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TAXATION AND REGULATION UNDER THE CANADIAN CONSTITUTION

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Thesis submitted to the School of Graduate Studies and Research
in partial fulfilment of the requirements for the L.L.M. degree

University of Ottawa

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If the thesis is judged to be unworthy of the confidence that they placed in me, they are not to be held responsible for it.

LIST OF ABBREVIATIONS

A.C.	Appeal Cases
Alta.	Alberta
App. Cas.	Appeal Cases
B.C.	British Columbia
B.C.R.	British Columbia Reports
c.	chapter
C.A.	Court of Appeal
C. de D.	Cahiers de Droit
CIGOL	Canadian Industrial Gas and Oil
C.J.C.	Chief Justice of Canada
C.P.R.	Canadian Pacific Railroad
Can.	Canadian
D.L.R.	Dominion Law Reports
ed.	edition
Edw.	Edward
J.	Journal
L.	Law
L.R.	Law Reports
M.P.R.	Maritime Provinces Reports
n.	note
N.B.	New Brunswick
N.E.P.	National Energy Program
NGGLT	Natural Gas and Gas Liquids Tax
O.C.A.	Ontario Court of Appeal
O.L.R.	Ontario Law Reports
O.R.	Ontario Reports
p.	page
P.C.	Privy Council

para.	paragraph
Q.B.	Queen's Bench
Que. B.R.	Quebec Reports
R.S.C.	Revised Statutes of Canada
R.S.S.	Revised Statutes of Saskatchewan
Reg.	Regulations
Rev.	Review
rev.	revised
S.	Statutes
s.	section
S.A.	Statutes of Alberta
S.C.	Supreme Court
S.C.C.	Supreme Court of Canada
S.C.R.	Supreme Court Reports
Sask. Q.B.	Saskatchewan Queen's Bench
T.D.	Trial Division
U.	University
U.K.	United Kingdom
U.S.	United States of America
Vict.	Victoria
W.W.R.	Western Weekly Reports

TAXATION AND REGULATION UNDER THE CANADIAN CONSTITUTION

INTRODUCTION

A question that often arises in Canadian constitutional law is whether legislation imposing a governmental levy is in relation to taxation or in relation to one of the regulatory heads of power in the Constitution Act, 1867.[1] This question is significant because legislation can be valid or invalid depending on how it is characterized by the courts. For example, the judicial characterization of a provincial enactment imposing a levy as being in relation to a matter falling within one of the federal heads of regulatory power would render that enactment invalid.[2] Likewise, the same would hold true with respect to the judicial characterization of a federal enactment imposing a levy as being in relation to a matter falling within one of the provincial heads of regulatory power.[3] Through a discussion of the case law

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[1]30 & 31 Vict., c.3 (U.K.) The taxing and regulatory heads of legislative power are allocated between the Parliament of Canada and the Provincial Legislatures by sections 91 to 95. The most important of these sections are section 91 entitled "Powers of Parliament", and section 92, entitled "Exclusive Powers of Provincial Legislatures."

[2]A provincial enactment charging a levy on federally incorporated banks was held to be invalid on the ground that the pith and substance of the legislation was in relation to matters falling within federal jurisdiction, namely, the regulation of banking in Re Alberta Legislation, [1939] A.C. 117, [1938] 4 D.L.R. 433 (P.C.), affirming [1938] S.C.R. 100, 2 D.L.R. 81 (S.C.C.).

[3]For example, federal unemployment insurance legislation providing for compulsory contributions from employers and employees and a contribution from the federal treasury was invalidated

(continued...)

this thesis shows how the courts have distinguished taxation from regulation for the purpose of constitutionally characterizing legislation.

It should be made clear at the outset of the thesis that what is meant by regulatory power is the power to pass regulatory legislation and not simply the power to pass regulations. Indeed, both taxation and regulation are examples of the exercise of legislative power, but their nature is different from one another. As one commentator pointed out:[4]

> It is necessary to distinguish the taxing power from other legislative powers. Its nature is different. It is a power to raise means, it is not a power to regulate specific ends.

This does not mean that taxation and regulation are unrelated to one another. All taxes have an effect on economic activity to

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[3](...continued)
on the ground that the pith and substance of the legislation was in relation to the thirteenth head in section 92, "Property and Civil Rights in the Province", in Reference re Employment and Social Insurance Act, [1936] S.C.R. 427, [1936] 1 D.L.R. 644 (S.C.C.) aff'd (sub. nom. Attorney-General for..of Canada v. Attorney-General for Ontario), [1937] A.C. 355, [1937] 1 D.L.R. 684 (P.C.).

