial peace and better working conditions for workers. In the context of labour relations, the safety of workers and of the public appears to be the most significant of the [page419] federal government's interests. Therefore, I have tried to consider those labour relations issues which could impact on the safe operation of the plant. In my opinion, there are two potential concerns. First, a collective agreement negotiated under provincial labour legislation might contain provisions which would interfere with the staffing requirements in the licences issued under the Atomic Energy Control Act. Second, a lockout by Ontario Hydro or other work stoppage under provincial labour law could threaten the safe operation of the plant. Both of these concerns appear to me to be easily addressed.

172 Section 8 of the Atomic Energy Control Regulations, C.R.C. 1978, c. 365, forbids the operation of a nuclear facility except in accordance with a licence issued by the AECB. The licences issued by the AECB may contain such conditions as the AECB deems necessary "in the interests of health, safety and security" (s. 9(2)). The licences issued to Ontario Hydro set out a variety of such conditions (see generally pp. 501-9 C.O.A.). Staffing and organization of the nuclear plants must conform with a specified organization plan that is filed with the AECB. Any changes to that plan must be reported to the AECB. The AECB must approve in writing staffing of certain management and supervisory positions. The licence also specifies minimum staffing levels to ensure the safe operation of the nuclear facility, as well as the training that some employees are required to receive.

Finally, there are requirements that any concerns affecting the safety or security of the plant must be reported to the AECB.

173 Any collective agreement provision that contravened these conditions, imposed pursuant to a valid federal regulation over a federal aspect of the nuclear facility, would be null and void because the provisions of the federal licence would be paramount. Valid federal legislation regarding nuclear [page420] plants would be paramount over provincial legislation and collective agreements reached pursuant to provincial legislation, as counsel for Ontario Hydro and the Society conceded in their oral submissions. The double aspect doctrine applies here. The federal licence, federal regulations and the Atomic Energy Control Act are in pith and substance directed towards the regulation of the safety of nuclear electrical generating facilities and the effective control of the development and use of reactors. The Ontario Labour Relations Act is in pith and substance directed towards the regulation of the relations between employees and employers. The two can operate concurrently, except in cases of outright conflict in which case the provisions of the federal law would apply under the doctrine of paramountcy.

174 Further, on a practical level, if a collective agreement led to the violation of the licence conditions, the AECB could shut the plant down by revoking or suspending the licence under which the plant operates (see ss. 27 and 28 of the Atomic Energy Control Regulations).

175 The evidence does not disclose that work stoppages represent a significant threat to safety. The licences under which Ontario Hydro's nuclear electrical generating stations operate seem to allow for work stoppages: the licences require the reporting of any actual or impending industrial disputes "which could affect the safety or security of the nuclear facility" (Art. A.A. 19, sub-article (v)). The licences do not prohibit work stoppages. Further, the affidavit of Ontario Hydro's Senior Vice-President of Operations outlines the practical concerns the company must face in the event of an imminent strike. This affidavit suggests that a temporary shut-down in the event of a strike, while undesirable, is a response that would preserve public safety in extreme cases.

176 As a result, federal control of labour relations does not appear to be integral to the effective regulation of the federal government's concerns with respect to Ontario Hydro's nuclear electrical generating [page421] facilities. Both staffing and work stoppages would be tempered by the conditions of the licences issued by the federal AECB. Moreover, if specific safety issues were of concern to the federal government, it could legislate with respect to those issues under its valid interest in safety flowing from its jurisdiction over the declared works. This would result in some trenching on provincial powers over labour relations and the management of electrical generating sites. However, the necessary trenching on provincial jurisdiction is much more in harmony with the principles of federalism than is the wholesale withdrawing of labour relations from provincial jurisdiction.

177 As I discussed above, the conclusion that labour relations is not integral to the exercise of federal jurisdiction is only strengthened by the presence of s. 92A of the Constitution Act, 1867.

This section expressly provides for provincial jurisdiction over the management of electrical generating sites, including those fuelled by nuclear reactors. Provincial control over labour relations appears to me to be integral to provincial jurisdiction over the management of nuclear electrical generating facilities. Further, as accepted by everyone, Ontario Hydro as a whole is a provincial undertaking. In this regard, I would adopt the reasoning of Galligan J.A., who dissented in the Ontario Court of Appeal. In discussing the trilogy of cases headed by Bell Canada, Galligan J.A. stated as follows (at p. 774):

> I made earlier reference to what seems to me to be a fundamental distinction between the situation in the trilogy of cases and the situation in this case. Those undertakings were truly national while this is undoubtedly provincial. The general language used by Beetz J. in those cases must be considered in that context and care should be taken so that they are not taken out of context and given a meaning which was not intended. His finding that labour relations is a vital part of management can indicate, quite apart from the ordinary principle that labour relations is a provincial matter, that labour relations [page422] is an integral, essential and vital part of the management of a provincial undertaking and the provincial power to legislate respecting a provincial undertaking must include the corresponding legislative power to regulate its labour relations. Thus for the same reason that labour relations of a federal undertaking must be regulated federally I think that labour relations of a provincial undertaking should be regulated provincially.

178 In conclusion, I am of the view that, notwithstanding s. 4 of the Canada Labour Code, a valid declaration by Parliament under s. 92(10)(c) of the Constitution Act, 1867 over nuclear electrical generating stations does not give Parliament jurisdiction over the labour relations of employees employed in those stations. Put another way, at issue herein are works not undertakings and as Hugessen J.A. said in Central Western Railway Corp. v. U.T.U., [1989] 2 F.C. 186, at p. 214, works, being physical things, do not have labour relations, but undertakings do. Control of labour relations is not integral to the federal interest in the nuclear plants. Indeed, it may be said on the contrary that, because of s. 92A of the Constitution Act, 1867 and the fact that Ontario Hydro is a provincial undertaking, control of labour relations is integral to the exercise of provincial jurisdiction over the nuclear electrical generating facilities. This result accords with the jurisprudence and the underlying principles that apply to federalism in general and the declaratory power in particular.

4. If Parliament's jurisdiction over nuclear electrical generating stations derives solely from the peace, order and good government clause of s. 91 of the Constitution Act, 1867, does that jurisdiction include the labour relations of employees employed in those stations?

179 It is not disputed in this case that Parliament has jurisdiction over atomic energy and

therefore the power to enact the Atomic Energy Control Act [page423] under the p.o.g.g. power in the opening words to s. 91 of the Constitution Act, 1867. The Attorney General of Canada argued that, if Parliament's jurisdiction over Ontario Hydro's nuclear electrical generating stations through the declaration in s. 18 of the Atomic Energy Control Act, supra, does not extend to labour relations, Parliament can regulate labour relations at the facilities through the exercise of its jurisdiction over atomic energy under the p.o.g.g. power. In my view, the answer to whether Parliament's jurisdiction under the p.o.g.g. power over Ontario Hydro's nuclear electrical generating plants extends to labour relations must be based on principles similar to those I applied in discussing the declaratory power. Both the p.o.g.g. power and the declaratory power are unusual in the division of powers scheme, and it is logical to apply the same balancing principles of federalism to both, absent special circumstances.

180 There are two recognized doctrines under the p.o.g.g. power which are relevant to this appeal: the emergency doctrine and the national concern doctrine. Under the emergency doctrine, Parliament may use its p.o.g.g. powers to enact legislation that would normally be ultra vires to combat a national emergency (see generally Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373). The type of legislation permissible under the emergency doctrine will be temporary in nature (R. v. Crown Zellerbach Canada Ltd., supra, at p. 432).

181 The Court developed the parameters of the national concern doctrine of the p.o.g.g. power in Crown Zellerbach. In his reasons for the majority, [page424] Le Dain J. described the following contours of the national concern doctrine (at pp. 431-32):

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of a national emergency, become matters of national concern;
3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

With regard to the last factor, the "provincial inability" test, Le Dain J. hastened to caution that the test "must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem" (p. 434). Therefore, that the federal government may have jurisdiction over atomic energy by reason of the national concern branch of the p.o.g.g. power does not give Parliament plenary power over all aspects of nuclear power.

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182 The p.o.g.g. power, like all of Parliament's powers, must be interpreted in accordance with the specific grants of power to the provinces under ss. 92 and 92A of the Constitution Act, 1867. While there is no dispute that Parliament has jurisdiction over atomic energy under the national concern branch of the p.o.g.g. power, the extent of what is swept within Parliament's jurisdiction is circumscribed to the national concern aspects of atomic energy which would appear to be the same as those aspects of the nuclear electrical generating stations which render them to the general advantage of Canada, namely the fact of nuclear production and its safety concerns.

183 I concluded above that Parliament does not require control over labour relations at Ontario Hydro's nuclear electrical generating stations in order to exercise effectively its jurisdiction over the works through the declaratory power. Similarly, it is not integral to the exercise of the p.o.g.g. power over atomic energy that Parliament regulate the labour relations of employees employed at Ontario Hydro's nuclear electrical generating stations.

184 To allow Parliament to control labour relations at these facilities where such regulation is not integral to the effective securing of Parliament's interest in the facilities would not be reconcilable with the distribution of legislative powers under which the provinces are accorded jurisdiction over both property and civil rights, including labour relations, and the management of electrical generating facilities. To define the federal jurisdiction under the p.o.g.g. power in this case to include labour relations would render the provincial power to manage the facilities meaningless since labour relations and management are "two elements of the same reality" (Bell Canada, supra, at p. 798). This would not have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental [page426] distribution of legislative power under the Constitution" (Crown Zellerbach, supra, at p. 432).

185 The Attorney General of Canada cited Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board, [1956] O.R. 862 (H.C.), as authority that Parliament's jurisdiction over atomic energy under the p.o.g.g. power extends to the labour relations of workers employed in the atomic energy industry. In Pronto, the Canadian Mine Workers Union applied to the OLRB for certification as the bargaining agent for the employees of two mining companies engaged in the mining and concentrating of uranium ores. The OLRB certified the union and the companies applied for an

order to quash the certification decision on the ground that the OLRB had no jurisdiction to hear the application. The companies argued that the federal Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, was applicable to their employees. McLennan J. held that control of atomic energy fell within the federal p.o.g.g. power and that "it would be incompatible with the power of Parliament to legislate with respect to the control of atomic energy for the peace, order and good government of Canada if labour relations in the production of atomic energy did not lie within the regulation of Parliament" (pp. 869-70).

186 Pronto was decided prior to the decision of this Court in Crown Zellerbach, supra, under which the present p.o.g.g. claim falls to be decided. Further, the judgment in Pronto is not supported by any reasons and does not accord with decisions of this Court which have indicated that federal and provincial powers must accommodate one another to the extent possible. Finally, it appears that the parties in Pronto conceded that if the mine fell within federal jurisdiction in some aspect then federal labour laws applied (at p. 868). Because of the [page427] structure of the parties' arguments, the result in the case was a foregone conclusion once federal jurisdiction over atomic energy was established. For these reasons, Pronto does not provide authority for the Attorney General of Canada's claim that through the p.o.g.g. power Parliament has jurisdiction over the labour relations at Ontario Hydro's nuclear electrical generating facilities.

187 In summary, while Parliament has jurisdiction over atomic energy under the national concern branch of the p.o.g.g. power, that jurisdiction does not extend to the labour relations between Ontario Hydro and those of its employees employed in the nuclear electrical generating stations. The federal government does not require control over labour relations at Ontario Hydro's nuclear facilities for the exercise of jurisdiction over atomic energy. In other words, the labour relations at issue in this case are not part of the single, distinctive and indivisible matter identified as atomic energy. This is not the say, however, that Parliament, where circumstances warrant, may not, in exercising its valid jurisdiction over nuclear energy, enact legislation which has an impact on the labour relations of Ontario Hydro's employees under either the national concern branch or the national emergency branch of the power to legislate for the peace, order and good government of Canada.

5. Is Ontario Hydro immune from the operation of the Canada Labour Code by virtue of interjurisdictional Crown immunity?

188 In view of the conclusion I have reached that it is the Ontario Labour Relations Act and not the Canada Labour Code, which constitutionally applies in the circumstances of this case, it is not strictly necessary that I address this question. Nonetheless, I am of the opinion that had I reached a different conclusion on the applicability of the Canada Labour Code, Ontario Hydro would not be [page428] immune from the operation of federal labour legislation.

189 The Divisional Court held that Ontario Hydro was a public policy instrument to which the Canada Labour Code should not be interpreted to apply unless the Code expressly and specifically

states that it does apply. I respectfully disagree. There is no jurisprudence indicating that a company like Ontario Hydro, described by the Divisional Court (at p. 279 O.R.) as a "provincial public policy instrument" and which the parties agreed is not a Crown agent, is entitled to interjurisdictional Crown immunity. Based on the arguments submitted on this issue, I see no reason to create a new category of interjurisdictional Crown immunity for a species of organization known as a public policy instrument. Therefore, I agree with the Attorney General of Canada's submission that Ontario Hydro stands on no higher footing than would any other employer in the province of Ontario, in so far as immunity from federal legislation is concerned.

VII. Conclusion

190 The federal government exercises exclusive jurisdiction over some aspects of Ontario Hydro's nuclear electrical generating facilities through its declaratory and p.o.g.g. powers. However, control of labour relations at those facilities is not integral to Parliament's effective regulation of the sites in terms of its interest in those sites. Therefore, in answer to the constitutional question, it is the Ontario Labour Relations Act which constitutionally applies to the labour relations between Ontario Hydro and those of its employees at its nuclear electrical generating facilities.

VIII. Disposition

191 For the foregoing reasons, I would allow the appeals, set aside the order of the Ontario Court of Appeal, and restore the order of the Divisional Court except the mandamus. Under the circumstances, [page429] I would award costs only in this Court to Ontario Hydro, CUPE and the Society, to be paid by the Attorney General of Canada.

Indexed as:

Eurig Estate (Re)

Marie Sarah Eurig, as Executor of the Estate of Donald Valentine Eurig, appellant;
v.
The Registrar of the Ontario Court (General Division) and the Attorney General for Ontario, respondents, and
The Attorney General of Quebec, the Attorney General of British Columbia and the Attorney General for Alberta, interveners.

[1998] 2 S.C.R. 565

[1998] S.C.J. No. 72

File No.: 25866.

Supreme Court of Canada

1998: April 27 / 1998: October 22.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law -- Estates -- Executors and administrators -- Probate fees -- Provincial regulation providing for probate fee based on value of estate administered -- Whether probate levy a fee or a tax -- Whether ad valorem levy ultra vires on ground that it is an indirect tax -- Whether ad valorem levy invalid on ground that it was imposed by body other than provincial legislature -- O. Reg. 293/92, s. 2(1) -- Administration of Justice Act, R.S.O. 1990, c. A.6, s. 5 -- Constitution Act, 1867, ss. 53, 54, 90, 92(2).

The appellant is the executor of her late husband's estate. Pursuant to s. 2(1) of O. Reg. 293/92, made under the Administration of Justice Act, the total value of the estate required payment of $5,710 in probate fees in order to obtain letters probate. Section 5(c) of the Administration of

Justice Act provides that the Lieutenant Governor in Council may make regulations requiring the payment of "fees in respect of proceedings in any court" and prescribing the amounts thereof. Section 2(1) of O. Reg. 293/92 sets out a schedule of ad valorem fees which must be paid in order to obtain a grant of probate. The appellant applied to the Ontario Court (General Division) for an order that she be issued letters probate without payment of the probate fee and for a declaration that the regulation which required that payment was unlawful. The application and subsequent appeal to the Ontario Court of Appeal were both dismissed.

Held (Gonthier and Bastarache JJ. dissenting): The appeal should be allowed.

Per Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Major JJ.: The probate levy as enforced at present is a tax, not a fee, according to the criteria set out in this Court's decision in Lawson. With respect to the first criterion, the levy is compulsory and therefore enforceable by law. While probate is not the foundation of the executor's title but only the authentic evidence of it, that authentication is nonetheless a practical and legal necessity in most cases. The criterion that the fee must be levied by a public body is also satisfied here. The probate levy also meets the criterion that the levy be intended for a public purpose, as the revenue obtained from probate fees is used for the public purpose of defraying the costs of court administration in general, and not simply to offset the costs of granting probate. Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid. In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service, indicating that the levy is a tax and not a fee. Although the probate levy is properly characterized as a tax, it is a direct tax and therefore intra vires the province pursuant to s. 92(2) of the Constitution Act, 1867.

While the Ontario legislature has the authority to implement a direct tax, it must do so in accordance with the requirements set out in the Constitution. Section 53 of the Constitution Act, 1867 mandates that bills for imposing any tax shall originate in the House of Commons. By virtue of s. 90, s. 53 is rendered applicable to the provinces. Thus, all provincial bills for the imposition of any tax must originate in the legislature. The probate fees in this instance are in substance a tax imposed by the Lieutenant Governor in Council without having originated in the legislature. Since s. 53 was not expressly amended, the province was obliged to abide by its terms. Its failure to do so renders the probate tax imposed under O. Reg. 293/92 unconstitutional.

Regardless of whether s. 53 was complied with, or even if s. 53 is considered redundant at the provincial level, the probate levy is not enforceable as it was not authorized by s. 5 of the Administration of Justice Act. While s. 5 authorizes the Lieutenant Governor in Council to impose fees, it does not constitute an express delegation of taxing authority. The Act clearly does not authorize the imposition of a tax, albeit a direct one.

Since s. 54 of the Constitution Act, 1867 concerns the appropriation of taxes, and not the imposition of taxes, it is not relevant to this appeal.

Per McLachlin and Binnie JJ.: As found by Major J., the probate "fee" imposed under O. Reg. 293/92 is in reality a tax which is ultra vires s. 5 of the Administration of Justice Act. The interpretation of s. 5 is not assisted by the legislative history of the probate fee under different and more specialized enactments. Section 5 does not contemplate a fee based on the size of the bank account of the person or estate requesting a service or initiating an action as opposed to the cost, however broadly calculated, of providing or administering same. However, Major J. was disagreed with in his conclusion that the tax is unconstitutional by virtue of non-compliance with s. 53 of the Constitution Act, 1867, which applies to the province by virtue of s. 90. Section 53 requires that money bills originate in the House of Commons. The analysis of Major J. reads the word "bills" out of the section, and takes the section out of the context of the series of sections in the Constitution Act, 1867 of which it forms a part. Section 53 addresses a state of affairs prior to any "legislation" coming into existence. Regulation 293/92 is not, and never was, a "bill". General principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text.

Per Gonthier and Bastarache JJ. (dissenting): While the probate fee is a tax, and a direct tax within the legislative authority of the province, it is not invalid on the ground that it was imposed by a body other than the legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the Constitution Act, 1867. The purpose of s. 53 is to provide that bills concerning taxation originate in the House of Commons rather than the Senate. With the abolition of bicameral legislatures in the provinces, s. 53 no longer has significance at the provincial level. Even if s. 53 of the Constitution Act, 1867 continues to apply to the provinces, the fact that the legislature has authorized the executive to prescribe fees in the form of a tax does not violate s. 53. The tax in the form of probate fees is imposed by s. 5 of the Administration of Justice Act. This Act was introduced in the Legislative Assembly of Ontario and therefore cannot violate s. 53. All that the legislature has done is delegate to the Lieutenant Governor in Council the authority to provide for the details of the tax through regulation. The provincial legislature is entitled to delegate taxing powers to its subordinate bodies, including the Lieutenant Governor in Council. Section 54 of the Constitution Act, 1867 is not relevant to this appeal. Moreover, the probate fees are authorized under s. 5 of the Administration of Justice Act. According to the ordinary rules of interpretation, including the legislative history of the impugned provision, s. 5(c) of the Administration of Justice Act, which authorizes the Lieutenant Governor in Council to prescribe fees in respect of proceedings in any court, is broad enough to authorize the Lieutenant Governor in Council to impose a direct tax on persons applying for probate.

Cases Cited

By Major J.

Distinguished: Cotton v. The King, [1914] A.C. 176; referred to: Lawson v. Interior Tree Fruit and

Vegetable Committee of Direction, [1931] S.C.R. 357; Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371; Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929; The King v. National Fish Co., [1931] Ex. C.R. 75; Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198; Air Canada v. British Columbia, [1989] 1 S.C.R. 1161.

By Binnie J.

Referred to: Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

By Bastarache J. (dissenting)

Hodge v. The Queen (1883), 9 App. Cas. 117; Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708; Irving Oil Ltd. v. Provincial Secretary of New Brunswick, [1980] 1 S.C.R. 787; Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371; Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929; Procureur général du Canada v. Compagnie de Publication La Presse, Ltée, [1967] S.C.R. 60.

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Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof, S.U.C. 1793, 33 Geo. 3, c. 8.
Administration of Justice Act, R.S.O. 1990, c. A.6, s. 5.
Constitution Act, 1867, ss. 53, 54, 90, 92(2), (14).
Constitution Act, 1982, ss. 45, 52(1).
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APPEAL from a judgment of the Ontario Court of Appeal (1997), 31 O.R. (3d) 777, 96 O.A.C. 354, [1997] O.J. No. 101 (QL), affirming a decision of the Ontario Court (General Division) (1994), 20 O.R. (3d) 385, 5 E.T.R. (2d) 304, [1994] O.J. No. 2570 (QL), dismissing the appellant's application for a declaration that the imposition of an ad valorem levy for grants of letters probate was unlawful. Appeal allowed, Gonthier and Bastarache JJ. dissenting.

Peter W. Hogg, Q.C., Peter T. Fallis, and J. Gregory Richards, for the appellant.
Tanya Lee, for the respondents.
Monique Rousseau, for the intervener the Attorney General of Quebec.
George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.
Robert J. Normey, for the intervener the Attorney General for Alberta.

Solicitors for the appellant: Fallis, Fallis & McMillan, Durham, Ont.
Solicitor for the respondents: The Ministry of the Attorney General, Toronto.
Solicitors for the intervener the Attorney General of Quebec: Monique Rousseau and André Gaudreau, Sainte-Foy.
Solicitor for the intervener the Attorney General of British Columbia: The Ministry of Attorney General, Victoria.
Solicitor for the intervener the Attorney General for Alberta: The Alberta Department of Justice, Edmonton.

The judgment of Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Major JJ. was delivered by

1 MAJOR J.:-- At issue in this appeal is whether the province of Ontario acted within its legislative authority in imposing an ad valorem levy for grants of letters probate.

I. Facts

2 The appellant is the executor of her late husband's estate. The total value of the estate was $414,000 which, pursuant to s. 2(1) of O. Reg. 293/92, subsequently amended by O. Reg. 802/94, required payment of $5,710 in probate fees in order to obtain letters probate. The regulation was purported to be under the authority of the Administration of Justice Act, R.S.O. 1990, c. A.6.

3 The appellant applied to the Ontario Court (General Division) for an order that she be issued letters probate without payment of the probate fee and for a declaration that the regulation which required that payment was unlawful. The application and subsequent appeal to the Ontario Court of Appeal were both dismissed.

II. Judicial History

A. Ontario Court (General Division) (1994), 20 O.R. (3d) 385

4 Morrison J., in assessing the probate charge, held that the difference between a fee and a tax is that a tax is compulsory, while a fee is only required to be paid where one seeks the services for which it is imposed. In concluding that the charge for probate is a fee and not a tax, he held that probate fees lack the universal application characteristic of a tax. In certain circumstances, executors can administer and distribute the bequest of a deceased without applying for a grant of probate. Also, living persons can arrange their affairs so that there is no necessity for probate. Morrison J. also held that "sliding scale" fees can be supported as ancillary or adhesive to a valid provincial regulatory scheme.

5 In rejecting the appellant's submission that the Administration of Justice Act does not authorize escalating fees as prescribed by the Regulations, Morrison J. held that the language used in s. 5(c) of the Act, together with the long history of similarly worded statutes providing for escalating probate fees, demonstrated the intention of the legislature to authorize volumetric fees. He therefore dismissed the application.

B. Ontario Court of Appeal (1997), 31 O.R. (3d) 777

6 Morden A.C.J.O. held that, in light of the legislative evolution of the probate fee system in Ontario, the ad valorem fee structure imposed by the Regulations is properly authorized by s. 5(c) of the Administration of Justice Act and is not a revenue-generating device enacted for a purpose not authorized by the Act.

7 He also held that the charge for probate is a fee and not a tax. A tax is a levy which is enforceable by law, imposed under the authority of the legislature by a public body, and made for a public purpose: Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357, at p. 363. Although the fee is compulsory and therefore enforceable by law, Morden A.C.J.O. found that it is legislation in relation to s. 92(14) of the Constitution Act, 1867 and is not aimed at raising a revenue under s. 92(2). Thus, the charge for probate did not meet all the requirements of a tax.

8 Morden A.C.J.O. held that the question of whether the taxing power could be delegated to the Lieutenant Governor in Council pursuant to ss. 53 and 54 of the Constitution Act, 1867 did not arise because the fees in question are not taxes. He concluded that even if the fees were considered to be taxes, they were ingredients of a regulatory scheme not covered by ss. 53 and 54. The appeal was dismissed.

III. Issues

9 On November 27, 1997, the Chief Justice stated the following constitutional questions:

1. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it is an indirect tax that is outside the legislative authority of the province of Ontario under s. 92(2) of the Constitution Act, 1867?
2. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it was imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the Constitution Act, 1867?

IV. Relevant Constitutional, Statutory and Regulatory Provisions

A. Constitutional Provisions

10 Constitution Act, 1867

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
>
> 54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.
>
> 90. The following Provisions of this Act respecting the Parliament of Canada, namely, -- the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, -- shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here

re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next here-inafter enumerated; that is to say, --

. . .

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

. . .

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Constitution Act, 1982

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

B. Statutory Provisions

11 Administration of Justice Act, R.S.O. 1990, c. A.6

5. The Lieutenant Governor in Council may make regulations,

(a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
(b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;
(c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

C. Regulations

12 Ontario Regulation 293/92 (pursuant to the Administration of Justice Act, R.S.O. 1990, c. A.6, s. 5)

2. -- (1) The following fees are payable in estate matters:

1. For a grant of probate, administration or guardianship, not being a double probate, cessate grant or administration de bonis non administratis.

i. on the first $50,000 of the value of the estate being administered, per thousand dollars or part thereof $ 5.00
ii. on the portion of the value of the estate being administered that exceeds $50,000, per thousand dollars or part thereof 15.00

The above section was re-enacted by O. Reg. 802/94, s. 1, which reads as follows:

2. -- (1) The following fees are payable in estate matters:

1. For a certificate of appointment of estate trustee, other than a certificate of succeeding estate trustee or a certificate of estate trustee during litigation,

i. on the first $50,000 of the value of the estate being administered, per thousand dollars or part thereof . .$ 5.00
ii. on the portion of the value of the estate being administered that exceeds $50,000, per thousand dollars or part thereof . . 15.00

V. Analysis

13 In Ontario, letters probate (now referred to as "certificate of appointment of estate trustee with a will") are issued by the Ontario Court (General Division). The purpose of probate is to certify that a will and codicils have been duly proved and registered in the court and that administration of the property of the deceased has been committed by the court to the persons named in the will as

executors. Ontario Regulation 293/92 (subsequently re-enacted as O. Reg. 802/94) sets out a schedule of ad valorem charges which must be paid in order to obtain a grant of probate. The appellant challenges the legality of those charges.

A. Is the Probate Levy a Fee or a Tax?

14 The appellant contends that the probate levy prescribed by s. 2(1) of O. Reg 293/92 is a tax rather than a fee. This distinction is important because a tax may be either direct or indirect, and pursuant to s. 92(2) of the Constitution Act, 1867, a province only has jurisdiction to impose a direct tax. Conversely, a province may charge a fee, regardless of whether it is an indirect tax, provided that it is validly enacted under a provincial head of power other than the taxing power: see Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371, at p. 412, and Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929, at p. 988.

15 Whether a levy is a tax or a fee was considered in Lawson, supra. Duff J. for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.

16 The first, third and fourth criteria pertain to the nature of the levy, while the second criterion involves a consideration of the manner in which the levy was imposed. In this appeal the first concern is identifying the nature of the probate levy. The manner in which the levy was imposed will be considered later.

17 The Court of Appeal held that with respect to the first Lawson criterion the probate fee is compulsory and therefore enforceable by law. I agree. A practical compulsion usually exists for the executor to obtain probate in order to comply with his or her legal obligations. Although probate is not the foundation of the executor's title but only the authentic evidence of it, that authentication is nonetheless a practical and legal necessity in most cases, as illustrated by R. Hull and I. M. Hull in Macdonell, Sheard and Hull on Probate Practice (4th ed. 1996), at p. 188:

> Any debtor of the testator is justified in refusing to pay his debt to the executor until probate is produced. All proceedings in an action by the executor to enforce such payment will be stayed until the plaintiff obtains probate. Similarly an action to recover possession of the testator's goods, or for damages for their wrongful conversion, brought by the executor, must fail unless the executor has proved the will. In the absence of special statutory provisions to the contrary, the executor will fail whenever it is necessary to establish title as the personal representative of the deceased.

See also The Solicitor's Guide to Estate Practice in Ontario, by M. E. Rintoul (2nd ed. 1990), at pp. 35-36, wherein protection for the executor and administrative efficiency are identified as practical and legal reasons that frequently compel an executor to obtain probate. The fact that in some

instances probate may be avoided does not lessen the fact that in Ontario letters probate are the rule in virtually all estate affairs.

18 The criterion that the fee must be levied by a public body is also satisfied here as probate fees in Ontario are levied by the Ontario Court (General Division).

19 The probate levy also meets the fourth Lawson criterion for a tax as the proceeds were intended for a public purpose. The Ontario Law Reform Commission concluded in 1991 that it is difficult to discern a principled justification for ad valorem probate fees, and that "[t]he only rationale for the graduated fee schedule appears to be that it has been regarded as a suitable vehicle for raising revenue" (Report on Administration of Estates of Deceased Persons, at p. 286).

20 Those conclusions are supported by the evidence before this Court which showed that probate fees do not "incidentally" provide a surplus for general revenue, but rather are intended for that very purpose. The revenue obtained from probate fees is used for the public purpose of defraying the costs of court administration in general, and not simply to offset the costs of granting probate.

21 Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid: see G. V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution (2nd ed. 1981), at p. 72. This nexus was also considered relevant to determining the nature of a municipal charge in Allard Contractors, supra. In that case the Court engaged the question of whether an indirect tax levied by a province was validly enacted as incidental to a matter of provincial jurisdiction. Addressing the relationship between a charge and the cost of the underlying service, Iacobucci J. wrote (at p. 411):

> A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme. . . .

22 In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service. The Agreed Statement of Facts clearly shows that the procedures involved in granting letters probate do not vary with the value of the estate. Although the cost of granting letters probate bears no relation to the value of an estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service, which indicates that the levy is a tax and not a fee.

23 Having determined that the probate levy is enforceable by law, is levied by a public body, is intended for public purposes, and that no nexus exists between the amount of the levy and the cost of the service for granting letters probate, the compelling conclusion is that the probate levy as

presently enforced is a tax.

B. Is the Probate Levy a Direct or Indirect Tax?

24 Section 92(2) of the Constitution Act, 1867 confers upon the provinces the power to raise revenue for provincial purposes only by means of direct taxation: see Allard Contractors, supra, at p. 394, per Iacobucci J. It therefore has to be determined whether the probate levy is a direct or indirect tax.

25 In Principles of Political Economy (1884), Book V, ch. II, at p. 550, John Stuart Mill defined the distinction between direct and indirect taxes. That oft repeated definition has not been much improved upon and is frequently referred to by courts in determining whether a levy is direct or indirect:

> A direct tax is one which is demanded from the very persons 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. . . .

26 Applying Mill's definition, the tax would be indirect if the executor was personally liable for payment of probate fees, as the intention would clearly be that the executor would recover payment from the beneficiaries of the estate. However, the legislation does not make the executor personally liable for the fees. Payment is made by the executor only in his or her representative capacity. As a result, this case is readily distinguishable from Cotton v. The King, [1914] A.C. 176 (P.C.), where the succession duty was intended to be paid by one person and recouped from another. Here, as the amount is paid out of the estate by the executor in his or her representative capacity with the intention that the estate should bear the burden of the tax, the probate fees fall within Mill's definition of direct tax. The probate levy does not fall within the more expansive definition of an "indirect tax" in Allard Contractors, per Iacobucci J., at p. 396.

27 Thus, although the probate levy is properly characterized as a tax and not a fee, it is a direct tax and therefore intra vires the province pursuant to s. 92(2) of the Constitution Act, 1867. As a result there is no need to consider whether it would survive as an indirect tax on the basis that it was ancillary to a valid regulatory scheme. Such a result in any event is doubtful on the facts.

C. Did the Implementation of the Probate Tax Violate Sections 53 or 54 of the Constitution Act, 1867?

28 While the Ontario legislature has the authority to implement a direct tax, it must do so in accordance with the requirements set out in the Constitution. Section 53 of the Constitution Act, 1867 mandates that bills for imposing any tax shall originate in the House of Commons. By virtue of s. 90 of the Constitution Act, 1867, s. 53 is rendered applicable to the provinces. Thus, all provincial bills for the imposition of any tax must originate in the legislature.

29 To date, s. 53 has been the subject of only limited academic and jurisprudential discussion. It has been suggested that the purpose of s. 53 is to prevent the introduction of taxation legislation in the Senate, and that with the abolition of bicameral legislatures in the provinces it has become redundant: see, e.g., W. H. McConnell in Commentary on the British North America Act (1977), at p. 132.

30 In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.

31 In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax ab initio without the authorization of the legislature. As Audette J. succinctly stated in The King v. National Fish Co., [1931] Ex. C.R. 75, at p. 83, "[t]he Governor in Council has no power, proprio vigore, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament."

32 The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation. As E. A. Driedger stated in "Money Bills and the Senate" (1968), 3 Ottawa L. Rev. 25, at p. 41:

> Through the centuries, the principle was maintained that taxation required representation and consent. The only body in Canada that meets this test is the Commons. The elected representatives of the people sit in the Commons, and not in the Senate, and, consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.

33 The conclusion that s. 53 continues to be binding upon the provinces is supported by the fact that the applicability of s. 53 to the provinces was not removed when the Constitution was amended in 1982, even though bicameral legislatures had ceased to exist at the provincial level by that time.

34 Section 53 is a constitutional imperative that is enforceable by the courts. A contrary opinion was expressed in Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, where Pigeon J. for the majority commented in obiter that ss. 53 and 54 are not entrenched in the Constitution and can be indirectly amended through inconsistent legislation. Those comments, however, were made before the passage of the 1982 amendments to the Constitution.

35 By virtue of s. 45 of the Constitution Act, 1982, the legislature of each province retains the discretion to exclusively make laws amending the constitution of the province. That power must be

read in association with s. 52(1) of the Constitution Act, 1982, which stipulates that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Subsection 52(1) effectively requires any provincial legislation that seeks to amend the constitution of the province to do so expressly: see J. Small in "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995), 27 Ottawa L. Rev. 33, at p. 50. Otherwise, the legislation is liable to being struck down on the basis that it is inconsistent with the Constitution.

36 Nothing in the Administration of Justice Act purports to amend the constitutional requirement for imposing tax legislation set out in s. 53. The Ontario legislature did not delegate to the Lieutenant Governor in Council the authority to impose a tax. Therefore whether it could constitutionally do so does not need to be addressed. The only power conferred by s. 5 of the Act was to make regulations regarding the payment of fees, not the imposition of taxes. Yet the probate fees in this instance are in substance a tax imposed by the Lieutenant Governor in Council without having originated in the legislature. While the legislature of Ontario may well be competent to establish probate taxes under the terms of the Administration of Justice Act, s. 53 requires that they do so explicitly. Since s. 53 was not expressly amended, the province was obliged to abide by its terms. Its failure to do so renders the probate tax imposed under O. Reg. 802/94 (previously O. Reg. 293/92) unconstitutional. The unconstitutionality of the impugned legislation is an important reminder of the fact that the imposition of a tax has both political and legal dimensions which require the legislature to act carefully if the tax is to be successfully implemented.

37 The appellant also challenges the validity of the probate tax on the ground that it violates s. 54 of the Constitution Act, 1867. However, since s. 54 concerns the appropriation of taxes, and not the imposition of taxes (see Small, supra, at p. 40), it is not relevant to this appeal.

D. Is the Probate Levy Authorized by Section 5 of the Administration of Justice Act?

38 Regardless of whether s. 53 was complied with, or even if s. 53 is considered redundant at the provincial level, the probate levy is not enforceable as it was not authorized by s. 5 of the Administration of Justice Act. Section 5 reads:

> 5. The Lieutenant Governor in Council may make regulations,
>
> (a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
> (b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;
> (c) requiring the payment of fees in respect of proceedings in any court

and prescribing the amounts thereof.

39 While these provisions authorize the Lieutenant Governor in Council to impose fees, they do not constitute an express delegation of taxing authority. Whether the province may delegate its taxing authority was not fully argued before this Court, is obiter in the result, and should be considered only when the issue has been raised in the courts below. Of relevance to this appeal is that the Act clearly does not authorize the imposition of a tax, albeit direct.

40 The constitutional requirement for a clear and unambiguous authorization of taxation within the enabling statute also provides the reply to Bastarache J.'s concerns. Once it has been determined that the probate fees levied by the impugned regulation are a direct tax, the question is whether the Administration of Justice Act, and the action of the Lieutenant Governor in Council in enacting O. Reg. 293/92, fulfil the legal and constitutional requirements for the imposition of a tax. Section 53 constitutionally mandates the court to strictly construct enabling legislation, such as s. 5 of the Administration of Justice Act, when determining whether it properly creates a taxation power. This simply strengthens the general principle of interpretation that "[i]f Parliament wants to give the Executive or some administrative agency the power to raise a tax by regulation, it must do so in a specific and unequivocal provision" (R. Dussault and L. Borgeat, Administrative Law: A Treatise (2nd ed. 1985), vol. 1, at p. 445).

41 Bastarache J. states that the authorization extended to the Lieutenant Governor in Council in the Administration of Justice Act to prescribe fees "includes the power to implement a direct tax" (para. 60). With respect, this conclusion cannot be sustained. The distinction between these two forms of charges cannot be erased by simply interpreting the word "fees" to include taxes. This distinction is both legally and constitutionally significant to determining the validity of the enactment. As s. 53 of the Constitution Act, 1867, Standing Order 56 of the Ontario legislature, and the general law on construction of taxing statutes all demonstrate, the imposition of taxes is an act of unique political significance, subject to special rules and requirements, none of which the impugned scheme meets. Ontario Regulation 293/92 is both unconstitutional and ultra vires as it seeks to impose a tax without clear and unambiguous authorization from the legislature to do so.

42 The appellant also argued that s. 5 does not authorize the imposition of ad valorem probate fees. Given my conclusion that the probate levy is a tax and not a fee, it is not necessary to address this issue. I would add, though, that the wording of the Act does not appear to restrict the type of fee that may be imposed provided that it possesses the characteristics of a fee, including inter alia the existence of a nexus between the amount charged and the cost of the service provided.

E. Disposition and Remedy

43 Section 52(1) of the Constitution Act, 1982 provides that the Constitution is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. The probate fee levied by O. Reg. 293/92 is in substance a direct tax which has not been imposed in accordance with the requirements of s. 53 of the

Constitution Act, 1867. Thus the regulation is invalid and of no force or effect.

44 An immediate declaration of invalidity would deprive the province of the revenue derived from probate fees, with no opportunity to remedy the legislation or find alternative sources of funding. Probate fees have a lengthy history in Ontario, and the revenue derived therefrom is substantial. For example, the evidence presented to this Court indicated that in 1993 and 1994, probate fees collected in Ontario totalled $51.8 million and $52.6 million, respectively. This revenue is used to defray the costs of court administration in the province. An immediate deprivation of this source of revenue would likely have harmful consequences for the administration of justice in the province. The declaration of invalidity is therefore suspended for a period of six months to enable the province to address the issue.

45 The final issue is whether the appellant is entitled to a refund of the probate fees of $5,710 paid by her as executor for her late husband's estate.

46 In Air Canada v. British Columbia, [1989] 1 S.C.R. 1161, La Forest J. for three of the six members of the Court held that there is a general rule against recovery of taxes paid under unconstitutional statutes, with exceptions where the relationship between the state and a particular taxpayer resulting in the collection of the tax is unjust or oppressive in the circumstances.

47 Even if this Court were to adopt the rule articulated by La Forest J., it would not prevent recovery by the appellant in this case. An exception has been recognized where taxes are paid under compulsion or protest: Air Canada, supra, at pp. 1209-10. Here, the appellant has challenged the validity of the regulation imposing the probate fee from the outset. She paid the fee in order to fulfil her legal obligations as executor of the estate only after the Ontario Court (General Division) held that the regulation was legally valid. Had the proper decision been rendered at first instance, the appellant would not have paid the fee. It would therefore be inequitable to deny recovery at this stage.

48 The appeal is accordingly allowed with costs and the appellant refunded the $5,710 paid by her.

49 For the reasons given, I would answer the constitutional questions as follows:

1. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it is an indirect tax that is outside the legislative authority of the province of Ontario under s. 92(2) of the Constitution Act, 1867?

Answer: No.

2. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it was imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the Constitution Act, 1867?

Answer: Yes.

The reasons of Gonthier and Bastarache JJ. were delivered by

50 BASTARACHE J. (dissenting):-- This appeal concerns the validity of the fees set for probate by the legislature of Ontario through Regulation 293/92, which was enacted pursuant to s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6. The facts and the issues have been set out in the reasons of Major J. and I will not repeat them.

51 I have read the reasons of my colleagues Major and Binnie JJ. and in a number of aspects, I cannot, with respect, agree with their approaches. I accept Major J.'s characterization of the probate fee as a tax and I accept that it is a direct tax within the legislative authority of the province. I do not, however, agree that the probate fee is invalid on the ground that it was imposed by a body other than the legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54 of the Constitution Act, 1867). Moreover, I do not accept Major and Binnie JJ.'s conclusion that the probate fees are not authorized under s. 5 of the Administration of Justice Act.

Sections 53 and 54 of the Constitution Act, 1867

52 Sections 53 and 54 of the Constitution Act, 1867, which are made applicable to the provincial legislature by virtue of s. 90 of the Act, provide as follows:

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
>
> 54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

53 The appellant argued that s. 53 of the Constitution Act, 1867 requires that any bill that appropriates public revenue or imposes any tax must originate in the Legislative Assembly. With respect to s. 54, the appellant argued that it prohibits the Legislative Assembly from adopting or passing such a bill unless it has been recommended to the Legislative Assembly by message of the Lieutenant Governor.

54 Major J., in his reasons, states that the rationale underlying s. 53 of the Constitution Act, 1867 is to prohibit any body other than the legislature from imposing a tax on its own accord. The purpose of s. 53 of the Constitution Act, 1867, in my view, is to provide that bills concerning taxation originate in the House of Commons rather than the Senate. The section was enacted because of a concern in English history about taxation bills being introduced in the House of Lords rather than in the Commons. With the abolition of bicameral legislatures in the provinces, s. 53 no longer has significance at the provincial level (W. H. McConnell, Commentary on the British North America Act (1977), at pp. 105-6 and 131-32; W. R. Anson, The Law and Custom of the Constitution (3rd ed. 1897), Part 1, at pp. 265-68).

55 Even if s. 53 of the Constitution Act, 1867 continues to apply to the provinces, the fact that the legislature has authorized the executive to prescribe fees in the form of a tax does not violate s. 53 of the Constitution Act, 1867. The tax in the form of probate fees is imposed by s. 5 of the Administration of Justice Act. This Act was introduced in the Legislative Assembly of Ontario and therefore cannot violate s. 53 of the Constitution Act, 1867. All that the legislature has done is delegate to the Lieutenant Governor in Council the authority to provide for the details of the tax through regulation. The provincial legislature is entitled to delegate taxing powers to its subordinate bodies, including the Lieutenant Governor in Council (Hodge v. The Queen (1883), 9 App. Cas. 117 (P.C.), at pp. 131-33; Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708 (P.C.), at p. 722; Irving Oil Ltd. v. Provincial Secretary of New Brunswick, [1980] 1 S.C.R. 787).

56 I agree with Major J. that s. 54 of the Constitution Act, 1867 is not relevant to this appeal. Section 54 requires that bills relating to the appropriation of taxes (supply bills) be accompanied by a royal recommendation. The only bills that are guaranteed to the executive under s. 54 of the Constitution Act, 1867 are true appropriation bills.

Section 5 of the Administration of Justice Act

57 Section 5 of the Administration of Justice Act provides as follows:

> 5. The Lieutenant Governor in Council may make regulations,
>
> (a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
> (b) providing for the payment of fees and allowances by Ontario

in connection with services under any Act for the administration of justice and prescribing the amounts thereof;

(c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

58 Having found that the probate fee enacted pursuant to s. 5 of the Administration of Justice Act is in reality a direct tax imposed by the province through its delegate, the Lieutenant Governor in Council, the issue to be decided at this stage is whether s. 5 of the Administration of Justice Act authorizes the imposition of the fee structure found in Regulation 293/92. In finding that the probate fee is a direct tax, it has been determined that the probate fee is (1) enforceable by law; (2) levied by a public body; and (3) intended for a public purpose (reasons of Major J., at paras. 17-20).