[4]K.C. Wheare, Federal Government, 4th ed., London: Oxford University Press, 1963, p. 107; quoted in G.-A. Beaudoin, Le Partage des Pouvoirs, 3rd ed., Ottawa: Éditions de l'Université d'Ottawa, 1983, p. 329. Nonetheless, taxes are never neutral in their effect on economic activity. For further discussion, see text following this footnote, footnote 224 and pp. 118, 119 and 129.

some extent in so far as they involve a reduction in the income of taxpayers. To the extent then that the distinction between taxation and regulation for constitutional purposes can be ignored, taxation can be used as a means of regulating economic activity. The difference between taxation and regulation for constitutional purposes will be made more clear in the course of the thesis.

Part I of the thesis briefly describes the scope of the taxing powers contained in sections 91 and 92 of the Constitution Act, 1867.[5] The repeated characterization by the courts of provincial marketing legislation as being in relation to indirect taxation is described in Part II of the thesis. Herein it is shown that the courts relied on an overly technical definition of a tax for constitutional purposes, instead of relying on an application of the pith and substance doctrine.[6] Part III of the thesis discusses the cases in which the courts did rely on the pith and substance doctrine to strike down legislation that purported to be an exercise of taxing power. It will be shown

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[5]30 & 31 Vict., c. 3 (U.K.).

[6]For a discussion of the pith and substance doctrine, see B. Laskin, "Tests for the Validity of Legislation: What's the Matter?" (1955), 11 U. of Toronto L.J. 114; D. Mundell, "Tests for the Validity of Legislation under the B.N.A. Act" (1954), 32 Can. Bar. Rev. 813.

that the courts often held in these cases that Parliament or the Provincial Legislature, as the case may be, by colourably relying on an exercise of taxing power, was attempting to regulate a matter otherwise outside of its jurisdiction.[7] Finally, in Part IV of the thesis, the importance of distinguishing between taxation and regulation is discussed in the context of the constitutional limitation on Parliament and the Provincial Legislatures that: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation."[8]

It is suggested in this thesis that by striking down provincial marketing legislation, as being in relation to taxation, and other regulatory legislation purporting to be taxation, as being colourable, the courts disclosed a policy bias against government interference with economic relations.[9] In Part IV of the thesis, it is suggested that the courts may have shifted their bias in favour of such interference.

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[7]For a discussion of the doctrine of "colourability", see P. Hogg, Constitutional Law of Canada (Carswell & Company Ltd., 2nd ed., 1985), p. 322.

[8]Constitution Act, 1867, 30 & 31 Vict., c.3 (U.K.), sec. 125.

[9]See B. Laskin, "Provincial Marketing Levies: Indirect Taxation and Federal Power" (1959), 13 U. Toronto L.J. 1.

I. THE SCOPE OF THE TAXING POWERS

Taxing power is allocated between the Parliament of Canada and the Provincial legislatures by sections 91(3), 92(2) and 92A(4) of the Constitution Act, 1867.[10] Section 91(3) grants to the Parliament of Canada legislative power in relation to "The raising of Money by any Mode or system of Taxation", while section 92(2) grants to the Provincial Legislatures legislative power in relation to, "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes". In order to augment provincial taxing power with respect to natural resources, section 92A(4), which is part of the so-called "resource amendment",[11] empowers the provinces to raise money by both direct and indirect taxes in respect of certain natural resources. The "resource amendment" is discussed later on in this Part of the thesis.[12]

Although strictly not one of the taxing powers, section 92(9) empowers the provinces to make laws in relation to:

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[10]30 & 31 Vic., c.3 (U.K.).

[11]The "resource amendment" was enacted by schedule 1 of the Constitution Act, 1982 (which is schedule B of the Canada Act, 1982, c.11 [U.K.]), secs. 50 and 51.

[12]Infra, at pp. 36-49.

> Shop, Saloon, Tavern, Auctioneer and other Licenses in order to the raising of a Revenue for Provincial, Local and Municipal purposes.