59 In determining whether or not the probate fee, as a direct tax, is authorized under the Administration of Justice Act, it is not necessary to conduct an analysis of whether a nexus exists between the quantum charged and the cost of the service. It is only because variable fees are indirect in their general tendency that the nexus argument is normally raised (see Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371, at pp. 398 and 402; see also Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929, at para. 53). In Allard and Home Builders', the nexus between the fee and the value of the service provided arose in the context of indirect taxes, which would only be valid if ancillary to a valid regulatory scheme. It is noted in Home Builders', at para. 53, that "[a]ny power of indirect taxation extending beyond regulatory costs would indeed render s. 92(2) [Direct Taxation] meaningless". It has long been accepted that there is no constitutional prohibition against a direct tax that is variable and designed to defray the costs of a regulation (see Shannon v. Lower Mainland Dairy Products Board, supra, at p. 721). As Professor La Forest (as he then was) stated in The Allocation of Taxing Power Under the Canadian Constitution (2nd ed. 1981), quoted in Home Builders', supra, at para. 52: "there is no doubt that direct taxation may be raised under section 92(2) even though it is framed in the form of a licence". The sole issue here is whether s. 5 of the Administration of Justice Act is broad enough to authorize this direct tax, not whether there is a nexus between the tax and the probate service, as would be required if the tax was indirect.

60 In my view, according to the ordinary rules of interpretation, including the legislative history of the impugned provision as thoroughly described by Morden A.C.J.O. in the Court of Appeal, s. 5(c) of the Administration of Justice Act is broad enough to authorize the Lieutenant Governor in Council to impose a direct tax on persons applying for probate. It authorizes the Lieutenant Governor in Council to prescribe fees in respect of proceedings in any court. This includes the power to implement a direct tax on applications for probate. The language of the section does not require that the fees be in proportion to services rendered. There is no exclusion of an "ad valorem" fee structure (Procureur général du Canada v. Compagnie de Publication La Presse, Ltée, [1967] S.C.R. 60).

61 The powers of a provincial legislature cannot be limited except by the Constitution. The

province of Ontario authorized the Lieutenant Governor in Council, through s. 5 of the Administration of Justice Act, to implement a direct tax in respect of court proceedings. The Lieutenant Governor in Council validly prescribed the amount for this tax and the method of payment through the taxing of applications for letters probate pursuant to Regulation 293/92. Accordingly, I would dismiss the appeal with costs.

The reasons of McLachlin and Binnie JJ. were delivered by

62 BINNIE J.:-- I agree with Justice Major's conclusion that Ontario's probate "fee" is in reality a tax, albeit a direct tax within the legislative authority of the province. I also agree with his proposed disposition of the appeal. I differ, however, from his conclusion that the probate tax imposed under O. Reg. 293/92 (now 802/94) is unconstitutional by virtue of non-compliance with s. 53 of the Constitution Act, 1867. I prefer to rest my conclusion on his alternative ground that O. Reg. 293/92 is ultra vires s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6.

63 The legislative power of the province is sovereign except as limited by the Constitution itself, including limitations flowing from the federal-provincial division of powers, and the Canadian Charter of Rights and Freedoms. In the absence of a constitutional prohibition, the legislature has power to authorize a tax structure of its own choosing, and for which it will be politically accountable, including a tax to be prescribed by the Lieutenant Governor in Council. I do not construe s. 53 of the Constitution Act, 1867 as constituting such a prohibition.

64 Major J. rightly observes at para. 31 that:

> In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax ab initio without the authorization of the legislature.

It seems to me this leads to a straightforward question of whether the regulation is ultra vires s. 5 of the Administration of Justice Act. There is no need to look to the constitutional subtleties of s. 53, which provides:

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Section 53 appears under the heading "Money Votes; Royal Assent" in a series of five sections dealing with various aspects of the relationships among the House of Commons, the Senate and the Crown. These provisions are made applicable to the provinces by s. 90. Section 53 requires that money bills originate in the House of Commons. Regulation 293/92 is not, and never was, a "bill". It is a regulation that was prescribed by the Lieutenant Governor in Council. Bills arise only as part of the legislative process in the House of Commons or the Senate.

65 My colleague advances the proposition in para. 32 that:

> The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. [Emphasis added.]

66 Again, in para. 40, he argues that s. 53 "constitutionally mandates the court to strictly construct enabling legislation". In my view, respectfully, this analysis reads the word "bills" out of the section, and takes the section out of the context of the series of sections of which it forms a part. Section 53 addresses a state of affairs prior to any "legislation" coming into existence. It is explicitly related to legislative procedure and there is nothing that I can see in its text to justify concluding that its "basic purpose" is the constitutional entrenchment of a principle of "strict construction" of legislation, delegated or otherwise. Regardless of the attraction of my colleague's broad rationale of promoting "parliamentary control over, and accountability for, taxation" (para. 32), I do not think the Court can facilitate achievement of the objective by rewriting s. 53. As the Court recently affirmed in Reference re Secession of Quebec, [1998] 2 S.C.R. 217, implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text.

67 I do, however, agree with Major J. that O. Reg. 293/92 is ultra vires s. 5 of the Administration of Justice Act, and would like to add a comment about the respondents' use of legislative history to support the government position. The respondents emphasized the historical evolution of probate fees in Ontario from 1793 until the present, and related the present fee structure to provisions in the Estates Act, R.S.O. 1990, c. E.21, having a bearing on probate fees. It is argued that it would be reasonable to infer from this historical context that the legislature of Ontario intended by s. 5 to continue the authority of the Lieutenant Governor in Council to impose escalating ad valorem probate fees. Leaving aside the taxation issue, the difficulty with relying on legislative history in this case is that the context has changed. The statutory authority no longer exists in an Act dealing with a court exercising a specialized estates jurisdiction. Section 5 of the Administration of Justice Act, unlike sections of the Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof, S.U.C. 1793, 33 Geo 3, c. 8, and subsequent versions of the Surrogate Courts Acts, does not have a narrow focus. Section 5(a) authorizes fees "for any thing required or authorized under any Act to be done by any person in the administration of justice" (emphasis added), s. 5(b) allows fees to be prescribed "in connection with services under any Act for the administration of justice" (emphasis added), and s. 5(c) allows fees to be prescribed "in respect of proceedings in any court" (emphasis added). The words "for", "in connection with" and "in respect of" are words of very broad signification, and the obligation to pay the prescribed fee can be in relation to an enormous variety of "things", "services", and "proceedings". If s. 5(c), for example, validly authorizes escalating ad valorem fees for probate, it must equally authorize escalating ad valorem type fees "in respect of" other court proceedings. The 200-year legislative history of probate fees does not, therefore, justify an interpretation of the new and more generalized power to prescribe fees in s. 5 of the Administration of Justice Act beyond the sort of "fees" that the text of s. 5 would otherwise support.

68 It is implicit in the notion of "fee for service" that there is, somewhere, a cost base that is

somehow connected to the provision of the relevant service and is to be allocated amongst users. The New Shorter Oxford English Dictionary, vol. 1, at p. 928, includes in its definition of "fee" a "sum payable to a public officer in return for the execution of relevant duties". The Court of Appeal accepted as appropriate in this regard the costs of operating the entire Ontario Court (General Division). The respondents seem to suggest that all users of the Ontario Court (General Division) are being subsidized by the government treasury and that some users cannot complain if they are subsidized less than other users. The record is singularly bare of any accounting data in this regard. In any event, as a matter of ordinary statutory interpretation, s. 5 cannot reasonably be construed as authorizing a fee for "things", "services" or "proceedings" based on the size of the bank account of the person seeking them rather than the cost of their delivery -- however broadly the cost of such things, services or proceedings may be defined.

69 In short, the Ontario legislature may delegate the power to prescribe an escalating ad valorem probate tax to the Lieutenant Governor in Council but it must do so in clear and unambiguous language. The present section authorizes the Lieutenant Governor in Council to prescribe fees, and unless and until the section is amended the charge to users for the relevant service must have some reasonable relationship to the cost of the provision of that service.

Appeal allowed with costs, Gonthier and Bastarache JJ. dissenting.

cp/d/hbb

Indexed as:

Lawson v. Interior Tree Fruit and Vegetable Committee of Direction

A.C. Lawson (Plaintiff), Appellant; and
Interior Tree Fruit and Vegetable Committee of Direction (Defendant), Respondent; and
The Attorney-General of Canada, Intervenant.

[1931] S.C.R. 357

Supreme Court of Canada

1930: October 7, 9 / 1931: February 16.

Present: Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law -- Produce Marketing Act of B.C. -- Ultra vires -- Legislation within Dominion power -- Trade and Commerce -- Levy imposed s. 10(k) -- Whether levy a tax -- Direct or indirect taxation -- Licence -- B.N.A. Act, ss. 91(2), 92(2), 92(9) -- Produce Marketing Act, B.C., 1926-1927, c. 54, ss. 2, 3, 10(1), 10(k), 15, 16, 20 -- Amending Act, (1928) B.C., c. 39.

By section 3 of the Produce Marketing Act of British Columbia (1926-27), c. 54 a "Committee of Direction" was constituted, "with the exclusive power to control and regulate (under the Act) the marketing of all tree fruits and vegetables ..., being products grown or produced in that portion of the province contained within" boundaries therein specified. By section 10(1), it was provided that, "for the purpose of controlling and regulating, under this Act, the marketing of any product within its authority (the) Committee shall, so far as the legislative authority of the province extends, have power to determine at what time and in what quantity, and from and to what places, and at what price the product may be marketed, and to make orders and regulations in relation to such matters." By section 10(k), the committee was also given the power "for the purpose of defraying the expenses of operation, to impose levies on any product marketed." By subsection 3 of section 16, as enacted by the Amendment Act of 1928, c. 39, it was provided that "the committee may fix licence fees to be paid by shippers."

Held that this legislation is ultra vires of the provincial legislature.

Per Duff, Newcombe, Rinfret and Lamont JJ. -- Such legislation is referable to the exclusive Dominion power to regulate trade and commerce. (Section 91 (2) B.N.A. Act.)

Newcombe J. however is careful expressly to reserve the position that the legislation would also be ultra vires of the province even if not within any of the Dominion enumerated powers.

Per Duff, Rinfret and Lamont JJ. -- The provisions of the statute, which authorize the committee to impose levies and to fixe licence fees are ultra vires, the levy not being within section 92(2) and the licence not being within section 92(9) of the B.N.A. Act.

Per Cannon J. -- The levy is an export tax falling within the category of duties of customs and excise and, as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the provincial legislature.

APPEAL from the decision of the Court of Appeal for British Columbia, affirming the judgment of the trial court, Murphy J. [(1930) 42 B.C. Rep. 493; [1930] W.W.R. 23.], and dismissing the appellant's action.

The action was brought at Grand Forks, on the 9th of August, 1929, by the appellant, a fruit rancher and shipper of fruit against the respondent, the Committee of Direction, claiming that the Produce Marketing Act was ultra vires, and for a declaration that he was under no obligation to obtain a licence from the Committee of Direction or to pay levies imposed or to otherwise observe the rules, regulations and orders passed by the Committee under the Produce Marketing Act, and for an injunction restraining the Committee from collecting such licence fees and levies or otherwise restricting the appellant from marketing the fruit and vegetables grown by him, and also for an injunction restraining the Committee from enforcing the general regulations passed by it and for damages. The action was brought as a test case for the purpose of determining whether or not the Produce Marketing Act was intra vires of the legislature of the province of British Columbia. The action was tried before the Honourable Mr. Justice Murphy at Vancouver on the 6th of March, 1930, who dismissed the appellant's action on the 11th of March, 1930. The appellant then appealed to the Court of Appeal for British Columbia which affirmed the judgment of the trial judge. The appellant obtained special leave to appeal to the Supreme Court of Canada on the 12th of September, 1930. The Attorney-General of Canada was granted leave to intervene before the Supreme Court of Canada.

H.S. Wood K.C. and C.F.R. Pincott, for the appellant. H.B. Robertson K.C., for the respondent. F.P. Varcoe, for the intervenant.

Solicitors for the appellant: Pincott & Pincott. Solicitors for the respondent: T.G. Norris. Solicitors

for the intervenant: W.S. Edwards.

The judgments of Duff, Rinfret and Lamont JJ. were delivered by

DUFF J.:-- The appellant, who is the plaintiff in the action giving rise to the appeal, claims a declaration that the respondent is not possessed of the authority which it is professing to exercise in control of the marketing outside the province of tree fruits and vegetables grown or produced within a defined area in British Columbia, over which the respondent professes to exercise jurisdiction.

By the Produce Marketing Act (s. 3), which was passed in 1927, there was constituted a Committee of Direction, under the name which the respondent bears, with "exclusive power to control and regulate" under the Act,

> the marketing of all tree fruits and vegetables (including tomatoes and melons), being products grown or produced in that portion of the province contained within

specified boundaries including what is described as the Grand Forks district, where the appellant has been for some years a fruit rancher and shipper. Two of the members of the Committee are selected by the Growers and Shippers Federation of British Columbia, which is a society of fruit growers and shippers incorporated under the Societies Act, while the third member of the Committee, the chairman, is named by the Lieutenant Governor in Council. The powers of the Committee are set forth in general terms, in the first paragraph of s. 10(1) which reads thus:

> 10. (1). For the purpose of controlling and regulating, under this Act, the marketing of any product within its authority, a Committee shall, so far as the legislative authority of the Province extends, have power to determine whether or not and at what time and in what quantity and from and to what places and at what price and on what terms the product may be marketed and delivered and to make orders and regulations in relation to such matters.

Then follows a series of sub-paragraphs, in which are more specifically described functions and powers: to estimate the quantity of any product to be available for marketing and at what times and places; to fix the quantities which may from time to time be marketed at any place by a shipper; to fix the place or places from which any such product may be delivered or dispatched for marketing; to make arrangements for carriage from time to time; to set minimum and maximum prices for any such product; to require returns; to have inspection of books and other documents; to prescribe the terms of sale of a product including the minimum brokerage which may be paid in respect thereto.

Marketing is defined as

> the buying and selling of a product and includes the shipping of a product for sale or for storage and subsequent sale and the offering of a product for sale and the contracting for the sale or purchase of a product, whether the shipping, offering or contracting be to or with a purchaser, a shipper or otherwise, but does not relate to the marketing of a product for consumption outside the Dominion and "market" has a corresponding meaning.

Having regard to this definition, it is obvious that the scope of the marketing operations affected by s. 10 does not exclude the shipping for delivery outside the province of British Columbia, or the offering or contracting for sale of the products to which the section applies to or with persons outside the province.

The Committee also has power for the purposes of defraying the expenses of operation "to impose levies on any product marketed," which levies "shall be payable at such rates and in such manner and at such times" as may be determined by the Federation. By s. 15, shippers are obliged to comply with every determination, order or regulation of the Committee, and any contract made by a shipper in violation of this provision is void. By s. 16, shippers are prohibited from doing any act "within the meaning of marketing or selling" in relation to any product "which is subject to the control and regulation" of the Committee, without having obtained a shipper's licence "to market and sell such products." By the 3rd subsection, as amended in 1928

> the Committee may fix licence fees to be paid by shippers. Shippers of car-load lots may be classified with reference to the quantity of product marketed and the fee may vary accordingly, but shall not in any case exceed twenty dollars; and in the case of other shippers the fee shall not exceed five dollars.

The Committee is also invested by the same section with authority to suspend or cancel the licence of a shipper

> for violation of this Act or of any determination, order or regulation made by it under this Act.

Marketing or selling by a shipper without a licence is an "offence against the Act," and so also is the failure of any shipper to comply with any determination, order or regulation of the Committee. The penalty for an "offence against the Act" is under s. 20, a fine not exceeding $1,000, or imprisonment for a term not exceeding one year, for an individual who is a shipper, and, for a corporation who is a shipper, a fine not exceeding $10,000.

The plaintiff's main contention on this appeal is that the respondent Committee is destitute of the powers it assumes to execute because the statute is ultra vires. This proposition is based on two general grounds. First, it is said that the substantive enactments of the statute are enactments on the

subject of "trade and commerce" within the meaning of these words as used in head 2 of s. 91 of the British North America Act; then it is said that the statute directly and substantively regulates the conduct of people outside the province and thereby purports to operate within a sphere beyond the control of the provincial legislature. Furthermore, particular provisions are attacked upon special grounds. These will be discussed.

It will not be necessary to pass upon the second of these grounds. What, if any, limitations affect the authority of a provincial legislature to determine, for the province, the legal effect, within the province, of extra-provincial acts, and to prescribe the rules of law, which, except in matters governed by s. 91, the provincial courts are to observe in controversies arising in relation to such acts, is a subject of multifarious ramifications, of great importance, and, in some respects, not free from difficulty. The prudent course would appear to be to express no opinion upon the points which have been raised within the limits of that subject in the present litigation; because in my opinion, the appeal can be determined without any reference to them. It must be understood that it is not intended to throw out or intimate any view upon any of those points.

It should perhaps be noted that the section, which defines, in general terms, the power of the Committee of Direction as a power

> to determine at what time, and in what quantity and from and to what places, and at what price the product may be marketed, and to make orders and regulations in relation to such matters,

limits, in explicit terms, the scope and operation of the power in this fashion: "so far as the legislative authority of the province extends." It has been pointed out, however, with perfect accuracy, that the section proceeds in a series of subsections to a specification of the powers with which the Committee is endowed, and that in bestowing these specified powers, the section does not, in express terms, impose any such limitation. As against this, it may no doubt be said that the specification is intended only as an exposition and elaboration of the powers embraced within the general words, and that consequently the qualification quoted affects all these specified powers. It is to be observed also that the definition of "marketing" does indisputably point to an intention that the jurisdiction of the Committee in controlling the action of shippers shall run beyond the boundaries of the province. As to that again, it may be argued, that it is within the authority of the provincial legislature, in dealing with a subject matter falling within s. 92, to legislate conditionally as well as absolutely. The legislature, although convinced of its own power to pass a given enactment, is quite competent, it may be contended, not without plausibility, to make the legal effectiveness of its enactment dependent upon the condition that the matter of it is within those classes of matters in relation to which it is competent to it to make rules of law. It is not necessary, however, to decide upon the effect of these qualifying words in s. 10, for the purpose of dealing with any branch of the appeal; and no opinion is expressed thereon. The Committee of Direction, in respect of the matters complained of by the appellant, acted systematically on the view that they possessed the powers ex facie given them by the statute, when read irrespectively of the qualifying words; and even if the

effect of them is to provide an answer to the allegation that the legislation is ultra vires, they provide no answer to the charge that, in the matters complained of, the Committee was exercising an authority it did not possess, because the legislature of British Columbia is incompetent to invest it with such authority. And, if the charge can be made good, that the Committee has been employing its ostensible powers to put into effect orders, rules and determinations to which the legislature is not competent to impart compulsory force, the appellant, in so far as they prejudice him, is entitled to a declaration to that effect.

Before proceeding to discuss the question arising in relation to head no. 2 of s. 91, I shall consider, first of all, the levies imposed upon the appellant by s. 10(k), and the demands for the payment of such levies. I think the contention of the appellant is well founded, that such levies so imposed, have a tendency to enter into and to affect the price of the product. 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. In the first place they are enforceable by law. Under s. 13 they can be sued for, and a certificate under the hand of the chairman of the Committee is prima facie evidence that the amount stated is due; and the failure of a shipper to comply with an order to pay such a levy would appear to be an offence under the Act by s. 15. Then they are imposed under the authority of the legislature. They are imposed by a public body. This Committee, of which the chairman is appointed by the Lieutenant-Governor in Council, and which is invested with wide powers of regulation and control over the fruit and vegetable industry within a great extent of territory, constituted by, and acting in every way under, the authority of the statute, exercising compulsory powers as well as inquisitorial powers of a most exceptional character, is assuredly a public authority. The levy is also made for a public purpose. When such compulsory, not to say dictatorial, powers are vested in such a body by the legislature, the purposes for which they are given are conclusively presumed to be public purposes. Indeed, when one considers the number of people affected by the orders of this Committee, and the extent of the territory over which it executes its orders and directions, it becomes evident that, in point of their potential effect upon the population of the territory and of the interest of the population in the Committee's activities, the operations of the Committee, as contemplated by the statute, greatly surpass in public importance many municipal schemes, the levies for the support of which nobody could dispute, would come under the head of taxation.

This brings us to the question whether the levies complained of are levies which can be brought under head no. 9 of s. 92. The words are these:

> Shop, saloon, tavern, auctioneer and other licences in order to the raising of a revenue for provincial, local or municipal purposes.

The question has never yet been decided whether or not the revenue contemplated by this head can in any circumstances be raised by a fee which operates in such a manner as to take it out of the

scope of "direct taxation." Prima facie, it would appear, from inspection of the language of the two several heads, 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. 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. Here, such is the primary purpose of the legislation. The imposition of these levies is merely ancillary, having for its object the creation of a fund to defray the expenses of working the machinery of the substantive scheme for the regulation of trade. Even the licence fee is discretionary with the Committee. This part of the statute would appear to be ultra vires. The levy authorized is not within s. 92(2), and the licence is not within s. 92(9).

It follows that the appellant is entitled to succeed upon that branch of his claim which affects the levies in question.

Coming now to the first ground of attack, namely, that the statute constitutes an attempt to regulate trade within the meaning of head no. 2 of s. 91. To repeat the general language of s. 10(1), the functions of the Committee are

> for the purpose of controlling and regulating the marketing of any product within its authority,

and for that purpose the Committee is empowered

> to determine whether or not and at what time, and in what quantity and from and to what places and at what price and on what terms the product may be marketed and delivered.

As I have said, the respondent Committee has attempted (in professed exercise of this authority) and in this litigation asserts its right to do so -- to regulate the marketing of products into parts of Canada outside British Columbia. It claims the right under the statute to control (as in fact it does), the sale of such products for shipment into the prairie provinces as well as the shipment of them into those provinces for sale or storage. The moment his product reaches a state in which it becomes a possible article of commerce, the shipper is (under the Committee's interpretation of its powers), subject to the Committee's dictation as to the quantity of it which he may dispose of, as to the places from which, and the places to which he may ship, as to the route of transport, as to the price, as to all the terms of sale. I ought to refer also to the provision of the statute which prohibits anybody becoming a licensed shipper who has not, for six months immediately preceding his application for a licence, been a resident of the province, unless he is the registered owner of the land on which he carries on business as shipper. In a statute which deals with trade that is largely interprovincial, this is a significant feature. It is an attempt to control the manner in which traders in other provinces, who send their agents into British Columbia to make arrangements for the

shipment of goods to their principals, shall carry out their interprovincial transactions. I am unable to convince myself that these matters are all, or chiefly, matters of merely British Columbia concern, in the sense that they are not also directly and substantially the concern of the other provinces, which constitute in fact the most extensive market for these products. In dictating the routes of shipment, the places to which shipment is to be made, the quantities allotted to each terminus ad quem, the Committee does, altogether apart from dictating the terms of contracts, exercise a large measure of direct and immediate control over the movement of trade in these commodities between British Columbia and the other provinces.

Such matters seem to constitute "matters of interprovincial concern," that is to say, of direct, substantial and immediate "concern," to the receiving province as well as to the shipping province. Otherwise you seem to denude the phrase of all meaning. No doubt the Committee also regulates the local trade in British Columbia, but the regulation of the trade with other provinces is no mere incident of a scheme for controlling local trade; it is of the essence of the statute and of the object and character of the Committee's activities. We have not here to do with any mere matter of contract or of civil status, with the right, for example, to sue in the provincial courts. Contract is no doubt involved, as the control of property is involved; but the central purpose of the legislation is to assume direct control of the trade as trade. Its aim is to regulate the producer and shipper as trader; as proprietor and contractor, it affects him directly and necessarily, but only as a means of governing him in carrying on his trade.

The scope which might be ascribed to head 2, s. 91 (if the natural meaning of the words, divorced from their context, were alone to be considered), has necessarily been limited, in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the scheme of the Act as a whole, the provinces were intended to possess. Therefore, it has been found necessary to say that this head does not comprise the regulation, by a system of licences, of a particular business within any one or within all of the provinces. But there is no lack of authority for the proposition that regulations governing external trade, that is, trade between Canada and foreign countries, as well as regulations in matters affected with an interprovincial interest, or regulations which are necessary as auxiliary to some Dominion measure relating to trade generally throughout the Dominion, and dealing with matters not falling within s. 92, such as, for example, the incorporation of Dominion companies, are within the purview of that head. In the elucidation of the words by Sir Montague Smith in Parsons case [(1881) 7 App. Cas. 96.], it is pointed out that there is a field over which the powers given by that head may operate quite consistently with the settled principle (Montreal Street Rly. Co. v. City of Montreal [[1912] A.C. p. 96.], which precludes the Dominion from interfering (in attempted exercise of the authority thereby given) with matters which are not of unquestionably Canadian interest and importance, or which are in each province of local or private interest only. Sir Montague Smith's words are these (Parson's case) [(1881) 7 A.C. 96, at 113.]:

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political

> arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province.

This passage received formal approval by the Judicial Committee in Wharton's case [[1915] A.C. 330 at 340.], where Lord Haldane said:

> Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in Citizens' Insurance Co. v. Parsons [(1881) 7 App. Cas. 96, at 112, 113.], on head 2 of s. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade.

In the Insurance case [[1916] 1 A.C. 588.], it was laid down that

> the authority of the Dominion Parliament to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces.

The distinction signalized in these cases is that indicated above, and fully expounded in Montreal Street Ry. v. City of Montreal [[1912] A.C. 96.], between what is national in its scope and concern and that which in each of the provinces is of private or local, that is to say, of provincial interest.

The judgment of Lord Haldane in the Board of Commerce case [[1922] 1 A.C. 191.], requires special examination. And, first of all, it is necessary to remember what it was the Judicial Committee was there dealing with. The Board of Commerce Act, 1919, had set up a Board endowed with most extraordinary powers, both regulative and inquisitorial, enabling it to examine minutely into the affairs of everybody, traders and non-traders alike, with the view to discovering and preventing the hoarding of the necessaries of life (as defined by the Board), or unfairness in the prices exacted from the purchasers of such commodities, and to promulgate regulations and particular orders in regard to all these things. There are few incidents of the daily economic life of private persons which the powers of the Board were not capable of reaching. These powers extended to matters of interprovincial concern, no doubt, but the predominant feature of the statute was its attempt to control matters of individual and local interest. An attempt was made to support the enactment as enacted under the residuary powers of s. 91, and also by reference to head no. 2 of the same section, Trade and Commerce. As to the first of these arguments, the contention was that, the matter of the legislation being the subjects of hoarding and fair prices, it must in the

circumstances of the time be held to have a distinct Dominion aspect, to have, that is to say, in each province, an aspect which was the concern of the Dominion as a whole, and which therefore would fall within the same category as the subject matter dealt with in Russell's case [(1881) 7 App. Cas. 829.]; that the subject matter of the legislation was not property and civil rights within the provinces, nor was it in each of the provinces substantially of local or private interest, but was strictly a matter of national concern in the sense in which those words were used in Attorney-General for Ontario v. Attorney-General for Canada [[1896] A.C. 348, at 360, 361.].

While the legislation dealt with matters which undoubtedly were of Dominion competence, it was, I repeat, mainly designed for the minute regulation of the affairs of individuals, in such a manner that, if it was to take effect, the Board established thereby might supersede the provincial legislatures in no unimportant degree. It is with reference to this state of affairs that the language which now follows must be interpreted: "It can, therefore," said Lord Haldane,

> be only under necessity, in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For, normally, the subject-matter to be dealt with in the case would be one falling within s. 92. Nor do the words in s. 91, the "Regulation of trade and commerce," if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the provincial powers under s. 92.

Lord Haldane then proceeds to refer specifically to Wharton's case [[1915] A.C. 330.], and to the Insurance case [[1916] 1 A.C. 588.]. He lays down two propositions, but these, as we shall see, do not derogate from the proposition in Wharton's case, in which the language in Parson's case [(1881) 7 App. Cas. 96.] is explicitly approved. He says nothing about it, and for a very good reason. In the Board of Commerce case [[1922] 1 A.C. 191.], he is not dealing, as we have seen, with matters that Sir Montague Smith mentions as constituting a field for the operation of the Dominion power in relation to trade and commerce, after excluding from the operation of that power matters possessing, in themselves, no immediate interprovincial concern or national concern, but possessing only a local or private interest in each of the provinces. Such matters -- matters which in the passage quoted are designated as properly within the field of s. 91(2) -- were not before the Board, because while the statute legislated upon them, its enactments included local matters also, to which, as I have said, the statute was mainly directed; and the operation of the statute in relation to the two classes of matters was so inseparable, that it must be ultra vires, as a whole, unless Dominion jurisdiction over such local matters could be maintained.

Of the two propositions, enunciated by Lord Haldane, both of which are expressed in the

affirmative, the first is that, while s. 91, head 2, was, in Wharton's case (1), held to be susceptible of lending aid to Dominion powers conferred by the general language of s. 91,

> that was because the regulation of the trading of Dominion Companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it.

The matters in respect of which head 2 was invoked in Wharton's case [[1915] A.C. 330.], and to which Lord Haldane herein refers, were not, in fact, in themselves, matters belonging to or immediately connected with the subject of interprovincial trade or that of foreign trade. They were matters connected with the exercise, within each of the provinces, by Dominion trading companies of their constitutional capacities, which they had received from the Dominion; matters which, in each of the provinces, would have fallen within the subjects described in head 13 or head 16 of s. 92, had it not been for the language of head 11, by virtue of which the provincial jurisdiction in relation to "incorporation of companies" was confined to the creation of "companies with provincial objects," and, accordingly, the subject of the incorporation of companies with "objects" other than "provincial" was relegated to the residuary capacity of the Dominion, under the reservation expressed in the general words of section 91.

The British North America Act treats a trading company created by the Dominion, under this residuary authority, as endowed with the status of an incorporated trading company in all the provinces; and its status and constitution as a corporation as being, therefore, matters not of provincial, but of direct and immediate national concern. Consequently, as Lord Haldane observes, the manner in which such trading companies shall be permitted to trade within each of the provinces acquires character as a matter of interest throughout the Dominion. Matters, otherwise of local concern only, and, so long as they continue to be so, outside the scope of head 2 of section 91, may become, in virtue of their relation to the trading activities of such companies, matters of national concern, and, in so far as they are so, subject to regulation under that head. It seems hardly necessary to observe that, here, there is nothing pointing to the conclusion that the regulative authority in respect of Trade and Commerce, in its application to matters which, in themselves, are involved in interprovincial or foreign trade, can only be invoked in aid of the execution of some power which the Dominion possesses independently of that head. Lord Haldane's proposition is strictly limited to matters which, in themselves, and independently of their connection with a Dominion trading company, would be of local concern only.

His Lordship's second proposition is that

> where there was no such power in that Parliament, as in the case of the Dominion Insurance Act, it was held otherwise, and that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the

provinces [[1922] 1 A.C. 191, at 198.].

The statute which the Board had to consider in the Insurance case [[1916] 1 A.C. 588.] was one which professed to regulate, by a licensing system, the whole business of insurance, including business entirely local, within a particular province; and his Lordship is here dealing with the business of insurance in so far as it might be regarded as a branch of trade, as a local matter. In the same judgment, the Dominion Parliament was held to be empowered, in "regulation of Trade and Commerce," to regulate the conditions upon which a foreign insurance company should be entitled to carry on its business in a single province in Canada. The authorities relied upon were principally Hodge v. The Queen [(1883) 9 App. Cas. 117.], and the decision on the McCarthy Act Reference [(1885) 12 L.N. 206.], which affirmed the exclusive authority of the provinces to regulate local trade within their own borders.

I do not think further examination of the authorities would be useful. The more recent cases leave entirely untouched the view embodied in the passage quoted from Parsons case [(1881) 7 App. Cas. 96.], and expressly adopted in Wharton's case [[1918] A.C. 330.], that foreign trade and trading matters of interprovincial concern are among the matters included within the ambit of head 2, s. 91.

It is not necessary, for the purposes of this appeal, to determine whether or not this statute could, in its entirety, be lawfully enacted by the Dominion Parliament alone. It is sufficient, for our present purposes, that in its characteristic and ruling provisions (the qualifying words in s. 10 being neglected), it aims at control of trade "in matters of interprovincial concern," in such a degree as to exclude it from the category of legislation in respect of matters local in the provincial sense; and that the Committee of Direction construes the powers it derives from the Act as enabling it to exercise such control, and executes those powers accordingly.

In the result, the appeal should succeed with costs throughout. The appellant is entitled to a declaration that he is not liable to the imposition of any levy by the respondents on, or in respect of, any product marketed by him; and that the respondents have no authority in any manner, to regulate or control the "marketing" (in the sense defined by the Act) of his product for consumption beyond the boundaries of British Columbia.

NEWCOMBE J.:-- The legislation in question, unless within property and civil rights in the province or private and local matters in the province, is clearly incompetent to the legislature; and, if it come within any of the classes of subjects enumerated in s. 91, it is, by the concluding paragraph of that section, not within any of the enumerations of s. 92.

Now I wish to exclude, for the purposes of this judgment, any conclusion as to what the result would be if the Produce Marketing Act of British Columbia were not within any of the Dominion enumerated powers; there it appears that differences might emerge, and these are subjects of debate in which it is not necessary that we should now engage, because I am in complete agreement with the majority of my learned brothers that the legislation is referable to the exclusive Dominion power

to regulate trade and commerce.

I thought there were two ways, either of which would serve to demonstrate the invalidity of the Act, and I had proposed to shew, independently of s. 91, that the legislation was neither property and civil rights nor private and local matters in the province; and, consequently, not within any of the provincial enumerations -- a ratio decidendi which I thought free from difficulty. But, seeing that the majority of the Court has reached practically the same result by the other route, holding that the subject matter is embraced in the regulation of trade and commerce, where I think it strictly belongs, I am content, for the present purposes, to leave the extent of the provincial field, as defined by s. 92, unexplored.

CANNON J.:-- My brother Duff has in his opinion gone into all the details of the Act and regulations and, to avoid repetition, I will shortly state my views.

The Act, if restricted to the local provincial market, would, according to the evidence, have affected less than ten per cent of the fruit and vegetables grown in British Columbia; its intent and purpose was to regulate the trade outside the province. Its actual operation affects the shipment to points in Canada outside of British Columbia of about 90 per cent of the products.

The Act is intended to operate interprovincially, and its clauses and the regulations adopted to carry it out constitute barriers to free trade between the provinces and clash with section 121 of the British North America Act, 1867, which, in enacting that

> 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,

prevents, in my humble opinion, any hindrance, such as that now before us, by legislation of the untrammelled commerce between the provinces in all "articles of the growth, produce or manufacture" of any one of them.

By the Produce Marketing Act of 1927, the province of British Columbia imposed levies on the fruits or vegetables grown or produced in a large area, including appellant's farm, and obliged all shippers to secure a licence to market and sell products of the province anywhere within the Dominion under a penalty for each contravention. Even leaving aside the licence, and considering only the levy, I believe, as pointed out by my brother Duff, that such imposts on commodities, on trade in commodities, have always been regarded as indirect taxes for a public purpose and come under the head of "taxation" -- which is dealt with in Part VIII of the British North America Act, where is found article 121. It may be considered as an excise tax which necessarily has a tendency to affect, and affects, the price of the product to the customer in another province. To use the words of Lord MacMillan, in Attorney-General for British Columbia v. McDonald Murphy Lumber Company [[1930] A.C. 357, at 363.], the levy in question

> is an export tax falling within the category of duties of customs and excise, and

> as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the provincial legislature.

I, therefore, reach the conclusion that this legislation is an attempt to impose by indirect taxation and regulations an obstacle to one of the main purposes of Confederation, which was, ultimately, to form an economic unit of all the provinces in British North America with absolute freedom of trade between its constituent parts.

The appellant is entitled to a declaration that he is not liable to the imposition of any levy by the respondent on any product marketed by him, and that the respondent has no authority in any manner to regulate or control the marketing and sale by him of any product to any point beyond the boundaries of British Columbia, with costs throughout against respondent.

> Appeal allowed with costs.

Indexed as:

Confédération des syndicats nationaux v. Canada (Attorney General)

Confédération des syndicats nationaux, Appellant;
v.
Attorney General of Canada, Respondent, and Attorney General of Quebec, Attorney General of New Brunswick and Canadian Labour Congress, Interveners.
And
Syndicat national des employés de l'aluminium d'Arvida inc., Jean-Marc Crevier and Marie Langevin, Appellants;
v.
Attorney General of Canada, Respondent, and Attorney General of Quebec, Attorney General of New Brunswick and Canadian Labour Congress, Interveners.

[2008] 3 S.C.R. 511

[2008] S.C.J. No. 69

2008 SCC 68

File Nos.: 31809, 31810.

Supreme Court of Canada

Heard: May 13, 2008;
Judgment: December 11, 2008.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

(96 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Catchwords:

Constitutional law -- Division of powers -- Unemployment insurance -- Series of active measures designed to maintain tie between insured persons and labour market -- Whether provisions of federal employment insurance legislation relating to employment service, to [page512] training and work-sharing programs and to employment benefits are valid -- Constitution Act, 1867, s. 91(2A) -- Employment Insurance Act, S.C. 1996, c. 23, ss. 24, 25, 56 to 65.2, 73, 75, 77, 109(c), 135(2).

Constitutional law -- Taxation -- Delegation of taxing authority -- Principle of parliamentary control over collection of taxes -- Employment insurance surpluses accumulated in Consolidated Revenue Fund -- Power to set premium rates delegated without legislated criteria -- Whether employment insurance premiums constitute administrative charge or tax -- If they constitute tax, whether they were collected in accordance with principle of parliamentary control and pursuant to valid delegation -- Constitution Act, 1867, ss. 53, 91(3) -- Employment Insurance Act, S.C. 1996, c. 23, ss. 66 to 66.3, 72.

Summary:

In 1996, the *Employment Insurance Act* established the legal framework for a significant restructuring of the unemployment insurance system. In addition to the usual active measures against unemployment, such as an employment service and training and work-sharing programs (ss. 60, 25 and 24), five types of employment benefits were introduced in this legislation (s. 59): wage subsidies, earnings supplements, self-employment assistance, job creation partnerships and skills loans or grants.

Two events related to the financing of the system laid the groundwork for the new legislation: in 1986, on the recommendation of the Auditor General of Canada, the Employment Insurance Account was consolidated with government revenues as a whole and, in 1990, the government stopped financing the Account out of its general revenues, relying on premiums at an annual rate based, at that time, on the cost over only a few previous years. In the 1996 legislation, Parliament revised the financing of the Account in order to balance the program's budget over the long term. Section 66 set out guidelines for a system under which premiums were to be set high enough to cover the system's current expenditures and ensure the gradual accumulation of a reserve so that rates could be stabilized regardless of the constraints of business cycles. In the space of six or seven years, the deficits were absorbed and surpluses totalling more than $40 billion were accumulated. In 2001, Parliament enacted s. 66.1, which, departing from s. 66, authorized the Governor General in Council to set premium rates directly for 2002 and 2003. For 2004, Parliament set the premium rate in the Act itself. For 2005, it went back, by enacting s. 66.3, to having the Governor General in Council set the rates.

[page513]

The appellants brought declaratory actions to challenge the constitutional validity of the "active" measures, the premium-setting mechanisms, the accumulation of surpluses and the allocation of those surpluses to overall federal expenditures. The Quebec Superior Court and Court of Appeal rejected their arguments.

Held: The appeals should be allowed in part. The versions of ss. 66.1 and 66.3 of the *Employment Insurance Act* in force in 2001, 2002 and 2005 were unconstitutional. Employers' and employees' premiums for those years were collected unlawfully. This declaration is suspended for a period of 12 months from the date of this judgment.

The impugned active measures are valid. The programs provided for in the *Employment Insurance Act* reflect changes in the economy and the labour market and are part of the "natural evolution" of the unemployment insurance power conferred on the Parliament of Canada. That power must be interpreted generously. Its objectives are not only to remedy the poverty caused by unemployment, but also to maintain the ties between unemployed persons and the labour market. Thus, regulating unemployment insurance does not mean simply taking passive responsibility for paying benefits to Canadian workers during periods when they are not working. It also means taking on a more active role designed to maintain or restore ties between persons who may become or are unemployed and the labour market. Job placement and training programs are initiatives that fell within Parliament's legislative jurisdiction from the outset. These programs, together with work-sharing programs, retain a close enough connection with the system's basic objectives and form to a sufficient extent an integral part of the system. Furthermore, the labour market has changed, and the way the federal power under s. 91(2A) of the *Constitution Act, 1867* is exercised can reflect this. Employment benefits programs illustrate this change, as they are designed to reinforce ties with the labour market or to prepare workers to re-enter it. For example, job creation partnerships are designed to alleviate some of the consequences of weak labour markets in disadvantaged regions and thus reduce unemployment. Earnings supplements also directly affect ties with the labour market: they temporarily increase the income of workers who would otherwise be more hesitant to accept jobs for less pay. Self-employment assistance fosters the establishment of businesses and helps insured participants re-enter the labour market. Wage subsidies paid to employers specifically facilitate entry into the labour market by disadvantaged persons who wish to improve their productivity or gain work experience, and they help establish or maintain the employability of workers [page514] who might otherwise be condemned to not working. Skills loans and grants enable insured participants to acquire advanced knowledge, and their purpose is to make it easier for such people to obtain employment. [para. 31] [para. 39] [paras. 42-49]

As long as s. 66 of the Act applied, the existence of criteria for the setting of employment insurance premium rates ensured the application of a principle of allocation of and stability in the amounts being levied, and this justifies characterizing those amounts, from a constitutional standpoint, as a regulatory charge despite the existence of large surpluses. Because the federal government made a firm policy decision to put an end to deficits in employment insurance, stabilize fluctuating premium rates and strengthen the system by building up an adequate reserve, the 1996 legislation

made the Employment Insurance Commission responsible for setting premium rates each year in accordance with the objectives set out in s. 66: ensuring that there would be enough revenue over a business cycle to pay the amounts charged to the Account, and maintaining relatively stable rate levels throughout the business cycle. During the period in question, from 1996 to 2001, the contributions collected were paid into the Consolidated Revenue Fund, the monies were used like any other part of the revenues in the Consolidated Revenue Fund, and the appropriate accounts were kept; the amounts needed for the system to function were credited or charged to the Employment Insurance Account. The government's use of them does not, therefore, constitute a misappropriation of employment insurance monies. [para. 59] [para. 66] [paras. 73-74]

When a new rate-setting mechanism was adopted for 2002, 2003 and 2005, the framework under s. 66 ceased to apply. The Act no longer included criteria to guide the setting of rates, which was now within the discretion of the Governor General in Council. Employment insurance premiums continued to be a part of government revenues, whereas, as a result of the disappearance of the relationship between that levy and the regulatory scheme, premiums were at the same time transformed into a payroll tax. But s. 53 of the *Constitution Act, 1867* reflects the ancient, but fundamental, principle of our democratic system that there should be no taxation without representation. Only Parliament may impose a tax *ab initio*. The delegation of taxing authority is constitutional if the legislation provides expressly and unambiguously for the delegation. The versions of ss. 66.1 and 66.3 that applied in 2002, 2003 and 2005 did not state that Parliament was delegating taxing authority. [page515] The delegation they did provide for concerned a charge that had become a levy for general purposes, but it was not specified in the Act that Parliament intended to delegate its taxing authority as such. [para. 60] [para. 70] [para. 75] [para. 82] [para. 87] [paras. 92-93]

Cases Cited

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History and Disposition:

APPEALS from judgments of the Quebec Court of Appeal (Robert C.J.Q. and Gendreau and Brossard JJ.A.), [2006] R.J.Q. 2672, SOQUIJ AZ-50398096, SOQUIJ AZ-50398097, [2006] Q.J. No. 12562 (QL), [2006] Q.J. No. 12563 (QL), 2006 CarswellQue 14211, 2006 QCCA 1453, 2006 QCCA 1454, affirming a decision of Gascon J., [2003] R.J.Q. 3188, SOQUIJ AZ-50206024, [2003] Q.J. No. 15801, 2003 CarswellQue 2667. Appeals allowed in part.

Counsel:

Guy Martin and *Jean-Guy Ouellet*, for the appellant Confédération des syndicats nationaux.

Gilles Grenier, Claude Leblanc and *Bernard Philion*, for the appellants Syndicat national des employés de l'aluminium d'Arvida inc., Jean-Marc Crevier and Marie Langevin.

James Mabbutt, René LeBlanc, Carole Bureau and *Linda Mercier*, for the respondent.

Alain Gingras, for the intervener the Attorney General of Quebec.

[page517]

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Steven Barrett and *Colleen Bauman*, for the intervener the Canadian Labour Congress.

English version of the judgment of the Court delivered by

LeBEL J.:--

I. Introduction

1 In these appeals, a set of issues related to Canada's employment insurance system are once again before this Court. The debate, which was originally political in nature and will no doubt always be partly political, has moved into the judicial realm. The appellants Confédération des syndicats nationaux ("CSN") and Syndicat national des employés de l'aluminium d'Arvida inc. ("Syndicat") are contesting important aspects of the federal employment insurance system in separate declaratory actions. They are, first of all, challenging the constitutional validity of a series of "active" measures that are intended to fight unemployment and not simply to compensate

unemployed persons. In the appellants' opinion, those measures do not fall within the legislative authority over unemployment insurance conferred on the Parliament of Canada by s. 91(2A) of the *Constitution Act, 1867*. The appellants are also contesting the method adopted to finance employment insurance, the accumulation of large surpluses in the Employment Insurance Account and the use of those surpluses by the federal government. For the reasons that follow, I conclude that the active measures adopted by Parliament fall within its legislative authority. In addition, it is my opinion that the system adopted to finance employment insurance has remained consistent with constitutional norms, except in 2002, 2003 and 2005. But the premium-setting mechanism used during those years was inconsistent with the constitutional principles that govern the creation of regulatory charges and the imposition of taxes by Parliament. I would therefore allow the appeals in part.

[page518]

II. Origin of the Case

2 This case arose out of efforts by the federal government to stabilize the national system of unemployment insurance or, as it is now called in the legislation, "employment insurance" and to adapt it better to the constraints inherent in changing business cycles. Various reforms were adopted over a period of several years that led to, among other things, the accumulation of large surpluses, political debates over the legitimacy and appropriateness of the surpluses and, finally, court challenges. To fully understand the nature and scope of these challenges, it will be necessary to summarize recent developments in the employment insurance system.

3 The federal employment insurance system dates back to a constitutional amendment passed in 1940. Various changes were made to the system over time, and after 1980 it began to run a deficit. The federal government had to replenish the system's account from time to time, which increased the federal deficit. In 1986, the government incorporated the account into the Consolidated Revenue Fund on the recommendation of the Auditor General of Canada. This account subsequently became known as the "Employment Insurance Account" ("Account"). In 1990, the government stopped covering the deficits in the Account. Successive federal governments then tried to restore financial stability to the employment insurance system and to rethink some of its methods and objectives.

4 In 1996, the *Employment Insurance Act*, S.C. 1996, c. 23, established the legal framework for a significant restructuring of the system of unemployment insurance, which has been known since then as employment insurance. The legislation tightened eligibility requirements for unemployment benefits and included measures of a more interventionist nature that were designed to maintain or improve the ability of workers to enter the labour market. At the same time, the Parliament of Canada reviewed the financing of the Account. It established a system under which premiums were

to be set high enough to cover the system's current expenditures and ensure the gradual accumulation [page519] of a reserve so that raises in premiums would be unnecessary during periods of economic slowdown and higher unemployment. During the years that followed, Parliament changed the premium-setting mechanisms frequently. These reforms led to the emergence and the sometimes rapid growth of surpluses in the Account. The surpluses apparently reached or exceeded $40 billion. Over the same period, employment insurance premiums were paid into the Consolidated Revenue Fund pursuant to the policy adopted in 1986.

5 The emergence of surpluses in the Account has given rise to extensive political debate that falls outside the jurisdiction of the courts. We must consider the appellants' two court challenges, which were heard and decided together. I will therefore now review the nature and purpose of the appellants' actions.

6 The appellants brought separate declaratory actions to challenge what they saw as an abuse of the federal unemployment insurance power; they argued that the limits of that power had been exceeded. In their opinion, s. 91(2A) of the *Constitution Act, 1867* gives the Parliament of Canada the power to establish a scheme to provide compensation to employees during periods of unemployment, but that scheme cannot include active measures to promote employment and is to be financed in accordance with the principle of mutuality. The premiums collected from employees and employers for the operation of the system cannot exceed what is needed to pay current expenditures and establish a reasonable reserve for the system's activities. Allocating premiums and the surpluses generated by the collection of premiums to other purposes, such as the elimination of the federal budget deficit, violates the Constitution. The appellants also argued that the premium-setting mechanism is unconstitutional. If that mechanism were justified as an exercise of the federal taxation power, it was implemented in a manner that violated s. 53 of the *Constitution Act, 1867*. On the basis of these arguments, which for the most part were common to the two proceedings, the Syndicat requested a finding that several provisions of the *Employment Insurance Act* are invalid and a [page520] declaration that the surpluses in the Account belong to the system's contributors, namely employers and employees. The CSN sought similar conclusions.

7 In substance, the primary purpose of the actions was to quash the "active" measures established in the *Employment Insurance Act*, namely the employment service and employment benefits. The appellants also contested the premium-setting mechanism, the federal government's use of premiums and the allocation of the Account's surpluses. The respondent, the Attorney General of Canada, argued that all the "active" measures challenged by the appellants, the allocation of surpluses in the Account and the premium-setting mechanisms are valid. The two declaratory actions were joined for hearing. Both the Superior Court and the Quebec Court of Appeal heard them together.

III. Judicial History

A. *Superior Court* ([2003] R.J.Q. 3188)

8 Gascon J. dismissed the appellants' actions in their entirety. He began by finding that the employment service and the active measures, that is, employment benefits and training and work-sharing programs, fall within the federal unemployment insurance power. Then, in the second part of his decision, he rejected the plaintiffs' arguments about the setting of premiums and the Employment Insurance Account's surpluses. In his opinion, the premium-setting mechanisms are constitutional. Premiums are a regulatory charge tied to the administration and implementation of the employment insurance system. If they were to be regarded as taxes, imposing them constituted a valid exercise of Parliament's taxation power. Moreover, according to Gascon J., the challenge to the premium rates themselves raised an administrative law issue that fell within the jurisdiction of another court. He added that the plaintiffs had at any rate abandoned this branch of their actions. Finally, the Superior Court held that the federal government had not appropriated the Account's surpluses. The federal [page521] government's financial statements continued to show a debt owed by the Consolidated Revenue Fund to the Account. In conclusion, Gascon J. refused to assess the political wisdom of the measures and methods that had led to the accumulation of surpluses in the Account.

B. *Quebec Court of Appeal* ([2006] R.J.Q. 2672, 2006 QCCA 1453, 2006 QCCA 1454)

9 The Quebec Court of Appeal unanimously dismissed the appellants' appeals, thus confirming the constitutionality of all the measures and provisions at issue. However, its reasoning differed in some respects from that of the Superior Court. Its decision comprises two sets of reasons. Robert C.J.Q. wrote the reasons on the constitutional challenge to the "active" measures and dealt with the issue whether those measures fell within Parliament's legislative jurisdiction. Gendreau and Brossard JJ.A. dealt in joint reasons with the setting of premiums and the issue of surplus allocation.

10 Robert C.J.Q. carefully and thoroughly reviewed the statutory provisions and programs at issue to determine whether they are constitutional. He first concluded that the employment service, the work-sharing program and the training measures are perfectly consistent with an approach designed to reduce the risk of unemployment. They therefore fall within the federal unemployment insurance power.

11 According to Robert C.J.Q., employment benefits programs are more problematic. This category of benefits includes five different programs established under s. 59 of the *Employment Insurance Act*: wage subsidies paid to employers as a springboard to possible regular employment (s. 59(*a*)), earnings supplements for employees interested in low-paid jobs (s. 59(*b*)), self-employment assistance to encourage the creation of small businesses (s. 59(*c*)), job creation partnerships involving businesses and community organizations in areas with high unemployment rates (s. 59(*d*)), and [page522] skills loans or grants for workers seeking to obtain advanced skills (s. 59(*e*)).

12 Robert C.J.Q. found on the basis of the principles laid down by the Supreme Court of Canada

in *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56 ("*Reference*"), that some of these programs do not fall within Parliament's jurisdiction over the public employment insurance system. He placed the programs in two categories: income replacement benefits and initiative promotion. According to Robert C.J.Q., the first category includes wage subsidies, earnings supplements and job creation partnerships. In his view, these programs are consistent with the purpose of insurance and meet the tests established in the *Reference*. They therefore fall within the federal unemployment insurance power.

13 However, Robert C.J.Q. did not clearly decide whether the initiative promotion programs, namely self-employment assistance and skills loans or grants, fall within the federal unemployment insurance power. Instead, he concluded that they had been validly adopted pursuant to the federal spending power. He also noted that these programs are not intended to regulate matters within provincial jurisdiction and that the Parliament of Canada had expressly made them subject to provincial consent.

14 In their joint reasons, Gendreau and Brossard JJ.A. rejected the appellants' arguments that the mechanisms for financing employment insurance and the appropriation of the Account's surpluses are unconstitutional. With regard to the premium-setting mechanism, they found that the distinction between regulatory charges and taxes is of little relevance in this case. Ultimately, the system for setting premiums resulted from a valid exercise of the federal taxation power. Moreover, according to Gendreau and Brossard JJ.A., the accumulation of surpluses in the Account is not problematic [page523] from a constitutional standpoint. All amounts collected by the federal government had to be paid into the Consolidated Revenue Fund. The way those amounts were recorded did not affect the claim that the Account continued to have against the Consolidated Revenue Fund.

15 After their case was dismissed by the Quebec Court of Appeal, the appellants appealed to this Court. Their appeals raise the same issues as in the courts below.

IV. Analysis

A. *General Nature of the Issues*

16 In this Court, the appellants first challenge the constitutional validity of the active measures incorporated into the *Employment Insurance Act* to address unemployment. This branch of the appeals concerns the interpretation of s. 91(2A) of the *Constitution Act, 1867* and thus the scope of Parliament's unemployment insurance power. A second branch focuses on the constitutionality of the system adopted to finance employment insurance, the accumulation of surpluses through the collection of premiums from employers and employees, and the allocation of those surpluses to purposes other than compensating unemployed persons.

17 Before turning to the parties' arguments, I note that the Chief Justice of this Court stated the following constitutional questions in an order dated October 17, 2007:

1. Do ss. 66 to 66.3 and 72 of the *Employment Insurance Act*, S.C. 1996, c.

23, exceed, in whole, in part or through their combined effect, the unemployment insurance power provided for in s. 91(2A) of the *Constitution Act, 1867*?

2. If the answer to question 1 is affirmative, do ss. 66 to 66.3 and 72 of the *Employment Insurance Act*, S.C. 1996, c. 23, exceed, in whole, in part or through their combined effect, the taxation power provided for in s. 91(3) of the *Constitution Act, 1867*?

[page524]

3. If the answer to question 2 is negative, do ss. 66 to 66.3 and 72 of the *Employment Insurance Act*, S.C. 1996, c. 23, satisfy the requirements of s. 53 of the *Constitution Act, 1867*?
4. Do ss. 24, 25, 56 to 65.2, 73, 75, 77, 109(*c*) and 135(2) of the *Employment Insurance Act*, S.C. 1996, c. 23, exceed, in whole, in part or through their combined effect, the unemployment insurance power provided for in s. 91(2A) of the *Constitution Act, 1867*?
5. If the answer to question 4 is affirmative, are ss. 24, 25, 56 to 65.2, 73, 75, 77, 109(*c*) and 135(2) of the *Employment Insurance Act*, S.C. 1996, c. 23, validly based on the federal spending power?

18 The principal statutory provisions mentioned in these questions are appended to these reasons. I will return to them in the course of my analysis.

B. *Issues Related to Parliament's Unemployment Insurance Power*

19 In this branch of their appeals, the appellants challenge the constitutional validity of the "active" measures to address unemployment. They argue, first of all, that an employment service (s. 60) should not even exist. They also object to the existence of work-sharing programs (s. 24) and benefits associated with participation in training activities. The appellants also contend that the employment benefits programs and support measures established under ss. 57 and 59 are unconstitutional, and thus *ultra vires* Parliament. In substance, according to the appellants, the power conferred on Parliament by the Constitution is limited to paying compensation during periods of unemployment, and Parliament may not exercise it to take action to prevent or limit unemployment; nor may Parliament exercise the federal spending power to intervene in matters under provincial legislative jurisdiction. On this last point concerning the spending power, the Attorney General of Quebec supports the appellants' position.

[page525]

20 The Attorney General of Canada disagrees with all the appellants' arguments, submitting that they are inconsistent with the judicial decisions in which the principles for interpreting the federal legislative power in this area were defined. In those decisions, he contends, and in the *Reference* in particular, Parliament's power was held to be broad and flexible, even where measures to prevent unemployment are concerned. In the respondent's view, the spending power need not therefore be considered.

C. *Issues Related to the Financing of the Employment Insurance System and to the System's Surpluses*

21 A second branch of the appeals concerns a set of issues related to the financing of the employment insurance system and the allocation of the surpluses accumulated since 1996 through the collection of premiums from employers and employees. According to the appellants, the statutory provisions applied since 1996 to set premium rates exceed the federal unemployment insurance power, as Parliament's authority to require the payment of premiums is limited to the amounts needed for the system to function properly and for reasonable reserves to be accumulated. In their view, the provisions in question -- ss. 66, 66.1 and 66.3 -- contravene this fundamental principle. Moreover, the appellants contend that the premium-setting mechanisms no longer have any connection with the regulatory framework of the employment insurance system and that they represent an unlawful exercise of the federal taxing power because the procedure followed is not consistent with the principle of parliamentary control over taxation provided for in s. 53 of the *Constitution Act, 1867*. Finally, the appellants argue that the accumulation of surpluses and the allocation of those surpluses to overall federal expenditures, including public debt reduction, are contrary to the principles that determine the constitutional framework for collecting and using employment insurance premiums.

22 According to the respondent, the setting and use of premiums have remained consistent with constitutional requirements. First, the statutory [page526] provisions in question are consistent with the principle that there must be a sufficient connection with the regulatory scheme for employment insurance. If not, the federal taxation power was validly exercised pursuant to a clear and sufficiently complete delegation of authority by Parliament. Finally, the respondent contends that the premiums were used and accounted for in accordance with the rules governing the Consolidated Revenue Fund and that the rights of contributors were not violated.

D. *Parliament's Unemployment Insurance Power*

23 In their arguments, the appellants and the Attorney General of Canada display conflicting visions of the scope of Parliament's unemployment insurance power. The appellants take the position that this power is essentially limited to the payment of benefits during periods of unemployment and the collection of money to pay those benefits. They stress that a close relationship must be maintained between the premiums imposed on employers and employees and

the system those premiums are used to finance. According to the respondent's interpretation, the Parliament of Canada may adopt active measures to prevent unemployment or alleviate its consequences.

24 In light of this fundamental disagreement, it will be necessary to consider the origin of the federal unemployment insurance power, its nature, how it should be interpreted and the constitutional principles governing it. These questions were recently considered by my colleague Deschamps J. in the *Reference*. Her analysis remains valid and must guide the application of s. 91(2A) in the appeals now before the Court.

25 The current employment insurance system originated in the economic and social problems caused by the Depression in the 1930s. In 1937, the Privy Council affirmed a decision of the Supreme Court of Canada that a first federal unemployment insurance statute, the *Employment and Social Insurance Act*, S.C. 1935, c. 38, was invalid (*Attorney-General for Canada v. Attorney-General [page527] for Ontario*, [1937] A.C. 355 (P.C.), aff'g *Reference re The Employment and Social Insurance Act*, [1936] S.C.R. 427). The Privy Council held that the legislation affected property and civil rights in the provinces -- employer-employee relations in particular -- and was therefore *ultra vires* the Parliament of Canada, at pp. 365 and 367.

26 Following that setback, the federal government entered into negotiations with the provinces. The discussions led to an agreement on a constitutional amendment that resulted in s. 91(2A). As Deschamps J. noted, that amendment conferred a new legislative power on Parliament that had been detached from the provinces' general jurisdiction over property and civil rights:

> This means that when the Constitution was amended, a portion of the jurisdiction over property and civil rights was detached so that the aspects relating to unemployment insurance could be assigned to Parliament.
>
> (*Reference*, at para. 37)

27 Deschamps J. then resolved a first issue: whether this new federal jurisdiction was immutable. One argument that had been made in the *Reference* was that the content of the jurisdiction corresponded to the content of the *Unemployment Insurance Act, 1940*, S.C. 1940, c. 44, First Schedule, Part II ("1940 Act"). According to this argument, the 1940 Act essentially restated the provisions of the 1935 legislation that the Privy Council had held to be invalid and that the government had sought to revive through the constitutional amendment. The parameters of the application of s. 91(2A) therefore had to be found in that Act. The Court rejected this argument and concluded that the 1940 Act was merely one way of exercising the new power and did not determine its content:

> The question is therefore not the way in which Parliament initially exercised its jurisdiction, but the scope of its jurisdiction over unemployment insurance.

(*Reference*, at para. 39)

[page528]

28 To determine the content of the power transferred to Parliament, this Court considered the circumstances of the transfer and its objectives. Relying in particular on the correspondence between the federal government and the provinces that led up to the constitutional amendment, the Court noted that the purpose of the 1940 Act had been not only to remedy the destitution caused by unemployment, but also to put an end to unemployment by creating return-to-work mechanisms, including a national employment service (*Reference*, at para. 42). Deschamps J. defined the purpose of the transfer of jurisdiction as follows:

> In essence, the purpose of the transfer of jurisdiction was to equip Canada with the tools it needed to mitigate the effects of anticipated unemployment by providing certain classes of unemployed persons with benefits and by setting up job search centres. The transfer of jurisdiction was to be a tool for internal organization involving both short-term relief measures, namely benefits, and medium-term measures, namely job placement services for the unemployed.

(*Reference*, at para. 43)

29 This is the context in which s. 91(2A) became part of the Canadian Constitution. This provision must nonetheless be interpreted in the same way as other provisions relating to the division of powers between Parliament and the provincial legislatures. It is necessary to identify the essential elements of the power and determine whether the adopted measures are "consistent with the natural evolution of that power" (*Reference*, at para. 44).

30 In this analysis of the content of legislative powers, changes in the way such powers are exercised and in the interplay of the powers assigned to the two levels of government often raise difficult problems. The solutions that must be applied when exercising powers change where new problems must be addressed. However, the evolution of society cannot serve as a pretext for changing the nature of the division of powers, which is a fundamental component of the Canadian federal system. The power in question must be interpreted generously, but in a manner consistent with its legal context, having regard to relevant historical elements [page529] (*Reference*, at paras. 45-46; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 201-2).

31 Thus, according to this Court's decision in the *Reference*, the federal unemployment insurance power must be interpreted generously. Its objectives are to remedy the poverty caused by unemployment and maintain the ties between unemployed persons and the labour market. On this

basis, the Court identified four characteristics of unemployment insurance plans under s. 91(2A):

> With these principles and objectives in mind, four characteristics that are essential to a public unemployment insurance plan can be identified:
>
> (1) It is a public insurance program based on the concept of social risk
> (2) the purpose of which is to preserve workers' economic security and ensure their re-entry into the labour market
> (3) by paying temporary income replacement benefits
> (4) in the event of an interruption of employment.

(*Reference*, at para. 48)

32 To determine whether the impugned measures fall within the power, the constitutional doctrines governing the division of powers must also be applied. The interplay between legislative powers often becomes complex. A given problem may have various aspects that can relate to different powers assigned to the two levels of government (*Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at paras. 23-24; *Reference*, at para. 8).

33 The first step is to identify the pith and substance of the legislation in question (*Canadian Western Bank*, at para. 25; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31). To do this, two facets of the legislation must be examined: its purpose and its legal effect. This analysis [page530] requires that the true purpose of the legislation be ascertained (*Canadian Western Bank*, at para. 27; *Reference*, at para. 8).

34 Therefore, it must now be determined whether the measures challenged by the appellants that relate to the employment service, to training and to employment are *intra vires* Parliament. The analysis on this point will focus on the dual purpose of the powers conferred on Parliament: to alleviate the economic consequences of unemployment and to maintain ties with the labour market.

E. *Impugned Legislative Measures*

35 The legislative measures at issue in these appeals were introduced at a time when the federal unemployment insurance system was undergoing changes. Those changes related to the financing of the system, which I will discuss below, and to the nature of the programs it comprises. They are reflected in the very title of the legislation, which is now called the "*Employment Insurance Act*". The new title demonstrates Parliament's commitment to ensuring employment and employability in addition to providing compensation for the loss of income resulting from unemployment. The concept is no longer referred to as unemployment insurance, as it was in 1940 when the constitutional amendment was passed, but as employment insurance.

36 The employment service program has, in one form or another, been part of the system since

the beginning. And the appellants concede that measures involving participation in training programs date back to the origins of the employment insurance system. Thus, s. 31 of the 1940 Act provided that an unemployed person taking an approved training program was still considered available for work and therefore eligible for benefits. Section 39 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, also provided for the extension of benefit periods where a claimant was enrolled in a training program. Work-sharing and job creation programs first appeared in 1977 in the *Employment and Immigration Reorganization Act*, S.C. 1977, c. 54.

[page531]

37 According to the CSN, premiums were not used to finance these additional measures at the time. Rather, the measures were financed through contributions by the Government of Canada to the Account (A.F., at para. 146). The CSN notes that these programs have been financed through the employment insurance system itself since 1990.

38 As I mentioned above, five types of employment benefits were introduced in the 1996 legislation (*Employment Insurance Act*, s. 59): wage subsidies, earnings supplements, self-employment assistance, job creation partnerships and skills loans or grants. These benefits are financed through the employment insurance system and are thus paid for by contributors. They are paid under a large number of programs -- 39 according to the CSN (A.F., at para. 153).

F. *Constitutional Validity of the Legislative Measures*

39 Whether all the legislative measures challenged by the appellants are valid depends on the understanding one has of the federal unemployment insurance power. As I noted above, the appellants, in the position they take, overlook one of the basic reasons why the employment insurance system was created: to maintain ties with the labour market. As this Court stated in the *Reference*, this objective was part of the system from the very beginning. As a result, where some of the impugned measures are concerned, there is no need to invoke the federal spending power to find that they are valid. They retain a close enough connection with the system's basic objectives and form to a sufficient extent an integral part of the system.

40 The Superior Court and the Court of Appeal discussed the content of the benefits in question but did not need to consider in detail all the programs governing the payment of such benefits. By virtue of s. 58 of the *Employment Insurance Act*, the benefits are paid to "insured participant[s]". Section 58 identifies two classes of unemployed persons who, as insured participants, are eligible for such [page532] benefits. The first consists of unemployed persons who have received unemployment benefits during the previous 36 months. The second consists of unemployed persons for whom a benefit period has been established in the previous 60 months and who have during that period received special benefits in respect of a pregnancy or of parental leave, have withdrawn from active participation in the labour force to care for their new-born children or children placed with

them for the purpose of adoption, and want to re-enter the labour force:

> **58.** (1) In this Part, "insured participant" means an insured person who requests assistance under employment benefits and, when requesting the assistance, is an unemployed person
>
> (*a*) for whom a benefit period is established or whose benefit period has ended within the previous 36 months; or
>
> (*b*) for whom a benefit period has been established in the previous 60 months and who (i) was paid special benefits under section 22 or 23 during the benefit period,
>
> (ii) subsequently withdrew from active participation in the labour force to care for one or more of their new-born children or one or more children placed with them for the purpose of adoption, and
> (iii) is seeking to re-enter the labour force.

41 Insured participants are thus eligible even if they have not been claimants. However, they must have been insured persons -- that is, they must have held insurable employment -- and must have been eligible to receive benefits during the prior period provided for in s. 58. They thus have a connection with the system. Robert C.J.Q. correctly noted that [TRANSLATION] "[e]mployment benefits are not temporary income replacement benefits, [but] constitute a new type of employment incentive" (para. 75). The government thus seeks to directly invest greater amounts in improving the employability of unemployed workers (para. 76). Robert C.J.Q. then explained the nature of these employment benefits:

[page533]

> [TRANSLATION] The direct investment in question involves five measures provided for in section 59 of the *Employment Insurance Act*.
>
> The first of these measures is the wage subsidy. A claimant may request that a wage subsidy be granted to an employer who will provide the claimant with a job that will lead to long-term employment or to employment with another employer. This measure is designed more specifically for people facing

> employment disadvantages who need time to become fully productive or who need work experience. Occasionally, this measure may enable employers to create a job that would otherwise not exist.
>
> The second type of employment benefit is the earnings supplement. The purpose of such supplements is to increase, for temporary periods, the incomes of people who would otherwise find it difficult to accept jobs that pay less than their previous jobs. Earnings supplements offer claimants an opportunity to leave employment insurance for work before their income benefits expire.
>
> Self-employment assistance is the third type of employment benefit. This program helps insured participants start businesses and helps them acquire, from service providers, the skills they need to make their proposed businesses viable. This assistance takes several forms, including consulting services and help in preparing a business plan. Insured participants continue to receive benefits while establishing their businesses.
>
> The fourth measure, the job-creation partnership, is designed to create jobs that are sustainable in local economies where there is high unemployment and jobs are scarce. Partnerships may be entered into with the private sector, the provinces, local communities and community organizations in order to provide jobs compatible with provincial and local community plans and priorities for economic development. Such partnerships seem similar to the old job creation measures.
>
> The fifth and final measure is a system of skills loans and grants. This type of financing enables an insured participant to attend an institution to develop needed job skills. In an explanatory document, Human Resources Development Canada stated that, since labour market training is a provincial responsibility, these benefits will be offered in any province only with the agreement of the provincial government. [paras. 77-82]

[page534]

42 Before discussing these benefits, I should mention that job placement was one of the objectives behind the creation of employment insurance. And obtaining additional training is sometimes tied to the receipt of benefits. As well, work sharing limits the impact of unemployment

and fosters entry into the labour market. These initiatives fall within Parliament's legislative jurisdiction. Regulating unemployment insurance does not mean simply taking passive responsibility for paying benefits to Canadian workers during periods when they are not working. It also means taking on a more active role designed to maintain or restore ties between persons who may become or are unemployed and the labour market. This federal power does not, of course, authorize Parliament to create parallel education systems despite the connections between work and training and many other aspects of life in society. It may not be interpreted in the abstract without regard for the federal constitutional context. It must be exercised in a manner consistent with the general framework of the division of powers. This being said, the power may legitimately be exercised to its full extent, having regard to the context, including the problems created by changes in the labour market and the increase in structural unemployment. The labour market has changed since 1940, and the way the federal power under s. 91(2A) is exercised can reflect this. However, the exercise of the federal power does not negate the provincial powers over education and labour market training, which relate to other aspects of these problems in the labour market.

43 Employment benefits programs illustrate this change. They are new initiatives, but they remain related to the objective of maintaining ties with the labour market. All these measures are designed to reinforce ties with the labour market or to prepare workers to re-enter it.

44 For example, job creation partnerships are designed to alleviate some of the consequences of weak labour markets in economically disadvantaged regions by strengthening the labour markets in those regions and thus reducing unemployment.

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45 Earnings supplements also directly affect ties with the labour market. They temporarily increase the income of workers who would otherwise be more hesitant to accept jobs for less pay. This measure helps speed up an actual return to the labour market before benefit periods expire.

46 Self-employment assistance is also consistent with the goal of maintaining ties with the labour market. Such benefits, which are paid under a variety of programs, enable the recipient to prepare for and consolidate a return to work. Thus, the payment of benefits fosters the establishment of businesses and in so doing helps insured participants re-enter the labour market.

47 Wage subsidies paid to employers have the same objective. They specifically facilitate entry into the labour market by disadvantaged persons who wish to improve their productivity or gain work experience. In this regard, *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, [1989] 1 S.C.R. 1532, does not provide a definitive answer to the question whether such benefits are valid. In that case, this Court did not have to explore the federal unemployment insurance power in its entirety. The general framework for the power was subsequently clarified in the *Reference*, in which the Court stressed the relevance and importance of the objective of maintaining ties with the

labour market. From this standpoint, wage subsidies form to a sufficient extent an integral part of the employment insurance system as a whole. They help establish or maintain the employability of workers who might otherwise be condemned to not working.

48 Skills loans and grants enable insured participants to acquire advanced knowledge, and their purpose is to make it easier for such people to obtain employment. Participation in training programs was part of the employment insurance system from the outset. This measure is quite simply targeted differently, as it applies to a pool of insured participants that includes more than just the system's regular claimants. But this does not mean that it does not fall within federal jurisdiction. Furthermore, [page536] this jurisdiction is exercised in a way that does not encroach on the provincial jurisdiction over education, since pursuant to s. 61(2) of the *Employment Insurance Act*, assistance may not be provided under the programs associated with these benefits without the agreement of the provinces.

49 The evolution of the legislation on employment insurance has reflected changes in the economy and the labour market. It is part of the "natural evolution" of the power conferred on the Parliament of Canada. The legislation thus remains consistent with the rules governing the division of powers between the two levels of government. This means that I need not consider the federal government's spending power and its application to the measures I have already discussed. However, this conclusion is not determinative of the appeals. It will also be necessary to consider the second branch of the appeals, which relates to the financing of the system, the surpluses generated by the reforms to the system and the allocation of the surpluses.

G. *Scope of the Appellants' Constitutional Challenge*

50 The second branch of the appeals relates to the financing of the employment insurance system since the *Employment Insurance Act* was passed in 1996. At issue in this branch are, *inter alia*, the existence and use of the surpluses generated by the financing mechanism adopted in 1996 or, in the stronger terms used by the appellants, the appropriation or misappropriation of those surpluses by the federal government.

51 The appellants' arguments raise questions about the nature of a tax in the context of the taxation power of the Parliament of Canada, and about the distinction between a tax and a regulatory charge or levy. The constitutional challenge relates primarily to the validity of ss. 66 to 66.3 and 72 of the *Employment Insurance Act* as enacted by Parliament since 1996.

52 It is therefore important to define the true purpose of the constitutional challenge. There is [page537] nothing unconstitutional about financing the system by requiring employers and employees to pay premiums. This has been the mechanism favoured by Parliament since the employment insurance system was established in 1940, as Gascon J. noted in the Superior Court (para. 202). However, there is no reason why Parliament could not have financed the system differently by means of its general taxing power under s. 91(3) of the *Constitution Act, 1867*. The new legislative power conferred on Parliament in 1940 fell within a constitutional framework that

did not limit Parliament's legislative jurisdiction with regard to federal government activities. Parliament could have decided to finance the new system out of the taxes collected by the federal government. Indeed, this was the source of funding used to absorb deficits in the employment insurance system for several years.

53 In my opinion, it must be determined whether the chosen financing mechanism was valid either as a regulatory charge or as a tax imposed pursuant to the general taxing power under s. 91(3). Finally, the creation of surpluses in the system, the use of those surpluses and what will eventually happen to them must be considered.

H. *Changes in the Financing Scheme*

54 The changes in the mechanisms used to finance employment insurance were part of a package of reforms to the system. Parliament had reviewed the nature of the benefits being paid and the eligibility requirements for benefits. As I mentioned above, Parliament also wanted to change the focus of the system somewhat by fostering a deeper commitment to maintaining the tie between employees and the labour market.

55 Originally, s. 17 of the 1940 Act provided that contribution rates were to be based on the rates set out in the Second Schedule to that Act. In 1955, the *Unemployment Insurance Act* contained a table of fixed rates of contribution (S.C. 1955, c. 50, s. 37). A different mechanism was adopted in the [page538] 1971 legislation, as the Unemployment Insurance Commission was made responsible for setting premium rates with the agreement of the federal Cabinet (s. 62). Section 63 of that Act required that premium rates be sufficient to raise an amount equal to the adjusted basic cost of benefit. That basic cost was derived from the cost over the designated three consecutive previous years, which was adjusted as necessary to account for an accumulated surplus or deficit. This mechanism was employed until 1996, except during a few years when the premium rate was set in the Act itself (Gascon J., at para. 207).

56 According to Gascon J., the financing mechanism used from 1971 on was unsatisfactory. Economic recessions led to increases in benefit payments, which resulted in greater unemployment insurance deficits. As a result, the Commission had to raise premium rates to replenish the Unemployment Insurance Account at times when the economic situation would instead have called for a reduction in contributions (Gascon J., at paras. 208-9).

57 The enactment of s. 66 of the *Employment Insurance Act* in 1996 was intended to correct this situation. The new Act established a system that its originators thought would be more adaptable to changes in and the constraints of business cycles. The government intended to avoid the distortions that had arisen in the former system based on a yearly assessment of results over the designated three previous years.

58 Before the new mechanism began to be employed, Parliament set the premium rate for 1995 and 1996 at three percent of insurable earnings (*Budget Implementation Act, 1994*, S.C. 1994, c. 18,

s. 26). That rate was maintained for 1996 pursuant to a transitional provision of the *Employment Insurance Act* (Schedule II, s. 12).

59 The new premium-setting system became applicable in 1997. At that time, the Act instructed the Employment Insurance Commission to try to maintain relatively stable premium rates throughout a business cycle while at the same time building up [page539] an adequate reserve. The Act made the Commission responsible for setting premium rates each year in accordance with these objectives, with the approval of the Governor General in Council on the recommendation of the Minister of Finance. For this purpose, s. 66 provided as follows:

> The Commission shall, with the approval of the Governor in Council on the recommendation of the Minister and the Minister of Finance, set the premium rate for each year at a rate that the Commission considers will, to the extent possible,
>
> (*a*) ensure that there will be enough revenue over a business cycle to pay the amounts authorized to be charged to the Employment Insurance Account; and
>
> (*b*) maintain relatively stable rate levels throughout the business cycle.

60 For 2002 and 2003, the system for setting premium rates changed once again. Because of problems caused by the growth of the employment insurance surpluses, Parliament made the Governor General in Council responsible for setting the applicable premium rate. The framework under s. 66 ceased to apply. The Act no longer included criteria to guide the setting of rates:

> **66.1** Notwithstanding section 66, the premium rate for each of the years 2002 and 2003 is the rate set for the year by the Governor in Council on the recommendation of the Minister and the Minister of Finance.
>
> (*An Act to amend the Employment Insurance Act and the Employment Insurance (Fishing) Regulations*, S.C. 2001, c. 5, s. 9)

61 For 2004, Parliament set the premium rate in the Act itself (*Budget Implementation Act, 2003*, S.C. 2003, c. 15, s. 21). For 2005, it went back to having the Governor General in Council set the rates by adding s. 66.3 to the *Employment Insurance Act* (*Budget Implementation Act, 2004*, S.C. 2004, c. 22, s. 25).

62 Other amendments were made during the years that followed. I will not comment on them because they are not directly relevant to these proceedings.

[page540]

I. *Surpluses*

63 The statutory amendments relating to the premium-setting mechanism gave rise to the problem of surpluses in the Account and also affected the speed at which that problem developed. The massive increase in those surpluses occurred over a period of just a few years. In the space of six or seven years, the deficits were absorbed and surpluses totalling more than $40 billion were accumulated. I will now look at the origin of the surpluses and the steps in their creation.

64 To understand how the surplus problem developed, it will be helpful to revisit the origins of the system. When the system came into effect, an unemployment insurance fund was established. That fund was replaced with the Account in 1971. At that time, the government's budget absorbed deficits in the Account that resulted from fluctuations in economic activity and in the amounts of benefits paid to unemployed persons. In 1986, on the recommendation of the Auditor General of Canada, the Account was consolidated with government revenues as a whole. In 1990, the government stopped financing the Account out of its general revenues.

65 Throughout that period, premiums, which legally speaking were debts to the Crown, were paid into the Consolidated Revenue Fund and credited to the Account. The amounts needed to manage the system and to pay benefits and the cost of authorized programs were in turn paid out of the Consolidated Revenue Fund and charged to the Account.

66 It is clear that around 1995, the government made a firm policy decision to put an end to deficits in employment insurance, stabilize fluctuating premium rates and strengthen the system by building up an adequate reserve. The legislative amendments summarized above gave effect to that decision. Their impact on the Account was quick, and striking. In 1996, the Account's surpluses already totalled $5 or $6 billion. Even though premium rates were gradually reduced, the surpluses rose to approximately $20 billion in 1998. That amount [page541] corresponded to the maximum reserve recommended by Canada's Chief Actuary (A.F. C.S.N., at p. 35, footnote 116). Starting in 2001, the growth of the surpluses, which then exceeded $40 billion, slowed down or even levelled off. When premium rates were set, the goal seemed to be to attain a relative balance between the system's receipts and current expenditures.

J. *Constitutionality of the Premium-Setting Mechanism*

67 The appellants, supported on this point by one intervener, the Canadian Labour Congress, submit that no provision of the Constitution authorized the premium-setting mechanisms that led to the accumulation of the surpluses in the Account and the use of those surpluses by the Government of Canada. They argue that the federal government misappropriated employment insurance monies.

In short, the appellants submit that amounts collected as premiums were diverted from their intended purposes and allocated to the government's current expenditures, to deficit reduction and to restoring a balance in public finances. According to them, these amounts were also used to finance employment and economic development programs that fell outside the federal unemployment insurance power, as opposed to paying compensation during actual periods of unemployment.

68 I will not discuss this final argument at length, since I rejected it above. In my opinion, the disputed measures, and employment benefits in particular, fall within federal legislative jurisdiction. The expenditures associated with these measures could be financed through premiums. This being said, however, the issue of the allocation of contributions and surpluses to general government expenditures remains to be resolved.

69 I reject from the outset a fact-based submission made by the appellants: that the government in power during the period following the passage of the *Employment Insurance Act* planned to accumulate these surpluses and then to misappropriate them. There was extensive evidence on this point [page542] in the Superior Court, and the parties placed great stress on this in argument. However, neither the Superior Court nor the Court of Appeal accepted this submission, and no error in assessing the facts has been shown that would justify an intervention by this Court on this point.

70 The problem of the surpluses in the Account appears instead to have developed in stages, but quickly. In the end, the enactment in 2001 of the transitional provisions that authorized the Governor General in Council to set premiums directly for 2002 and 2003 was a sign of a recognition that the surpluses were substantial, that they had played a role in restoring financial balance to the federal government's activities and that a solution for the problems they created would be complex. The government considered these surpluses to be part of public revenues and did not agree with returning them to contributors. However, this is not the place to discuss the appropriateness of this policy approach. Rather, the issue is what the legal nature of premiums has been since the *Employment Insurance Act* came into force in 1996.

71 The government could have financed the system through either premiums or taxes, as it had a choice between a special levy and general taxation (P. Issalys and D. Lemieux, *L'action gouvernementale: Précis de droit des institutions administratives* (2nd ed. 2002), at pp. 607-9 and 617-18). The Attorney General of Canada argues first that a premium is a regulatory charge, that is, a form of special levy connected with a government program. In the alternative, he submits that a premium can be considered a tax for the purposes of s. 91(3) of the *Constitution Act, 1867* and that the premiums were imposed in accordance with the Constitution.

72 This question of the validity of imposing regulatory charges has come before this Court on several occasions. In its decisions, the Court has accepted the use of regulatory charges to finance government programs and has developed tests for identifying such special levies. There are two steps in the identification process. First, the existence of a [page543] regulatory scheme must be established. According to the analytical approach adopted in *Westbank First Nation v. British*

Columbia Hydro and Power Authority, [1999] 3 S.C.R. 134, there must be (1) a complete and detailed code of regulation, (2) a regulatory purpose of influencing specific behaviour, (3) the existence of actual or properly estimated costs of the regulation and (4) a relationship between the regulation and the person who either benefits from it or made it necessary (para. 44). Rothstein J. recently reiterated these criteria in *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131, 2008 SCC 7, at paras. 25-26, although he reminded us that the list is not exhaustive. Next, if the court finds that a regulatory scheme exists, it must determine whether there is a relationship between that scheme and the charge (*Connaught*, at para. 27). Revenue collection must be related to the regulation or must in itself have a regulatory purpose of influencing the behaviour of the persons concerned (*Westbank*, at para. 44). As the Court noted in *Connaught*, the accumulation of excessive surpluses may indicate that a levy is a tax and not a regulatory charge (para. 40). However, the test is flexible, and the characterization of a levy as a regulatory charge does not depend primarily on the absence or the amounts of surpluses (*Connaught*, at para. 40). It depends above all else on whether the collected amounts or a substantial part thereof are allocated to the regulated activity.

73 Despite the existence of large surpluses, a sufficient connection was maintained between employment insurance premiums and the regulatory scheme as long as s. 66 of the *Employment Insurance Act* applied. Section 66 contained principles that governed the exercise of the premium-setting power delegated to the Commission: connection with the business cycle, stabilization of premium rates and building up of reserves:

> **66.** The Commission shall, with the approval of the Governor in Council on the recommendation of the [page544] Minister and the Minister of Finance, set the premium rate for each year at a rate that the Commission considers will, to the extent possible,
>
> (*a*) ensure that there will be enough revenue over a business cycle to pay the amounts authorized to be charged to the Employment Insurance Account; and
>
> (*b*) maintain relatively stable rate levels throughout the business cycle.

These principles served as the basis for a policy of allocation of and stability in the amounts being levied that justifies characterizing those amounts, from a constitutional standpoint, as a regulatory charge. I need not decide here whether the relevant tests for the exercise of the Employment Insurance Commission's regulatory power were properly applied. That branch of the proceedings instead concerned administrative law principles. As a result, it is, as Gascon J. pointed out, highly unlikely that this was a matter for the Superior Court; Gascon J. also noted that that branch of the proceedings had been abandoned before him.

74 During the period in question, from 1996 to 2001, the contributions collected were paid into the Consolidated Revenue Fund in accordance with the Act. The amounts needed for the system to function were credited or charged to the Account. However, it is clear that the Account does not constitute -- as is the case of pension fund assets -- a trust fund or patrimony by appropriation. It forms part of Canada's government accounting, and premiums form part of the government's revenues. The government's use of it does not, therefore, constitute a misappropriation of employment insurance monies. Those monies were used like any other part of the revenues in the Consolidated Revenue Fund, and the appropriate accounts were kept.

75 However, this conclusion does not resolve the issue of the legal effects of the situation resulting from the 2001 and 2004 amendments to the *Employment Insurance Act*, under which the power to set premium rates was delegated to the Governor General in Council but the legal framework for exercising the power was eliminated. In my opinion, those amendments had a significant effect on the validity of such levies in the circumstances in [page545] which they were adopted, that is, at a time when government representatives could not have helped but see that employment insurance revenues in fact greatly exceeded what the system required and that those revenues no longer had an actual connection with the system. This confirms that the relationship between the levy and the regulatory scheme had disappeared and that premiums had been transformed into a kind of payroll tax.

76 In 1999, the Minister of Finance of the day firmly believed that premiums formed part of general government revenues (*House of Commons Debates*, vol. 136, 2nd Sess., 36th Parl., Oral Question Period, November 1, 1999). He reaffirmed this position in 2001 (vol. 137, 1st Sess., 37th Parl., Oral Question Period, March 2, 2001). In a report, the House of Commons Standing Committee on Finance recommended a mechanism for setting premium rates in the future, but it was not in favour of going back to what had been done in the past. All the evidence that can be drawn from parliamentary debates or documents confirms that the government and Parliament did not seem willing to reduce premium rates to such an extent as to establish a connection between them and benefits paid under the system. The 2001 legislation, which applied in 2002 and 2003, altered the legal status of premiums. As I mentioned above, the provision delegated a discretion to set premium rates to the Governor General in Council. That discretion does seem to have been exercised in such a way that the surpluses in the Account gradually stabilized. But this fact does not eliminate the legal issue raised by the 2001 and 2004 amendments.

77 As a result of the approach taken by Parliament, premiums collected under this system can no longer be viewed as a regulatory charge. As I mentioned above, s. 66.1 was silent regarding the connection between premiums and benefits.

78 Exactly the same wording was used for s. 66.3, which applied to 2005. Thus, the effect of ss. 66.1 and 66.3 was that s. 66 did not apply. As I mentioned above, s. 66 imposed rules that applied to the Commission's exercise of its regulatory authority and to the preparation of opinions by the Minister and the Minister of Finance. It required [page546] the Commission to set a premium rate

that might establish relatively stable rate levels while at the same time ensuring that enough revenue would be collected to pay all authorized expenditures of the employment insurance system. This resulted in a framework under which it was possible to maintain a connection between the employment insurance program and its expenditures and revenues. It also ensured that premiums continued to constitute a regulatory charge within the meaning of *Westbank* and *Connaught*. When Parliament departed from s. 66 by passing ss. 66.1 and 66.3 in 2001 and 2004, this legal situation was radically altered. Every legal connection between revenues and expenditures disappeared. The collection of premiums ceased to be tied to the system and to its requirements, contrary to the principle laid down in *Westbank* (para. 44). The legal connection between the premium-setting system and the regulatory scheme ceased to exist.

79 Thus, following those statutory amendments, premiums no longer constituted a regulatory charge within the meaning of *Westbank* and *Connaught*. Rather, they became a levy on payrolls and wages. They were transformed into a tax. If this is the case, the Attorney General of Canada argues, the tax was validly imposed pursuant to Parliament's general taxation power under the *Constitution Act, 1867*.

80 The scope of Parliament's taxing power is well known. Parliament may tax by any means. However, if a levy is a tax, it must be imposed in accordance with the Constitution. Section 53 of the *Constitution Act, 1867* therefore poses a problem.