This head of power need not be discussed in any detail[13] for the purposes of this thesis beyond mentioning that it confers upon the provinces the power to levy indirect taxes as well as direct taxes in order to defray the expenses of a licensing scheme[14] and that it interacts with the federal heads of power in a manner similar to section 92(2).[15] It is also worth mentioning that licence fees may also be levied pursuant to the federal and the provincial heads of regulatory power.[16]

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[13]For a more detailed discussion, see G.V. La Forest, The Allocation of Taxing Power under the Canadian Constitution (Canadian Tax Foundation, Toronto, 2nd ed., 1981), pp.151-165; Beaudoin, supra, n. 4, pp. 340, 341; J.E. Magnet, "The Constitutional Distribution of Taxation Power in Canada" (1978), 10 Ottawa L. Rev. 473, pp.521-527; Hogg, supra, n.7, p. 603.

[14]In commenting on s.92(9), Lord Atkin, on behalf of the Judicial Committee of the Privy Council, in Shannon v. Lower Mainland Dairy Products Board [1938] A.C. 708, at p.721, [1938] 4 D.L.R. 81, at p. 86, stated as follows: "But, if licenses 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." See also Magnet, id., wherein it is argued that a revenue raised pursuant to s. 92(9) may be in excess of the expenses of administering the licensing scheme.

[15]In other words, the licensing power has no independent regulatory content. See La Forest, supra, n.12, pp. 162-165; Hogg, supra, n.7, p.603.

[16]See Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708, at p. 722, [1938] 4 D.L.R. 81, at p.87.

The first section of this Part of the thesis briefly describes how the courts have interpreted sections 91(3) and 92(2) of the Constitution Act, 1867[17] in such a way so as to give to each of them a scope that does not unnecessarily overlap with one another. The next section of this Part of the thesis describes the difference between direct taxation and indirect taxation.

A. The Scope of Taxing Power in Sections 91 and 92

Sections 91 and 92 are exclusive grants of legislative power. This is evident from the terminology used in the two sections. However, it has been recognized for a long time[18] that the subject matters in sections 91 and 92, on first inspection at least, are not mutually distinct categories. Moreover, it has been suggested[19] that it is also evident from the terminology

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[17]30 & 31 Vic., c.3 (U.K.).

[18]See Citizens Insurance Company v. Parsons (1881), 7 App. Cas. 96 (P.C.), at pp. 107, 108.

[19]Id., at pp. 107, 108. For a discussion of the doctrine of federal paramountcy, see B. Laskin, Canadian Constitutional Law (Carswell, Toronto, 4th ed., rev., 1975 by A.S. Abel), pp.23-59; B. Laskin, "Occupying the Field: Paramountcy in Penal Legislation" (1963), 41 Can. Bar. Rev. 234; W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1962-63), 9 McGill L.J. 185; D. Alhéritière, "De la Prépondérance Fédérale en Droit Constitutionnel Canadien" (1971), 12 C. de D., 545.

used in the two sections that paramountcy is assigned to the power granted in section 91 in cases of a conflict of powers. The exclusive grant of legislative power given to the Parliament of Canada by section 91 is provided for by the following terminology:

> ...it is hereby declared that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say, ...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.

Section 92, on the other hand, simply grants exclusive legislative power to the Provincial Legislatures in the following terms:

> In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say....

Thus the problem that arises when conflicting legislation is enacted by the two levels of government is resolved by the assignment of paramountcy to the legislation enacted by the

Parliament of Canada. Conflicts can arise because the subject matters in sections 91 and 92, on first inspection at least, are not mutually distinct categories. To some extent, they overlap with one another. This is especially true with respect to the third head of section 91, "The raising of Money by any Mode or System of Taxation", and the second head of section 92, "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes". The third head of section 91 is broadly enough worded that it would seem to embrace everything in the second head of section 92.[20] The two taxing powers, however, are independent of one another, with the result that there is no constitutional objection to double taxation by the two levels of government.[21] The courts having held that there is room enough for both taxes,[22] there is no conflict for constitutional purposes between a provincial tax and a federal tax that has already

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[20]See Citizens Insurance Company v. Parsons (1881), 7 App.Cas. 96, at p.108.

[21]See B. Laskin, Canadian Constitutional Law, supra, n.18, p.641; La Forest, supra, n.13, p.81. In this regard, the federal and the provincial taxing powers are often described as being concurrent with one another. See also La Forest, id., pp.51-53; Hogg, supra, n.7, p.602; Beaudoin, supra, n. 4, pp. 329, 330; Magnet, supra, n. 13, pp. 484, 485.

[22]Forbes v. Attorney-General for Manitoba, [1937] A.C. 260, [1937] 1 D.L.R. 289 (P.C.); In re Silver Bros. (sub. nom., Attorney-General for Quebec v. Attorney-General for Canada), [1932] A.C. 514, 53 Que. B.R. 418 (P.C.).

occupied the field so that there is no need to apply the doctrine of federal paramountcy in these kinds of situations.[23]

Another kind of conflict arises in connection with the two taxing powers, namely, how can both the Parliament of Canada and the Provincial Legislatures be given exclusive power over the same subject matter? If both legislative bodies are given exclusive power over the same subject matter, the giving of full legislative force to the federal taxing power would seem to leave the provincial taxing power without legislative force, its subject matter being fully embraced by the federal taxing power.[24] Clearly, it was never intended that the provincial taxing power should have no legislative force. As was pointed out by the Privy Council in Bank of Toronto v.Lambe.[25]

> It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time

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[23]The doctrine of federal paramountcy applies in a different way to the taxing powers. For example, it might apply in the case of federal and provincial income taxes aggregating to more than 100% of a person's income. See In re Silver Bros., id. See also Beaudoin, supra, n. 4, p. 329.

[24]See text accompanying footnote 20. See also Beaudoin, id., pp. 327, 328; Magnet, supra, n. 13, pp. 476-479.

[25](1887), 12 App. Cas. 575, at p. 585. Again, in Caron v. The King, [1924] A.C. 999, [1924] 4 D.L.R. 105, at p. 108, the Privy Council spoke of an "apparent antinomy" in the terminology used in secs. 91(3) and 92(2). See also Citizens Insurance Company of Canada v. Parsons, supra, n. 18.

> to give to the provincial legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes.

It has long been held that in order to make sense out of the conflicting terminology of the kind just described in the two grants of legislative power over taxation in sections 91 and 92 and to give effect to these two grants of legislative power, it is necessary to read the two sections together.[26] Accordingly, Sir Montague Smith in Citizen's Insurance Company of Canada v. Parsons[27] described the method to be used in reading sections 91 and 92 together as follows:[28]

> 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

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[26] Citizen's Insurance Company v. Parsons, supra, n. 18, at pp. 107, 108.

[27] Id.

[28] Id., at pp. 108, 109.

> 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 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.

By reading the two heads of taxing power together in this fashion, it was obvious to Sir Montague Smith that the "general power" in section 91(3) did not "override the particular one" in section 92(2).[29]

Later on, in Bank of Toronto v. Lambe,[30] the Privy Council gave explicit recognition to the exclusive nature of the provincial taxing power in the following terms:

> ...as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures.

This reconciliation of the taxing powers, however, leaves open the question of whether the Parliament of Canada may raise money

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[29] Id., at p. 108.

[30] Supra, n. 25, at p. 585. See also Professor Magnet supra, n. 13, p. 477, where he concludes as follows: "The result is that section 92(2) is treated as being carved out of section 91(3), leaving behind an area of federal incompetence.

by indirect taxation for provincial purposes. Indeed, if the Constitution Act, 1867[31] exhausts the full range of legislative power exercisable in Canada, as has sometimes been suggested,[32] then the Parliament of Canada may very well have this power.

It has never been necessary for the courts to answer the question of whether the federal taxing power includes the power to levy indirect taxes for provincial purposes. For example, in reading the two heads of taxing power together, in Caron v. The King,[33] a case involving federal taxation of a provincial cabinet minister, the Privy Council did not think it was necessary to say whether the particular grant of power conferred by section 92(2) is a subtraction from the general grant of power conferred by section 91(3) or whether section 91(3) is confined to federal taxes for federal purposes.[34] In the view of the Privy Council,

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

[32]Attorney-General of Ontario v. Attorney-General for Canada, [1912] A.C. 571, at pp.581, 583, 3 D.L.R. 509 (P.C.). Accord Bank of Toronto v. Lambe (1887), 12 App.Cas 575, at p.587 (P.C.). In Murphy v. C.P.R., [1958] S.C.R. 626 at p.643, (1958), 15 D.L.R.(2D) 145,at p.153 (S.C.C.), however, Rand J. noted that the exhaustibility doctrine is accompanied by limitations when he stated: "It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself."