K. *Violation of Section 53*

81 The *Constitution Act, 1867* provides that Parliament alone has the power to impose a tax and that the legislation must originate in the House of Commons:

> **53.** Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

[page547]

82 This Court has confirmed that s. 53 reflects the ancient, but fundamental, principle of our democratic system that there should be no taxation without representation: *Westbank*, at para. 19, and *Connaught*, at para. 4. According to this principle, a tax can be imposed only by Parliament or a clearly authorized delegate of Parliament (J. E. Magnet, *Constitutional Law of Canada* (9th ed. 2007), vol. 1, *Federalism / Aboriginal Peoples*, at p. 626).

83 In *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, the majority of this Court held that levies to finance an agricultural products marketing scheme were not taxes, but regulatory charges. There was therefore no need to discuss the delegation of taxing authority. However, in an *obiter dictum* concerning the scope of s. 53, Pigeon J., writing for the majority,

appeared to reduce that provision to a mere rule of internal parliamentary procedure:

> It may be contended that, in authorizing a board or agency to impose and to use levies or charges, Parliament is indirectly doing what it may not do directly, namely, having a tax levied and appropriated otherwise than by means of a bill voted in the House of Commons on the recommendation of the Governor General. In my view this attack fails for two reasons. I agree with the Chief Justice that adjustment levies, as well as levies for expenses, are not taxes. Furthermore, ss. 53 and 54 are not entrenched provisions of the constitution, they are clearly within those parts which the Parliament of Canada is empowered to amend by s. 91(1). [pp. 1290-91]

84 This *dictum* has been criticized by Professor Hogg on the basis that s. 53 is a true constitutional rule. In his view, the fact that it can be amended by statute cannot justify violating it (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at p. 14-6). In *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at para. 34, Major J. stated that "[s]ection 53 is a constitutional imperative" and that the Court is not bound by the *dictum*.

[page548]

85 In *Eurig*, following an analysis based on the principles laid down in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, this Court held that amounts collected in respect of grants of letters probate constituted a tax rather than a regulatory fee (*Eurig*, at paras. 15 *et seq.*). Major J., writing for the majority of the Court, held as a matter of policy that, although the requirement that a tax result from the clearly expressed will of Parliament is absolute, this does not mean that Parliament may not delegate the power to establish "the details ... of taxation" as well as its mechanism:

> My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. ...
>
> ...
>
> The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation. [Emphasis added; paras. 30 and 32.]

86 Finally, the most recent decision in which this Court considered the delegation of taxing authority under s. 53 is *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*,

[2001] 1 S.C.R. 470, 2001 SCC 15. One of the issues in that case was whether provincial legislation authorizing the Minister of Finance to prescribe tax rates for school purposes was constitutional.

87 Iacobucci J., writing for a unanimous Court, noted that the delegation of the imposition of a tax is constitutional if the legislation provides expressly and unambiguously for the delegation:

> The delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation. The animating principle is that [page549] only the legislature can impose a new tax *ab initio*. But if the legislature expressly and clearly authorizes the imposition of a tax by a delegated body or individual, then the requirements of the principle of "no taxation without representation" will be met. In such a situation, the delegated authority is not being used to impose a completely new tax, but only to impose a tax that has been approved by the legislature. [Emphasis added; para. 74.]

88 According to Professor Hogg, it would be difficult to interpret *Ontario English Catholic Teachers' Assn.* as relating to the delegation of control over the details and mechanism of taxation, since "that phrase was never referred to" (p. 14-8). Yet, Iacobucci J. had quoted the relevant passage from *Eurig* (para. 71 of *Ontario English Catholic Teachers' Assn.*). The position taken by the Court in *Eurig* therefore remains valid. According to it, the taxing authority of Parliament or of a legislature may not be delegated unless that body clearly and unambiguously expresses its intent to delegate the authority.

89 In *Eurig*, the majority of the Court disagreed with the view of Gonthier and Bastarache JJ., dissenting, that taxing authority had been validly delegated, because the legislation did not clearly state that the Lieutenant Governor in Council had the power to "tax":

> [T]he probate levy is not enforceable as it was not authorized by s. 5 of the *Administration of Justice Act*. Section 5 reads:
>
> **5.** The Lieutenant Governor in Council may make regulations,
>
> (a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
> (b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;

[page550]

> (c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.
>
> While these provisions authorize the Lieutenant Governor in Council to impose fees, they do not constitute an express delegation of taxing authority... .
>
> ...
>
> Bastarache J. [dissenting] states that the authorization extended to the Lieutenant Governor in Council in the *Administration of Justice Act* to prescribe fees "includes the power to implement a direct tax" (para. 60). With respect, this conclusion cannot be sustained. The distinction between these two forms of charges cannot be erased by simply interpreting the word "fees" to include taxes. This distinction is both legally and constitutionally significant to determining the validity of the enactment... . [T]he imposition of taxes is an act of unique political significance, subject to special rules and requirements, none of which the impugned scheme meets. Ontario Regulation 293/92 is both unconstitutional and *ultra vires* as it seeks to impose a tax without clear and unambiguous authorization from the legislature to do so. [Emphasis added; emphasis in original omitted; paras. 38 and 41.]

90 In *Ontario English Catholic Teachers' Assn.*, the impugned provision of Ontario's *Education Act*, R.S.O. 1990, c. E.2, read as follows:

> **257.12** (1) The Minister of Finance may make regulations,
>
> ...
>
> (b) prescribing the tax rates for school purposes for the purposes of section 257.7;

91 As well, the delegation in the statute of the setting of rates was part of a detailed statutory framework in which the "structure of the tax, the tax base, and the principles for its imposition" were set out (para. 75). Relying on the principles established in *Eurig*, Iacobucci J. concluded that this delegation was constitutional:

[page551]

> The *EQIA* meets this requirement, as s. 257.12(1)(b) of the new *Education Act*expressly authorizes the Minister of Finance to prescribe the tax rates for school purposes. When the Minister sets the applicable rates, a tax is not imposed *ab initio*, but is imposed pursuant to a specific legislative grant of authority. [Emphasis added; para. 75.]

92 In short, in this case concerning employment insurance, only Parliament may impose a tax *ab initio*. According to this Court's decisions, taxing authority must be delegated expressly and unambiguously. Once this requirement is met, the delegate may exercise the power to establish the details and mechanisms of taxation.

93 The relevant provisions of the *Employment Insurance Act* must therefore be examined to determine whether, as in *Ontario English Catholic Teachers' Assn.*, they are consistent with the principles laid down in this Court's decisions. The provisions in question, ss. 66.1 and 66.3, do not state that Parliament is delegating taxing authority to the Governor General in Council. The nature of the levy remains ambiguous. It is unclear whether Parliament still considered that it was exercising the authority to impose a regulatory charge in enacting those provisions. At the time Parliament delegated the power to collect employment insurance premiums to the Commission and the Governor General in Council, the legislation contained no statement either that its purpose was to collect a tax or that Parliament's taxing authority was being delegated to the Governor General in Council. The delegation concerned a charge that was no longer a levy for specific purposes but had become a levy for general purposes with the meaning of *Westbank*, but it was not specified in the Act that Parliament intended to delegate its taxing authority as such. Parliament would have had to state that it was delegating that authority to the Governor General in Council. Owing to the ambiguous nature of the levy, whether Parliament intended to delegate its taxing authority remained uncertain.

[page552]

94 I accordingly conclude that the version of s. 66.1 of the *Employment Insurance Act* that applied in 2002 and 2003 is invalid. This means that employment insurance premiums were collected unlawfully, without the necessary legislative authorization. The same conclusion must be reached as regards the version of s. 66.3 that applied in 2005 and the premiums collected that year. In the circumstances of this case, which involves the improper exercise of a power conferred on Parliament, I would suspend the declaration of invalidity to allow the consequences of that invalidity to be rectified. I would dismiss the appellants' other claims and affirm the judgments of the Court of Appeal and the Quebec Superior Court with respect to them.

V. Answers to the Constitutional Questions

95 I therefore answer the constitutional questions as follows:

Question 1: No.

Question 2: No.

Question 3: No for the versions of ss. 66.1 and 66.3 of the *Employment Insurance Act* that applied in 2002, 2003 and 2005, but yes for the other provisions of the Act.

Question 4: No.

Question 5: It is not necessary to answer this question.

VI. Conclusion

96 For these reasons, I would therefore allow the appeals in part and declare that the versions of ss. 66.1 and 66.3 of the *Employment Insurance Act* that applied in 2002, 2003 and 2005 are invalid and that employers' and employees' premiums for 2002, 2003 and 2005 were collected unlawfully. I would suspend the declaration for a period of 12 months from the date of this judgment. I would award costs to the appellants throughout.

[page553]

* * * * *

APPENDIX

Constitution Act, 1867

> **53.** Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Employment Insurance Act, S.C. 1996, c. 23

22. (1) Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant who proves her pregnancy.

...

23. (1) Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides.

...

24. (1) The Commission may, with the approval of the Governor in Council, make regulations providing for the payment of work-sharing benefits to claimants who are qualified to receive benefits under this Act and are employed under a work-sharing agreement that has been approved for the purposes of this section by special or general direction of the Commission, ...

...

25. (1) For the purposes of this Part, a claimant is unemployed and capable of and available for work during a period when the claimant is

(*a*) attending a course or program of instruction or training at the claimant's own expense, or under employment benefits or similar benefits that are the subject of an agreement under section 63, to which the Commission, or an authority that the Commission designates, has referred the claimant; or

(*b*) participating in any other employment activity

[page554]

(i) for which assistance has been provided for the claimant under prescribed employment benefits or benefits that are the subject of an agreement under section 63 and are similar to the prescribed employment benefits, and
(ii) to which the Commission, or an authority that the Commission

designates, has referred the claimant.

...

57. (1) Employment benefits and support measures under this Part shall be established in accordance with the following guidelines:

(*a*) harmonization with provincial employment initiatives to ensure that there is no unnecessary overlap or duplication;

(*b*) reduction of dependency on unemployment benefits by helping individuals obtain or keep employment;

(*c*) co-operation and partnership with other governments, employers,community-based organizations and other interested organizations;

(*d*) flexibility to allow significant decisions about implementation to be made at a local level;

(*d.*1) availability of assistance under the benefits and measures in either official language where there is significant demand for that assistance in that language;

(*e*) commitment by persons receiving assistance under the benefits and measures to

(i) achieving the goals of the assistance,
(ii) taking primary responsibility for identifying their employment needs and locating services necessary to allow them to meet those needs, and
(iii) if appropriate, sharing the cost of the assistance; and

(*f*) implementation of the benefits and measures within a framework for evaluating their success in assisting persons to obtain or keep employment.

[page555]

(2) To give effect to the purpose and guidelines of this Part, the Commission shall work in concert with the government of each province in which employment benefits and support measures are to be implemented in designing the benefits and measures, determining how they are to be implemented and establishing the framework for evaluating their success.

(3) The Commission shall invite the government of each province to enter into agreements for the purposes of subsection (2) or any other agreements authorized by this Part.

58. (1) In this Part, "insured participant" means an insured person who requests assistance under employment benefits and, when requesting the assistance, is an unemployed person

(*a*) for whom a benefit period is established or whose benefit period has ended within the previous 36 months; or

(*b*) for whom a benefit period has been established in the previous 60 months and who

(i) was paid special benefits under section 22 or 23 during the benefit period,
(ii) subsequently withdrew from active participation in the labour force to care for one or more of their new-born children or one or more children placed with them for the purpose of adoption, and
(iii) is seeking to re-enter the labour force.

(2) For the purposes of subsection (1), "benefit period" includes a benefit period established under the *Unemployment Insurance Act* and "special benefits" includes benefits under sections 18 and 20 of that Act.

59. The Commission may establish employment benefits to enable insured participants to obtain employment, including benefits to

(*a*) encourage employers to hire them;

(*b*) encourage them to accept employment by offering incentives such as temporary earnings supplements;

(*c*) help them start businesses or become self-employed;

(*d*) provide them with employment opportunities through which they can gain work experience [page556] to improve their long-term employment prospects; and

(*e*) help them obtain skills for employment, ranging from basic to advanced skills.

60. (1) The Commission shall maintain a national employment service to provide information on employment opportunities across Canada to help workers find suitable employment and help employers find suitable workers.

(2) The Commission shall

(*a*) collect information concerning employment for workers and workers seeking employment and, to the extent the Commission considers necessary, make the information available with a view to assisting workers to obtain employment for which they are suited and assisting employers to obtain workers most suitable to their needs; and

(*b*) ensure that in referring a worker seeking employment there will be no discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act* or because of political affiliation, but nothing in this paragraph prohibits the national employment service from giving effect to

(i) any limitation, specification or preference based on a *bona fide* occupational requirement, or

(ii) any special program, plan or arrangement mentioned in section 16 of the *Canadian Human Rights Act*.

(3) The Commission may, with the approval of the Governor in Council, make regulations for the purposes of subsections (1) and (2).

(4) In support of the national employment service, the Commission may establish support measures to support

(*a*) organizations that provide employment assistance services to unemployed persons;

(*b*) employers, employee or employer associations, community groups and communities in developing and implementing strategies for dealing with labour force adjustments and meeting human resource requirements; and

[page557]

(*c*) research and innovative projects to identify better ways of helping persons prepare for, return to or keep employment and be productive participants in the labour force.

(5) Support measures established under paragraph (4)(*b*) shall not

(*a*) provide assistance for employed persons unless they are facing a loss of their employment; or

(*b*) provide direct federal government assistance for the provision of labour market training without the agreement of the government of the province in which the assistance is provided.

61. (1) For the purpose of implementing employment benefits and support measures, the Commission may, in accordance with terms and conditions approved by the Treasury Board, provide financial assistance in the form of

(*a*) grants or contributions;

(*b*) loans or loan guarantees;

(*c*) payments for any service provided at the request of the Commission; and

(*d*) vouchers to be exchanged for services and payments for the provision of the services.

(2) The Commission may not provide any financial assistance in a province in support of employment benefits mentioned in paragraph 59(*e*) without the agreement of the government of the province.

(3) Payments under paragraph (1)(*c*) include the following transitional payments, which may not be made under this section more than three years after it comes into force:

(*a*) payments to a public or private educational institution for providing a course or program of instruction or training at the request of the Commission under employment benefits authorized by paragraph 59(*e*); and

(*b*) payments to a province in respect of the course or program if it is provided by a public educational institution and there is an agreement between the government of the province and the Commission to remunerate the province for all or part of the cost of providing the course or program.

...

[page558]

66. The Commission shall, with the approval of the Governor in Council on the recommendation of the Minister and the Minister of Finance, set the premium rate for each year at a rate that the Commission considers will, to the extent possible,

(*a*) ensure that there will be enough revenue over a business cycle to pay the amounts authorized to be charged to the Employment Insurance Account; and

(*b*) maintain relatively stable rate levels throughout the business cycle.

...

71. There shall be established in the accounts of Canada an account to be known as the Employment Insurance Account.

72. There shall be paid into the Consolidated Revenue Fund

(*a*) all amounts received under Parts I and III to IX, as or on account of premiums, fines, penalties, interest, repayment of overpaid benefits and benefit repayment;

(*b*) all amounts collected by the Commission for services rendered to other government departments or agencies or to the public; and

(*c*) all amounts received on account of principal or interest on loans made by the Commission under Part II or as repayment of overpayments made by the Commission under that Part.

73. There shall be credited to the Employment Insurance Account and charged to the Consolidated Revenue Fund

(*a*) an amount in each year equal to the amount receivable as or on account of premiums payable for that year under this Act;

(*b*) any other amounts provided out of the Consolidated Revenue Fund appropriated by Parliament for any purpose related to employment insurance and administered by the Commission; and

(*c*) an amount equal to all benefit repayments receivable under Part VII.

[page559]

An Act to amend the Employment Insurance Act and the Employment Insurance (Fishing) Regulations, S.C. 2001, c. 5

9. The Act is amended by adding the following after section 66:

66.1 Notwithstanding section 66, the premium rate for each of the years 2002 and 2003 is the rate set for the year by the Governor in Council on the recommendation of the Minister and the Minister of Finance.

Budget Implementation Act, 2004, S.C. 2004, c. 22

25. The *Employment Insurance Act* is amended by adding the following after section 66.2:

66.3 Notwithstanding section 66, the premium rate for the year 2005 is the rate set for the year by the Governor in Council on the recommendation of the Minister and the Minister of Finance.

Solicitors:

Solicitors for the appellant Confédération des syndicats nationaux: Pepin et Roy, Montréal.

Solicitors for the appellant Syndicat national des employés de l'aluminium d'Arvida inc., Jean-Marc Crevier and Marie Langevin: Philion Leblanc Beaudry, Québec.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

cp/e/qllls

Case Name:

Charter Construction Ltd. v. Ontario (Minister of Transportation)

Between
Charter Construction Limited, Applicant, and
Her Majesty the Queen in Right of Ontario as represented by the Minister of Transportation, Respondent

[2008] O.J. No. 1838

69 R.P.R. (4th) 1

63 M.V.R. (5th) 121

2008 CarswellOnt 2655

46 M.P.L.R. (4th) 1

167 A.C.W.S. (3d) 1010

Court File No.: 06-1398

Ontario Superior Court of Justice

P.H. Howden J.

Heard: August 7, 2007; March 12, 2008.
Judgment: May 5, 2008.

(61 paras.)

Government law -- Crown -- Authority and powers -- Discretionary powers -- Abuse of -- Practice and procedure -- Legislation --Interpretation -- Statutes -- Application by Charter Construction for order that permit fee prescribed under Public Transportation and Highway Improvement Act was an invalid exercise of the respondent Minister's statutory power or that proposed subdivision did not fall within the permit provisions of Act -- Part of lands feel with 800-metre corridor within provincial access highways as described in s. 34 and 38 of Act -- Applicant sought to build

residential development -- Application allowed -- Fees were ancillary to valid regulatory scheme and were not a tax -- Subdivision did not fall under Act as the 800-metre provisions did not encompass a stand-alone residential subdivision development -- Public Transportation and Highway Improvement Act, ss. 34(2)(d), 38(2) (f).

Application by Charter Construction for an order finding that the permit fee prescribed under the Public Transportation and Highway Improvement Act was an invalid exercise of the respondent Minister's statutory power or that the proposed subdivision did not fall within the permit provisions of the Act. The Act established a system of controlling and regulating provincial highways and specified land use issues. The applicant proposed to build a 300-home residential development. Its phase one had been approved without a permit. Ss. 34(2)(d) and 38(2)(f) of the Act required a permit for the use of land, any part of which was within 800 metres for the purpose of a shopping centre, stadium, fairground, racetrack, drive-in theatre, or any other purpose that caused persons to congregate in large numbers. Part of the subject land was within the 800-metre corridor of Highways 11 and 12 established by ss. 34(2)(d) and 38(2)(f). The applicant argued that the permit fee was an indirect tax as it was passed on to the eventual homeowner and was thus ultra vires the provincial authorities. The Minister argued that the permit charges were related to a regulatory scheme and were not a tax.

HELD: Application allowed. The fees charged were ancillary or adhesive to the regulatory scheme governing traffic control on provincial highways under the Act. They were neither a tax nor were they arbitrarily set. The proposed residential development did not, however, fall within ss. 34(2)(d) and 38(2)(f) of the Act and the Minister's use of its powers under ss. 34(2)(d) and 38(2)(f) had been arbitrary. The purpose of sections 34(2) and 38(2) was to accommodate and control traffic and to promote judicious planning of the provincial highway system based on traffic-related considerations. The only purpose for which permits were to be allowed or refused was on provincial traffic planning considerations. While the proposed draft plan included one block of commercial, the development remained a residential subdivision. The Act was never intended to govern all traffic issues. Its ambit was traffic control and safe and efficient traffic movement on the provincial highway system. To interpret s. 38(2)(f), which targeted large scale crowd-attracting commercial development with accompanying volumes and traffic surges as if it contained the same wide degree of control as in s. 38(2)(a) covering all buildings within 45 meters of a controlled access highway ignored the scheme of the Act and the express intention of the Legislature. In approaching the scheme and intent of the Act contextually and harmoniously with the ordinary meaning of the provision, ss. 34(2)(d) and 38(2)(f) did not encompass a stand-alone residential subdivision development.

Statutes, Regulations and Rules Cited:

Interpretation Act, R.S.O. 1990, c. I.11, s. 10 R

Public Transportation and Highway Improvement Act, R.S.O. 1990, c. P.50, s. 34(2), s. 34(2)(a), s.

34(2)(b), s. 34(2)(c), s. 34(2)(d), s. 34(2)(e), s. 34(2)(f), s. 34(16), s. 34(17), s. 38(2)(f), s. 38(11), s. 38(12)

Counsel:

W.J. Leslie, for the Applicant.

M. Fleishman, for the Respondent.

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1 P.H. HOWDEN J.:-- This application raises two issues of importance:

(i) is the permit fee prescribed under sections 34(17) and 38(12) of the *Public Transportation and Highway Improvement Act*, R.S.O. 1990, c. P.50 *(PTHIA)* an invalid exercise of the Minister's statutory power, either because it is an invalid tax having no connection to the cost of services associated with the issuance of the permits or because it is arbitrarily set?

(ii) is a residential subdivision, part of which is within 800 metres of a provincial highway, captured by the permit provisions of sections 34(2)(d) and 38(2)(f) of the *PTHIA*?

(i) Is the Permit Charge Levied Under Section 34 or 38 of the *PTHIA* an Invalid Tax or a Regulatory Charge?

2 Sections 34(16) and (17) provide for permits and fee as follows:

> 34(16) The Minister may issue permits under this section in such form and upon such terms and conditions as he or she considers proper, and may in his or her discretion cancel any such permit at any time. R.S.O. 1990, c. P.50, s. 34(16).
>
> 34(17) The Minister may prescribe the fee to be paid for any permit or class of permit under this section. R.S.O. 1990, c. P.50, s. 34(17).

Sections 38(11) and (12) are in the same terms. Section 38 applies to controlled access highways whereas section 34 refers to the "King's Highway". There is no question that part of the subject land lies within the regulatory corridor of both the King's Highway (Highway 12) and a controlled access highway (No. 11).

3 The applicant corporation, an Ontario land developer, raised this issue in its application and in its factum before the hearing in August 2007. The respondent dealt with the second question fully in

its original factum and responding record, but on the validity of the permit charge, supported it initially only as an exercise of ministerial discretion. I reserved my decision following the original hearing of the application. Counsel for the respondent (represented by the Minister of Transportation -- MTO) requested a further opportunity to address the permit/tax issue. Following a telephone conference with both counsel, I ordered that the respondent be at liberty to file a further affidavit (subject to cross-examination) and both parties were allowed to file supplementary facta on the permit fee/tax issue. My endorsement with reasons was issued on November 2, 2007. I heard full argument on March 12, 2008.

4 The original position of the applicant was that the fee paid for a permit under sections 34 and 38 of the *PTHIA* was, in effect, an indirect tax which provincial authorities cannot impose constitutionally. The cost was to be passed on to the eventual homeowner, hence its indirect nature. In addition, the permit price was argued not to constitute a fee because there was no relation of the fee to the cost of highway improvements resulting from the development. Counsel for the applicant cited Re *Eurig Estate* (1998), 165 D.L.R. (4th) 1 (S.C.C.) in support of both positions. The Supreme Court of Canada held, at paras. 21 and 22 of *Eurig*:

> (21) Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided for a levy to be constitutionally valid ... Addressing the relationship between a charge and the cost of the underlying service, Iacobucci J. wrote (at p. 411):
>
> > a surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme ...
>
> (22) In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service. The Agreed Statement of Facts clearly shows that the procedures involved in granting letters probate do not vary with the value of the estate. Although the cost of granting letters probate bears no relation to the value of an estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service, which indicates that the levy is a tax and not a fee.
>
> The respondent had filed no evidence to meet this issue of nexus between the

permit charged and the cost of associated services, as well as what in law associated services should entail.

5 By the time of the subsequent hearing, MTO had filed affidavit evidence dealing with the characterization of the permit charges. It had originally taken the position in argument that the Minister had the right and discretion under sections 34 and 38 to issue or refuse permits to charge a fee for same.

6 At the subsequent hearing, the MTO position became more clear and nuanced. Mr. Fleishman submitted that the permit charges are related to a regulatory scheme, and are sufficient to pay for the administrative cost of the permit system. As such, it matters not whether they are direct or indirect.

7 The issue now is whether the permit charges under sections 34 and 38 of the *PTHIA* are "ancillary to or adhesive to a valid regulatory scheme". See *Allard Contractors Limited v. Coquitlan (District)* [1993] 4 S.C.R. 371 at para. 52; *Eurig, supra*, at para. 14. The principle was expressed by the Supreme Court of Canada decisions in *Allard,* re *Eurig,* and *620 Connaught Limited v. Canada (Attorney General),* [2008] S.C.J. No. 7, 2008 SCC 7. It is outlined in paras. 18 to 20 of *620 Connaught*, per Rothstein J.:

> 18. The issue of whether a levy is a tax or a regulatory charge has been considered on prior occasions by this court. The issue was relevant when determining the constitutionality of a provincial levy that had indirect tendencies ... If it was a tax, it would be *ultra vires* the province, whose taxing authority under s. 92(2) of the *Constitution Act, 1867* is restricted to direct taxes within the province. However, if it was a regulatory charge, the province was constitutionally competent to impose such charge. ...
> 19. It will be useful to first differentiate a regulatory charge from a user fee. A user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this court in *Eurig*, there must be a clear nexus between the quantum charged and the cost to the government of providing such services or facilities. The fees charged cannot exceed the cost of the government of providing the services or facilities. However, courts will not insist that fees correspond precisely to the cost of the relevant service.
> 20. By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or, the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour, e.g. a per-tonne charge on landfill waste may be levied to discourage the production of waste or a deposit-refund charge on bottles may encourage

> recycling of glass or plastic bottles'. (See *Westbank*, at para. 29, referring to re *Ottawa (Regional Municipality) By-law 234-1992*, [1996] O.M.B.D. No. 553 (Q.L.) ...

8 In this case, the submission of the respondent MTO is that the permit charges form a regulatory charge which is intended to defray the costs of the regulatory scheme. The indicia of a "regulatory scheme" are set out in *Westbank First Nation v. British Columbia Hydro and Power Authority* [1999] 3 S.C.R. 134 at para. 24:

> Certain indicia have been present when this court has found a regulatory scheme. The factors to consider when identifying a regulatory scheme include the presence of:
>
> (i) a complete and detailed code of regulations;
> (ii) a specific regulatory purpose which seeks to affect the behaviour of individuals;
> (iii) actual or properly estimated costs of the regulation; and
> (iv) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it.
>
> This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

9 The respondent submits that the permit system under the *PTHIA* meets all of the *Westbank* indicia for a regulatory scheme. The charge is not a tax because it is related to a regulatory scheme, and it is not levied as a revenue producer for general governmental purposes. *Westbank*, at para. 43, *620 Connaught*, at para. 24-26.

10 The applicant referred to the indicia for a tax which were set out in *Westbank* and in *620 Connaught* at para. 18. The factors important to a tax are:

> (i) it is compulsory and enforceable by law;
> (ii) it is imposed under the authority of the Legislature;
> (iii) it is levied by a public body;
> (iv) it is intended for a public purpose; and
> (v) it is unconnected to any form of a regulatory scheme.

The applicant's position is that the fees charged for the permits under sections 34 and 38 of the *PTHIA* are arbitrary, lack a nexus to the purpose of the Act, and are more consistent with a tax than a regulatory charge associated with a scheme of regulation. In the submission of Mr. Leslie on the

applicant's behalf, the cross-examination of the MTO representative on his affidavit leads to the conclusion that there is no correlation between the revenue generated by the MTO permit fees and the costs of administering the permit system. Finally, the applicant submits that there is no evidence to support a nexus between the permit fee charged and the applicant's 300 residential-unit development of Phase 1. Mr. Leslie asserts that the respondent has failed to meet indicia three and four of the factors relevant to a regulatory scheme.

11 I do not understand the applicant to be disputing either of the first two indicia of a regulatory scheme, i.e. (i) a complete and detailed code of regulation, and (ii) whether there is a specific regulatory purpose. The first factor was said by the Supreme Court of Canada in *Westbank* to focus on the nature of the purported regulation itself. In *Allard,* the regulatory scheme was described as a complete and detailed code to regulate gravel and soil extraction. What constitutes regulatory activity is not to be approached on an unduly narrow basis. This was emphasized in *Connaught* where the appellant hotel, restaurant and bar operators were proposing that the regulatory scheme to be considered should be restricted to the regulation of alcoholic beverages in Jasper National Park. The court held that that focus was unduly narrow because the appellant businesses benefit from all aspects of the park including heritage presentations, visitor services and highway maintenance. The court concluded that the appropriate regulatory scheme to consider was the scheme governing the administration and operation of the park as a whole.

12 According to the evidence presented by MTO, the *PTHIA* establishes a system of controlling and regulating provincial highways, as well as certain related and specified land use issues including buildings, highway entrances, plantings, signs and commercial crowd-attracting and event -- focused developments. As stated by Mr. Hewitt, head of the corridor management section of MTO, the *PTHIA* seeks to control development along provincial highways in the nature described in sections 30 (trees, fences and obstructions), 31 (highway interferences), 32 (livestock on highways), 33 (liability for non-repair), 34 and 38 (differentiated control of various types of development depending on proximity to the highway system.) MTO reviews development plans coming within the several corridors described in the *PTHIA* to ensure the safety, efficiency and reliability of the provincial highway system and to ensure that the proposed development does not adversely impact on that system. (Affidavit of Tom Hewitt, paras. 36-44.) The regulatory scheme is one of highway corridor control and review of development applications within the corridor by issuance and denial of permits, and by attaching conditions to permits, in order to ensure that necessary improvements are made in a timely fashion coincident with the development that requires them. I am satisfied that the *PTHIA* sets up a code of regulation which meets indicator (i) from *Westbank*.

13 The second feature of a regulatory scheme is that there is a specific regulatory purpose seeking to affect the behaviour of individuals. In this case, the regulatory purpose is to control traffic and ensure safe and efficient movement of traffic on the provincial highway system by responsible traffic planning. In order to do that, the *PTHIA* affects the behaviour of individuals proposing development within the highway corridor and the types of development referred to within the various radii within the corridor. If a permit is not obtained, the development cannot proceed

lawfully within the Act. As well, conduct is controlled by conditions that may be attached to the permit within the ambit of the purpose of the Act. The Supreme Court of Canada stated in relation to this factor:

> ... a regulatory scheme usually delineates certain required or prohibited conduct'. For example, in re *Exported Natural Gas Tax*, at p. 1075, the levy there was held to not be a regulatory charge because the text belies any purpose of modifying or directing the allocation of gas to particular markets.' ... in sum, a regulatory scheme must regulate in some specific way and for some specific purpose.

Factor (ii) from *Westbank* is met.

14 The third indicator of a regulatory scheme is described as the actual or properly estimated costs of regulation which are to have a fairly close nexus to the revenues raised through the scheme. In *Connaught*, the Supreme Court of Canada stated in relation to this indicium at para. 38:

> 38. In order for a regulatory charge intended to defray the costs of a regulatory scheme to be connected', the fee revenue must be tied to the costs of the regulatory scheme.

15 In *Westbank*, it was held that a charge is a tax if it is unconnected to any form of regulatory scheme. In other words, even if the levy has all the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme, but if it is not, if there is not a nexus between cost and revenue, it may well be held to be a tax.

16 It was further held in *Connaught*, at para. 39:

> In referring to a comprehensive and integrated regulatory scheme in *Ontario Home Builders,* ([1996] 2 S.C.R. 929) Iacobucci J. states, at para. 85:
>
> > The carefully designed mechanics of the scheme ensure that the power of indirect taxation will not extend beyond the regulatory costs; this is crucial in order to avoid rendering s. 92(2) of the *Constitution Act, 1867* meaningless.
>
> In this case, it is equally necessary that the fee revenue not exceed the regulatory costs in order to avoid rendering s. 53 of the *Constitution Act, 1867* meaningless.
>
> 40. However, as stated in *Allard*, at pp. 411-12, the government needs to be given some reasonable leeway with respect to the limit on fee revenue generation.

> While a significant or systematic surplus above the cost of the regulatory scheme would be inconsistent with the regulatory charge and would be a strong indication that the levy was in pith and substance a tax, a small or sporadic surplus would not, as long as there was a reasonable attempt to match the revenues from the fees with the costs associated with the regulatory scheme.

17 In *Connaught,* the Supreme Court of Canada found that there was a $17,000,000 shortfall between fees collected and total expenditures in a two-year period, 2003/2004. In the absence of evidence of the total fee revenue for the particular national park in question, the court inferred from the information relating to all mountain parks that the fee revenues from Jasper National Park likely did not exceed, and certainly did not significantly exceed, the cost of the regulatory scheme for the park. Therefore, the court held that the business license fees were connected to the regulatory scheme governing the park (at para. 44).

18 In this case, MTO's evidence establishes that since 2003 and 2004, there was a focused concern with the problem that fees for permits were not close to meeting the costs of operating the permit review system under the *PTHIA.* Exhibit C to the affidavit of Norris Bot demonstrates a serious intent by MTO to raise fees charged since 2004 in order to cover the cost of administering the permit review scheme. While Mr. Bot was not able to explain the accuracy of the overhead factor in the cost formula used by MTO, there is no evidence that that factor is inappropriate. The formula is: 40 (number of employees administering the regulatory program) x $64,000 (average annual salary per employee) x 2 (overhead and operating expenses). There is no doubt that the first two figures are appropriate, and, as stated in *Connaught,* at para. 72:

> ... it is not for this court to undertake a rigorous analysis of (the agency's) accounts. A surplus itself is not a problem so long as (the agency) made reasonable attempts to match the fee revenue with the administrative costs of the regulatory scheme, which is what occurred in this case.

19 In view of this approach, I find that Mr. Bot's evidence establishes an intent by MTO since 2004, to match revenues generated by permit fees to the administrative cost of operating the regulatory scheme. In 2004, costs were far in excess of revenues. By 2006, revenues from permit fees were increased to attempt to recover the full administrative cost. While there is no evidence to support the overhead factor of 2 in the cost formula, there is no doubt that there are overhead and operating costs beyond salaries. There is no evidence that 2 is not an appropriate factor to use in costing the regulatory scheme. In 2006, revenues from permits had increased to $5,700,000 and costs were $5,120,000. As in *Allard* at para. 73, there is no evidence of any intention "to raise revenue in excess of regulatory needs". From the decisions in *Allard* (at para. 73) and *Connaught* (paras. 44 and 45), the government is to be granted reasonable leeway in these circumstances. I find that the permit fees established by the Minister under sections 34 and 38 of the *PTHIA* were intended only to cover the costs of the regulatory scheme. For these reasons, factor (iii) of the indicia of a regulatory scheme is met.

20 I am satisfied that item (iv), the relationship between the regulation and the person being regulated, is also met. Where a proposal for development within the applicable corridor will impact on the highway system, highway improvements need to be co-ordinated with the actual development to ensure that the goals of highway control and traffic movement are met.

21 I conclude that the fees charged are ancillary or adhesive to the regulatory scheme governing traffic control on provincial highways under the *PTHIA*. They are neither a tax nor are they arbitrarily set.

(ii) Is Residential Development on Land Within 800 Metres of Provincial Highways Subject to sections 34 and 38 Permit Control?

(a) The Residential Subdivision Proposal and Process

The applicant corporation put forward a proposal for an official plan amendment in order to accommodate a residential subdivision on 99.6 ha. (246 acres). It comprises 2,236 residential units of varying densities, high, low and medium and is called the Stone Ridge subdivision. There are small blocks on the draft plan set aside for a school, park, environmental protection, and neighbourhood commercial uses. (*Glavic Affidavit, paras. 8 and 9, Application Record.)* The respondent, through the Minister of Transportation (MTO), deals with the acquisition, maintenance, improvement, drainage of, and impact of development on, the provincial highway network. Part of the subject land is within the 800-metre corridor of Highways 11 and 12, near Orillia, established by sections 34(2)(d) and 38(2)(f) of the *PTHIA*.

Sections 34(2) and 38(2)(f) read as follows:

Section 34(2). Despite any general or special Act, regulation, by-law or other authority, no person shall, except under a permit therefore from the Minister,

(a) place, erect or alter any building, fence, gasoline pump or other structure or any road upon or within 45 metres of any limit of the King's Highway or upon or within 180 metres of the centre point of an intersection;
(b) place any tree, shrub or hedge within 45 metres of any limit of the King's Highway or within 180 metres of the centre point of an intersection;

(c) display any sign, notice or advertising device, whether it contains words or not, other than one sign not more than sixty centimeters by thirty centimeters in size displaying the name or the name and occupation of the owner of the premises to which it is affixed or the name of such premises within 400 metres of any limit of the King's Highway;
(d) use any land, any part of which lies within 800 metres of any limit of the King's Highway, for the purposes of a shopping centre, stadium, fair ground, race track, drive-in theatre or any other purpose that causes persons to congregate in large numbers;
(e) sell, offer for sale or display produce, goods or merchandise upon the King's Highway; or
(f) construct or use any private road, entranceway, gate or other structure or facility as a means of access to the King's Highway. R.S.O. 1990, c. P.50, s. 34(2).

Section 38(2) Despite any general or special Act, regulation, by-law or other authority no person shall, except under a permit therefore from the Minister,

(f) use any land, any part of which lies within 800 metres of any limit of a controlled-access highway, for the purposes of a shopping centre, stadium, fair ground, race track, drive-in theatre or any other purpose that causes persons to congregate in large numbers.

22 All of the requirements in section 34(2) of the *PTHIA* are repeated in section 38(2) in relation to "controlled access" highways. Section 34(2) applies to "the King's Highway". Section 38(2) adds subsections (c) and (d) regarding fruit/vegetable stands and transmission lines within 45 metres and 400 metres respectively of a controlled access highway. A "controlled access highway" under s. 38 is designated as such by the Lieutenant Governor in Council and is part of the King's Highway referred to in s. 34, being the provincial highway network. Highway 11 is designated a controlled access highway and is, with Highway 12, part of the provincial highway network.

23 The proposed draft plan of subdivision was circulated to various interested parties and agencies for comment and suggested conditions for development. MTO was one of those agencies. It wrote the City on February 10, 2004, confirming that it had completed its review of the proposed plan and suggested to the City of Orillia two conditions:

* that prior to final approval, a storm water management plan shall be provided to MTO;
* that prior to final approval, a "copy of a traffic impact study

> (report/analysis/assessment) showing anticipated traffic volumes and their impact on Highways 11 and 12" was to be submitted to MTO.

This letter contained an inaccurate reference to the statutory provisions as requiring permits for all structures "within 800 metres of the highway limits". Sections 34(2)(d) and 38(2)(f) actually apply only to certain named types of commercial development and any other "purpose that causes people to congregate in large numbers", not simply to all buildings within 800 metres. As well, they apply to parcels of land, any part of which is within 800 metres of provincial highway limits. The City was requested to make the applicant aware of MTO's permit requirements, but no suggestion was made by the MTO letter of February 10, 2004 to insert them as a condition of development or as a note to conditions.

24 On June 1, 2004, MTO's project manager wrote to the applicant's traffic consultants, commenting on a preliminary traffic assessment. He informed the consultants what future highway realignments they could assume to be in place for purposes of a traffic study. At the end, the MTO letter states:

> The permit requirements noted in our February 10, 2004 letter remain valid and we request that they be included in Notes of Draft Approval. Draft plan conditions requested in the February letter also still pertain.

25 This was the first mention by MTO that the *PTHIA* permit requirements should be mentioned in the draft approval. It came some four months after its comments on the proposed plan were submitted to Orillia, and not to the approval authority but to a private consulting firm. A copy went to the City of Orillia.

26 The City of Orillia approved the draft plan and the official plan amendment in September 2004. It failed to include the storm water condition requested in MTO's letter of February 10, 2004. But, in requiring by condition to the approval traffic management and road improvements to the satisfaction of MTO, the City appeared to have addressed and encapsulated, in language wider than the MTO request, the only other condition proposed to it by MTO.

> 20. Prior to final approval, the Ministry of Transportation shall confirm that it is satisfied with the provisions for road improvements and traffic management attributable to the proposed development.

Subsequently, MTO took the position that the City had not included any of its requirements, including issuance of permits under the *PTHIA*, whereas the City had done what MTO had requested of it in its comment letter to the City, with the exception of the storm water plan. The traffic requirement in condition 20 was in fact broader than that proposed by MTO to ensure that traffic concerns were met. Contrary to MTO's position following draft approval, MTO had not put forward to the City a request for a condition of draft approval or a note referring to the permit process established in the *PTHIA*. In its comments of February 10, 2004, it had merely asked that

the City give the applicant notice that permits were required for "structures within 800 metres of Highways 11 and 12".

27 On April 14, 2005, a City official named Andrew Fyle e-mailed MTO as follows:

> Peter -- as discussed, I have drafted an amendment to the Note for the Conditions of Draft Approval to supplement our standard wording re: satisfaction of MTO requirements found in Condition No. 20. This is found in Note 8 (later Note 7). Hopefully, this addresses your requirements.

28 On April 18, 2005, MTO's project manager pronounced himself satisfied with the new Note 7. The conditions of draft approval were not modified, nor was any appeal taken from them by MTO to modify the conditions. The Note which was added has no authority in the *Planning Act* and merely sets out how MTO wants its traffic concerns dealt with to meet condition 20. This Note was done behind the back of the approval authority, the Council of the City of Orillia, and the applicant to satisfy MTO's as well as the City's prior omissions. The irony is that sections 34(2) and 38(2) give the permit process of the *PTHIA* priority over the *Planning Act* process, meaning there is no need in law for Note 7 to the draft conditions in that regard. Clearly the Legislature intended that zoning and building issues under the Planning Act and the Building Code Act were not to interfere with provincial traffic planning. *Multi-Malls Inc. v. Minister of Transportation and Communications* (1977), 14 O.R. (2d) 49, at para. 40.

29 By August 15, 2005, MTO and the applicant were disagreeing about traffic requirements, how to assess them, and the possible need for road improvements. The applicant told MTO of its dissatisfaction with MTO's request for a full traffic assessment of the entire plan of subdivision before any development could occur, whether phased or not. The applicant's project manager, Henry Glavic, told MTO that the applicant would proceed to register Phase 1 of the draft plan, allowing for some 300 units. On several occasions in 2005 and 2006, MTO reminded the applicant of the permit requirements of sections 34(2) and 38(2) of the *PTHIA*. Finally, on March 21, 2006, after repeatedly refusing to accept the applicant's traffic assessment for Phase 1, and at one point demanding a traffic analysis of the complete plan before the 300-unit Phase 1 could proceed, MTO accepted the Phase 1 study. The alleged understanding in respect of the communication is in para. 28 of Mr. Hewitt's affidavit, filed on behalf of MTO:

> On March 21, 2006, Dorton wrote to inform Charter Construction that their Phase 1 traffic impact study of March 2, 2006 had been accepted. Dorton also stipulated that future phases would only be considered after review and subsequent approval of a full buildout traffic impact study of Stone Ridge Residential Subdivision. This Phase 1 traffic impact study approval was an act of good faith on the part of the Ministry, as it was clear from the year 2005, full buildout traffic impact study submissions that the Ministry was requiring highway improvements associated with this development. I am advised by Peter

> Dorton that it was understood by all parties, including Charter Construction, at the time follow up full buildout traffic impact study would be submitted to the Ministry prior to seeking MTO clearance to register additional phases.

30 The letter of March 21, 2006 is attached to Mr. Hewitt's affidavit as an exhibit. It simply notes that MTO had completed its review and was accepting the submission as acceptable in regard to Phase 1 development. MTO also was accepting that future commercial developments in the area were the driving forces behind the need for future highway improvements. There is no confirmation in the letter of this approval being a good faith gesture or that the approval meant anything more than that acceptance that Phase 1 entailed no highway improvements. MTO stated that a complete traffic impact study for the remainder of the Stone Ridge subdivision would be required.

31 Meanwhile or prior to these events, three developments of significant commercial or institutional content situated partially or wholly within the 800-metre corridor were allowed to develop without permits from MTO: a 1,000-seat theatre, a call centre employing 700 persons, and a chronic care facility. The applicant's West Ridge residential subdivision of over 300 lots required only one permit. Phase 1 proceeded to the construction phase. MTO by this time was requiring of the applicant permit fees for each building unit, unlike MTO's decision with respect to West Ridge. The applicant did not recognize the respondent's authority under the *PTHIA* to require any permit, or one permit for each unit, in these circumstances. It paid the MTO's permit fees under protest.

32 In concluding this introductory section on the process followed by the applicant's residential draft plan and MTO's fragmented efforts to carry out its highway-corridor responsibilities, one could reasonably draw the inference that MTO was entering an area of regulation new to it. Its commenting procedures were uncoordinated and the corridor-permit requirements under sections 34(2) and 38(2) were being applied haphazardly, even arbitrarily. Yet the Ministry has had the responsibility for highway-corridor control in the interest of traffic planning for several decades. In dealing with residential development on land within the 800-metre highway corridor, there is a serious question as to MTO's appreciation of its legislated mandate and the limits of that mandate.

(b) Statutory Interpretation

33 Counsel for MTO rightly stresses that the interpretation of legislation must be carried out with an eye to the purpose of the Act and the provision in question. The approach to statutory interpretation is a contextual and purposive one, but not to the exclusion of the words in the provision in question. In the words cited by the Supreme Court of Canada in Re *Rizzo and Rizzo Shoes Limited*, [1998] 1 S.C.R. 27:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

34 The modern principle has been cited and relied on in numerous decisions of Canadian courts. The principal components of the modern principle are set out in *Sullivan and Driedger on the Construction of Statutes*, at pp. 1 and 2:

> The chief significance of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. The first dimension emphasized is textual meaning ...
>
> A second dimension endorsed by the modern principle is legislated intent ... this aspect of interpretation is captured in *Driedger's* reference to the scheme and object of the Act and the intention of Parliament.
>
> A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read.
>
> *Sullivan and Driedger on the Construction of Statutes*, (4th Ed.), by R. Sullivan, Butterworth's, 2002.

35 Both counsel in this case agree that there is no appellate authority interpreting the legislative provisions of sections 34(2)(d) and 38(2)(f) in relation to a stand-alone residential subdivision. In *Essex 143 Joint Venture Limited v. Ontario (Minister of Transportation)* (2006), 23 M.P.L.R. (4th) 165 (Ont. C.A.), a case involving a residential phase of a mixed use (residential/commercial) development, the application judge issued declarations that the residential portion was not a use of land that is rendered subject to a permit from the Minister by s. 34(2)(d) or s. 38(2)(f) of the *PTHIA* and that the developer was permitted to proceed with the residential development without a permit. The Court of Appeal, in a judgment written by Rouleau J.A., held that the application judge had viewed the issue too narrowly; in its full context, what the application judge had before him was the residential phase of a mixed use development, not simply a stand-alone residential development. The appeal was allowed, the application judge's order was set aside, and in its stead a declaration was substituted that required the respondent to apply for a permit under s. 38(2)(f) of the *PTHIA* prior to proceeding with the proposed residential subdivision (at para. 30).

36 The Court of Appeal's judgment expressly states (at para. 29):

> Having reached this conclusion (that the project as a whole was a mixed commercial/residential one), it is not necessary for me to determine whether, standing along, a residential development of the type proposed by the developer would fall within the terms of s. 3(2)(f) of the *PTHIA*.

I should add that in *Essex 143,* the court engaged in no statutory analysis of s. 34(2) and 38(2)(f) of the *PTHIA*. The issue in that case was confined to the nature of the development and how broadly or narrowly the development project should be defined in a phased situation. The commercial phase had gone ahead first -- it was a significant development with a regional traffic draw, consisting of a grocery store, Canadian Tire department store, an automotive dealership, and associated parking. MTO and the Town agreed, as a condition to the commercial development and the necessary highway improvements, that the entire development came within the permit provisions of the *PTHIA*, without challenge by the developer. No similar condition was required by the City of Orillia in this case; the Notes to the draft conditions do not have legal status under the Planning Act. However, the MTO had certainly put the applicant on notice following approval of Phase 1 that all development in the subdivision would be subject to MTO traffic requirements and permits.

37 As a starting point for my deliberations in this case, the Court of Appeal in 1976 set out at some length the history of s. 34(2)(d) and s. 38(2)(f) and their purpose (*Multi-Malls*). The Court of Appeal found that the purpose of the *PTHIA* is generally to accommodate and control traffic on the provincial highway network.

> (36) It seems clear that the purpose of the Act in general is not to ensure proper land use planning but generally to control traffic. All of its provisions deal with the procedure for the designation, acquisition, construction, maintenance and financing of roads, for determining the need for and use of King's Highways, secondary highways, tertiary resource, industrial, county, suburban, township, city, town, village and development roads.
>
> (37) Part II devotes itself to the particular concept of the "controlled-access highway". We are now familiar with the traffic planning concept of high-speed roadways intended to permit the faster movement of traffic. We know that to allow such faster movement safely, it is necessary to restrict access to such roadways now called "controlled-access highways".
>
> (38) The introduction of such designations (i.e. controlled-access highways), justifiable on the basis of the public need for faster traffic between certain points, involved a sacrifice of private convenience. Long setbacks were required, the erection of distracting signs had to be prohibited, and the construction of entrance or access roads had to be controlled. Yet obviously, there are situations in which it would be unfair to so prohibit, especially where the greater public interest would not be unduly harmed. Thus, the provision presently dealt with was made for the granting of permits to persons wishing to do that which would otherwise conflict with the general prohibitions.

38 The Court of Appeal in *Multi-Malls* concluded in respect of sections 34/38 permit regulation that the MTO has a limited discretion. The discretion to refuse or grant such permits must be exercised having regard to traffic planning concerns and interests (at para. 39). The issue in *Multi-Malls* involved whether a permit could be refused on the ground of official plan concerns of

the Town of Tillsenburg which were unrelated to traffic planning. Interestingly, in the course of his judgment, Lacourciere J.A. makes the point that the wording of sections 34(2) and 38(2) does not encompass a discretion to issue permits as the MTO "considers proper". The latter words attach to the imposition of terms and conditions, not to the discretion to issue permits in the first place or not. The Legislature, by amendment in 1957 repealed the words "in his discretion" which originally described the Minister's discretion to issue permits. Lacourciere J.A. held (at para. 23):

> The change to be noted is the repeal of the words in his discretion' which originally modified the may issue' discretion. The repeal of these words may be taken to be a deliberate expression of the intent of the Legislature indicating the desire to restrict the ambit of discretionary power.

In this vein, Lacourciere J.A., writing for the Court of Appeal, rejected the Divisional Court's decision in *Multi-Malls* which recognized a broad discretion in a Minister of the Crown to regard all matters of good government when exercising discretion, including matters well beyond those in the Minister's home statute.

39 So, the purpose of sections 34(2) and 38(2) comes within the overall purpose of the Act, to accommodate and control traffic and to promote judicious planning of the provincial highway system based on traffic-related considerations. The opening words of the sections are obviously intended to allow provincial traffic planning concerns to override local planning policies and decisions if they are in conflict. Nevertheless, it is also a matter of significance, as Lacourciere J.A. stressed in para. 38 of *Multi-Malls*, that a public power to permit or not permit otherwise legitimate conduct and to review development proposals within the highway corridor should be used within the purposes of the governing statute and is to be conducted fairly, not arbitrarily. The discretion to issue highway corridor permits is to be construed with the understanding that it was intended to alleviate the prohibition of private actions by the *PTHIA*. *Multi-Malls*, at para. 39. In the words of Rand J. in *Roncarelli v. Duplessis* [1959] S.C.R. 121 at pp. 140-141, cited at para. 29 of *Multi-Malls*, in relation to use of a different statutory permit power:

> It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the discretion of the Commission'; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

40 The Legislature in sections 34(2) and 38(2) adopted a permit system to deal with buildings, gas stations, hedges, trees, advertising signs, fresh food stands, transmission lines, and large

commercial crowd-producers like a stadium, theatre, race track and "any other purpose that causes people to congregate in large numbers". The *PTHIA* adopted a legislative scheme of prohibiting specified development on lands within broadly delineated distances from the provincial or controlled access highways, from which prohibition a proponent can apply for a permit to allow a development that comes within the legislated categories and highway corridors and which is not in conflict with provincial traffic planning. This scheme permits MTO to review development proposals within the described use and structural categories and within the prescribed distances of provincial highways with a view to determining whether and to what extent the road system can accommodate them safely and to determine what, if any, improvements are required to the highway system to accommodate anticipated traffic. The only purpose for which permits are to be allowed or refused is on provincial traffic planning considerations. This scheme is not designed as a parallel scheme to that under the Building Code Act where permits must be considered for each individual building or structure.

41 The terms of sections 34(2) and 38(2) use a cone technique, starting with the highway itself and then using short distance radii from the highway with broad clauses capturing a wide spectrum of development, and extending out to greater distances from the highway, using less broadly described types of development to be prohibited, like transmission lines at 400 metres. The smallest corridor of prohibition is in s. 34(2)(e) -- it applies to the sale of goods "upon" the highway. Within 45 metres of a provincial (or controlled access) highway, no building or structure or road can be placed or altered without a permit. This is a very broad prohibition of development proposed close to high speed highways. Such development can be distracting, and can produce heavier traffic flows into the provincial highways with immediate impact due to their proximity. Also, within 45 metres of provincial highways, no tree, shrub or hedge can be placed without a permit. Because of proximity to high speed highways, such installations can cause obstruction on a curve and unsafe conditions for traffic unless they are carefully dealt with in terms of distance and conditions of development through use of the permit review process in sections 34 and 38 of the *PTHIA*.

42 The next corridor of prohibition and permit control applies to signs or advertising devices within 400 metres of the highways, and, in s. 38(2)(d) only, power or transmission lines within 400 metres of a designated controlled access highway. The categories of use narrow to more specifically described classes of objects which no longer include broad categories like "building", "structures", and "roads", and the corridor of prohibition and permit control widens to 400 metres, or about one-quarter of a mile in non-metric terms.

43 Finally, the largest corridor of prohibition and permit-regulation applies to what the Legislature described in s. 34(2)(d) and 38(2)(f) -- the use of land, any part of which is within 800 metres "for the purpose of a shopping centre, stadium, fairground, racetrack, drive-in theatre, or any other purpose that causes persons to congregate in large numbers". Those categories of development are capable of producing emergency situations, heavy volumes, and traffic surges from the crowd-attracting development described. The provisions in sections 34(2) and 38(2) are in language apparently carefully chosen by the Legislature. There is no evidence before me of any restriction of

choice in the decision to use this kind of language and technique. The provisions of subsections (2)(d) and (2)(f) fit within the overall scheme of the Act and of the sections.

44 The crux of the problem of interpretation of sections 34(2)(d) and 38(2)(f) comes with the concluding words: "or any other purpose that causes persons to congregate in large numbers".

45 For the applicant, Mr. Leslie contends that subsections (2)(d) and (2)(f) do not purport to prohibit or regulate residential development at all. They list five commercial uses which are the type of uses that cause crowds of people to gather, and then add "or any other purpose that causes persons to congregate in large numbers". Mr. Leslie submits that those words should be read *eiusdem generis* to mean any other commercial uses that cause persons to congregate. He cited Re *Gravestock* [1943] O.J. No. 196 (H.C.J.) at para. 12:

> The principle of this rule as regards statutes was explained in *Rex v. Wallis* (1793) 5 T.R., 375, 379, to the effect that if the Legislature had meant the general words to be applied without restriction, it would have used only one compendious word. *Attorney General for Ontario v. Hamilton Street Railway Company* (1902), 54 C.C.C. 344 (O.C.A.).

46 The MTO's position put forward by Mr. Fleishman is that this legislation, being remedial, should attract a liberal interpretation informed by the purpose of the Act, which is to plan for and control traffic. In that light, he submits that sections 34(2)(d) and 38(2)(f) should be read so as to include the named types of commercial development plus any development for any other purpose which would carry with it significant traffic generation. *Interpretation Act*, R.S.O. 1990, c. I.11, s. 10; *Sullivan and Driedger on Construction of Statutes, supra,* at pp. 1-2; *Earthroots Coalition v. Ontario (Minister of Natural Resources)*, [2003] O.J. No. 3341 (Div. Ct.), at paras. 22-23.

47 A factual aspect which bears on the integrity and consistency in the MTO's use of its discretion regarding sections 34(2) and 38(2) is how it dealt with other major development in this area in recent years. The evidence from the applicant is that three other commercial or institutional projects went ahead in the area of the subject land and within the 800-metre corridor without any permit from the MTO. The West Ridge development was a residential subdivision of this applicant comprising 315 homes, allowed to proceed by one all-inclusive MTO permit. This subdivision is immediately adjacent to and south of Highway 12, within 800 metres of Highway 11. According to Henry Glavic,

> The respondent never required or (the applicant) was (not) issued a single-use land and building permit pursuant to s. 34 of the *PTHIA.* The West Ridge Subdivision is similar to the applicant's Stone Ridge Subdivision.

Under cross-examination, Mr. Glavic conceded that the West Ridge Subdivision proceeded on obtaining one MTO permit for the entire West Ridge subdivision. In regard to West Ridge, only one MTO permit was required and only one fee, not as in this case, a permit and corresponding fee

charged for each unit.

48 The four projects and the position of MTO are:

Project	MTO Position
Call Centre, including 700 employees	No permit was required
Leisure World, 224 beds	No permit was required
Galaxy Cinema, 1080 seats	No permit was required
West Ridge Subdivision, 315 homes	One permit only was required

49 Under cross-examination, the MTO representative conceded that the call centre is a traffic generator, though he believed it not to be a major one. There was no evidence informing that belief. No permit or even a traffic study was required regarding it or regarding Leisure World, the chronic care facility, despite their position within the 800-metre radius. The MTO representative said that the theatre went ahead without a permit by mistake. No reason was provided as to how this "mistake" could have occurred, despite the agency review process under the *Planning Act*, as well as the overriding requirements of sections 34 and 38 of the *PTHIA*, and the requirement of a building permit under the *Building Code Act* (whereby development must accord with existing law including the *PTHIA*).

50 In this case, the applicant's Phase 1 residential subdivision of 300 homes was approved by MTO without any overall traffic assessment and on the basis that no highway improvements were required. The applicant did not accept MTO's position that their residential subdivision comes within sections 34(2)(d) or 38(2)(f). It paid for and obtained the MTO permits under protest.

51 In my view, the applicant's position that only Phase 1 is before the court and, alternatively, that only homes within the 800-metre radius are subject to MTO permit supervision is not tenable in

light of the holding in *Essex 143* and the words of s. 34(2)(d) and 38(2)(f). The essence of the Court of Appeal's holding in *Essex 143* is that the court must look at the full context of the proposed development. In this case, the proposal includes over 2,000 units, not simply the 300 units in Phase 1. To hold otherwise would be to allow developments to escape responsibility for the cost of highway improvements caused by them merely by making piece-meal applications.

52 As to the character of the subdivision, while the draft plan does include one block of commercial, it remains a residential subdivision, *not* a mixed use development as in *Essex 143* for this reason. The nature of usage for the commercial block is neighbourhood commercial, which means it is planned to serve only the local subdivision population. It is ancillary to and serves the residential proposal. Therefore, what I have before me is a proposed residential development of 2,265 units, Phase 1 of which is a registered plan fully approved and being built without any traffic improvements required. The MTO's position on deciding not to oppose to Phase 1 is that later phases would require a full traffic assessment and would be subject to permit control, whether or not the actual lots are within the 800-metre radius. A significant portion of the subdivision land, looking at its entirety, is within that radius from both Highways 11 and 12.

53 The serious issue is whether, in these circumstances and in view of the purpose, scheme and words of the statute, this residential development is subject to the permit control imposed under sections 34 and 38 of the *PTHIA*. As I have found earlier, sections 34 and 38 were enacted to deal with whether road improvements or additions were necessitated for the types or categories of development described in those sections in order to prevent distractions and encroachments in proximity to provincial highways in order to promote traffic flow and driving safety.

54 Is a stand-alone residential development in the 800-metre corridor caught by sections 34(2)(d) and 38(2)(f) of the *PTHIA*? In my view, it is not. The object of the Act is to accommodate and control traffic, as *Multi-Malls* held, but to use that general object to distort the words and technique of control chosen by the Legislature in these provisions, as MTO's position would have me do, is to ignore the ordinary and grammatical sense of the words, the intention of the Legislature, and the ambit of the Act. If that were the intent, it would have been simple to say that all development proposals within 800 metres were to be regulated, or simply to add "residential development" as a prohibited category. But in sections 34 and 38, the kind of comprehensive control over all buildings is reserved to the 45-metre corridor in subsection (a). The *PTHIA* was never intended to govern all traffic issues. Its ambit is traffic control and safe and efficient traffic movement on the provincial highway system. The Legislature chose a mechanism of distances from provincial highways plus categories of development to describe the reach of the MTO permit system. MTO is not granted by the *PTHIA* some overarching authority over all traffic issues within Ontario or every development proposal within 800 metres, otherwise the scheme of sections 34 and 38 would have been different. The municipal approval authorities deal with developmental impact on regional, county and local road systems. But within the distances and categories of development set out in sections 34(2) and 38(2) of the *PTHIA* in relation to those corridor distances, the provincial permit control holds sway regarding traffic planning and improvements necessitated by development that comes within those

provisions. To interpret s. 38(2)(f), which targets large scale crowd-attracting commercial development with accompanying volumes and traffic surges as if it contained the same wide degree of control as in s. 38(2)(a) covering all buildings close to a controlled access highway (within 45 metres) ignores the scheme of the Act and the express intention of the Legislature. If the legislative tools chosen by the Legislature some five decades ago are no longer regarded as adequate, the legislation should be amended to change and update the control required.

55 This is not the first time that this legislation has been judicially interpreted not to include residential proposals within the 800 metre corridor. (See *Essex 143*, ruling of Cusinato J.) It should therefore be a matter of some urgency as to whether the present legislative scheme and provisions in sections 34 and 38 are no longer adequate to address the public interest.

56 Section 38(2)(f) requires a permit from MTO for anyone to use any land part of which is within 800 metres of a controlled access highway for

> the purposes of a shopping centre (which was the case in the mixed use development with regional commercial components in *Essex 143*), stadium, fairground, racetrack, drive-in theatre or any other purpose that causes people to congregate in large numbers.

This subsection does not read, "or any other purpose with significant traffic impact on the provincial highway system", nor does it simply state, "for any other purpose".

57 The word "congregate" is not a term of art. Its ordinary meaning applies here. "To congregate" means "gather into a crowd or a mass". (*Concise Oxford English Dictionary*, Oxford University Press, 10th ed., 2002.) In no sense of the words used by the Legislature does "congregate" involve "to reside" or "to live in a residential community", a state of permanence with smoother, rhythmic traffic flow than regional commercial draws like a shopping centre or fairgrounds. The ordinary meaning of the words used describe crowd-attracting commercial uses, most with surge potential due to event programs (in the case of racetracks and stadia), or opening and closing times and holidays (as with shopping centres or fairgrounds), which cause people to assemble or gather together.

58 In approaching the scheme and intent of the Act contextually and harmoniously with the ordinary meaning of the provision, I find that sections 34(2)(d) and 38(2)(f), as they now read, do not encompass a stand-alone residential subdivision development. I conclude that sections 34(2)(d) and 38(2)(f) do not capture within the MTO permit control system this stand-alone residential development located partly within 800 metres of provincial or controlled access highways. In addition, MTO's haphazard approach to the permit control provisions in the area of the Stone Ridge subdivision has been inconsistent and arbitrary. In my view, because MTO's scheme of review is concerned only with traffic planning related to a development and not a building-review scheme as is the case under the *Building Code Act*, MTO's approach in issuing one permit for the West Ridge subdivision is the appropriate one if indeed residential development becomes included within the

regulated categories of sections 34 and 38.

59 In sum, I find that the proposed residential development does not fall within sections 34(2)(d) and 38(2)(f) of the *PTHIA,* and MTO's use of its powers under sections 34(2)(d) and 38(2)(f) of the *PTHIA* has been arbitrary.

60 In view of my finding on the second question, the application is therefore allowed. There will be an order that the respondent has no right to require permits for the applicant's residential subdivision and that the respondent account for permit fees that it has unlawfully charged, the same to be repaid to the applicant forthwith.

61 Unless costs are agreed, I will consider written submissions in regard to costs filed within 30 days.

P.H. HOWDEN J.

cp/e/qljxk/qlclg/qltxp/qlaxw/qlrxg/qljxl/qlbrl/qlcas/qlaxw

Indexed as:

Reference re: Firearms Act (Can.)

IN THE MATTER OF Section 27(1) of the Judicature Act, R.S.A. 1980, chapter J-1
AND IN THE MATTER OF a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta for hearing and consideration of the questions set out in Order in Council 461/96 respecting the Firearms Act, S.C. 1995, chapter 39
The Attorney General for Alberta, appellant;
v.
The Attorney General of Canada, respondent, and The Attorney General for Ontario, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Government of the Northwest Territories, the Minister of Justice for the Government of the Yukon Territory, the Federation of Saskatchewan Indian Nations, the Coalition of Responsible Firearm Owners and Sportsmen (CORFOS), the Law-Abiding Unregistered Firearms Association (LUFA), the Shooting Federation of Canada, the Association pour la santé publique du Québec inc., the Alberta Council of Women's Shelters, CAVEAT, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent Health, the Canadian Pediatric Society, the Coalition for Gun Control, the Canadian Association of Chiefs of Police, the Corporation of the City of Toronto, the City of Montreal and the City of Winnipeg, interveners.

[2000] 1 S.C.R. 783

[2000] S.C.J. No. 31

2000 SCC 31

File No.: 26933.

Supreme Court of Canada

2000: February 21, 22 / 2000: June 15.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA (61 paras.)

Constitutional law -- Division of powers -- Criminal law power -- Firearms -- Licensing and registration of ordinary firearms -- Whether licensing and registration provisions of Firearms Act intra vires Parliament -- Constitution Act, 1867, s. 91(27) -- Firearms Act, S.C. 1995, c. 39.

In 1995, Parliament amended the Criminal Code by enacting the Firearms Act. The amendments require the holders of all firearms to obtain licences and register their guns. Alberta referred constitutional questions to the Court of Appeal to determine whether the licensing and registration provisions of the Firearms Act, as they relate to ordinary firearms, are intra vires Parliament. The majority of the Court of Appeal concluded that the Act is a valid exercise of Parliament's criminal law power. Alberta appealed to this Court.

Held: The appeal should be dismissed. The impugned provisions of the Firearms Act are constitutional.

The Firearms Act constitutes a valid exercise of Parliament's jurisdiction over criminal law. The Act in "pith and substance" is directed to enhancing public safety by controlling access to firearms. Its purpose is to deter the misuse of firearms, control those given access to guns, and control specific types of weapons. It is aimed at a number of "mischiefs", including the illegal trade in guns, both within Canada and across the border with the United States, and the link between guns and violent crime, suicide, and accidental deaths. The purpose of the Firearms Act conforms with the historical public safety focus of all gun control laws. The changes introduced by the Act represent a limited expansion of the pre-existing gun control legislation. The effects of the Act also suggest that its essence is the promotion of [page785] public safety. The criteria for acquiring a licence are concerned with safety. Criminal record checks and background investigations are designed to keep guns out of the hands of those incapable of using them safely. Safety courses ensure that gun owners are qualified.

The Firearms Act possesses all three criteria required for a criminal law. Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety. The regulation of guns as dangerous products is a valid purpose within the criminal

law power. That purpose is connected to prohibitions backed by penalties.

The Firearms Act is not essentially regulatory legislation. The Act's complexity does not necessarily detract from its criminal nature. Nor does the law give either the chief firearms officer or the Registrar undue discretion. The offences are clearly defined in the Act. The chief firearms officer and the Registrar are explicitly subject to the supervision of the courts. Further, the law's prohibitions and penalties are not regulatory in nature. They are not confined to ensuring compliance with a scheme, but independently serve the purpose of public safety. Parliament's intention was not to regulate property, but to ensure that only those who prove themselves qualified to hold a licence are permitted to possess firearms of any sort. Finally, Parliament may use indirect means to further the end of public safety.

The 1995 gun control scheme is distinguishable from existing provincial property regulation schemes. The Act addresses the aspects of gun control which relate to the dangerous nature of firearms and the need to reduce misuse. While ordinary guns are often used for lawful purposes, they are also used for crime and suicide, and cause accidental death and injury. Their control accordingly falls within the criminal law power.

The registration provisions cannot be severed from the rest of the Act. The licensing provisions require everyone who possesses a gun to be licensed; the registration [page786] provisions require all guns to be registered. These portions of the Firearms Act are both tightly linked to Parliament's goal of promoting safety by reducing the misuse of any and all firearms. Both portions are integral and necessary to the operation of the scheme.

The Firearms Act does not trench on provincial powers such that upholding it as criminal law will upset the balance of federalism. The provinces have not established that the effects of the Act on provincial jurisdiction over property and civil rights are more than incidental. First, the mere fact that guns are property does not suffice to show that a gun control law is in pith and substance a provincial matter. Second, the Act does not significantly hinder the ability of the provinces to regulate the property and civil rights aspects of guns. Third, assuming (without deciding) that the provincial legislatures have the jurisdiction to enact a law in relation to the property aspects of firearms, the double aspect doctrine permits Parliament to address the safety aspects of ordinary firearms. Fourth, the Firearms Act does not precipitate the federal government's entry into a new field since gun control has been the subject of federal law since Confederation. There is no colourable intrusion into provincial jurisdiction.

The problems associated with the misuse of firearms are firmly grounded in morality. However, even if gun control did not involve morality, it could still fall under the federal criminal law power. Parliament can use the criminal law to prohibit activities which have little relation to public morality.

The apprehensions of northern, rural and aboriginal Canadians that this law does not address their particular needs do not go to the question of Parliament's jurisdiction to enact the law. The cost of

the program and the efficacy of the law, or lack thereof, are equally irrelevant to Parliament's ability to enact it under the division of powers analysis. Within its constitutional sphere, [page787] Parliament is the judge of whether a measure is likely to achieve its intended purpose.

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APPEAL from a judgment of the Alberta Court of Appeal (1998), 219 A.R. 201, 179 W.A.C. 201, 65 Alta. L.R. (3d) 1, 164 D.L.R. (4th) 513, 19 C.R. (5th) 63, 128 C.C.C. (3d) 225, [1999] 2 W.W.R. 579, [1998] A.J. No. 1028 (QL), upholding the constitutionality of the licensing and registration provisions of the Firearms Act. Appeal dismissed.

Roderick A. McLennan, Q.C., Thomas W. R. Ross and Neal A. McLennan, for the appellant.
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Robert E. Charney and Edward J. Maksimowski, for the intervener the Attorney General for Ontario.
Louise Walsh Poirier and Reinhold Endres, Q.C., for the intervener the Attorney General of Nova Scotia.
Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.
Kenneth J. Tyler, for the intervener the Attorney General of Manitoba.
Graeme G. Mitchell, Q.C., and Thomson Irvine, for the intervener the Attorney General for Saskatchewan.
Scott Duke, for the intervener the Government of the Northwest Territories.
William Craik and Lee Kirkpatrick, for the Minister of Justice for the Government of the Yukon Territory.
Delia Opekokew, Darren W. Winegarden, Albert C. Peeling and John D. Parsons, for the intervener the Federation of Saskatchewan Indian Nations.

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Dallas K. Miller, Q.C., for the intervener the Coalition of Responsible Firearm Owners and Sportsmen.
David R. Holman, for the intervener the Law-Abiding Unregistered Firearms Association.
Brian A. Crane, Q.C., and Paul Shaw, for the intervener the Shooting Federation of Canada.
Paul Larochelle, Q.C., and Michèle Thivierge, for the intervener the Association pour la santé publique du Québec inc.
Alexander D. Pringle, Q.C., and June Ross, for the intervener the Alberta Council of Women's Shelters.
Peter A. Downard, Paul F. Monahan and Rochelle S. Fox, for the interveners CAVEAT, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent Health and the Canadian Pediatric Society.
Jill Copeland, for the interveners the Coalition for Gun Control, the Canadian Association of Chiefs of Police, the Corporation of the City of Toronto, the City of Montreal and the City of Winnipeg.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The following is the judgment delivered by

THE COURT:--

I. Introduction

1 In 1995, Parliament amended the Criminal Code, R.S.C., 1985, c. C-46, by enacting the Firearms Act, S.C. 1995, c. 39, commonly referred to as the gun control law, to require the holders of all firearms to obtain licences and register their guns. In 1996, the Province of Alberta challenged Parliament's power to pass the gun control law by a reference to the Alberta Court of Appeal. The Court of Appeal by a 3:2 majority upheld Parliament's power to pass the law. The Province of Alberta now appeals that decision to this Court.

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2 The issue before this Court is not whether gun control is good or bad, whether the law is fair or unfair to gun owners, or whether it will be effective or ineffective in reducing the harm caused by the misuse of firearms. The only issue is whether or not Parliament has the constitutional authority to enact the law.

3 The answer to this question lies in the Canadian Constitution. The Constitution assigns some matters to Parliament and others to the provincial legislatures: Constitution Act, 1867. The federal government asserts that the gun control law falls under its criminal law power, s. 91(27), and under its general power to legislate for the "Peace, Order and good Government" of Canada. Alberta, on the other hand, says the law falls under its power over property and civil rights, s. 92(13). All agree that to resolve this dispute, the Court must first determine what the gun control law is really about -- its "pith and substance" -- and then ask which head or heads of power it most naturally falls within.

4 We conclude that the gun control law comes within Parliament's jurisdiction over criminal law. The law in "pith and substance" is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties. This brings it under the federal criminal law power. While the law has regulatory aspects, they are secondary to its primary criminal law purpose. The intrusion of the law into the provincial jurisdiction over property and civil rights is not so excessive as to upset the balance of federalism.

II. Reference Questions

5 The formal questions put to the Alberta Court of Appeal by the Alberta government in 1996 are attached in Appendix A. Simply put, the issue before us is whether or not the licensing and registration provisions in the Firearms Act, as they [page792] relate to ordinary firearms, were validly enacted by Parliament. The impugned provisions of the Act are attached in Appendix B.

III. Legislation

6 For many years, the Criminal Code has restricted access to firearms, mainly automatic weapons

and handguns, by classifying some as prohibited and some as restricted. The Firearms Act amendments extended this regulation to all firearms, including rifles and shotguns. As a result, s. 84 of the Criminal Code now controls three classes of firearms: (1) prohibited firearms (generally automatic weapons); (2) restricted firearms (generally handguns); and (3) all other firearms (generally rifles and shotguns). The third class of guns is variously referred to as "ordinary firearms", "long guns", and "unrestricted firearms". We will refer to this class as "ordinary firearms".

7 The reference questions focus on the validity of the licensing and registration provisions for ordinary firearms introduced by the Firearms Act. The licensing sections of the Act provide that a person must be licensed in order to possess a firearm. Eligibility for a licence reflects safety interests. An applicant with a criminal record involving drug offences or violence, or a history of mental illness, may be denied a licence. An applicant who seeks to acquire a firearm must pass a safety course which requires a basic understanding of firearm safety and the legal responsibilities of firearm ownership. The chief firearms officer, who issues licences, may conduct a background check on the applicant in order to determine eligibility, and may attach conditions to a licence. Once issued, a licence is valid for five years, but it may be revoked for contravention of its conditions or for [page793] certain criminal convictions. A licence refusal or revocation may be appealed to a court.

8 The registration provisions of the Act are more limited. A firearm cannot be registered unless the applicant is licensed to possess that type of firearm. Registration is generally done by reference to the serial number on the firearm. A registration certificate is valid as long as its holder owns the weapon. If ownership of a registered weapon is transferred, the new owner must register the weapon. In order to give gun owners time to register their weapons, people who owned ordinary firearms as of January 1, 1998 are deemed to hold registration certificates that are valid until January 1, 2003. Possession of an unregistered firearm of any type is an offence. All licences and registration certificates, along with imported, exported, lost and stolen guns, are recorded in the Canadian Firearms Registry, which is operated by a federal appointee.

IV. Reasons of the Alberta Court of Appeal

9 The Alberta Court of Appeal upheld the 1995 gun control law by a 3:2 majority: (1998), 65 Alta. L.R. (3d) 1. The court wrote four judgments.

A. Majority

10 Fraser C.J.A., in a comprehensive judgment, began by noting that guns may be regulated by both the federal and provincial governments for different purposes, and that the effectiveness of the law is irrelevant to its constitutional characterization. She found that Parliament's purpose in enacting the law was to enhance public safety. While guns preserve lives and serve as useful tools, they also wound and kill. The latter aspect of guns -- their inherent dangerousness -- is the focus of the impugned provisions of the Act. Parliament's aim [page794] was to reduce the misuse of guns in

crime, including domestic violence, as well as to reduce suicides and accidents caused by the misuse of firearms. The licensing provisions, which require applicants to pass a safety course and undergo a criminal record check and background investigation, support this purpose. The registration system, by seeking to reduce smuggling, theft and illegal sales, also addresses misuse. The licensing and registration provisions are inextricably intertwined. While the provisions entail the regulation of property rights, this regulation is the means of the law, not its end. On this basis, Fraser C.J.A. concluded that the Act is in pith and substance designed to protect public safety from the misuse of firearms.

11 Fraser C.J.A. went on to the second step in the analysis: considering whether or not that pith and substance could be allocated to one of Parliament's heads of power under the Constitution Act, 1867. She held that the legislation falls under the criminal law power, s. 91(27), under either its "prevention" aspect or its "prohibition, penalty, and purpose" aspect. The law does not represent a "colourable" or improper intrusion into provincial jurisdiction.

12 Berger and Hetherington JJ.A. wrote separate opinions agreeing with the Chief Justice. Hetherington J.A. held that any firearm, used improperly, is dangerous to human life and health. As a result, Parliament's purpose, in seeking to prevent crime and promote public safety by discouraging possession, is a valid criminal law purpose. The potential inefficacy of the law, highlighted by Alberta and the other provincial governments, is irrelevant unless it shows that Parliament had a different purpose -- a colourable motive. Colourability has not been shown because the law genuinely attempts to improve firearms storage, reduce trafficking, and aid in tracking guns generally. While the law may [page795] affect property and civil rights, that does not prevent Parliament from enacting it. Hetherington J.A. concluded that the Firearms Act contains prohibitions accompanied by penal sanctions, enacted for criminal public purposes, and therefore it is a valid law under the test propounded by La Forest J. of this Court in RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, and R. v. Hydro-Québec, [1997] 3 S.C.R. 213.

13 Berger J.A. likewise noted that all guns are capable of causing death if misused. He held that Parliament's purpose in enacting the legislation was to ensure that firearms are only possessed by those qualified to use them. The licensing provisions identify those who are qualified. The registration system ensures that only qualified people can acquire firearms. As a prohibition backed by a penalty, for a public purpose, the law is a valid exercise of Parliament's criminal law power. The regulatory aspects of the law are merely the means to an end.

B. Minority

14 Conrad J.A. dissented, Irving J.A. concurring. Conrad J.A. broadly defined the purpose of the law as regulating all aspects of the possession and use of firearms. While firearms and safety are subjects of both federal and provincial concern, the criminal law power represents a "carve-out" from provincial jurisdiction. The regulation of ownership rather than use and the complexity of the regulations demonstrate that this legislation cannot be classified as valid criminal law. The Criminal

Code generally prohibits acts, rather than regulating ownership. Possession itself is not dangerous; it is only misuse that is dangerous, and the law goes far beyond prohibiting misuse. This led Conrad J.A. to conclude that the Firearms Act represents a colourable intrusion into the provincial jurisdiction over property and civil rights, and is invalid as an exercise of Parliament's jurisdiction [page796] over criminal law or its peace, order and good government power. While she would have struck down the legislation entirely, she held that if the licensing scheme were deemed valid, the registration scheme could be severed from the licensing scheme.

V. Analysis

15 The issue before us is whether the licensing and registration provisions of the Firearms Act constitute a valid federal enactment pursuant to Parliament's jurisdiction over criminal law or its peace, order and good government power. In order to answer this question, we must engage in the division of powers analysis used so often by this Court, and most recently summarized in Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494, 2000 SCC 21; see also Whitbread v. Walley, [1990] 3 S.C.R. 1273, R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, and R. v. Morgentaler, [1993] 3 S.C.R. 463. There are two stages to this analysis. The first step is to determine the "pith and substance" or essential character of the law. The second step is to classify that essential character by reference to the heads of power under the Constitution Act, 1867 in order to determine whether the law comes within the jurisdiction of the enacting government. If it does, then the law is valid.

A. Characterization: What Is the Pith and Substance of the Law?

16 The first task is to determine the "pith and substance" of the legislation. To use the wording of ss. 91 and 92, what is the "matter" of the law? What is its true meaning or essential character, its core? To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body, and the legal effect of the law.

17 A law's purpose is often stated in the legislation, but it may also be ascertained by reference to extrinsic material such as Hansard and government [page797] publications: see Morgentaler, supra, at pp. 483-84. While such extrinsic material was at one time inadmissible to facilitate the determination of Parliament's purpose, it is now well accepted that the legislative history, Parliamentary debates, and similar material may be quite properly considered as long as it is relevant and reliable and is not assigned undue weight: see Global Securities, supra, at para. 25; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 35; and Doré v. Verdun (City), [1997] 2 S.C.R. 862, at para. 14. Purpose may also be ascertained by considering the "mischief" of the legislation -- the problem which Parliament sought to remedy: see Morgentaler, supra, at pp. 483-84.

18 Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it

will be ineffective (e.g., criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g., burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis: Morgentaler, supra, at pp. 487-88, and Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373. Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its "total meaning": W. R. Lederman, Continuing Canadian Constitutional Dilemmas (1981), at pp. 239-40. In some cases, the effects of the law may suggest a purpose other than that which is stated in the law: see Morgentaler, supra, at pp. 482-83; Attorney-General for Alberta v. Attorney-General for Canada, [1939] A.C. 117 (P.C.) (Alberta Bank Taxation Reference); and Texada Mines Ltd. v. Attorney-General of British Columbia, [1960] S.C.R. 713; see generally P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.), at pp. 15-14 to 15-16. In other words, a law may say [page798] that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be "colourable".

19 Against this background, we turn to the purpose of the Firearms Act. Section 4 states that the purpose of the Act is "to provide ... for the issuance of licences, registration certificates and authorizations under which persons may possess firearms" and "to authorize ... the manufacture of" and "transfer of" ordinary firearms. This is the language of property regulation. However, this regulatory language is directly tied to a purpose cast in the language of the criminal law. The licensing, registration and authorization provisions delineate the means by which people can own and transfer ordinary firearms "in circumstances that would otherwise constitute [a criminal] offence". Those who challenge the legislation point to the first part of the section and its regulatory focus. Those who seek to uphold the law point to the second part of the section and its criminal focus.

20 The statements of the Honourable Allan Rock, Minister of Justice at the time, in his second-reading speech in the House of Commons, reveal that the federal government's purpose in proposing the law was to promote public safety. He stated: "The government suggests that the object of the regulation of firearms should be the preservation of the safe, civilized and peaceful nature of Canada" (House of Commons Debates, vol. 133, No. 154, 1st Sess., 35th Parl., February 16, 1995, at p. 9706 (emphasis added)). Mr. Rock went on to describe the contents of the bill in more detail (at p. 9707):

> First, tough measures to deal with the criminal misuse of firearms; second, specific penalties to punish those who would smuggle illegal firearms; and third, measures overall to provide a context in which the legitimate [page799] use of firearms can be carried on in a manner consistent with public safety. [Emphasis added.]

(See also the judgment of Fraser C.J.A., at paras. 169-72.)

Later, the Minister referred to the problems of suicide, accidental shootings, and the use of guns in domestic violence, and detailed some of the shooting tragedies that had spurred public calls for gun control. Russell MacLellan, the Parliamentary Secretary of Justice at the time, underscored the government's concerns, noting that the Act pursues "three fundamental policies: the deterrence of the misuse of firearms, general controls on persons given access to firearms, and controls placed on specific types of firearms" ("Canada's firearms proposals" (1995), 37 Can. J. Crim. 163, at p. 163).

21 Another way to determine the purpose of legislation is to look at the problems it is intended to address -- the so-called "mischief" approach. The Firearms Act is aimed at a number of evils or "mischiefs". One is the illegal trade in guns, both within Canada and across the border with the United States: see The Government's Action Plan on Firearms Control, tabled in the House of Commons in 1994. Another is the link between guns and violent crime, suicide, and accidental deaths. In a paper commissioned by the Department of Justice in 1994, The Impact of the Availability of Firearms on Violent Crime, Suicide, and Accidental Death: A Review of the Literature with Special Reference to the Canadian Situation, Thomas Gabor found that all three causes of death may increase in jurisdictions where there are the fewest restrictions on guns. Whether or not one accepts Gabor's conclusions, his study indicates the problem which Parliament sought to address by enacting the legislation: the problem of the misuse of firearms and the threat it poses to public safety.

[page800]

22 Finally, there is a strong argument that the purpose of this legislation conforms with the historical public safety focus of all gun control laws. This reference challenges the licensing and registration provisions of the Act only as they relate to ordinary firearms. Alberta does not question the licensing and registration of restricted and prohibited weapons. It freely admits that the restrictions on those categories of weapons are constitutional. Indeed, Alberta would have difficulty alleging otherwise, as numerous courts have upheld the validity of different aspects of the federal gun control legislation that existed prior to the enactment of this Act: see R. v. Schwartz, [1988] 2 S.C.R. 443; McGuigan v. The Queen, [1982] 1 S.C.R. 284; and Attorney General of Canada v. Pattison (1981), 30 A.R. 83 (C.A.).

23 More specifically, before the introduction of the Firearms Act, the registration of all restricted weapons was upheld by the British Columbia Court of Appeal in Martinoff v. Dawson (1990), 57 C.C.C. (3d) 482. Furthermore, the Criminal Code required anyone seeking to obtain any kind of firearm to apply for a firearms acquisition certificate. This requirement was upheld in R. v. Northcott, [1980] 5 W.W.R. 38 (B.C. Prov. Ct.). These cases upheld the previous gun control legislation on the basis that Parliament's purpose was to promote public safety. The Firearms Act

extends that legislation in two respects: (1) it requires all guns to be registered, not just restricted and prohibited firearms; and (2) eventually all gun owners will be required to be licensed, not just those who wish to acquire a firearm. These changes represent a continuation of Parliament's focus on safety concerns, and constitute a limited expansion of the pre-existing legislation. Given the general acceptance of the gun control legislation that has existed for the past hundred years, the constitutional validity of which has always been predicated on Parliament's concern for public safety, it is difficult to now impute a different purpose to Parliament. This [page801] supports the view that the law in pith and substance is about public safety.

24 The effects of the scheme -- how it impacts on the legal rights of Canadians -- also support the conclusion that the 1995 gun control law is in pith and substance a public safety measure. The criteria for acquiring a licence are concerned with safety rather than the regulation of property. Criminal record checks and background investigations are designed to keep guns out of the hands of those incapable of using them safely. Safety courses ensure that gun owners are qualified. What the law does not require also shows that the operation of the scheme is limited to ensuring safety. For instance, the Act does not regulate the legitimate commercial market for guns. It makes no attempt to set labour standards or the price of weapons. There is no attempt to protect or regulate industries or businesses associated with guns (see Pattison, supra, at para. 22). Unlike provincial property registries, the registry established under the Act is not concerned with prior interests, and unlike some provincial motor vehicle schemes, the Act does not address insurance. In short, the effects of the law suggest that its essence is the promotion of public safety through the reduction of the misuse of firearms, and negate the proposition that Parliament was in fact attempting to achieve a different goal such as the total regulation of firearms production, trade, and ownership. We therefore conclude that, viewed from its purpose and effects, the Firearms Act is in "pith and substance" directed to public safety.

B. Classification: Does Parliament Have Jurisdiction to Enact the Law?

25 Having assessed the pith and substance or matter of the law, the second step is to determine whether that matter comes within the jurisdiction of the enacting legislature. We must examine the [page802] heads of power under ss. 91 and 92 of the Constitution Act, 1867 and determine what the matter is "in relation to". In this case, the question is whether the law falls under federal jurisdiction over criminal law or its peace, order and good government power; or under provincial jurisdiction over property and civil rights. The presumption of constitutionality means that Alberta, as the party challenging the legislation, is required to show that the Act does not fall within the jurisdiction of Parliament: see Nova Scotia Board of Censors v. McNeil, [1978] 2 S.C.R. 662.

26 The determination of which head of power a particular law falls under is not an exact science. In a federal system, each level of government can expect to have its jurisdiction affected by the other to a certain degree. As Dickson C.J. stated in General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641, at p. 669, "overlap of legislation is to be expected and accommodated in a federal state". Laws mainly in relation to the jurisdiction of one level of government may

overflow into, or have "incidental effects" upon, the jurisdiction of the other level of government. It is a matter of balance and of federalism: no one level of government is isolated from the other, nor can it usurp the functions of the other.

27 As a general rule, legislation may be classified as criminal law if it possesses three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty: RJR-MacDonald, supra; Hydro-Québec, supra; and Reference re Validity of Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1 (the "Margarine Reference"). The Attorney General of Canada argues that the 1995 gun control law meets these three requirements, and points to commentary on this legislation which supports its position: D. Gibson, "The Firearms Reference in the Alberta Court of Appeal" (1999), 37 Alta. L. Rev. 1071; D. M. Beatty, "Gun Control and Judicial Anarchy" (1999), 10 Constitutional Forum 45; A. C. Hutchinson and D. Schneiderman, "Smoking Guns: The Federal Government Confronts The Tobacco and Gun Lobbies" (1995), 7 Constitutional [page803] Forum 16; and Peter W. Hogg's testimony before the Standing Senate Committee on Legal and Constitutional Affairs, October 26, 1995.