[33][1928] A.C. 999, [1924], 4 D.L.R. 105 (P.C.); aff'g [1923], 64 S.C.R. 255, [1923], 1 D.L.R. 1173 (S.C.C.).

[34][1924], 4 D.L.R. 105, at p.108.

it would only be necessary to decide this issue in the "not very probable event of the Parliament of Canada desiring to raise money for provincial purposes by indirect taxation."[35] It is not very surprising that this should have been considered by the Privy Council a "not very probable event" because the case law had already strongly suggested that the meaning to be attributed to "for Provincial Purposes" in section 92(2) was simply that the provincial taxing power was to be exercised to raise money for the exclusive disposition of the provincial legislatures.[36] The improbable came to pass, however, with a 1957 amendment[37] to the federal Agricultural Products Marketing Act.[38] The amendment gave effect to a provincial marketing levy, which had been invalidated by the Supreme Court of Canada in Reference re Farm

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[35] Id.

[36] As Duff C.J.C. stated in Reference re Employment and Social Insurance Act, [1936] S.C.R.247, at p.434, [1936] 3 D.L.R. 644, at p.649 (S.C.C.): "If you read No.2 of s.92 with s.126, and by the light of the observations of Lord Watson in St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App.Cas.46 there is ... solid ground for the conclusion that the words 'for provincial purposes' mean neither more nor less than this: the taxing power of the legislature is given to them for raising money for the exclusive disposition of the legislature." See also Dow v. Black (1875), L.R. 6 P.C. 272 (P.C.); Laskin, supra, n. 21, p.740.

[37] 1957 (Can.), c.15, sec.2.

[38] 1949 (Can.), c.16.

Products Marketing Act[39] on the ground that the levy was an indirect tax. The Supreme Court of Canada later invalidated the federal amendment as legislation in relation to a provincial regulatory matter in Reference re Agricultural Products Marketing Act.[40] Even though it was not necessary for the Court to invalidate the amendment by holding that it was an exercise of federal taxing power for a provincial purpose,[41] the tenability of the proposition that the federal taxing power may be exercised to

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[39][1957] S.C.R. 198, 7 D.L.R. (2d) 257 (S.C.C.).

[40][1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257 (S.C.C.), rev.g on this point (1977), 78 D.L.R. (3d) 477, 16 O.R. (2d) 451 (O.C.A.).

[41]Chief Justice Laskin and Justice Pigeon, as they then were, were unable to characterize the federal amendment as a taxing statute. See (1978), 84 D.L.R. (3d) 257, at p. 299 (per Laskin, C.J.C.) and p. 322 (per Pigeon, J.).

levy indirect taxes for such a purpose was severely undermined.[42]

As Chief Justice Laskin, as he then was, stated:[43]

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

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[42]The Ontario Court of Appeal was not as unanimous concerning the validity of this proposition as the Supreme Court of Canada was. Mr. Justice MacKinnon in the Ontario Court of Appeal held that the amendment was a valid exercise of Parliament's authority to levy indirect taxation for provincial purposes. As he stated:

> It is clear that Parliament, in carrying out its national obligations, can make grants to individual Provinces and raise money by general taxation for such purposes. Its power to impose indirect taxes for any purposes is unlimited by the constitutional Act.

See 78 D.L.R. (3d) 477, at p. 483. Mr. Justice Dubin, on the other hand, seemed to be of the opposite view when he agreed with Rand J.'s comment concerning limitations on the exhaustibility doctrine in Murphy v. C.P.R., supra, n. 32. Mr. Justice Dubin, however, like the Supreme Court of Canada, was unable to characterize the federal amendment as a taxing statute. See 78 D.L.R. (3d) 477, at p. 483. For an argument that the federal power of taxation is unrestricted by the purpose for which the money raised is to be used or by the provincial power of taxation, see La Forest, supra, n. 13, at p. 52. For some reasons as to why the federal power to levy indirect taxes should not be restricted by provincial purposes, see also Magnet, supra, n. 13, pp.478, 479.

[43]84 D.L.R. (3d) 257, at p. 299.