28 Before determining whether the three criminal law criteria are met by this legislation, some general observations on the criminal law power may be apposite. Criminal law, as this Court has stated in numerous cases, constitutes a broad area of federal jurisdiction: RJR-MacDonald, supra; Hydro-Québec, supra; and Margarine Reference, supra. The criminal law stands on its own as federal jurisdiction. Although it often overlaps with provincial jurisdiction over property and civil rights, it is not "carved out" from provincial jurisdiction, contrary to the view of Conrad J.A. It also includes the law of criminal procedure, which regulates many aspects of criminal law enforcement, such as arrest, search and seizure of evidence, the regulation of electronic surveillance and the forfeiture of stolen property.

29 Not only is the criminal law a "stand-alone" jurisdiction, it also finds its expression in a broad range of legislation. The Criminal Code is the quintessential federal enactment under its criminal jurisdiction, but it is not the only one. The Food and Drugs Act, the Hazardous Products Act, the Lord's Day Act, and the Tobacco Products Control Act have all been held to be valid exercises of the criminal law power: see Standard Sausage Co. v. Lee, [1933] 4 D.L.R. 501 (B.C.C.A.); R. v. Cosman's Furniture (1972) Ltd. (1976), 73 D.L.R. (3d) 312 (Man. C.A.); Big M Drug Mart, supra (legislation struck down on other grounds); and RJR-MacDonald, supra (legislation struck down on other grounds), respectively. Thus the fact that some of the provisions of the Firearms Act are not contained within the Criminal Code has no significance for the purposes of constitutional classification.

30 Although the criminal law power is broad, it is not unlimited. Some of the parties before us [page804] expressed the fear that the criminal law power might be illegitimately used to invade the provincial domain and usurp provincial power. A properly restrained understanding of the criminal law power guards against this possibility.

31 Within this context, we return to the three criteria that a law must satisfy in order to be classified as criminal. The first step is to consider whether the law has a valid criminal law purpose. Rand J. listed some examples of valid purposes in the Margarine Reference at p. 50: "Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by [criminal] law". Earlier, we concluded that the gun control law in pith and substance is directed at public safety. This brings it clearly within the criminal law purposes of protecting public peace, order, security and health.

32 In determining whether the purpose of a law constitutes a valid criminal law purpose, courts look at whether laws of this type have traditionally been held to be criminal law: see Morgentaler, supra, at p. 491, and RJR-MacDonald, supra, at para. 204; see also Scowby v. Glendinning, [1986] 2 S.C.R. 226, Westendorp v. The Queen, [1983] 1 S.C.R. 43, and R. v. Zelensky, [1978] 2 S.C.R. 940. Courts have repeatedly held that gun control comes within the criminal law sphere. As Fraser C.J.A. demonstrated in her judgment, gun control has been a matter of criminal law since before the enactment of the Criminal Code in 1892, and has continued since that date (see also E. M. Davies, "The 1995 Firearms Act: Canada's Public Relations Response to the Myth of Violence" (2000), 6 Appeal 44, and M. L. Friedland, A Century of Criminal Justice (1984), at pp. 125 ff.).

33 Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety. Section 2 of the Criminal Code (as amended by s. 138(2) of the Firearms Act) defines a "firearm" as "a barrelled weapon from which any shot, bullet or other projectile can [page805] be discharged and that is capable of causing serious bodily injury or death to a person" (emphasis added). This demonstrates that Parliament views firearms as dangerous and regulates their possession and use on that ground. The law is limited to restrictions which are directed at safety purposes. As such, the regulation of guns as dangerous products is a valid purpose within the criminal law power: see R. v. Felawka, [1993] 4 S.C.R. 199; RJR-MacDonald, supra; R. v. Wetmore, [1983] 2 S.C.R. 284; and Cosman's Furniture, supra.

34 The finding of a valid criminal law purpose does not end the inquiry, however. In order to be classified as a valid criminal law, that purpose must be connected to a prohibition backed by a penalty. The 1995 gun control law satisfies these requirements. Section 112 of the Firearms Act prohibits the possession of a firearm without a registration certificate. Section 91 of the Criminal Code (as amended by s. 139 of the Firearms Act) prohibits the possession of a firearm without a licence and a registration certificate. These prohibitions are backed by penalties: see s. 115 of the Firearms Act and s. 91 of the Code.

35 It thus appears that the 1995 gun control law possesses all three criteria required for a criminal law. However, Alberta and the provinces raised a number of objections to this classification which must be considered.

(1) Regulation or Criminal Prohibition?

36 The first objection is that the Firearms Act is essentially regulatory rather than criminal

legislation because of the complexity of the law and the discretion it grants to the chief firearms officer. These aspects of the law, the provinces argue, are the hallmarks of regulatory legislation, not the criminal law: see Hogg, supra, at pp. 18-25 and 18-26.

37 Despite its initial appeal, this argument fails to advance Alberta's case. The fact that the Act is [page806] complex does not necessarily detract from its criminal nature. Other legislation, such as the Food and Drugs Act, R.S.C., 1985, c. F-27, and the Canadian Environmental Protection Act, R.S.C., 1985, c. 16 (4th Supp.), are legitimate exercises of the criminal law power, yet highly complex. Nor does the Act give the chief firearms officer or Registrar undue discretion. The offences are not defined by an administrative body, avoiding the difficulty identified in the dissenting judgment in Hydro-Québec, supra. They are clearly stated in the Act and the Criminal Code: no one shall possess a firearm without a proper licence and registration. While the Act provides for discretion to refuse to issue an authorization to carry or transport under s. 68 or a registration certificate under s. 69, that discretion is restricted by the Act. A licence shall be refused if the applicant is not eligible to hold one: s. 68. Eligibility to hold a licence is delineated in the rest of the Act: a person is ineligible to hold a licence if the person has been convicted of certain offences (s. 5(2)) or is subject to a prohibition order (s. 6); s. 7 requires the applicant to complete a safety course. Discretion regarding registration is also bounded by the Act. A refusal by the chief firearms officer or the Registrar must be for "good and sufficient reason": ss. 68 and 69; the refusal must be in writing with reasons given (s. 72). These provisions demonstrate that the Act does not give the chief firearms officer or the Registrar undue discretion. Furthermore, the chief firearms officer and the Registrar are explicitly subject to the supervision of the courts. Refusal or revocation of a licence or a registration certificate may be referred to a provincial court judge: s. 74. The courts will interpret the words "good and sufficient reason" in ss. 68 and 69 in line with the public safety purpose of the Act, ensuring that the exercise of discretion by the chief firearms officer and the Registrar is always wed to that purpose.

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38 Furthermore, the law's prohibitions and penalties are not regulatory in nature. They are not confined to ensuring compliance with the scheme, as was the case in Boggs v. The Queen, [1981] 1 S.C.R. 49, but stand on their own, independently serving the purpose of public safety. Nor are the prohibitions and penalties directed to the object of revenue generation. Parliament's intention was not to regulate property, but to ensure that only those who prove themselves qualified to hold a licence are permitted to possess firearms of any sort.

39 Alberta and the supporting interveners argued that the only way Parliament could address gun control would be to prohibit ordinary firearms outright. With respect, this suggestion is not supported by either logic or jurisprudence. First, the jurisprudence establishes that Parliament may use indirect means to achieve its ends. A direct and total prohibition is not required: see Reference

re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, and RJR-MacDonald, supra. Second, exemptions from a law do not preclude it from being prohibitive and therefore criminal in nature: see R. v. Furtney, [1991] 3 S.C.R. 89, Morgentaler v. The Queen, [1976] 1 S.C.R. 616, and Lord's Day Alliance of Canada v. Attorney General of British Columbia, [1959] S.C.R. 497. Third, as noted above, the prohibition in this case is not merely designed to enforce a fee payment or regulatory scheme separate from the essential safety focus of the law: by way of contrast, see Boggs, supra. Finally, if prohibition is not required to make handgun control constitutional, which no one suggests, why should it be required for ordinary firearms?

40 In a related argument, some provincial interveners contended that if the purpose of the legislation is to reduce misuse, then the legislation should deal with misuse directly. On this view, Parliament could prohibit the careless or intentional misuse of guns, as it has in ss. 85-87 of the Criminal Code, [page808] but could not prohibit people from owning guns if they present risks to public safety or regulate how people store their guns. Again, the answer is that Parliament may use indirect means to further the end of public safety. The risks associated with ordinary firearms are not confined to the intentional or reckless conduct that might be deterred by a prohibition on misuse. The Attorney General of Canada argued, for example, that the suicide rate is increased by the availability of guns. A person contemplating suicide may be more likely to actually commit suicide if a gun is available, it was argued; therefore Parliament has a right to prevent people at risk, for example due to mental illness, from owning a gun. A prohibition on misuse is unlikely to deter a potential suicide; a prohibition on gun ownership may do so. Other examples where a prohibition on misuse falls short are not hard to envisage. A prohibition on misuse is unlikely to prevent the death of a child who plays with a gun; a prohibition on irresponsible ownership or careless storage may do so. Again, reducing availability may have a greater impact on whether a robber uses a gun than a law forbidding him to use it. Whether the 1995 gun law actually achieves these ends is not at issue before us; what is at issue is whether Parliament, in targeting these dangers, strayed outside its criminal law power. In our view, it did not.

(2) Property and Civil Rights or Criminal Law?

41 Alberta's second major objection to classifying the 1995 gun control scheme as criminal law is that it is indistinguishable from existing provincial property regulation schemes such as automobile and land title registries.

42 This argument overlooks the different purposes behind the federal restrictions on firearms and the [page809] provincial regulation of other forms of property. Guns are restricted because they are dangerous. While cars are also dangerous, provincial legislatures regulate the possession and use of automobiles not as dangerous products but rather as items of property and as an exercise of civil rights, pursuant to the provinces' s. 92(13) jurisdiction: Canadian Indemnity Co. v. Attorney-General of British Columbia, [1977] 2 S.C.R. 504; Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.), [1958] S.C.R. 608; Provincial Secretary of Prince Edward Island v. Egan, [1941] S.C.R. 396.

43 The argument that the federal gun control scheme is no different from the provincial regulation of motor vehicles ignores the fact that there are significant distinctions between the roles of guns and cars in Canadian society. Both firearms and automobiles can be used for socially approved purposes. Likewise, both may cause death and injury. Yet their primary uses are fundamentally different. Cars are used mainly as means of transportation. Danger to the public is ordinarily unintended and incidental to that use. Guns, by contrast, pose a pressing safety risk in many if not all of their functions. Firearms are often used as weapons in violent crime, including domestic violence; cars generally are not. Thus Parliament views guns as particularly dangerous and has sought to combat that danger by extending its licensing and registration scheme to all classes of firearms. Parliament did not enact the Firearms Act to regulate guns as items of property. The Act does not address insurance or permissible locations of use. Rather, the Act addresses those aspects of gun control which relate to the dangerous nature of firearms and the need to reduce misuse.

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44 In a variation on the theme of property and civil rights, the opponents of the 1995 gun control law argue that ordinary guns, like rifles and shotguns, are common property, not dangerous property. Ordinary firearms are different, they argue, from the automatic weapons and handguns that Parliament has regulated in the past. Ordinary guns are used mainly for lawful purposes in hunting, trapping and ranching. Automatic weapons and handguns, by contrast, have few uses outside crime or war. The fact that Parliament has the right under the criminal law power to control automatic weapons and handguns does not, they argue, mean that Parliament has the right to regulate ordinary guns.

45 The difficulty with this argument is that while ordinary guns are often used for lawful purposes, they are also used for crime and suicide, and cause accidental death and injury. Guns cannot be divided neatly into two categories -- those that are dangerous and those that are not dangerous. All guns are capable of being used in crime. All guns are capable of killing and maiming. It follows that all guns pose a threat to public safety. As such, their control falls within the criminal law power.

46 In a further variation on this argument, the provinces of Ontario and Saskatchewan submitted that even if the licensing provisions of the law were valid criminal legislation, the registration provisions are mainly provincial property legislation and should be severed and struck out. The argument is that the registration portions of the Act simply amount to regulation, with little connection to the public safety purpose advanced by the federal government to justify the Act as a whole. Conrad J.A. agreed with this argument, finding that although the Act "cleverly intertwines" the licensing and registration provisions through "clever packaging", the registration provisions could be severed from the gun control law. As proof, she [page811] pointed to the fact that the pre-existing firearms acquisition certificate scheme, governing prohibited and restricted arms,

applied to ordinary firearms without being connected to a registration system.

47 We are not persuaded that the registration provisions can be severed from the rest of the Act, nor that they fail to serve Parliament's purpose in promoting public safety. The licensing provisions require everyone who possesses a gun to be licensed. The registration provisions require all guns to be registered. The combination of the two parts of the scheme is intended to ensure that when a firearm is transferred from one person to another, the recipient is licensed. Absent a registration system, this would be impossible to ascertain. If a gun is found in the possession of an unlicensed person, the registration system permits the government to determine where the gun originated. With a registration scheme in place, licensed owners can be held responsible for the transfer of their weapons. The registration system is also part of the general scheme of the law in reducing misuse. If someone is found guilty of a crime involving violence, or is prohibited from possessing a weapon, the registration scheme is expected to assist the police in determining whether the offender actually owns any guns and in confiscating them. The registration scheme is also intended to reduce smuggling and the illegal trade in guns. These interconnections demonstrate that the registration and licensing portions of the Firearms Act are both tightly linked to Parliament's goal in promoting safety by reducing the misuse of any and all firearms. Both portions are integral and necessary to the operation of the scheme. The government is not prevented from improving the system because the pre-existing firearms acquisition certificate system was not connected to a registration system. Moreover, prior to this Act, the federal government had a registration system for handguns. It now seeks to extend it to all guns. Contrary to the suggestions of [page812] Conrad J.A., no improper purpose in including registration in the scheme has been demonstrated.

(3) Undue Intrusion into Provincial Powers?

48 In a related argument, Alberta and the provincial interveners submit that this law inappropriately trenches on provincial powers and that upholding it as criminal law will upset the balance of federalism. In support of its submission, Alberta cites the work of D. M. Beatty, who suggests applying considerations of rationality and proportionality from the Canadian Charter of Rights and Freedoms s. 1 cases to questions of legislative competence: Constitutional Law in Theory and Practice (1995). It seems far from clear to us that it would be helpful to apply the technique of weighing benefits and detriments used in s. 1 jurisprudence to the quite different exercise of defining the scope of the powers set out in ss. 91 and 92 of the Constitution Act, 1867. This said, however, it is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power. A federal state depends for its very existence on a just and workable balance between the central and provincial levels of government, as this Court affirmed in Reference re Secession of Quebec, [1998] 2 S.C.R. 217; see also General Motors of Canada Ltd. v. City National Leasing, supra. The courts, critically aware of the need to maintain this balance, have not hesitated to strike down legislation that does not conform with the requirements of the criminal law: see Boggs, supra, and the Margarine Reference, supra. The question is not whether such a balance is necessary, but whether the 1995 gun control law upsets that balance.

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49 The argument that the 1995 gun control law upsets the balance of Confederation may be seen as an argument that, viewed in terms of its effects, the law does not in pith and substance relate to public safety under the federal criminal law power but rather to the provincial power over property and civil rights. Put simply, the issue is whether the law is mainly in relation to criminal law. If it is, incidental effects in the provincial sphere are constitutionally irrelevant: see, e.g., Consortium Developments (Clearwater) Ltd. v. Sarnia (City), [1998] 3 S.C.R. 3, and Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85. On the other hand, if the effects of the law, considered with its purpose, go so far as to establish that it is mainly a law in relation to property and civil rights, then the law is ultra vires the federal government. In summary, the question is whether the "provincial" effects are incidental, in which case they are constitutionally irrelevant, or whether they are so substantial that they show that the law is mainly, or "in pith and substance", the regulation of property and civil rights.

50 In our view, Alberta and the provinces have not established that the effects of the law on provincial matters are more than incidental. First, the mere fact that guns are property does not suffice to show that a gun control law is in pith and substance a provincial matter. Exercises of the criminal law power often affect property and civil rights to some degree: Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A.C. 368 (P.C.). Such effects are almost unavoidable, as many aspects of the criminal law deal with property and its ownership. The fact that such effects are common does not lessen the need to examine them. It does suggest, however, that we cannot draw sharp lines between criminal law and property and civil rights. Food, drugs and obscene materials are all items of property and are all legitimate subjects of criminal laws. In order to determine the proper classification of this law, then, we must go beyond the simplistic proposition that [page814] guns are property and thus any federal regulation of firearms is prima facie unconstitutional.

51 Second, the Act does not significantly hinder the ability of the provinces to regulate the property and civil rights aspects of guns. Most provinces already have regulations dealing with hunting, discharge within municipal boundaries, and other aspects of firearm use, and these are legitimate subjects of provincial regulation: see R. v. Chiasson (1982), 66 C.C.C. (2d) 195 (N.B.C.A.), aff'd [1984] 1 S.C.R. 266. The Act does not affect these laws.

52 Third, the most important jurisdictional effect of this law is its elimination of the ability of the provinces to not have any regulations on the ownership of ordinary firearms. The provinces argue that it is in their power to choose whether or not to have such a law. By taking over the field, the federal government has deprived the provinces of that choice. Assuming (without deciding) that the provincial legislatures would have the jurisdiction to enact a law in relation to the property aspects of ordinary firearms, this does not prevent Parliament from addressing the safety aspects of ordinary

firearms. The double aspect doctrine permits both levels of government to legislate in one jurisdictional field for two different purposes: Egan, supra.

53 Fourth, as discussed above, this law does not precipitate the federal government's entry into a new field. Gun control has been the subject of federal law since Confederation. This law does not allow the federal government to significantly expand its jurisdictional powers to the detriment of the provinces. There is no colourable intrusion into provincial jurisdiction, either in the sense that Parliament has an improper motive or that it is taking over provincial powers under the guise of the criminal law. While we are sensitive to the concern of the provincial governments that the federal jurisdiction over criminal law not be permitted such an [page815] unlimited scope that it erodes the constitutional balance of powers, we do not believe that this legislation poses such a threat.

(4) Is Moral Content Required?

54 Yet another argument is that the ownership of guns is not criminal law because it is not immoral to own an ordinary firearm. There are two difficulties with this argument. The first is that while the ownership of ordinary firearms is not in itself regarded by most Canadians as immoral, the problems associated with the misuse of firearms are firmly grounded in morality. Firearms may be misused to take human life and to assist in other immoral acts, like theft and terrorism. Preventing such misuse can be seen as an attempt to curb immoral acts. Viewed thus, gun control is directed at a moral evil.

55 The second difficulty with the argument is that the criminal law is not confined to prohibiting immoral acts: see Proprietary Articles Trade Association v. Attorney-General for Canada, [1931] A.C. 310 (P.C.). While most criminal conduct is also regarded as immoral, Parliament can use the criminal law to prohibit activities which have little relation to public morality. For instance, the criminal law has been used to prohibit certain restrictions on market competition: see Attorney-General for British Columbia v. Attorney-General for Canada, supra. Therefore, even if gun control did not involve morality, it could still fall under the federal criminal law power.

(5) Other Concerns

56 We recognize the concerns of northern, rural and aboriginal Canadians who fear that this law does not address their particular needs. They argue that it discriminates against them and violates treaty rights, and express concerns about their ability to access the scheme, which may be administered [page816] from a great distance. These apprehensions are genuine, but they do not go to the question before us -- Parliament's jurisdiction to enact this law. Whether a law could have been designed better or whether the federal government should have engaged in more consultation before enacting the law has no bearing on the division of powers analysis applied by this Court. If the law violates a treaty or a provision of the Charter, those affected can bring their claims to Parliament or the courts in a separate case. The reference questions, and hence this judgment, are restricted to the issue of the division of powers.

57 We also appreciate the concern of those who oppose this Act on the basis that it may not be effective or it may be too expensive. Criminals will not register their guns, Alberta argued. The only real effect of the law, it is suggested, is to burden law-abiding farmers and hunters with red tape. These concerns were properly directed to and considered by Parliament; they cannot affect the Court's decision. The efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis. Furthermore, the federal government points out that it is not only career criminals who are capable of misusing guns. Domestic violence often involves people who have no prior criminal record. Crimes are committed by first-time offenders. Finally, accidents and suicides occur in the homes of law-abiding people, and guns are stolen from their homes. By requiring everyone to register their guns, Parliament seeks to reduce misuse by everyone and curtail the ability of criminals to acquire firearms. Where criminals have acquired guns and used them in the commission of offences, the registration system seeks to make those guns more traceable. The cost of the program, another criticism [page817] of the law, is equally irrelevant to our constitutional analysis.

VI. Conclusion

58 We conclude that the impugned sections of the Firearms Act contain prohibitions and penalties in support of a valid criminal law purpose. The legislation is in relation to criminal law pursuant to s. 91(27) of the Constitution Act, 1867 and hence intra vires Parliament. It is not regulatory legislation and it does not take the federal government so far into provincial territory that the balance of federalism is threatened or the jurisdictional powers of the provinces are unduly impaired.

59 Having determined that the legislation constitutes a valid exercise of Parliament's jurisdiction over criminal law, it is unnecessary to consider whether the legislation can also be justified as an exercise of its peace, order and good government power.

60 We would dismiss the appeal. The licensing and registration provisions in the Firearms Act do not constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the Constitution Act, 1867. The Act is a valid exercise of Parliament's jurisdiction over criminal law pursuant to s. 91(27).

61 The answers to the reference questions are as follows:

Question 2:

(1) No.
(2) No.

Question 3:

(1) No.

(2) No.

[page818]

Appendix A -- The Reference Questions

The Reference was initiated by Her Majesty the Queen in Right of Alberta on September 26, 1996 by Order in Council 461/96. The Lieutenant Governor in Council referred four specific questions to the Court (under headings 2 and 3):

1. For purposes of these questions,

(a) "Firearms Act" means the Firearms Act, chapter 39 of the Statutes of Canada, 1995;
(b) "ordinary firearm" means "firearm", as defined in section 2 of the Criminal Code (Canada), as amended by section 138 of the Firearms Act, except that it does not include a "prohibited firearm" or a "restricted firearm" as those terms are defined in section 84 of the Criminal Code (Canada), as enacted by section 139 of the Firearms Act;
(c) "licensing provisions" means those portions of the Firearms Act relating to the mandatory regime of licensing for those persons who own or possess or wish to own or possess an ordinary firearm, including, without limitation, sections 5 to 10, 54, 55, 56, 58, 61, 64, 67, 68 and 70, and the related enforcement provisions of the Criminal Code (Canada), as enacted by section 139 of the Firearms Act;
(d) "Registration provisions" means those portions of the Firearms Act relating to the mandatory regime of registration for an ordinary firearm, including, without limitation, sections 13 to 16, 54, 60, 61, 66, 69, 71, 82 to 94, 112 and 115, and the related enforcement provisions of the Criminal Code (Canada), as enacted by section 139 of the Firearms Act.

2. (1) Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the Constitution Act, 1867?

(2) If the answer to the question posed in subsection (1) is "yes", are the licensing provisions ultra vires the Parliament of Canada insofar as they regulate the

possession or ownership of an ordinary firearm?

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3. (1) Do the registration provisions, as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the Constitution Act, 1867?

(2) If the answer to the question posed in subsection (1) is "yes", are the registration provisions ultra vires the Parliament of Canada insofar as they require registration of an ordinary firearm?

Appendix B -- The Legislation

This is the version of the Firearms Act as assented to, and as referred to the Alberta Court of appeal by Order in Council 461/96. It does not take into account any amendments to the Act.

5. (1) A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition or prohibited ammunition.

(2) In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person, within the previous five years,

(a) has been convicted or discharged under section 736 of the Criminal Code of

(i) an offence in the commission of which violence against another person was used, threatened or attempted,
(ii) an offence under this Act or Part III of the Criminal Code,
(iii) an offence under section 264 of the Criminal Code (criminal harassment), or

(iv) an offence relating to the contravention of subsection 39(1) or (2) or 48(1) or (2) of the Food and Drugs Act or subsection 4(1) or (2) or 5(1) of the Narcotic Control Act;

(b) has been treated for a mental illness, whether in a hospital, mental institute, psychiatric clinic or otherwise and whether or not the person was confined to such a hospital, institute or clinic, that was associated with violence or threatened or attempted violence on the part of the person against any person; or

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(c) has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person.

(3) Notwithstanding subsection (2), in determining whether a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge may but need not have regard to the criteria described in subsection (2).

6. (1) A person is eligible to hold a licence only if the person is not prohibited by a prohibition order from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition.

(2) Subsection (1) is subject to any order made under section 113 of the Criminal Code (lifting of prohibition order for sustenance or employment).

7. (1) An individual is eligible to hold a licence only if the individual

(a) successfully completes the Canadian Firearms Safety Course, as given by

an instructor who is designated by a chief firearms officer, and passes the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;

(b) except in the case of an individual who is less than eighteen years old, passes the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;

(c) successfully completed, before January 1, 1995, a course that the attorney general of the province in which the course was given had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act; or

(d) passed, before January 1, 1995, a test that the attorney general of the province in which the test was administered had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act.

(2) An individual is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual

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(a) successfully completes a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and passes any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course; or

(b) passes a restricted firearms safety test, as administered by an instructor who is designated by a chief firearms officer, that is approved by the federal Minister.

(3) An individual against whom a prohibition order was made

(a) is eligible to hold a licence only if the individual has, after the expiration of the prohibition order,

(i) successfully completed the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer,

and

(ii) passed the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course; and

(b) is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual has, after the expiration of the prohibition order,

(i) successfully completed a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and

(ii) passed any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course.

(4) Subsections (1) and (2) do not apply to an individual who

(a) in the prescribed circumstances, has been certified by a chief firearms officer as meeting the prescribed criteria relating to the safe handling and use of firearms and the laws relating to firearms;

(b) is less than eighteen years old and requires a firearm to hunt or trap in order to sustain himself or herself or his or her family;

(c) on the commencement day, possessed one or more firearms and does not require a licence to acquire other firearms;

(d) requires a licence merely to acquire cross-bows; or

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(e) is a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms.

(5) Subsection (3) does not apply to an individual in respect of whom an order is made under section 113 of the Criminal Code (lifting of prohibition order for sustenance or employment) and who is exempted by a chief firearms officer

from the application of that subsection.

8. (1) An individual who is less than eighteen years old and who is otherwise eligible to hold a licence is not eligible to hold a licence except as provided in this section.

(2) An individual who is less than eighteen years old and who hunts or traps as a way of life is eligible to hold a licence if the individual needs to hunt or trap in order to sustain himself or herself or his or her family.

(3) An individual who is twelve years old or older but less than eighteen years old is eligible to hold a licence authorizing the individual to possess, in accordance with the conditions attached to the licence, a firearm for the purpose of target practice, hunting or instruction in the use of firearms or for the purpose of taking part in an organized competition.

(4) An individual who is less than eighteen years old is not eligible to hold a licence authorizing the individual to possess prohibited firearms or restricted firearms or to acquire firearms or cross-bows.

(5) An individual who is less than eighteen years old is eligible to hold a licence only if a parent or person who has custody of the individual has consented, in writing or in any other manner that is satisfactory to the chief firearms officer, to the issuance of the licence.

9. (1) A business is eligible to hold a licence authorizing a particular activity only if every person who stands in a prescribed relationship to the business is eligible under sections 5 and 6 to hold a licence authorizing that activity or the acquisition of restricted firearms.

(2) A business other than a carrier is eligible to hold a licence only if

(a) a chief firearms officer determines that no individual who stands in a prescribed relationship to the business need be eligible to hold a licence under section 7; or
(b) the individuals who stand in a prescribed relationship to the business and who are determined by a chief firearms officer to be the appropriate individuals to satisfy the requirements of section 7 are eligible to hold a licence under that section.

(3) A business other than a carrier is eligible to hold a licence only if every employee of the business who, in the course of duties of employment, handles or would handle firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition is the holder of a licence authorizing the holder to acquire restricted firearms.

(4) In subsection (3), "firearm" does not include a partially manufactured barrelled weapon that, in its unfinished state, is not a barrelled weapon

(a) from which any shot, bullet or other projectile can be discharged; and
(b) that is capable of causing serious bodily injury or death to a person.

(5) Subsection (1) does not apply in respect of a person who stands in a prescribed relationship to a business where a chief firearms officer determines that, in all the circumstances, the business should not be ineligible to hold a licence merely because of that person's ineligibility.

(6) Subsection (3) does not apply in respect of an employee of a museum

(a) who, in the course of duties of employment, handles or would handle only firearms that are designed or intended to exactly resemble, or to resemble with near precision, antique firearms, and who has been trained to handle or use such a firearm; or
(b) who is designated, by name, by a provincial minister.

10. Sections 5, 6 and 9 apply in respect of a carrier whose business includes the transportation of firearms, [page824] prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition from one province to any

other province, or beyond the limits of a province, as if each reference in those sections to a chief firearms officer were a reference to the Registrar.

13. A person is not eligible to hold a registration certificate for a firearm unless the person holds a licence authorizing the person to possess that kind of firearm.

14. A registration certificate may be issued only for a firearm

(a) that bears a serial number sufficient to distinguish it from other firearms; or
(b) that is described in the prescribed manner.

15. A registration certificate may not be issued for a firearm that is owned by Her Majesty in right of Canada or a province or by a police force.

16. (1) A registration certificate for a firearm may be issued to only one person.

(2) Subsection (1) does not apply in the case of a firearm for which a registration certificate referred to in section 127 was issued to more than one person.

54. (1) A licence, registration certificate or authorization may be issued only on application made in the prescribed form containing the prescribed information and accompanied by payment of the prescribed fees.

(2) An application for a licence, registration certificate or authorization must be made to

(a) a chief firearms officer, in the case of a licence, an authorization to carry or an authorization to transport; or
(b) the Registrar, in the case of a registration certificate, an authorization to export or an authorization to import.

(3) An individual who, on the commencement day, possesses one or more restricted firearms or one or more handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) must specify, in any application for a licence authorizing the individual to possess restricted firearms or handguns that are so referred to,

(a) except in the case of a firearm described in paragraph (b), for which purpose described in section 28 the individual wishes to continue to possess restricted firearms or handguns that are so referred to; and

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(b) for which of those firearms was a registration certificate under the former Act issued because they were relics, were of value as a curiosity or rarity or were valued as a memento, remembrance or souvenir.

55. (1) A chief firearms officer or the Registrar may require an applicant for a licence or authorization to submit such information, in addition to that included in the application, as may reasonably be regarded as relevant for the purpose of determining whether the applicant is eligible to hold the licence or authorization.

(2) Without restricting the scope of the inquiries that may be made with respect to an application for a licence, a chief firearms officer may conduct an investigation of the applicant, which may consist of interviews with neighbours, community workers, social workers, individuals who work or live with the applicant, spouse, former spouse, dependants or whomever in the opinion of the chief firearms officer may provide information pertaining to whether the applicant is eligible under section 5 to hold a licence.

56. (1) A chief firearms officer is responsible for issuing licences.

(2) Only one licence may be issued to any one individual.

(3) A business other than a carrier requires a separate licence for each place where the business is carried on.

58. (1) A chief firearms officer who issues a licence, an authorization to carry or an authorization to transport may attach any reasonable condition to it that the chief firearms officer considers desirable in the particular circumstances and in the interests of the safety of the holder or any other person.

(2) Before attaching a condition to a licence that is to be issued to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer must consult with a parent or person who has custody of the individual.

(3) Before issuing a licence to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer shall have a parent or person who has custody of the individual sign the licence, including any conditions attached to it.

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60. The Registrar is responsible for issuing registration certificates for firearms and assigning firearms identification numbers to them and for issuing authorizations to export and authorizations to import.

61. (1) A licence or registration certificate must be in the prescribed form and include the prescribed information and any conditions attached to it.

(2) An authorization to carry, authorization to transport, authorization to export or authorization to import may be in the prescribed form and include the prescribed information, including any conditions attached to it.

(3) An authorization to carry or authorization to transport may take the form of a condition attached to a licence.

(4) A licence that is issued to a business must specify each particular activity that the licence authorizes in relation to prohibited firearms, restricted firearms, firearms that are neither prohibited firearms nor restricted firearms, cross-bows, prohibited weapons, restricted weapons, prohibited devices, ammunition or prohibited ammunition.

64. (1) A licence that is issued to an individual who is eighteen years old or older expires on the earlier of

(a) five years after the birthday of the holder next following the day on which it is issued, and
(b) the expiration of the period for which it is expressed to be issued.

(2) A licence that is issued to an individual who is less than eighteen years old expires on the earlier of

(a) the day on which the holder attains the age of eighteen years, and
(b) the expiration of the period for which it is expressed to be issued.

(3) A licence that is issued to a business other than a museum expires on the earlier of

(a) one year after the day on which it is issued, and
(b) the expiration of the period for which it is expressed to be issued.

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(4) A licence that is issued to a museum expires on the earlier of

(a) three years after the day on which it is issued, and
(b) the expiration of the period for which it is expressed to be issued.

66. A registration certificate for a firearm expires where

(a) the holder of the registration certificate ceases to be the owner of the firearm; or
(b) the firearm ceases to be a firearm.

67. (1) A chief firearms officer may renew a licence, authorization to carry or authorization to transport in the same manner and in the same circumstances in which a licence, authorization to carry or authorization to transport may be issued.

(2) On renewing a licence authorizing an individual to possess restricted firearms or handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns), a chief firearms officer shall decide whether any of those firearms or handguns that the individual possesses are being used for

(a) the purpose described in section 28 for which the individual acquired the restricted firearms or handguns; or
(b) in the case of any of those firearms or handguns that were possessed by the individual on the commencement day, the purpose described in that section that was specified by the individual in the licence application.

(3) A chief firearms officer who decides that any restricted firearms or any handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) that are possessed by an individual are not being used for that purpose shall

(a) give notice of that decision in the prescribed form to the individual; and
(b) inform the Registrar of that decision.

(4) Subsections (2) and (3) do not apply to a firearm

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(a) that is a relic, is of value as a curiosity or rarity or is valued as a memento, remembrance or souvenir;
(b) that was specified in the licence application as being a firearm for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir;
(c) for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir; and
(d) in respect of which an individual, on the commencement day, held a registration certificate under the former Act.

(5) A notice given under paragraph (3)(a) must include the reasons for the decision and be accompanied by a copy of sections 74 to 81.

68. A chief firearms officer shall refuse to issue a licence if the applicant is not eligible to hold one and may refuse to issue an authorization to carry or authorization to transport for any good and sufficient reason.

69. The Registrar may refuse to issue a registration certificate, authorization to export or authorization to import for any good and sufficient reason including, in the case of an application for a registration certificate, where the applicant is not eligible to hold a registration certificate.

70. (1) A chief firearms officer who issues a licence, authorization to carry or authorization to transport may revoke it for any good and sufficient reason including, without limiting the generality of the foregoing,

(a) where the holder of the licence or authorization

(i) is no longer or never was eligible to hold the licence or authorization,
(ii) contravenes any condition attached to the licence or authorization, or

(iii) has been convicted or discharged under section 736 of the Criminal Code of an offence referred to in paragraph 5(2)(a); or

(b) where, in the case of a business, a person who stands in a prescribed relationship to the business has [page829] been convicted or discharged under section 736 of the Criminal Code of any such offence.

(2) The Registrar may revoke an authorization to export or authorization to import for any good and sufficient reason.

71. (1) The Registrar

(a) may revoke a registration certificate for any good and sufficient reason; and
(b) shall revoke a registration certificate for a firearm held by an individual where the Registrar is informed by a chief firearms officer under section 67 that the firearm is not being used for

(i) the purpose for which the individual acquired it, or
(ii) in the case of a firearm possessed by the individual on the commencement day, the purpose specified by the individual in the licence application.

(2) A registration certificate for a prohibited firearm referred to in subsection 12(3) (pre-August 1, 1992 converted automatic firearms) is automatically revoked on the change of any alteration in the prohibited firearm that was described in the application for the registration certificate.

82. The Commissioner of the Royal Canadian Mounted Police shall, after consulting with the federal Minister and the Solicitor General of Canada, appoint an individual as the Registrar of Firearms.

83. (1) The Registrar shall establish and maintain a registry, to be known as the Canadian Firearms Registry, in which shall be kept a record of

(a) every licence, registration certificate and authorization that is issued or revoked by the Registrar;
(b) every application for a licence, registration certificate or authorization that is refused by the Registrar;
(c) every transfer of a firearm of which the Registrar is informed under section 26 or 27;

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(d) every exportation from or importation into Canada of a firearm of which the Registrar is informed under section 42 or 50;
(e) every loss, finding, theft or destruction of a firearm of which the Registrar is informed under section 88; and
(f) such other matters as may be prescribed.

(2) The Registrar is responsible for the day-to-day operation of the Canadian Firearms Registry.

84. The Registrar may destroy records kept in the Canadian Firearms Registry at such times and in such circumstances as may be prescribed.

85. (1) The Registrar shall establish and maintain a record of

(a) firearms acquired or possessed by the following persons and used by them in the course of their duties or for the purposes of their employment, namely,

(i) peace officers,
(ii) persons training to become police officers or peace officers under the control and supervision of

(A) a police force, or
(B) a police academy or similar institution designated by the federal Minister or the lieutenant governor in council of a

province,

(iii) persons or members of a class of persons employed in the public service of Canada or by the government of a province or municipality who are prescribed by the regulations made by the Governor in Council under Part III of the Criminal Code to be public officers, and

(iv) chief firearms officers and firearms officers; and

(b) firearms acquired or possessed by individuals on behalf of, and under the authority of, a police force or a department of the Government of Canada or of a province.

(2) A person referred to in subsection (1) who acquires or transfers a firearm shall have the Registrar informed of the acquisition or transfer.

(3) The Registrar may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

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86. The records kept in the registry maintained pursuant to section 114 of the former Act that relate to registration certificates shall be transferred to the Registrar.

87. (1) A chief firearms officer shall keep a record of

(a) every licence and authorization that is issued or revoked by the chief firearms officer;

(b) every application for a licence or authorization that is refused by the chief firearms officer;

(c) every prohibition order of which the chief firearms officer is informed under section 89; and

(d) such other matters as may be prescribed.

(2) A chief firearms officer may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

88. A chief firearms officer to whom the loss, finding, theft or destruction of a firearm is reported shall have the Registrar informed without delay of the loss, finding, theft or destruction.

89. Every court, judge or justice that makes, varies or revokes a prohibition order shall have a chief firearms officer informed without delay of the prohibition order or its variation or revocation.

90. The Registrar has a right of access to records kept by a chief firearms officer under section 87 and a chief firearms officer has a right of access to records kept by the Registrar under section 83 or 85 and to records kept by other chief firearms officers under section 87.

91. (1) Subject to the regulations, notices and documents that are sent to or issued by the Registrar pursuant to this or any other Act of Parliament may be sent or issued in electronic or other form in any manner specified by the Registrar.

(2) For the purposes of this Act and Part III of the Criminal Code, a notice or document that is sent or issued in accordance with subsection (1) is deemed to have been received at the time and date provided by the regulations.

92. (1) Records required by section 83 or 85 to be kept by the Registrar may

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(a) be in bound or loose-leaf form or in photographic film form; or

(b) be entered or recorded by any system of mechanical or electronic data processing or by any other information storage device that is capable of reproducing any required information in intelligible written or printed form within a reasonable time.

(2) Subject to the regulations, a document or information received by the Registrar under this Act in electronic or other form may be entered or recorded by any information storage device, including any system of mechanical or electronic data processing, that is capable of reproducing stored documents or information in intelligible written or printed form within a reasonable time.

(3) Where the Registrar maintains a record of a document otherwise than in written or printed form, an extract from that record that is certified by the Registrar has the same probative value as the document would have had if it had been proved in the ordinary way.

93. (1) The Registrar shall, as soon as possible after the end of each calendar year and at such other times as the Solicitor General of Canada may, in writing, request, submit to the Solicitor General a report, in such form and including such information as the Solicitor General may direct, with regard to the administration of this Act.

(2) The Solicitor General of Canada shall have each report laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Solicitor General receives it.

94. A chief firearms officer shall submit the prescribed information with regard to the administration of this Act at the prescribed time and in the prescribed form for the purpose of enabling the Registrar to compile the reports referred to in section 93.

112. (1) Subject to subsections (2) and (3), every person commits an offence who, not having previously committed an offence under this subsection or subsection 91(1) or 92(1) of the Criminal Code, possesses a firearm that is neither a prohibited firearm nor a restricted firearm without being the holder of a registration certificate for the firearm.

(2) Subsection (1) does not apply to

(a) a person who possesses a firearm while the person is under the direct and immediate supervision of a [page833] person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it;
(b) a person who comes into possession of a firearm by operation of law and who, within a reasonable period after acquiring possession of it, lawfully disposes of it or obtains a registration certificate for it; or
(c) a person who possesses a firearm and who is not the holder of a registration certificate for the firearm if the person

(i) has borrowed the firearm,
(ii) is the holder of a licence under which the person may possess it, and
(iii) is in possession of the firearm to hunt or trap in order to sustain himself or herself or his or her family.

(3) Every person who, at any particular time between the commencement day and the later of January 1, 1998 and such other date as is prescribed, possesses a firearm that, as of that particular time, is neither a prohibited firearm nor a restricted firearm is deemed for the purposes of subsection (1) to be, until January 1, 2003 or such other earlier date as is prescribed, the holder of a registration certificate for the firearm.

(4) Where, in any proceedings for an offence under this section, any question arises as to whether a person is the holder of a registration certificate, the onus is on the defendant to prove that the person is the holder of the registration certificate.

115. Every person who commits an offence under section 112, 113 or 114 is guilty of an offence punishable on summary conviction.

Solicitors for the appellant: McLennan Ross, Edmonton.
Solicitor for the respondent: The Deputy Attorney General of Canada, Ottawa.
Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

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Solicitor for the intervener the Attorney General of Nova Scotia: The Department of Justice, Halifax.
Solicitor for the intervener the Attorney General for New Brunswick: The Office of the Attorney General, Fredericton.
Solicitors for the intervener the Attorney General of Manitoba: Ladner Downs, Vancouver.
Solicitor for the intervener the Attorney General for Saskatchewan: The Deputy Attorney General, Regina.
Solicitor for the intervener the Government of the Northwest Territories: The Department of Justice, Yellowknife.
Solicitor for the intervener the Minister of Justice for the Government of the Yukon Territory: The Department of Justice, Whitehorse.
Solicitor for the intervener the Federation of Saskatchewan Indian Nations: The Federation of Saskatchewan Indian Nations, Saskatoon.
Solicitors for the intervener the Coalition of Responsible Firearm Owners and Sportsmen: Dallas K. Miller Law Office, Medicine Hat.
Solicitors for the intervener the Law-Abiding Unregistered Firearms Association: Neufeld Law Office, Red Deer.
Solicitors for the intervener the Shooting Federation of Canada: Shaw McLennan & Ironside, Collingwood, Ontario.
Solicitors for the intervener the Association pour la santé publique du Québec inc.: Brochet Dussault Larochelle, Sainte-Foy.
Solicitors for the intervener the Alberta Council of Women's Shelters: Pringle & Associates, Edmonton.
Solicitors for the interveners CAVEAT, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent [page835] Health and the Canadian Pediatric Society: Fasken Campbell Godfrey, Toronto.
Solicitors for the interveners the Coalition for Gun Control, the Canadian Association of Chiefs of Police, the Corporation of the City of Toronto, the City of Montreal and the City of Winnipeg: Ruby & Edwardh, Toronto.

cp/d/qlhbb

Indexed as:

Ward v. Canada (Attorney General)

Her Majesty The Queen, appellant;
v.
Ford Ward, respondent, and
The Attorney General of Quebec, the Attorney General for Alberta, the Attorney General of Newfoundland and the International Fund for Animal Welfare Inc., interveners.

[2002] 1 S.C.R. 569

[2002] S.C.J. No. 21

2002 SCC 17

File No.: 27717

Supreme Court of Canada

2001: October 31 / 2002: February 22.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND (58 paras.)

Constitutional law -- Distribution of legislative powers -- Fisheries -- Federal regulation prohibiting sale of young hooded and harp seals -- Whether regulation falls within federal fisheries power -- Constitution Act, 1867, ss. 91(12), 92(13) -- Marine Mammal Regulations, SOR/93-56, s. 27.

Constitutional law -- Distribution of legislative powers -- Criminal law -- Federal regulation prohibiting sale of young hooded and harp seals -- Whether regulation falls within federal criminal law power -- Constitution Act, 1867, s. 91(27) -- Marine Mammal Regulations, SOR/93-56, s. 27.

Section 27 of the Marine Mammal Regulations prohibits the sale, trade or barter of young harp seals and hooded seals, referred to respectively as whitecoats and bluebacks. W held a commercial sealing licence issued under the Fisheries Act which permitted him to harvest hooded and harp seals. On a seal hunt in 1996, W [page570] harvested approximately 50 seals, including a number of bluebacks. He was charged with selling blueback pelts contrary to s. 27 of the Regulations. W argued that s. 27 was ultra vires Parliament. Trial proceedings were suspended pending the outcome of the constitutional challenge. The trial judge upheld s. 27 as a valid exercise of the federal fisheries power under s. 91(12) of the Constitution Act, 1867. The majority of the Court of Appeal allowed W's appeal.

Held: The appeal should be allowed.

Section 27 of the Marine Mammal Regulations is intra vires Parliament under the fisheries power. The purpose of s. 27 is to control the killing of bluebacks and whitecoats by prohibiting their sale, thus making it largely pointless to harvest them. Parliament's object is to regulate the seal fishery by eliminating the commercial hunting of these seals, while at the same time allowing for a limited harvesting for non-commercial purposes. The prohibition exists in the context of a scheme that is concerned with the overall "management and control" of the marine fisheries resource. It is not directed at controlling commerce or property but rather is designed to curtail a hunt that was damaging the economic viability of the sealing industry and the fisheries resource in general. The method chosen to curtail the commercial harvest of bluebacks and whitecoats may be imperfect, but efficacy is not a valid consideration in the pith and substance analysis. Moreover, to argue that because the legislative measure is a prohibition on sale, it must be in pith and substance concerned with the regulation of sale, confuses the purpose of s. 27 with the means chosen to achieve it. Viewed in the context of the legislation as a whole and the legislative history, there is nothing to suggest that Parliament was trying to regulate the local market for trade of seals and seal products. Section 27 is in pith and substance concerned with the management of the Canadian fishery and falls within the federal fisheries power. The federal power over fisheries is not confined to conserving fish stocks, but extends more broadly to maintenance and preservation of the fishery as a whole, including its economic value.

Although broad, the fisheries power is not unlimited. Parliament must respect the provincial power over property and civil rights. Whether a matter best conforms to [page571] a subject within federal or provincial jurisdiction cannot be determined by drawing a line between federal and provincial powers on the basis of conservation or sale. The activity at stake must be examined to determine whether the matter regulated is related in pith and substance to the federal fisheries power or the provincial power over property and civil rights. Here, since s. 27 is vitally connected to protecting the economic viability of the Canadian fishery as a whole, it is a valid federal measure. This result fully respects the provinces' constitutional right to control property and civil rights.

Section 27 does not fall within the federal criminal law jurisdiction. While a prohibited act and a

penalty are present, it does not possess a valid criminal law purpose.

Cases Cited

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APPEAL from a judgment of the Newfoundland Court of Appeal (1999), 182 D.L.R. (4th) 172, 183 Nfld. & P.E.I.R. 295, 556 A.P.R. 295, [1999] N.J. No. 336 (QL), allowing the respondent's appeal from a decision of the Newfoundland Supreme Court, Trial Division (1997), 152 D.L.R. (4th) 363, 155 Nfld. & P.E.I.R. 313, 481 A.P.R. 313, [1997] N.J. No. 208 (QL). Appeal allowed.

David Meadows and Paul Adams, for the appellant.
V. Randell J. Earle, Q.C., and Stephen Willar, for the respondent.
Alain Gingras, for the intervener the Attorney General of Quebec.

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S.H. Rutwind, for the intervener the Attorney General for Alberta.
Written submissions only by Harold J. Porter, for the intervener the Attorney General of Newfoundland.
Clayton C. Ruby, for the intervener the International Fund for Animal Welfare Inc.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

McLACHLIN C.J.:--

I. Introduction

1 This appeal concerns the federal and provincial division of powers set out in ss. 91 and 92 of the Constitution Act, 1867. It focuses on the constitutionality of a federal regulation prohibiting the sale of young hooded and harp seals. The issue is whether this prohibition falls under the federal government's power to legislate in relation to sea coast and inland fisheries or the criminal law, in which case it is valid, or whether it falls under the provincial power over property and civil rights, in which case it is invalid.

2 For the reasons that follow, I conclude that the regulation is valid federal legislation under the fisheries power. The federal power over fisheries is not confined to conserving fish stocks, but extends to the management of the fisheries as a public resource. This resource has many aspects, one of which is to yield economic benefits to its participants and more generally to all Canadians.

The prohibition on the sale of young hooded and harp seals was designed to curtail a hunt that was damaging the economic viability of the sealing industry and the fisheries resource in general. This brings the regulation within the fisheries power.

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II. Facts

3 Ford Ward is a licensed fisherman and sealer who resides in La Scie, a town on the north coast of Newfoundland. During the period in question, he held a commercial sealing licence issued under the authority of the Fisheries Act, R.S.C. 1985, c. F-14, which permitted him to harvest hooded and harp seals. During March and April of 1996, Ward engaged in the seal hunt off the northeast coast of Newfoundland in an area known as "the Front". On the voyage in question, Ward harvested approximately 50 seals, a number of which included hooded "blueback" seals.

4 On November 20, 1996, Ward was charged with selling blueback seal pelts contrary to s. 27 of the Marine Mammal Regulations, SOR/93-56 (the "Regulations"), which prohibits the sale, trade or barter of whitecoat and blueback seals. Ward applied to the Supreme Court of Newfoundland, Trial Division, for a declaration that s. 27 was ultra vires the Parliament of Canada. The parties agreed to suspend trial proceedings on the charges pending the outcome of the constitutional challenge.

5 Young harp and hooded seals, respectively referred to as whitecoats and bluebacks, are named after the colour of their coats. A harp seal is born with a yellowish-white coat that it retains until it moults, which can occur up to three weeks after its birth. Unlike the harp seal, a hooded seal moults its white fur prior to birth while still in the womb. A hooded seal is thus born with bluish colour fur which it retains from 16 to 30 months, after which the seal moults for a second time. After the hooded seal has completely moulted its blue coat, it is no longer considered to be a blueback.

6 Both hooded and harp seals birth their offspring in a 10-day period in late March of each year. Births [page575] at the Front occur on the pack ice, which in effect becomes a whelping platform. A harp seal will wean either before or immediately after the moult, and most of the period that a harp seal is a whitecoat is spent on the pack ice where it is easily recognizable. In contrast, a blueback seal is weaned between four and six days after birth, and does not remain on the ice for very long afterwards. Thus, while the harp seal is a whitecoat for no more than three weeks, most of which is spent on the ice, the hooded seal can be a blueback for 16 to 30 months, with only days spent on the ice.

7 After bluebacks leave the ice and take to water, their identification becomes difficult. The hunt is largely conducted from boats with small crews, as sealers are not permitted to harvest in the whelping patches on the ice. The majority of seals are shot with a rifle while they are in the water.

The identification problem arises from the fact that a blueback is not recognizable as such once it is in the water; its dark head is not distinguishable in colour or size from the dark heads of other seals. Thus, the seal hunter does not know for sure whether the seal head bobbing up and down in the water is a blueback until it is killed and brought aboard the vessel. However, if sealers are harvesting in a concentration of bluebacks, this fact should quickly become apparent in the course of the hunt.

8 The past 30 years have seen vigorous anti-sealing campaigns directed largely at the killing of seal pups at the Front and in the Gulf of St. Lawrence. In 1983, the Council of the European Communities issued a directive banning the import of whitecoat and blueback skins. A second directive in 1985 extended the ban to October 1989. The campaigns all but destroyed the traditional markets for Canadian seal products and threatened to spread to other fish products, particularly canned fish. In June of 1984, the federal government established the Royal Commission on Seals and the Sealing [page576] Industry in Canada, also known as the Malouf Commission. In light of the circumstances surrounding the campaigns and the market threat to other fish products, the Malouf Commission recommended in its Report that the large-scale commercial hunting of whitecoats and bluebacks "should not be permitted", and non-commercial hunting, "to the extent that it occurs at all, should be carefully regulated and strictly limited" (Seals and Sealing in Canada (1986), vol. 1, at p. 40).

9 The government responded by passing new regulations, including the ban on the sale, trade or barter of whitecoats and bluebacks here at issue.

III. Judgments

10 Wells J. of the Supreme Court of Newfoundland, Trial Division upheld s. 27 of the Regulations as a valid exercise of the federal government's fisheries power: (1997), 155 Nfld. & P.E.I.R. 313. He held that the federal fisheries power extended beyond conservation to more general socio-economic goals. Curtailing the excessive killing of young seals to "achieve national objectives" (para. 41) fell within this power. Section 27 was in pith and substance directed at this purpose. The Regulations do not prohibit the killing of bluebacks because of the difficulty of their identification in the water. As a practical solution, the federal government chose to control the killing of the bluebacks and whitecoats by prohibiting their sale, thus making it largely pointless to harvest them. While acknowledging that a prohibition on sale may be an imperfect method of regulation, Wells J. found on the evidence that a prohibition on the killing of bluebacks would simply not work.

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11 The majority of the Newfoundland Court of Appeal, per Marshall J.A., reversed Wells J. and held s. 27 of the Regulations invalid: (1999), 183 Nfld. & P.E.I.R. 295. Marshall J.A. rejected the

argument that the purpose of banning the trade in bluebacks is to prevent the killing of baby seals for their pelts, which is inherently cruel, morally wrong and hence a proper subject of criminal control. He also rejected the argument that the prohibition fell under the federal fisheries power. In his view, the fisheries power was confined to issues of conservation, and legislation enacted for "socio-economic" reasons was simply too broad a description for division of powers purposes. The prohibition was the antithesis of conservation, since it would result in leaving dead seals in the water. Hence it did not fall under the fisheries power.

12 O'Neill J.A. dissented, holding like Wells J. that the fisheries power was broad enough to extend beyond conservation to the general regulation of the fisheries resource for the common good, and that prohibiting sale virtually eliminated the harvest of young seals. He concluded that the purpose of s. 27 "is not to control the sale of seal pelts for its own sake" (para. 120), but to discourage commercial taking of bluebacks and whitecoats. In his view, s. 27 was in pith and substance in relation to the federal fisheries power, and it was unnecessary to consider whether s. 27 could be classified in relation to the criminal law power.

IV. Legislation

13 The federal and provincial division of powers is set out in ss. 91 and 92 of the Constitution Act, 1867. Section 91 grants exclusive legislative authority to the Parliament of Canada for all matters in relation to sea coast and inland fisheries (s. 91(12)), and the [page578] criminal law (s. 91(27)). Section 92 specifies that the legislature in each province may exclusively make laws in relation to property and civil rights in the province (s. 92(13)).

14 The relevant portions of the Regulations made under the authority of s. 43 of the Fisheries Act are as follows:

> 2. (1) ...
>
> "blueback" means a hooded seal that has not moulted its blue coat;
>
> "whitecoat" means a harp seal that has not begun to moult its white coat....
>
> ...
>
> 27. No person other than a beneficiary shall sell, trade or barter a whitecoat or blueback.

V. Issue

15 The issue on this appeal is whether the federal regulation prohibiting the sale, trade or barter

of blueback seals is a valid exercise of the federal fisheries power or the federal criminal law power.

VI. Analysis

16 In order to resolve the issue posed by this appeal, we must determine whether s. 27, in pith and substance, falls under the federal power over fisheries or the criminal law. The pith and substance analysis asks two questions: first, what is the essential character of the law? Second, does that character relate to an enumerated head of power granted to the legislature in question by the Constitution Act, 1867? See Reference re Firearms Act (Can.), [2000] 1 S.C.R. 783, 2000 SCC 31; Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494, 2000 SCC 21; see also R. v. Morgentaler, [1993] 3 S.C.R. 463; Whitbread v. Walley, [1990] 3 S.C.R. 1273. We must address these questions first with respect to the federal fisheries power, [page579] second with respect to the federal criminal law power.

A. The Pith and Substance of Section 27 of the Regulations in Relation to the Fisheries Power

(1) The Essential Character of the Law

17 The first task in the pith and substance analysis is to determine the pith and substance or essential character of the law. What is the true meaning or dominant feature of the impugned legislation? This is resolved by looking at the purpose and the legal effect of the regulation or law: see Reference re Firearms Act, supra, at para. 16. The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, Parliament was regulating the fishery, or venturing into the provincial area of property and civil rights. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law: see Reference re Firearms Act, supra, at paras. 17-18; Morgentaler, supra, at pp. 482-83. The effects can also reveal whether a law is "colourable", i.e. does the law in form appear to address something within the legislature's jurisdiction, but in substance deal with a matter outside that jurisdiction?: see Morgentaler, supra, at p. 496. In oral argument, Ward expressly made clear that he is not challenging the law on the basis of colourability.

18 The pith and substance analysis is not technical or formalistic: see P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.), vol. 1, at p. 15-12. It is essentially a matter of interpretation. The court looks at the words used in the impugned legislation as well as the background and circumstances surrounding its enactment: see Morgentaler, supra, at p. 483 ; Reference re Firearms Act, supra, at para. 17. In conducting this analysis, the court should not be concerned with the efficacy of the law or [page580] whether it achieves the legislature's goals: see RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 44, per La Forest J.; Reference re Firearms Act, supra, at para. 18.

19 Section 27 of the Regulations, read alone, is simply a prohibition of sale, trade or barter,

suggesting it might fall within the provincial rather than federal domain. However, we cannot stop at this point. We must go further. What is the purpose of s. 27, and what is its effect? How does it fit into the regulatory scheme as a whole? The question is not whether the Regulations prohibit the sale so much as why it is prohibited.

20 To answer this question, we need go no further than the findings of the trial judge. Wells J. found that the purpose of s. 27 of the Regulations was to control the killing of bluebacks and whitecoats by prohibiting their sale, thus making it largely pointless to harvest them. In other words, the prohibition on sale, trade or barter is directed not to controlling commerce, but to preventing the harvesting of these seals.

21 This purpose is clear from both the Regulations as a whole and the legislative history. As discussed, s. 27 of the Regulations was adopted in response to the Malouf Commission, which recommended that the commercial harvest of bluebacks and whitecoats be curtailed. The reaction to this harvest destroyed the traditional seal markets and was threatening the markets for Canadian fish products abroad.

22 The method the government chose to curtail the commercial harvest of bluebacks and whitecoats was a prohibition on their sale, trade or barter. This, as Wells J. found, was because prohibiting the killing of bluebacks simply would not have worked. The seals are harvested while in the sea by hunters on boats. It is impossible to distinguish bluebacks from other seals in the water. Not until a blueback is brought aboard the boat does the seal hunter know that he has taken one. When this happens, the [page581] seal hunter knows that the seals in the area are bluebacks. Since he cannot sell, trade or barter bluebacks, he will stop killing them. This will tend to stop the commercial harvest of bluebacks, as recommended by the Malouf Commission. As Wells J. conceded, the method chosen may be imperfect. However, it is the only practical method for curtailing the commercial taking of bluebacks. In any event, as noted, the efficacy of the law is not a valid consideration in the pith and substance analysis.

23 Situating s. 27 in its context supports the view that it is neither directed at property nor at trade, but at curtailing the commercial hunting of bluebacks and whitecoats. The Regulations are enacted under the authority of s. 43 of the Fisheries Act, which permits the government to make regulations "for the proper management and control of the sea-coast and inland fisheries" and "respecting the conservation and protection of fish" (emphasis added). This notion of "management and control" of the fisheries is again reflected in s. 3 of the Regulations. The Regulations as a whole are concerned not with property, but with generally regulating the fishery, including details as to who may kill (with exemptions for Indians, Inuk and "beneficiaries" under certain aboriginal claim settlements), methods of killing, quotas and seasons for killing, allowable fishing areas, reporting duties, and provisions for observation of the seal fishery. Included are restrictions on the disposition of the edible parts of cetaceans or walruses, narwhal tusks and the prohibition on the sale, trade or barter of whitecoats and bluebacks at issue here. In short, the prohibition we are concerned with exists in the context of a scheme that is concerned with the overall "management and control" of the

marine fisheries resource.

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24 I conclude that Parliament's object was to regulate the seal fishery by eliminating the commercial hunting of whitecoats and bluebacks through a prohibition on sale, while at the same time allowing for limited harvesting of these animals for non-commercial purposes. Stated another way, the "mischief" that Parliament sought to remedy was the large-scale commercial hunting of whitecoats and bluebacks. This was done to preserve the economic viability of not only the seal fishery, but the Canadian fisheries in general.

25 Turning to the effects of the legislation, s. 27 affects the legal rights of its subjects by prohibiting the sale of whitecoats and bluebacks that have otherwise been legally harvested. Ward submits that the legal effect of s. 27 is to regulate the property and processing of a harvested seal product. The argument amounts to saying that because the legislative measure is a prohibition on sale, it must be in pith and substance concerned with the regulation of sale. This confuses the purpose of the legislation with the means used to carry out that purpose. Viewed in the context of the legislation as a whole and the legislative history, there is nothing to suggest that Parliament was trying to regulate the local market for trade of seals and seal products. Ward's argument that s. 27 is directed at regulating an already processed product because the seals are skinned and the meat preserved on the vessel similarly confuses the purpose of s. 27 with the means chosen to achieve it.

26 Ward also argues that the "close time" variation method would better avoid newborn seals being killed on the ice and the negative reaction the government was seeking to avoid than a prohibition on sale. This argument also fails. As previously mentioned, an inquiry into efficacy does not advance the pith and substance inquiry. The purpose of legislation cannot be challenged by proposing an alternate, allegedly better, method for achieving that purpose.

[page583]

27 Finally, Ward submits that the purpose of s. 27 -- saving Canada's markets for seal products -- had already eroded by the time it was introduced in 1993, citing the Malouf Commission in support. This is a variant on the efficacy argument. It was for the government to determine if a problem existed and if the means chosen would address it. Moreover, the evidence shows that the danger of damage to other sea products, like canned fish, continued to exist at the time the Regulations were adopted.

28 I conclude that the s. 27 prohibition on sale is essentially concerned with curtailing the commercial hunting of whitecoats and bluebacks for the economic protection of the fisheries

resource. As such, it is in pith and substance concerned with the management of the Canadian fishery.

(2) Does the Pith and Substance of Section 27 of the Regulations Fall within the Federal Fisheries Power?

29 Having determined the pith and substance of s. 27, we must ask whether it fits within the federal fisheries power. This requires us to consider the scope of the fisheries power and its relationship to the provincial power over property and civil rights. More precisely, does the fisheries power extend beyond measures relating to conservation to the management of the resource to preserve its economic viability?

30 Before examining the scope of the federal fisheries power in relation to property and civil rights, it may be useful to consider the principles that guide the exercise. They are well known and I content myself with briefly summarizing them.

1. The Constitution must be interpreted flexibly over time to meet new social, political and historic realities: see Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 155-56; see also Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.); Reference re Secession of Quebec, [1998] 2 S.C.R. 217, [page584] at para. 52; Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 180; Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, at p. 365; Attorney General of British Columbia v. Canada Trust Co., [1980] 2 S.C.R. 466, at p. 478; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at pp. 343-44; Hogg, supra, at p. 15-45.
2. The principle of federalism must be respected: see Reference re Secession of Quebec, supra, at para. 55. Power is shared by two orders of government, each autonomous in developing policies and laws within their own jurisdiction subject to the courts which "control the limits of the respective sovereignties": see Northern Telecom Canada Ltd. v. Communication Workers of Canada, [1983] 1 S.C.R. 733, at p. 741. Classes of subjects should be construed in relation to one another: see Reference re Waters and Water-Powers, [1929] S.C.R. 200, at p. 216, per Duff J. In cases where federal and provincial classes of subjects contemplate overlapping concepts, meaning may be given to both through the process of "mutual modification": see Citizens Insurance Co. of Canada v. Parsons (1881), 7 App. Cas. 96 (P.C.); see also W. R. Lederman, Continuing Canadian Constitutional Dilemmas (1981), at p. 274. Classes of subjects should not be construed so broadly as to expand jurisdiction indefinitely: see Hogg, supra, at p. 18-4, in the criminal law context; compare Proprietary Articles Trade Association v.

Attorney-General for Canada, [1931] A.C. 310 (P.C.), with Canadian Federation of Agriculture v. Attorney-General for Quebec, [1951] A.C. 179 (P.C.) (the "Margarine Reference").

31 With these principles in mind -- flexibility and respect for the proper powers of both the federal government and the provinces -- I approach the [page585] question at hand, the scope of the federal fisheries power.

32 Three different views on the scope of the federal fisheries power are presented:

1. The federal fisheries power extends only to conservation measures directed to preserving numbers (the conservation theory, espoused by the majority of the Newfoundland Court of Appeal).
2. The fisheries power extends only to the management of the fisheries resource in its natural state to the point of harvest and sale. This would include setting the permissible times and methods of extracting the resource, but it would not extend to the regulation of sale, processing and "markets" (the "point of sale" theory, espoused by Ward).
3. The fisheries power extends beyond conservation to measures intended to carry out economic goals and policies associated with the fisheries as a resource (the economic policy theory, advanced by the federal Crown).

33 Only the last theory is capable of supporting a regulation directed in pith and substance at curtailing the commercial hunting of young seals to protect the economic viability of the resource from retaliatory boycotts. The issue is therefore whether this theory of the fisheries power is valid. The jurisprudence suggests that it is.

34 First, the preponderance of authority suggests that the fisheries power is not confined to conservation, nor to pre-sale activities, but extends more broadly to maintenance and preservation of the fishery as a whole, including its economic value. In The Queen v. Robertson (1882), 6 S.C.R. 52, Ritchie C.J. described the fisheries power as extending "to subjects affecting the fisheries generally, tending to their regulation, protection and preservation". Accordingly, Parliament's power extended to "all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, [page586] who are interested in the fisheries as a source of national or provincial wealth" (pp. 120-21).

35 In Reference re Certain Sections of the Fisheries Act, 1914, [1928] S.C.R. 457 (aff'd [1930] A.C. 111 (P.C.)), Newcombe J. cited, at p. 472, the definition of a fishery given in Patterson on the Fishery Laws (1863), at p. 1, as "the right of catching fish in the sea, or in a particular stream of water". But he went on to cite the broader "leading definition" from J. A. H. Murray's A New English Dictionary (1888), defining fishery in terms of the "business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water". Davey C.J.B.C., in Mark Fishing Co. v. United Fishermen & Allied Workers' Union (1972), 24 D.L.R. (3d) 585

(B.C.C.A.), said of this: "The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found, and the right is exercised" (p. 592). See also International Fund for Animal Welfare, Inc. v. Canada, [1987] 1 F.C. 244 (T.D.) (division of powers issue aff'd [1989] 1 F.C. 335 (C.A.)).

36 The theme that the fisheries power refers to the resource was affirmed by this Court, per Laskin C.J. (dissenting, but not on this point) in Interprovincial Co-Operatives Ltd. v. The Queen, [1976] 1 S.C.R. 477, who wrote, at p. 495, that the federal fisheries power "is concerned with the protection and preservation of fisheries as a public resource", extending even to the "suppression of an owner's right of utilization".

37 Again, in Northwest Falling Contractors Ltd. v. The Queen, [1980] 2 S.C.R. 292, Martland J., speaking for the Court, recognized that the fisheries power involved legislating in relation to fisheries as a resource (at p. 298):

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> ... federal legislative jurisdiction under s. 91.12 of the British North America Act is not a mere authority to legislate in relation to "fish" in the technical sense of the word. The judgments in this Court and in the Privy Council have construed "fisheries" as meaning something in the nature of a resource.

38 More recently, in Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans), [1997] 1 S.C.R. 12, Major J. noted that the Minister's duty under the Fisheries Act extends beyond conservation to management and development of the fishery for the benefit of the public, stating (at para. 37):

> Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the Fisheries Act, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43).

39 In Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans), [1987] 2 F.C. 93 (rev'g [1984] 2 F.C. 398 (T.D.)), the Federal Court of Appeal directly confronted whether the federal fisheries power is confined to conservation of the fish stock. At issue were federal regulations for closing times that favoured sports fishers over commercial fishers. At trial, Collier J. held that the fisheries power did not extend to the general management and control of the fisheries for the benefit of Canadians beyond mere protection and preservation of the resource. The Federal Court of Appeal reversed the decision. Marceau J.A. expressed the view that "Parliament may manage the fishery on social, economic or other grounds, either in conjunction with steps taken to conserve, protect, harvest the reserve or simply to carry out social, cultural or economic goals and policies" (p. 106).

40 Moreover, the courts have rejected the view that the federal power extends only to management of fisheries in their natural state and terminates prior to the point of sale. In British Columbia Packers Ltd. v. [page588] Canada Labour Relations Board, [1976] 1 F.C. 375 (C.A.) (appeal to S.C.C. dismissed on other grounds, [1978] 2 S.C.R. 97), Jackett C.J. remarked that the fisheries power does not extend to the "making of laws in relation to things reasonably incidental to carrying on a fishing business, such as labour relations and disposition of the products of the business, when such things do not in themselves fall within the concept of 'fisheries'" (p. 385 (emphasis deleted)). However, it is clear that aspects of sale that are necessarily incidental to the exercise of the fisheries power fall within federal jurisdiction: see R. v. N.T.C. Smokehouse Ltd. (1993), 80 B.C.L.R. (2d) 158 (C.A.); R. v. Saul (1984), 10 D.L.R. (4th) 736 (B.C.S.C.); R. v. Twin (1985), 23 C.C.C. (3d) 33 (Alta. C.A.). The rationale is that the federal government may limit sales in order to prevent injurious exploitation of the resource. It therefore appears that no bright line can be drawn at the point of sale for the purposes of defining the scope of the federal fisheries power.

41 These cases put beyond doubt that the fisheries power includes not only conservation and protection, but also the general "regulation" of the fisheries, including their management and control. They recognize that "fisheries" under s. 91(12) of the Constitution Act, 1867 refers to the fisheries as a resource; "a source of national or provincial wealth" (Robertson, supra, at p. 121); a "common property resource" to be managed for the good of all Canadians (Comeau's Sea Foods, supra, at para. 37). The fisheries resource includes the animals that inhabit the seas. But it also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation.

42 Although broad, the fisheries power is not unlimited. The same cases that establish its broad parameters also hold that the fisheries power must be [page589] construed to respect the provinces' power over property and civil rights under s. 92(13) of the Constitution Act, 1867. This too is a broad, multi-faceted power, difficult to summarize concisely. For our purposes, it suffices to note that the regulation of trade and industry within the province generally (with certain exceptions) falls within the province's jurisdiction over property and civil rights: see Citizens Insurance, supra; see also Attorney-General for Canada v. Attorney-General for Alberta, [1916] 1 A.C. 588 (P.C.).

43 Thus we have before us two broad powers, one federal, one provincial. In such cases, bright jurisdictional lines are elusive. Whether a matter best conforms to a subject within federal jurisdiction on the one hand, or provincial jurisdiction on the other, can only be determined by examining the activity at stake. Measures that in pith and substance go to the maintenance and preservation of fisheries fall under federal power. By contrast, measures that in pith and substance relate to trade and industry within the province have been held to be outside the federal fisheries power and within the provincial power over property and civil rights.

44 The cases bear this out. Measures whose essence went to the regulation of fish processing and labour relations in the fishery have been held to fall outside the federal power. On the other hand, measures primarily related to the regulation of the fisheries resource but incidentally touching the

sale of fish have been upheld as valid federal legislation.

45 In Reference re Certain Sections of the Fisheries Act, supra, this Court held that the federal power to regulate the fisheries does not extend to the licensing of fish canneries or to the regulation of trade [page590] processes once the resource had been extracted and converted into a commodity. Newcombe J. noted that the power to control the sale or storage of fish, or the manufacture and sale of fishing equipment might be used to manage the resource, but on the facts of the case there was an insufficient link between the impugned legislation and the fisheries power (p. 472).

46 Similarly, labour relations in the fisheries were held to be matters essentially falling within the provincial power to regulate business in the province and outside the federal fisheries power: see British Columbia Packers and Mark Fishing, supra; see also Barry's Ltd. v. Fishermen, Food and Allied Workers' Union (1993), 104 Nfld. & P.E.I.R. 277 (Nfld. C.A.).

47 These cases suggest that measures essentially directed to regulating fish processing and labour relations fall under the provincial power over property and civil rights, and outside the federal fisheries power. If the activity is in pith and substance a matter of trade and industry within the province, it will not fall under the federal fisheries power merely because some aspects of the activity touch upon the fishery. Conversely, measures that are in pith and substance directed to the fishery fall within the federal fisheries power even though they possess aspects relating to property and civil rights.

48 It follows that the federal fisheries power is not confined to measures directed at conserving the resource, nor limited by the distinction between control of the resource in its natural state and at "point of sale". While Parliament must respect the provincial power over property and civil rights, the approach to be adopted is not simply drawing a line between federal and provincial powers on the basis of conservation or sale. The issue is rather whether the matter regulated is essentially connected -- related in pith and substance -- to the [page591] federal fisheries power, or to the provincial power over property and civil rights.

49 We earlier established that the regulation here at issue, while on its face a simple ban on sale, trade or barter, is in pith and substance concerned with curtailing commercial hunting of young seals to preserve the fisheries as an economic resource, vitally connected to protecting the economic viability of the Canadian fishery as a whole. It follows that s. 27 is a valid federal measure. This result fully respects the constitutional right of the provinces to control property and civil rights. If the essential character of the measure was directed toward regulating business or property within the province, it would be in pith and substance a matter of property and civil rights and outside federal jurisdiction. However, that is not the case. Section 27 of the Regulations is thus a valid exercise of the federal fisheries power.

B. Whether Section 27 of the Regulations Is in Relation to the Criminal Law

50 Having concluded that the challenged legislation is constitutionally valid under the federal

fisheries power, we need not consider whether it might also be valid under the criminal law power. However, in view of the fact that the issue was fully argued, I comment briefly on it.

51 Although the criminal law power is broad, it is not unlimited: see Reference re Firearms Act, supra, at para. 30. Legislation may amount to criminal law if it possesses three components: a prohibited act, a penalty and a valid criminal law purpose: see Reference re Firearms Act, RJR-MacDonald and Margarine Reference, supra; see also R. v. Hydro-Québec, [1997] 3 S.C.R. 213. Examples of a criminal law purpose include public peace, order, security, health and morality: see Margarine Reference, [page592] supra. Courts also look to whether the particular law has traditionally been held to be criminal law: see Morgentaler, supra.

52 In this case, a prohibited act (i.e. the sale of bluebacks and whitecoats) and a penalty (contained in s. 78 of the Fisheries Act), are present. However, no valid criminal law purpose has been established.

53 Two points arise for consideration: first, is the protection of animals against killing in the circumstances here disclosed capable of constituting a criminal purpose? Second, if so, then is the impugned legislation directed to this purpose? The Criminal Code, R.S.C. 1985, c. C-46, contains prohibitions against cruelty to animals, and I am prepared to assume without deciding that the federal criminal law powers could extend to prohibitions on the killing and manner of killing of animals like seals as a matter of public peace, order, security, health or morality. However, I see nothing in the record that supports the view that s. 27 in fact possesses such a criminal law purpose.

54 The record indicates that there was public disapproval towards the commercial hunting of baby seals in general and the clubbing of baby seals in particular. It was this disapproval that manifested itself during the anti-sealing campaign, leading to the European Community import ban, market boycotts and the establishment of the Malouf Commission to study the sealing industry.

55 However, nothing indicates that it was ethical considerations that led to the s. 27 prohibition. Public peace, order, security and morality played no direct role in its adoption. Indeed, the Malouf Commission suggested that the killing of young seals through clubbing and shooting was not inhumane. It is also of note that s. 27 prohibits the sale [page593] of whitecoats and bluebacks, not their killing. If the mischief Parliament sought to remedy was the killing of young seals on ethical grounds, one would expect to find an outright prohibition on killing.

56 Without suggesting that measures related to the treatment or killing of animals could not have a valid criminal law purpose, it is simply not made out in this particular case. The wording of the legislation along with the legislative history suggest that the legislation was enacted to manage the fisheries by eliminating the large-scale killing and commercial hunting of whitecoats and bluebacks, and not to criminalize their killing or sale.

VII. Conclusion and Disposition

57 I conclude that s. 27 of the Regulations, prohibiting the sale, trade or barter of whitecoat and blueback seals, is a valid measure under the federal fisheries power. I would therefore allow the appeal, restore the decision of the trial judge, and find that s. 27 of the Regulations is a valid exercise of Parliament's jurisdiction under sea coast and inland fisheries contained in s. 91(12) of the Constitution Act, 1867.

58 I would answer the constitutional questions as follows:

1. Is s. 27 of the Marine Mammal Regulations, SOR/93-56, within the legislative authority of the Parliament of Canada as being legislation pertaining to the sea coast and inland fisheries under s. 91(12) of the Constitution Act, 1867?

   Yes.

2. Is s. 27 of the Marine Mammal Regulations within the legislative authority of the Parliament of Canada as being legislation pertaining to the criminal law under s. 91(27) of the Constitution Act, 1867?

No.

[page594]

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federal responsibility can be entirely remitted to the discretion of the provincial Legislature.[93]

14.4 Referential legislation

(a) Incorporation by reference

Incorporation by reference is a technique which is occasionally used by legislative bodies, especially where it is desired to enact the same law as another jurisdiction.[94] Instead of repeating in full the desired rules, the drafter may simply incorporate by reference, or adopt, the rules of another jurisdiction. The leading case on the validity of this technique is *A.-G. Ont. v. Scott* (1956),[95] where the Supreme Court of Canada upheld an Ontario statute which provided for the enforcement in Ontario of orders to pay maintenance obtained in England (and some other foreign jurisdictions) by wives who were resident in England against husbands who were resident in Ontario. Section 5(2) of the Ontario statute provided that in proceedings to enforce a foreign maintenance order the husband was entitled "to raise any defence that he might have raised in the original proceedings [in England] had he been a party thereto". In other words, the Ontario Legislature, instead of itself specifying the defences which were available in Ontario to the husband, was accepting whatever defences were specified by the Parliament of the United Kingdom. The Supreme Court of Canada held that this provision was valid. Their lordships denied that there was a delegation involved; all that was involved was the incorporation or adoption of certain English laws into Ontario law.

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93 *Coughlin v. Ont. Highway Transport Bd.* [1968] S.C.R. 569; *Re Agricultural Products Marketing Act* [1978] 2 S.C.R. 1198, 1222-1226; and see discussion accompanying note 97, below. The constitutional rule is not a prohibition of the inter-delegation of "legislative" power, as the Ontario Court of Appeal wrongly assumed in *Re Peralta* (1985) 49 O.R. (2d) 705 (C.A.); affirmed under name *Peralta v. Ont.* [1988] 2 S.C.R. 1045. What is prohibited is the inter-delegation of any kind of power, including administrative power, to a primary law-making body — the Parliament or a Legislature. What is permitted is the inter-delegation of any kind of power, including "legislative" power, to a body or official other than a primary law-making body: *R. v. Furtney* [1991] 3 S.C.R. 89, 104 (upholding federal delegation to Lieutenant Governor in Council, regardless of whether delegated power is "administrative" or "legislative").

94 Where the incorporating legislative body is under an obligation to enact statutes in both official languages, the general rule is that the incorporated instrument must also be in both languages: see ch. 56, Language, under heading 56.4(d), "Incorporation by reference", below.

95 [1956] S.C.R. 137.

(f) Efficacy

The last two sections of this chapter have made clear that, in characterizing a statute for the purpose of judicial review on federal grounds, it is relevant to look at the purpose of the statute and the effects of the statute. However, that does not mean that the reviewing court should pass judgment on the likely efficacy of the statute. That would breach the longstanding injunction that courts are not concerned with the wisdom or policy of legislation.[70] A reviewing court may well believe that the legislative policy is misguided, but that belief should play no role in classifying the law for constitutional purposes. The classification must be based on the purpose and effects as understood by the legislators.

In *Re Firearms Act* (2000),[71] the question was whether Parliament's gun control legislation should be upheld as criminal law. There was no doubt that the purpose of the legislation was to promote public safety, which was a typically criminal purpose. But those attacking the constitutionality of the legislation argued that the legislation's regime of registration of guns and licensing of owners would be completely useless as a contributor to public safety. Gun control, it was argued, simply burdens law-abiding farmers and hunters with pointless red tape and has no effect on those who use guns for criminal purposes or even those who carelessly misuse guns. The Court was clearly sceptical about these points, because the Court pointed out that restrictions on access to guns could have an effect on the incidence or severity of crime, especially domestic crime, and could reduce suicides and accidents, while a register of firearms would help to trace stolen or lost guns and contribute to the detection of crime. But the conclusive answer to the argument was the institutional one that efficacy was a matter for Parliament and not the Court: "Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis."[72]

The same answer was given by the Supreme Court of Canada in *Ward v. Canada* (2002)[73] to a constitutional challenge to a federal regulation that prohibited the sale of baby seals. A ban on sale was on the face of it within property and civil rights in the province and therefore outside federal power. But the Court upheld the validity of the law under the federal power over fisheries (s. 91(12)) by classifying the law as a measure to protect the resource. The Court accepted the evidence of the Government of Canada that the purpose of the ban on sale was not to regulate the marketing of baby seals but to limit the killing of baby seals by removing the commercial incentive to harvest them. This invited the question of why the Government did not directly prohibit the killing of the animals

70 Chapter 12, Parliamentary Sovereignty, under heading 12.2(g), "Wisdom or policy of legislation", above.

71 [2000] 1 S.C.R. 783.

72 *Id.*, para. 18; also to the same effect, para. 57.

73 [2002] 1 S.C.R. 569.

if that was indeed its purpose. McLachlin C.J. for the Court held that this was an impermissible inquiry into the efficacy of the law: "The purpose of legislation cannot be challenged by proposing an alternate, allegedly better, method for achieving that purpose."[74]

(g) Colourability

The courts are, of course, concerned with the substance of the legislation to be characterized and not merely its form. The "colourability" doctrine is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction. In the *Alberta Bank Taxation Reference*,[75] for example, the Privy Council held that the legislation, although ostensibly designed as a taxation measure, was in reality directed at banking. Similarly, attempts by the federal Parliament to regulate insurance (a provincial matter) by incorporating provisions into the Criminal Code (criminal law being federal), or by enacting special taxing measures, have been struck down as colourable.[76] A provincial attempt to relieve debtors from the payment of interest (a federal matter) by forgiving part of the principal of the loan has also been condemned as colourable,[77] as has been a provincial attempt to prohibit the propagation of communism (speech being a federal matter) by controlling the use of property.[78]

In *Re Upper Churchill Water Rights* (1984),[79] the Supreme Court of Canada struck down a Newfoundland statute that expropriated the assets of a company that generated hydro-electricity at Churchill Falls in Labrador. On the face of it, the statute seemed valid, because it was clear that Newfoundland had the power to expropriate property situated within its borders. But the Court held that the pith and substance of the statute was to deprive the company of the capacity to fulfil a long-term contract to supply power to Hydro-Quebec at below-market rates. The nullification of this contract was outside the power of Newfoundland, because the contract created rights in Quebec. The statute made no mention of the power contract or of any rights outside the province, and was thus "cloaked in the proper constitutional form".[80] The statute was nevertheless held to be invalid as "a colourable attempt to interfere with the power contract".[81]

In *R. v. Morgentaler (No. 3)* (1993),[82] the Supreme Court of Canada struck down a Nova Scotia statute that required "designated" medical procedures to be

74 *Id.*, para. 26.
75 Note 28 and accompanying text, above.
76 *A.-G. Ont. v. Reciprocal Insurers* [1924] A.C. 328; *Re Insurance Act of Can.* [1932] A.C. 41.
77 *A.-G. Sask. v. A.-G. Can.* (Sask. Farm Security) [1949] A.C. 110.
78 *Switzman v. Elbling* [1957] S.C.R. 285.
79 [1984] 1 S.C.R. 297.
80 *Id.*, 332.
81 *Id.*, 333.
82 [1993] 3 S.C.R. 463.

untary basis,[27] provincially-incorporated companies.[28] Presumably, the provinces and the industry are now content with, or at least reconciled to, the continued federal presence, because there has been no constitutional attack on it since 1942. The current federal statutes include preambles which indicate that the powers over trade and commerce, aliens and insolvency are relied upon as supporting their constitutionality. The first two of these heads have, of course, been relied upon in the past. But in all the litigation between 1916 and 1942 the federal power over "insolvency" (s. 91(21)) was never considered as a possible basis of federal jurisdiction.

In the *Wentworth Insurance* case (1969),[29] a federal law applicable to insolvent insurance companies was upheld. The federal Winding-Up Act provided a certain order of priority for the distribution by the liquidator to creditors of securities which insurance companies were required by provincial law to keep on deposit. The Ontario Insurance Act provided a different administration and a different order of priority for the distribution of the same fund. On the winding-up of the Wentworth Insurance Company, the question arose whether the company's deposit should be administered in accordance with the federal or the provincial law. The Supreme Court of Canada divided sharply on the question, but decided by a majority of five to four to adopt the reasoning of Laskin J.A. in the Ontario Court of Appeal to the effect that the federal law was a valid law in relation to insolvency, and that the federal law was the applicable provision. Hall J. for the minority said that the federal law was "a foray into the field of insurance, an area forbidden to Parliament", and that it was "colourable legislation and, because of this, ultra vires".[30] Certainly the majority's decision was a startling departure from the course of decision between 1916 and 1942 when so many and various federal attempts to enter the field of insurance were rebuffed. Now entry had been gained through the "insolvency" door. Whether the same point of entry would lead to the regulation of solvent companies, for the purpose of preventing insolvency, is of course much more doubtful.

21.6 Business in general

The insurance cases discussed in the previous section of this chapter established the proposition that the regulation of business was ordinarily a matter

27 In *Can. Pioneer Management v. Labour Relations Bd. Sask.* [1980] 1 S.C.R. 433, it was held that a provinciallyincorporated life insurance company, which was voluntarily registered under the Canadian and British Insurance Companies Act, was still subject to provincial labour relations law.

28 Canadian and British Insurance Companies Act, R.S.C. 1985, c. I-12; Foreign Insurance Companies Act, R.S.C. 1985, c. I-13; Department of Insurance Act, R.S.C. 1985, c. I-14; A. Pedoe, "Federal versus State Supervision of Insurance" (1950) 15 Law and Contemp. Probs. 5575.

29 *A.-G. Ont. v. Policy-holders of Wentworth Insurance Co.* [1969] S.C.R. 779.

30 *Id.*, 806.

within property and civil rights in the province. To this proposition there are a number of exceptions. Some industries fall within federal jurisdiction because they are enumerated in s. 91, such as navigation and shipping (s. 91(10)) and banking (s. 91(15)), or because they are excepted from s. 92(10), namely, inter-provincial or international transportation and communications undertakings (s.

(*Continued on page 21-9*)

92(10)(a) and (b)) and works declared to be for the general advantage of Canada (s. 92(10)(c)). Some industries have been held to fall within federal jurisdiction under the peace, order, and good government power, namely, aeronautics and the production of atomic energy. Other federal powers confer a limited power to regulate business, for example, trade and commerce (s. 91(2)), taxation (s. 91(3)), interest (s. 91(19)), the criminal law (s. 91(27)) and peace, order, and good government (s. 91 opening words).

But the gaps in federal power are very important and extensive. The trade and commerce power will authorize a federal prohibition of the importation of margarine, but not a prohibition of its manufacture or sale.[31] The trade and commerce power will also authorize the regulation of interprovincial marketing, but not local marketing.[32] The trade and commerce power will also authorize the regulation of competition, but not the regulation of wages and prices, product standards or particular industries such as insurance.[33] The taxation power may be used to provide various kinds of incentives or disincentives with a view to the control of business activity,[34] but may not be used as a device to assume regulatory control over the insurance industry.[35] The interest power may be used to control interest rates, but not to control other terms of loans.[36] The criminal law power may be used to prohibit undesirable commercial practices, but if the law departs from the conventional criminal format the criminal law power will not sustain it.[37] The criminal law power may also be used to enforce closing hours on businesses for religious reasons, but not for secular reasons.[38] The peace, order, and good government power will authorize the control of rents, prices and profits in times of emergency, but not in normal times.[39]

The previous paragraph is not intended to be an exhaustive list of the gaps in the federal power to regulate business. It is simply a recitation of the better-known arenas of controversy. The gaps in federal power are covered by the provincial power over property and civil rights. The double-aspect doctrine also ensures substantial areas of concurrency even when federal power exists. The point is that the regulation of an industry, or the more general regulation of prices or profits or combinations, has traditionally been regarded by the courts, not in

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31 *Can. Federation of Agriculture v. A.-G. Que.* (Margarine) [1951] 1 A.C. 179. See also *UL Can. v. Que.* [2005] 1 S.C.R. 143 (upholding provincial law prohibiting sale of yellow-coloured margarine).

32 See sec. 21.9, "Marketing", below.

33 See ch. 20, Trade and Commerce, under heading 20.3, "General trade and commerce", above.

34 *Reader's Digest Assn. v. A.-G. Can.* (1965) 59 D.L.R. (2d) 54 (Que. C.A.).

35 *Re Insurance Act of Can.* [1932] A.C. 41.

36 *A.-G. Ont. v. Barfried Enterprises* [1963] S.C.R. 570.

37 See ch. 18, Criminal Law, under heading 18.2, "Definition of criminal law", above.

38 See ch. 18, Criminal Law, under heading 18.8, "Sunday observance law", above.

39 See ch. 17, Peace, Order and Good Government, under heading 17.4, "The emergency branch", above. For provincial power to control prices, see *Home Oil Distributors v. A.-G. B.C.* [1940] S.C.R. 444; *Carnation Co. v. Que. Agricultural Marketing Bd.* [1968] S.C.R. 238.

terms of its ultimate, often nation-wide objectives, but in terms of its immediate impact upon freedom of contract and property rights.[40] In these terms, of course, restraints on business fall into the category of property and civil rights in the province.[41]

21.7 Professions and trades

Regulation of professions and trades typically takes the form of restrictions on entry, coupled with rules of conduct, which often include fee-setting, and administration by a governing body. Such regulation is no different for constitutional purposes than that of other industries, and comes within property and civil rights in the province.[42]

In *Krieger v. Law Society of Alberta* (2002),[43] the question arose whether the Law Society of Alberta had the power to discipline a provincial Crown prosecutor who had failed to make timely disclosure to the defence of exculpatory evidence in his possession. The Supreme Court of Canada held that the Law Society, which was empowered by provincial law to regulate the legal profession in the province, did have the jurisdiction. Although the duty of prosecutors to make timely disclosure was a rule of criminal procedure (a federal responsibility),[44] a default could also be a breach of professional responsibility. Crown prosecutors, whether federal or provincial, who practised in the province were all members of the Law Society. Like other lawyers in the province, they came within the jurisdiction of the Law Society to enforce professional standards of behaviour.

21.8 Labour relations

(a) Provincial power

The regulation of labour relations[45] over most of the economy is within provincial competence under property and civil rights in the province. The leading

40 The same approach has been taken in the labour relations cases: see sec. 21.8, "Labour relations", below.

41 *N.S. Bd. of Censors v. McNeil* [1978] 2 S.C.R. 662 (film censorship characterized as regulation of film business and upheld under s. 92(13)).

42 *Beaule v. Corp. of Master Electricians* (1969) 10 D.L.R. (3d) 93 (Que. C.A.) (electricians); *Re Imrie* [1972] 3 O.R. 275 (H.C.) (realtors); *R. v. Buzunis* (1972) 26 D.L.R. (3d) 502 (Man. C.A.) (accountants); *Re Levkoe* (1977) 18 O.R. (2d) 265 (Div. Ct.) (pharmacists); *Re Underwood McLellan* (1979) 103 D.L.R. (3d) 268 (Sask. C.A.) (engineers); *A.-G. Can. v. Law Society of B.C.* [1982] 2 S.C.R. 307 (lawyers); *Global Securities Corp. v. B.C.* [2000] 1 S.C.R. 494 (securities dealers); *Law Society of B.C. v. Mangat* [2001] 3 S.C.R. 113, paras. 38-47 (lawyers, relying on s. 92(14) as well as s. 92(13)).

43 [2002] 3 S.C.R. 372. Iacobucci and Major JJ. wrote the opinion of the Court.

44 It is also a constitutional requirement: *R. v. Stinchcombe* [1991] 3 S.C.R. 326; discussed in ch. 47, Fundamental Justice, under heading 47.21(c), "Pre-trial disclosure by the Crown", below.

45 For discussion, see Tremblay, note 1, above, 227-253; Laskin, *Canadian Constitutional Law*

s. 92(16) has been suggested, along with s. 92(13).[10] A municipal by-law temporarily banning assemblies in the streets and parks of Montreal has been upheld primarily under s. 92(16), with s. 92(13) also relied upon.[11] Jurisdiction over local trade is also undoubtedly provincial, and the power has usually been attributed to s. 92(13), but it has been suggested that s. 92(16) is the more appropriate attribution.[12] Provincial film censorship has been upheld (before the adoption of the Charter of Rights), with s. 92(13) and s. 92(16) offered as alternative sources of power.[13] The regulation of gaming by video lottery terminal has been held to be competent to the province, with s. 92(13) and s. 92(16) offered as alternative sources of power.[14] Section 92(16) has been held to be the sole source of power to sustain the Heroin Treatment Act, a public health measure enacted by British Columbia.[15]

21.5 Insurance

(a) Reasons for regulation

The insurance industry became the arena in which the two levels of government contended for the power to regulate business, or at least that part of business activity over which legislative power was not specifically allocated by the Constitution Act, 1867. Unlike banking (s. 91(15)), insurance is not specifically mentioned in the Constitution Act, 1867; but, like banking, insurance was one of the first industries to attract fundamental regulation.

Because the terms and conditions of insurance policies are in practice stipulated by the insurer, and are not well understood by the insured, governments sought to protect the insured by requiring the inclusion of certain conditions in every policy. Because the financial strength, probity and permanence of an insurer cannot in practice be judged by the insured, and are essential to the fulfilment of the policy, governments sought to control entry to, and supervise the performance of, the industry by licensing insurers, by requiring a security deposit, by limiting the insurers' powers of investment, and by official inspection of their books. Similar considerations apply to banks and loan and trust companies.

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10 *Provincial Secretary P.E.I. v. Egan* [1941] S.C.R. 396 is the leading case, but the opinions of Duff C.J., Hudson and Taschereau JJ. do not refer to any particular head of s. 92, while Rinfret J. refers inconclusively (at p. 413) to three heads, namely, s. 92(9), (13) and (16).

11 *A.-G. Can. and Dupond v. Montreal* [1978] 2 S.C.R. 770, 792 (s. 92(8), (14) and (15) are also invoked).

12 See ch. 20, Trade and Commerce, under heading 20.1, "Relationship to property and civil rights", above. Compare *Rio Hotel v. N.B.* [1987] 2 S.C.R. 59, 63, 67 (provincial authority to regulate the sale and consumption of alcohol comes from 92(16) and/or 92(13)).

13 *N.S. Bd. of Censors v. McNeil* [1978] 2 S.C.R. 662, 699.

14 *Siemens v. Man.* [2003] 1 S.C.R. 6, para. 22.

15 *Schneider v. The Queen* [1982] 2 S.C.R. 112. This was the view of all judges except Estey J., who in a separate concurrence suggested (at p. 141) s. 92(7) and (13), as well as (16).

30.6 Electricity

(a) Hydro-electricity

The provincial Legislatures have power over the generation and distribution of hydro-electricity, because dams,[81] generating stations and distribution systems are "local works and undertakings" within s. 92(10) of the Constitution Act, 1867.

In *Fulton v. Energy Resources Conservation Board* (1981),[82] the Supreme Court of Canada held that a proposed electricity substation and transmission line in Alberta, which would deliver 99 per cent of its output to customers within the province, was a local work or undertaking within provincial jurisdiction, even though it was to connect with a transmission line in British Columbia to enable power to be shared, especially during emergencies or periods of surplus. If a more substantial operational connection had existed between the two systems, the systems would have been classified as a single interprovincial undertaking and would have come within federal jurisdiction under s. 92(10)(a).[83] Jurisdiction over electrical distribution systems is thus governed by the same principles as jurisdiction over other media of transportation and communication, such as railways, pipelines and telephones.[84]

In *Re Upper Churchill Water Rights* (1984),[85] the Newfoundland Legislature purported to expropriate all the assets of a company that generated hydro-electricity at Churchill Falls in Newfoundland (Labrador) and transmitted the bulk of the production into Quebec. The Supreme Court of Canada struck down the legislation, because its purpose was to destroy a contractual right outside Newfoundland, namely, the right to receive power under a long-term contract between the generating company and Hydro-Quebec. The Court did not consider the

81 A dam is also subject to federal jurisdiction under s. 91(10) ("navigation and shipping") with respect to its effect on navigability: *Smith v. Ont. and Minnesota Power Co.* (1918) 44 O.L.R. 43 (A.D.); *Re Waters and Water Powers* [1929] S.C.R. 200, 226; and probably under s. 91(12) ("inland fisheries") with respect to its effect on the movement of fish. It has been suggested that a dam that spans a river forming a boundary between two provinces is within exclusive federal jurisdiction under s. 92(10)(a): [1929] S.C.R. 200, 225; but this is probably wrong, because a dam is not a work of transportation or communication to which s. 92(10)(a) is restricted: see ch. 22, Transportation and Communication, under heading 22.3 "Transportation and communication", above. An analogy is a mine which crosses a provincial boundary: compare *R. v. Belous* [1977] 6 W.W.R. 19 (Man. C.A.) (interprovincial mine within federal jurisdiction, but because of declaration under s. 92(10)(c)).

82 [1981] 1 S.C.R. 153.

83 *Re Town of Summerside and Maritime Electric Co. (No. 2)* (1983) 3 D.L.R. (4th) 577 (P.E.I.S.C. in banco) (submarine cable linking N.B. and P.E.I. electrical systems created federal undertaking).

84 See ch. 22, Transportation and Communication, especially sec. 22.7, "Related undertakings", above.

85 [1984] 1 S.C.R. 297.

question whether the continuous and regular transmission of power from Churchill Falls to Quebec converted the operation into a federal undertaking.

(b) Other kinds of electricity

Electricity generated from oil, gas, coal or other sources of energy than water power would be governed by the same constitutional principles as hydro-electricity. An exception, however, is electricity generated from nuclear power, which would probably come within federal jurisdiction for reasons explained in the earlier discussion of uranium.[86]

(c) Section 92A

It seems likely that the foregoing principles have not been changed by s. 92A(1)(c) of the Constitution Act, 1867, which was added to the Constitution in 1982.[87] Under s. 92A(1)(c), each provincial Legislature has the power to make laws in relation to:

> (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

As a general proposition, this provision is declaratory of the pre-1982 law. The provision contains no express exception for the case where electricity is generated from nuclear power. However, in that case, the Supreme Court of Canada has held that it is the federal Parliament that has legislative authority over the operation and management of the nuclear plant.[88] Another exception to the provincial jurisdiction recognized by s. 92A(1)(c) would be the case where electricity is generated within an interprovincial undertaking.

The 1982 amendments also provided for the export of resources, including electricity. Before 1982, the province was incompetent to make laws in relation to the export of resources, that being a matter within the federal trade and commerce power.[89] Under s. 92A(2), each provincial Legislature has the power to make laws in relation to "the export from the province to another part of Canada" of (among other resources) electricity. This new power only applies to electricity

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86 *Ont. Hydro v. Ont.* [1993] 3 S.C.R. 327; note 18, above. This case upholds federal jurisdiction over the nuclear power plant. Whether federal jurisdiction would extend to the distribution of the electricity is much less clear.

87 For analysis, see references in note 1, above.

88 Note 86, above.

89 *Can. Industrial Gas & Oil v. Govt. of Sask.* [1978] 2 S.C.R. 545; *Central Can. Potash Co. v. Govt. of Sask.* [1979] 1 S.C.R. 42.

(c) Provincial power

At the provincial level, the most obvious sources of power are the following. The power over property and civil rights (s. 92(13)) authorizes the regulation of land use and most aspects of mining, manufacturing and other business activity, including the regulation of emissions that could pollute the environment.[120] This power, and the power over municipal institutions (s. 92(8)), also authorizes municipal regulation of local activity that affects the environment, for example, zoning, construction, purification of water, sewage, garbage disposal and noise.[121] The provinces can also control activities on provincial public lands (s. 92(5)), which contain much mining and lumbering.[122] The provinces also possess the power to tax (s. 92(2)), and can use it to tax the consumption of products that cause pollution, such as gasoline, and to exempt products that reduce pollution, such as insulation.[123]

120 See ch. 20, Property and Civil Rights, above. In *R. v. Lake Ontario Cement* [1973] 2 O.R. 247 (H.C.), a provincial law prohibiting the emission of contaminants was upheld.

121 *R. v. Young* (1973) 1 O.R. (2d) 564 (C.A.) (anti-noise by-law upheld); *114957 Can. v. Hudson* [2001] 2 S.C.R. 241 (by-law restricting use of pesticides upheld).

122 Chapter 29, Public Property, above.

123 Chapter 31, Taxation, below.

it is sold by the producer.[91] Such a tax is indirect, and before 1982 was incompetent to the provinces.[92]

The Constitution Act, 1982 added a new s. 92A to the Constitution Act, 1867.[93] The new s. 92A, which augmented provincial power over natural resources, included as subsection (4) the following taxing power:

> (4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
>
> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
>
> (b) sites and facilities in the province for the generation of electrical energy and the production therefrom
>
> whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

This new power authorizes the taxation of non-renewable natural resources, forestry resources and electricity facilities. These resources may be taxed in place, or their primary production may be taxed. The phrase, "any mode or system of taxation", which is the same language as appears in the federal taxing power of s. 91(3), is apt to include indirect as well as direct taxation. A tax on a resource in place would be a direct tax, which before 1982 would in any event have been competent to the provinces under s. 92(2).[94] But a tax on the production of a resource would be an indirect tax, which before 1982 would have been incompetent to the provinces under s. 92(2). Such a tax is now competent to the provinces under s. 92A(4).

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91 E.g., *Allard Contractors v. Coquitlam* [1993] 4 S.C.R. 371 (impost on extraction of gravel held to be indirect; but upheld as regulatory charge; s. 92A(4) not considered).

92 *Can. Industrial Gas and Oil v. Govt. of Sask.* [1978] 2 S.C.R. 545. In that case, ingenious drafting provided a powerful argument that the normal indirect classification did not apply. In 1974, the province of Saskatchewan appropriated to itself the sudden rise in the international price of oil by levying a tax on every barrel of oil produced in Saskatchewan. The tax was the difference between the cost of producing a barrel of oil before the price increase (a figure specified in the taxing legislation) and the actual well-head price received by the producer. This tax could not be recouped by the producer from the purchaser because any increase in the well-head price would simply increase the tax payable by the producer. The price determined the tax, rather than the other way around. The Saskatchewan Court of Appeal accordingly held the tax to be direct and valid. The Supreme Court of Canada reversed, holding by a majority that the tax formed part of the price paid by the purchaser, and that the tax was indirect.

93 For commentary on s. 92A, see W.D. Moull, "Section 92A of the Constitution Act, 1867" (1983) 61 Can. Bar. Rev. 715; R.D. Cairns, M.A. Chandler and W.D. Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23 Osgoode Hall L.J. 253; R.D. Cairns, M.A. Chandler and W.D. Moull, "Constitutional Change and the Private Sector: The Case of the Resource Amendment" (1986) 24 Osgoode Hall L.J. 299.

94 Section 31.6, "Property taxes", above.

CONSTITUTIONAL CHANGE AND THE PRIVATE SECTOR: THE CASE OF THE RESOURCE AMENDMENT

BY ROBERT D. CAIRNS,* MARSHA A. CHANDLER,** WILLIAM D. MOULL***

The 1982 resource amendment to the Constitution, *section 92A, has been analysed primarily from the perspective of its impact on intergovernmental relations in the formation of resource policies. Yet the fundamental, constitutional 'rules of the game' may also affect the ongoing relationship between governments and private-sector resource participants. In this article, the authors discuss how section 92A might affect that relationship in terms both of the policy-making process and of the substance of the resultant policies.*

I. INTRODUCTION

The recent changes in Canada's *Constitution*[1] have been extensively analysed from both legal and political perspectives. So far, most of the commentary has focused on the implications of constitutional change for intergovernmental relations and on the limitations on government powers that flow from entrenchment of individual rights under the *Charter*.[2] This has been particularly so in the case of the resource amendment contained in section 92A of the *Constitution*,[3] where the bulk of the analysis has centred on relationships in the public sector. Indeed, in an earlier paper[4] we ourselves explored the impact of section 92A on Canadian federalism. However, there is little question that the prevailing constitutional arrangements also form the fundamental rules

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[1] *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *ibid.*

[3] *Supra*, note 1, Part VI, ss 50, 51.

[4] R.D. Cairns, M.A. Chandler & W.D. Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23 Osgoode Hall L.J. 253.

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of the game for the private sector. Thus, any major change in the intergovernmental dynamic will have consequences for the public–private nexus. The purpose of this paper is to consider the effects of the constitutional revisions contained in section 92A on the relationship between governments and the resource industry.

To do this it is first necessary for us to spell out the formal changes in the *Constitution* and to indicate the likely legal implications of the new constitutional arrangements for the private sector. The focus of the paper then shifts to the possible policy impact of section 92A. The first element in examining its direct consequences for industry is the effect it may have on the *process* of policy making. Will the constitutional changes lead to alterations in the modes of consultation and negotiation between government and business? Operating under section 92A, will the resource industry be more removed from the policy process, or will the new arrangements portend greater access for industry? The second question here is the possible effect on policy *substance.* Does section 92A suggest that there may be greater government intervention in the resource sector? Are the instruments of resource policy used by governments likely to change? In conclusion, we will offer some thoughts on how the ongoing relationships between governments and the resource industry may develop under section 92A.

II. THE LEGAL PERSPECTIVE

The resource amendment, contained in section 92A of the *Constitution,* has altered the face of provincial legislative powers in relation to natural resources. In a formal sense, in the context of the division of the complete range of legislative powers in Canada between the federal and provincial orders of government, section 92A has shifted the balance more toward the provincial side by augmenting provincial powers to raise revenues from resources and to regulate their development and production. At the same time, however, the pre-existing legislative powers of Parliament have not been diminished by section 92A. Overall, section 92A has strengthened the role of the producing provinces as resource administrators, but not at the expense of the prior role of the federal government.

In so doing, section 92A has gone a long way toward overcoming the legislative incapacities of the provinces that resulted from the decisions of the Supreme Court of Canada in *CIGOL*[5] and *Central Canada Potash*[6]

[5] *Canadian Industrial Gas & Oil Ltd* v. *Government of Saskatchewan* (1978), [1979] 1 S.C.R. 37, 80 D.L.R. (3d) 449 [hereinafter *CIGOL*].

[6] *Central Canada Potash Co. Ltd* v. *Government of Saskatchewan* (1979), [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609 [hereinafter *Central Canada Potash*].

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in the late 1970s. Both of those decisions resulted from private sector challenges to legislative initiatives of the province of Saskatchewan — to its regime for capturing windfall oil profits in *CIGOL*, and to its potash prorationing scheme in *Central Canada Potash*. In both instances, the legal result turned upon the Supreme Court's perceptions of the pre-92A balance of formal federal-provincial legislative powers. At the same time, however, in both cases the protagonists were a provincial government on the one side and a private sector challenger on the other.[7] The battleground in each case was the scope of a province's legislative powers in relation to natural resources; but the battles were waged between the province and the private sector.

However, in strengthening the formal role of the provinces as resource managers through the removal of some of the barriers to the exercise of legislative power erected by *CIGOL* and *Central Canada Potash*, section 92A does not really give any clear indication of whether the new legislative powers it confers on the provinces will be used by them or of the manner in which they will be used. It may be that possession of legislative power tempts its use; but other considerations, such as prevailing economic conditions and the political philosophies of provincial governments over time, will likely be the key factors in determining the extent to which provincial legislatures resort to their powers under section 92A. As well, several of the provisions of section 92A contain sufficient interpretive uncertainties to make it difficult to predict just how far the boundaries of provincial legislative authority have been extended and thus how far a province may be able to move if it feels inclined to do so. This is particularly so in the case of the resource-management powers set out in subsections 92A(1) and (2).

Subsection 92A(1) deals with provincial legislative powers in relation to resources within the province. It provides as follows:

> (1) In each province, the legislature may exclusively make laws in relation to
> (a) exploration for non-renewable natural resources in the province;
> (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
> (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

The list of legislative powers set out in subsection 92A(1) seems comprehensive with respect to the resource-related activities it mentions.

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[7] The federal government did join in the *Central Canada Potash* litigation as a co-plaintiff after the action had been commenced. See, however, W.D. Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980) 18 Osgoode Hall L.J. 1 at 29.

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All phases of resource development seem to be covered, from preliminary exploration stages through the placement of development facilities to the production stage itself. In respect of forestry resources and non-renewable natural resources, such as minerals and hydrocarbons, provincial jurisdiction specifically encompasses laws in relation to their rate of primary production. It is hard to see any material aspect of the development of resources within a province that is absent from the listing in subsection 92A(1).

Before section 92A, of course, the producing provinces exercised resource-management powers under section 92(5) of the *Constitution* in respect of provincially owned Crown lands, which are the property of the provinces under section 109 of the *Constitution.*[8] As well, most — if not all — of the resource-related activities mentioned in subsection 92A(1) likely fell within the general legislative powers of the provinces under section 92; but section 92 does not specifically refer to resources (except for section 92(5), which is confined to Crown-owned resources), so those prior provincial powers arose by implication under other, less explicit, heads of provincial jurisdiction (such as that in section 92(13) in relation to "property and civil rights" within the province). Subsection 92A(1) has, at the very least, confirmed provincial resource-management powers within the province — powers that can be exercised as a matter of *general* legislative authority and not as a subspecies of the rights flowing from provincial Crown ownership — by expressly entrenching those powers in the *Constitution.*

The principal difficulty in interpreting the effect of subsection 92A(1) lies not so much in the scope of the resource-related activities it mentions, as those seem reasonably clear. Rather, the difficulty lies in the scope of the powers conferred in relation to those activities and especially in the purposes and objectives for which they may be used. In the *Central Canada Potash* decision, for example, the Supreme Court struck down Saskatchewan's potash prorationing scheme on the ground that it was really intended by the province to affect the extraprovincial market in Saskatchewan potash. As an extraprovincial marketing scheme, it infringed upon the exclusive authority of Parliament in relation to interprovincial and international trade and commerce under section 91(2) of the *Constitution.* The Court reached this conclusion despite the fact that the principal mechanism through which the scheme operated was

[8] Those powers are expressly preserved by subsection 92A(6), as are all other prior provincial powers and rights.

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a closely regulated regime of controls on the rate of production of potash within Saskatchewan.[9]

Under subsection 92A(1), and despite the fact that provincial legislative jurisdiction now expressly includes laws in relation to resource production rates, it seems likely that precisely the same result would be reached if the courts were to conclude that the principal provincial objective underlying a legislated scheme is extraterritorial. The powers conferred by subsection 92A(1) are expressly confined to resource-related activities "in the province," so that those powers must be exercised only through mechanisms and for purposes that are restricted to the boundaries of the province in question. They cannot be used to infringe upon the extraprovincial legislative powers, particularly those in respect of extra-provincial trade and commerce, which are retained by Parliament.

That is not the end of the matter, however, for subsection 92A(2) now does confer some authority on the producing provinces in relation to the extraprovincial marketing of resource production. It provides as follows:

> (2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

The new provincial jurisdiction under subsection 92A(2) is not open-ended, as is evident from its terms. In the first place, it can be exercised only in respect of the export of resource production "to another part of Canada" — it cannot be used when resource production is also to be exported *from* Canada (as was the case in *Central Canada Potash*). Second, the proviso at the end of the subsection will prevent provincial "export" laws from operating in a discriminatory fashion. The language of that proviso is hardly a model of clarity. When read at its broadest, it may mean that a producing province cannot adopt a regime that would have the effect of favouring local use and consumption of locally produced resources by discriminating either in prices (a lower price, or price rebate, for local use or consumption) or in supplies (requiring that local needs be satisfied before allowing any exports). A narrower reading of the proviso would permit a producing province to discriminate, either in prices

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[9] The scheme also included a price-fixing element, which, while not the heart of the regime, certainly helped the Court in characterizing it as a marketing scheme with its principal effect outside Saskatchewan. However, given its view of the provincial motivation in imposing the scheme, it seems likely that the Court would have reached the same conclusion even in the absence of that price-fixing element. See Moull, *supra*, note 7 at 27-39. See also W.D. Moull, "Section 92A of the Constitution Act, 1867" (1983) 61 Can. B. Rev. 715 at 730-31.

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or in supplies, as between itself and the rest of Canada so long as it did not attempt to pick and choose among the other components of the Canadian federation. When the courts come to consider its meaning, it may even be that the proper interpretation of the proviso will fall somewhere between these two extremes, perhaps with self-favouring price discrimination being prohibited but self-favouring supply discrimination being allowed.[10]

The third constraint upon provincial legislative powers under subsection 92A(2) arises from the express preservation of federal paramountcy in subsection 92A(3), which reads as follows:

> (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Traditional judicially developed theories of federal legislative paramountcy probably would have reached the same conclusion as that made express in subsection 92A(3). Since subsection 92A(2) does not purport to confer any 'exclusive' legislative powers on the provinces, it is unlikely that the courts would have seen those powers as derogating from any pre-existing authority of Parliament (notably the trade and commerce power but including any others as well); and when otherwise valid federal and provincial legislative measures conflict, to the extent that the subject cannot comply with one without violating the other, the judicial theories of federal paramountcy always render the provincial enactment inoperative to the extent of the conflict.[11]

While federal jurisdiction and paramountcy are expressly preserved by subsection 92A(3), it is equally clear that subsection 92A(2) represents an expansion of provincial legislative jurisdiction into a formerly forbidden field — the regulation of interprovincial marketing of resource production. For the first time, the producing provinces will be able to exercise a legislative jurisdiction to control exports of resource production from the province so long as the legislation is not discriminatory (in whatever sense of the non-discrimination proviso the courts eventually settle upon), is confined in its principal impact to exports to other parts of Canada, and does not run afoul of any overriding federal legislation. That

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[10] A reading along these lines is supported by the French version of the subsection (which is equally authoritative). There, the language of the proviso is divided somewhat more clearly into two types of discrimination: "discrimination in prices" ("*des disparités de prix*") and "discrimination in supplies exported to another part of Canada" ("*des disparités dans les exportations destinées à une autre partie du Canada*").

[11] See, for instance, the decision of the Supreme Court of Canada in *Multiple Access Ltd* v. *McCutcheon* (1982), [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1.

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jurisdiction can be exercised in respect of the production of electrical energy in the province and in respect of the "primary production" from forestry and non-renewable natural resources in the province.[12]

However, whether — and how — that jurisdiction will be exercised by the provinces is far from clear at the moment. The resource-management powers in subsections 92A(1) and (2) have not been used as yet — at least, no new legislation has appeared that is ostensibly grounded in either provision. Current economic conditions do not seem to favour close regulation of the resource sector, and the prevailing political philosophies in the western provinces (such as the Saskatchewan Conservatives' 'open-for-business' theme since their election in April 1982) seem inimical to the pro-active style of resource management that was more common in the 1970s. It seems more likely that the powers set out in subsections 92A(1) and (2) will be reserved for reactive use in some future time of perceived crisis, either in some further conflict over resources with the federal government (as, for example, when the current federal-provincial energy agreements expire at the end of 1986) or when a provincial government believes that the private sector is unable or unwilling to respond to market conditions in the desired way (as in the prelude to Saskatchewan's imposition of potash prorationing in 1969).

The revenue-raising aspect of section 92A promises a greater degree of provincial legislative activity. In *CIGOL*, the Supreme Court of Canada struck down a measure enacted by Saskatchewan in an attempt to capture for itself the windfall profits it saw accruing to the private sector as a result of the 1973 Arab oil crisis. The Supreme Court concluded that the measure was an indirect tax borne primarily by purchasers of Saskatchewan oil outside the province and thus violated section 92(2) of the *Constitution*, which limits the provinces to "direct taxation" levied "within the province." Moreover, the Court said that Saskatchewan's measure intruded upon the federal trade and commerce power under section 91(2) because it was an "export" tax intended, at least in part, to affect the price of Saskatchewan oil in extraprovincial markets.

Subsection 92A(4) has reduced most of the fetters on provincial resource taxation powers flowing from *CIGOL*. It reads as follows:

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[12] In the new Sixth Schedule to the *Constitution*, which was added by subsection 92A(5), the "primary" production from forestry and non-renewable natural resources is defined in such a way as to include, not only raw resource products, but also any processed or refined products short of the manufacturing stage (except in the case of crude oil and certain of its equivalents, where the product ceases to be "primary" as soon as it is refined). However, this extended definition of "primary" production is not likely to carry great significance for the western producing provinces, for, at the moment, most processing and refining activities to which it might apply take place elsewhere.

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(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,
whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

The time-honoured distinction between direct and indirect taxation is clearly gone from the resource field. As is the case with the federal taxation power under section 91(3) of the *Constitution*, the producing provinces will now be able to impose "any mode or system of taxation" upon resources and resource production within the province. Since they may do so whether or not the taxed production "is exported in whole or in part from the province," it will no longer be of concern that someone outside the province might ultimately bear the burden of the tax in the form of higher prices.

The provincial inability to impose an "export" tax, however, remains under subsection 92A(4).[13] That is clearly the case under the subsection itself in respect to production exported to another part of Canada, since a provincial tax regime is expressly prohibited from differentiating between that production and production not exported from the province. It is also likely the case in respect of any production exported from Canada as well as from the producing province. If a provincial measure that was in form "taxation" purported to differentiate in any material respect in relation to production destined for international markets (such as by taxing that production alone, or taxing it at higher rates than applied to other production used or consumed in Canada), then the courts probably would see the scheme as being, in substance, something other than true "taxation." In all likelihood, it would then be categorized as "export" legislation beyond the bounds even of subsection 92A(2); but in any case it would not be "taxation" legislation authorized by subsection 92A(4).

Aside from this qualification, however, subsection 92A(4) will now give the producing provinces added flexibility in designing resource revenue-raising measures. They will now be able to choose from among a full range of both direct and indirect tax regimes, including combinations

[13] In addition to *CIGOL*, provincial "export" taxes (including combined tax-plus-rebate schemes) were struck down by the courts in *Attorney General for British Columbia* v. *McDonald Murphy Lumber Co.* (1930), [1930] A.C. 357, [1930] 2 D.L.R. 721 (P.C.) and in *Texada Mines Ltd* v. *Attorney General for British Columbia* (1960), [1960] S.C.R. 713, 24 D.L.R. (2d) 81.

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of the two that were not possible in days before section 92A when an element of indirectness could taint an otherwise valid direct tax. As a result, provincial resource taxation measures can now be designed in ways that parallel the Crown royalty regimes that have been adopted for production from provincially-owned Crown lands (and for which the direct–indirect distinction was never relevant because of the different source of their constitutional authority — provincial Crown proprietary rights under section 109). In fact, the formerly crucial distinction between Crown royalties and taxation may ultimately wither away in practical terms if the flexibility of subsection 92A(4) is exploited to the fullest. At the very least, even if the provinces wish to maintain the distinction for legal and symbolic purposes, parallel royalty and taxation systems can be designed by the provinces in such a way that they are virtually indistinguishable from each other and thus, for administrative purposes, can operate essentially as one system.

Saskatchewan has already taken some steps in this regard. Effective 1 January 1983, the government replaced the complex tax regime adopted for freehold oil production after the *CIGOL* decision[14] with a new statute imposing an indirect commodity tax on freehold oil production[15] that is identical, in its essentials, with the pre-existing Crown oil royalty system.[16] Effective 1 January 1984, it also enacted a new mineral taxation regime[17] that, when compared with its predecessor,[18] promises at least the opportunity for further simplification of the province's revenue-raising system. No other province has followed Saskatchewan's lead as yet. Given that a move from direct to indirect resource taxation can enhance the conceptual and administrative simplicity of a provincial revenue-raising system for any particular resource and that such a move entails far fewer elements of political philosophy than might a move towards greater use of the resource-management powers in subsections 92A(1) and (2), it is probable that other provincial governments will follow suit in the future.

Subsection 92A(4) seems likely to engender more provincial legislative initiatives than will subsections 92A(1) and (2). There is still nothing, however, in subsection 92A(4) that indicates what, if any, effect its

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[14] *The Oil Well Income Tax Act*, R.S.S. 1978, c. O-3.1 (Supp.).

[15] *The Freehold Oil and Gas Production Tax Act*, S.S. 1982-83, c. F-22.1.

[16] Compare *The Freehold Oil and Gas Production Tax Regulations, 1983*, R.R.S. c. F-19, Reg. 142, ss 201-203, with *The Petroleum and Natural Gas Regulations, 1969*, Sask. Reg. 8/69, s. 58. For further elaboration on this point, see W.D. Moull, "Mineral Taxation in Saskatchewan under the New Constitution" in R.H. Bartlett, ed., *Mining Law in Canada* (Saskatoon: Law Society of Saskatchewan, 1984) 221 at 229-30.

[17] *The Mineral Taxation Act, 1983*, S.S. 1983-84, c. M-17.1.

[18] *The Mineral Taxation Act, 1978*, R.S.S. c. M-17.

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provisions may have on overall resource tax burdens in a province or on the level of the provincial share of resource revenues. Direct taxes can be set at low levels, indirect taxes at high levels — and *vice versa.* Provincial political philosophies and responses to economic conditions from time to time — not section 92A — will determine the future course of provincial resource tax policies. What section 92A has done is to remove a legal barrier formerly imposed by the *Constitution* on the implementation of these policies.

In the end, then, section 92A furnishes the producing provinces with additional legal shelter for their resource policies, whether in relation to resource revenue raising or resource management. Even if the new powers conferred on the provinces by section 92A are not used extensively and expressly, their enactment has reduced the chance of a successful private sector challenge to a given policy initiative to the same extent that section 92A has enhanced provincial legislative powers. Provincial government–private sector resource litigation is not likely to disappear entirely, since section 92A has many rough edges that may require judicial smoothing in the future. The scope for successful challenge, however, has been reduced considerably from what it was in the days of *CIGOL* and *Central Canada Potash,* and so has the opportunity for the private sector to play the litigation bargaining chip in its future dealings with provincial governments.

III. DIRECT POLICY CONSEQUENCES

On its face, section 92A neither specifies the nature of the policy-making process that will prevail thereunder, nor mandates any particular policy outcomes. The direct implications of the resource amendment for the private sector may thus appear uncertain. However, it is still possible to discern several consequences concerning natural resources that are of significance to the industry in its relationship with governments.

Section 92A does not purport to resolve many crucial areas of policy disagreement. Thus, the amendment leaves the management of these conflicts to other mechanisms, particularly ongoing 'nothing is forever' intergovernmental agreements rather than the more permanent, less flexible, and more difficult to achieve 'once and for all settlements' represented by constitutional amendments.[19] The *Western Accord* (1985) and the *Atlantic Accord* (1985) are examples of policy-making instruments of this kind, which go beyond previous intergovernmental agreements.

[19] On the differences between these two modes, see J.S. Dupré, "Reflections on the Workability of Executive Federalism" in R. Simeon, ed., *Intergovernmental Relations,* vol. 63 (Toronto: University of Toronto Press, 1985) 1.

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These accords provide a *modusoperandi* that is at once more flexible than a constitutional amendment and yet, at the same time, more stable and indeed more binding than a simple administrative agreement.[20] What has emerged since the passage of section 92A has been greater federal-provincial cooperation. These accords, as well as the ongoing natural gas pricing agreements, are reflective of a mutual acceptance of the existence of legitimate, if not always coincident, concerns on both federal and provincial sides.

This arrangement of negotiating stable federal-provincial agreements seems important on two counts for the private sector. First, it provides a long sought-after degree of certainty for industry.[21] It commits both levels of government to a particular set of arrangements for a finite period of time and makes unilaterally determined surprises by one government or the other less likely. Second, it provides a clear point of access for the industry, which will now be able to make its preferences known to both orders of government as they make their way to the bargaining table.

The apparent enhancement of concurrent provincial powers over resources under section 92A cannot, however, be translated automatically into policy gains for the industry. Greater concurrency still means that, as in the past, producers must be ready to press their influence upon the level of government where they will get the more sympathetic hearing.[22] The strengthening of provincial legislative powers and the resultant greater concurrency of resource jurisdiction makes either level of government a potential focus for industry influence.

Increased provincial powers over interprovincial trade and all forms of resource taxation have, at the same time, reduced the opportunity for private interests to challenge provincial legislation in the courts (as occurred in the *Central Canada Potash* and *CIGOL* cases).[23] Finding it more difficult to use the judicial route to counter provincial regulation and taxation, the industry will be found to depend even more on the

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[20] For a discussion of the place of "Accords" in Canada's division of powers, see *Report of The Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 3 (Ottawa: Minister of Supply and Services, 1985) (Chair: D.S. Macdonald) at 256-58.

[21] In his analysis of the submission of the mining industry to the Macdonald Commission, David Yudelman argues that uncertainty with regard to government intervention was deemed a crucial problem by the industry. See D. Yudelman, *Mining and the Macdonald Commission: The State of the Industry in the Mid-1980s* (Kingston: Centre for Resource Studies, Queen's University, 1985).

[22] See G. Stevenson, *Unfulfilled Union* (Toronto: MacMillan, 1979).

[23] This is not to suggest that there are not ambiguities in section 92A or that there are not constitutional limits on provincial powers thereunder. Both exist, of course, and the courts may have to address them in the future; but the overall scope for judicial review of provincial resource legislation has clearly been reduced.

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political process in order to pursue its interests. The conflicts at the political bargaining table are less likely to be focused on jurisdictional issues as they were in the past. The likelihood of policy being determined by political bargaining rather than by the courts is reinforced by recent experiences in which, even with apparent legal authority, the federal government was unwilling to proceed without the cooperation of the producing provinces. The management of offshore resources and natural gas pricing are two important examples of Ottawa seeking provincial agreement in areas for which there was clear federal legislative jurisdiction.[24] In sum, the constitutional changes in provincial powers over non-renewable natural resources make it less likely that private interests can reach for the judicial lever in attempting to influence policy outcomes.

The extent of the eventual exercise of provincial powers over natural resources is not determined by section 92A itself, or indeed by any other part of the *Constitution.* As Peter Russell has pointed out, "[T]he level of a government's activity in a given field of policy depends less on its constitutional resources than on its will to use the resources it has."[25] Political will and subsequent policy making are conditioned by a variety of factors, including current ideology and prevailing economic conditions as well as forces outside the particular policy field.[26]

However, section 92A has furnished provincial governments with a wider range of policy instruments. The provinces will now be better able to tailor their regulatory, tax, and incentive schemes to their own perceived needs. The availability of indirect resource taxation measures under subsection 92A(4) is an important advance for the provinces in this respect. This increased opportunity for precision may also help the provinces to avoid inadvertent secondary effects that may be to the disadvantage of private firms or individuals.

One of the important changes in this regard, particularly in the western provinces, is that, for purposes of resource management and resource taxation, the constitutional distinction between Crown and freehold lands has been blurred. Formerly, the provinces had substantially fewer constitutional powers in respect of freehold lands. Fiscal and regulatory regimes had to be established to reflect this fact. By treating the two

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[24] M.A. Chandler, "Constitutional Change and Public Policy" (1986) 19 Can. J. Pol. Sci. 103.

[25] P.H. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources" (1985) 11 Can. Pub. Pol. 161 at 165.

[26] There are several excellent analyses of political will in the resource sector. See, for example, G.B. Doern & G. Toner, *The Politics of Energy: the Development and Implimentation of the NEP* (Toronto: Methuen, 1985), and J. MacDougall, "Natural Resources and National Politics: A Look at Three Canadian Resource Industries" in G.B. Doern, ed., *The Politics of Economic Policy*, vol. 40 (Toronto: University of Toronto Press, 1985) 103.

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more symmetrically, section 92A permits the provinces to have a more consistent policy for the two types of land holding. This consistency could be achieved either by a total merger of the regimes for the two types of lands or by designing parallel regimes for the two, thereby retaining the separate identity of a province's Crown lands for symbolic or other reasons. The resulting opportunity for simplification of the provincial tax and regulatory regimes, if pursued, should have the beneficial effect on the private sector of reducing the costs of compliance with often complex tax and regulatory measures.

Because the provinces have greater fiscal and regulatory authority grounded in legislative powers, there may be a somewhat diminished incentive to use the Crown corporation as a means of effecting policy objectives. For example, the creation of the Potash Corporation of Saskatchewan was partly a response to the provincial government's inability to control the development of the potash industry under the old constitutional provisions. This, however, is a difficult incentive to evaluate because of the many motives, ideology among them, involved in the establishment of Crown corporations.[27] Once again, other, more concrete considerations may outweigh constitutional abstractions in the choice of policy instruments.

IV. THE RESOURCE INDUSTRY AND GOVERNMENT IN THE EIGHTIES

In our earlier paper, we concluded that section 92A was part of a new stage in federal-provincial resource relations. We said that: "The amendment provides a revised framework for the management of conflict that acknowledges the legitimate interests of both federal and provincial governments in resource development."[28] In the immediately preceding section of this paper, we examined the prospects for direct policy consequences under section 92A for the resource sector. Beyond that, however, does the change in federal-provincial relationships under section 92A indirectly imply changes in the industry-government relationship as well?

Historically, both levels of government maintained a relatively minor role in natural resource management, confined to encouraging private sector development. There were, typically, few major differences of opinion between government departments and the private sector regarding

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[27] See M.J. Trebilcock & J.R.S. Prichard, "Crown Corporation: The Calculus of Instrument Choice" in J.R.S. Prichard, ed., *Crown Corporations in Canada* (Toronto: Butterworths, 1983) 1, and Chandler, *supra*, note 24.

[28] Cairns, Chandler & Moull, *supra*, note 4 at 274.

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the proper objectives of governments in relation to resource exploitation or the appropriate means of reaching those objectives.[29] The industry was the prime agent for developing resources while the role of the state was largely facilitative of this private sector activity.

Changes to the symbiotic relationship among federal government, provincial governments, and private resource developers were already beginning to become apparent in the 1960s, particularly in the tax reform debates of that era. Both the Carter Royal Commission on Taxation and Ontario's Smith Committee on Taxation brought forward proposals to increase taxation of the exhaustible resource industries. In the 1970s there was a continuing challenge to the favoured position of the extractive industries. More generally, no longer was resource policy left as the exclusive function of clientele-oriented mines and resources departments comprised largely of technical officials. Resources became matters for finance ministries and premiers' offices as well. In short, resource matters became highly politicized.

Conflicts between federal and provincial governments, between regions, and between the public and private sectors dominated the decade.[30] Increasingly, new interest groups entered the political process in the 1970s.[31] These interest groups were not only public, but private as well. No longer was there just the triad of private producers, the producing provinces, and the federal government seeking a common goal; consumers, non-producing provincial governments, environmentalists, banks, *et cetera*, all began to exert their influence directly or through new government departments and agencies. As well, the homogeneity of private producer interests was ruptured. Central Canada Potash, for instance, acted as a renegade in its legal challenge of potash prorationing. Its interests differed markedly from those of the other producers (all of whom, at the time, were private), and it pursued those interests by attacking a regulatory scheme designed to protect the industry as a whole. The differences in interest between the major petroleum producers and the small independent exploration and production firms were also becoming more readily apparent. Capture of the taxation and regulatory processes by a single interest group composed of major private-sector producers was now far less likely than it had been historically. Instead,

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[29] G. Stevenson, "The Process of Making Mineral Policy in Canada" in C. Beigie & A. Hero, eds., *Natural Resources in U.S.-Canadian Relations* (Boulder, Col.: Westview Press, 1980) 167 c. 14.

[30] We have described these conflicts at more length in *supra*, note 4 at 254-263.

[31] As a general phenomenon, see A.P. Pross, "Canadian Pressure Groups in the 1970s: Their Role and their Relations with the Public Service" (1975) 18 Can. Pub. Admin. 121. More specific to the resource sector, see M. Chandler and W.M. Chandler, "The Path of Resource Development" in D.C. MacDonald, ed., *The Government and Politics of Ontario* (Toronto: Nelson, 1985) 362.

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pressures continued for industry to internalize such costs as pollution and to spread the benefits of development far more widely in society.[32] The resource amendment was, in part, the result of the emergence of these new interests, and it correspondingly affirms the political influence they will continue to exert. In future, one may expect that private producers will have continuing but diminished influence in the political process compared to the practically exclusive access they once had.

The expanded role of government under section 92A would seem to imply an increase in intervention. This may, or may not, be inescapable; but the more important change is that the character of intervention has altered, from protecting the interests of the private producers in a simple, isolated system to a political and bureaucratic balancing of interests in a far more interdependent system. There will be a greater sophistication in the analysis of policy as it affects the natural resource sector of the economy by the numerous departments and agencies of the provincial and federal governments. The private producers will have to pursue their interests in a more competitive (but not necessarily hostile) political process as the system continues to grope to an equilibrium in the context of fundamental concerns such as budget deficits and technological change. To maintain what influence they do have, resource producers may well have to respond to a range of concerns that they may previously have considered to be peripheral or even irrelevant.

It is impossible, as yet, to quantify the gains and losses that the private sector will realize under the resource amendment. What is already apparent, however, is that section 92A confirms the legitimacy of multiple interests in the resource policy-making arena. It thus provides an altered political framework for the development of resource policy. The resource politics of the eighties will be characterized neither by the industry dominance of earlier times nor by the pernicious inter-governmental bickering that spanned the seventies. By providing a stronger legislative base for resource management by the provinces and by entrenching policy perspectives beyond those of the industry and the producer provinces, section 92A makes it very clear that in the eighties governments will have a greater hand in developing Canada's resources and that the interests of the industry are not the only ones that will drive policy. A healthy resource sector is understood to be an important objective of all parties, but benefits to industry are not the only policy objectives worth pursuing.

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[32] See D. Yudelman, *Canadian Mineral Policy Past and Present: The Ambiguous Legacy* (Kingston: Centre for Resource Studies, Queen's University, 1985).

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