The courts have, therefore, reconciled the two taxing powers by removing from the federal power the power to raise direct taxes, and possibly indirect taxes, for the exclusive disposition of the Provincial Legislatures. What is left to the federal power is the plenary power to raise taxes,[44] unrestricted in kind and in area, for the exclusive disposition of the Parliament of Canada. As for the provincial power, within its ambit, it is as full and as plenary as the federal power.[45]

B. Direct Taxation Within the Province and the Resource Amendment

Since section 92(2) limits the scope of provincial taxing power to direct taxation within the province,[46] the principal

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[44]The plenary nature of the federal power of taxation is affirmed in Minister of Finance v. Smith, [1927] A.C. 193 (P.C.); Croft v. Dunphy [1933] A.C. 156, [1933] 1 D.L.R. 225 (P.C.); British Columbia Electric Ry Co. v. The King, [1946] A.C. 527, [1946] 2 D.L.R. 81 (P.C.). See also La Forest, supra, n.13, pp.39, 40, 56, 57; Beaudoin, supra, n. 4, pp. 327-329; Magnet, supra, n. 13, p. 475. When combined with the federal spending power, the federal taxing power is a powerful tool of economic regulation that allows the federal government to enter into fields of activity otherwise reserved to the legislative competence of the Provinces. For further discussion of the spending power, see infra, n.230 and La Forest, supra, n.13, pp.45-51.

[45]See La Forest, supra, n.13, p.56.

[46]The taxation of persons, property, transactions or benefits located or occurring within another province is prevented under sec. 92(2) of the Constitution Act, 1867 30 & 31 Vic., c.3 (U.K.) by the restriction of provincial taxing power to the levying of taxes within the province. Nonetheless, provincial taxes may be measurable by extra-provincial attributes. See Bank of Toronto v. Lambe (1887), 12 App. Cas. 575.

burden and effect of a provincial tax usually remains within the province.[47] Besides the issues arising from the limitations on provincial taxing power to direct taxation and to taxation within the province, the issue may arise with respect to provincial legislation authorizing levies with a burden and effect outside of the province as to whether the legislation may be characterized as being in relation to provincial taxation under section 92(2) or as being in relation to the regulation of trade and commerce under section 91(2)[48] Such issues are less important, however, in connection with the taxation of natural resources, now that the "resource amendment"[49] has granted to Provincial Legislatures power in relation to both the regulation and the indirect taxation of natural resources.

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[47]With respect to the production of natural resources, however, the principal burden and effect of any tax thereon does not remain within the province in so far as they are often exported from the province and the tax is ultimately paid for by someone from outside of the province. See Attorney-General for British Columbia v. Esquimault and Nanaimo R.R., [1950] A.C. 87, [1950] D.L.R. 305 (P.C.); Canadian Industrial Gas & Oil Ltd., v. Government of Saskatchewan, [1978] 2 S.C.R. 545, 80 D.L.R. (3d) 449 (S.C.C.), rev'g (1975), 65 D.L.R. (3d) 79, [1976] 2 W.W.R. 356 (Sask. C.A.), aff'g [1975] 2 W.W.R. 481 (Sask. Q.B.), where a tax on oil was paid for by out-of-province consumers in the form of higher prices. The limitation on the scope of provincial taxation also limits to some extent the effect of double taxation. For further reading, see La Forest, supra, n.13, pp.111-147, Magnet, supra, n.13, p.500.

[48]For example, see Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan, id.

[49]Supra, n. 11.

The distinction between direct taxation and indirect taxation is discussed next. This is followed by a discussion of how the scope of provincial taxing power has been augmented by the resource amendment.

1. Direct Taxation Versus Indirect Taxation

Taxation is direct when it is intended that the person upon whom it is levied does not pass it on by adding it to the price of commodities to be paid by another. John Stuart Mill put it this way in 1848:[50]

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

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[50] J.S. Mill, Principles of Political Economy, Book V, chapter 2, 1848, p. 367; as quoted by La Forest, supra, n.13, p. 78 and by Magnet, supra, n. 13, p.486. The Privy Council adopted this definition in Bank of Toronto v. Lambe (1887), 12 App.Cas. 575 and in Attorney General for Quebec v. Reed (1884), 10 App. Cas. 141.

> he will recover the amount by means of an advance in price.

It has been conjectured that the Fathers of Confederation had Mill's definition in mind when they framed the Constitution.[51] At that time certain taxes were generally recognized as either being direct or indirect such as income taxes, property taxes and estate taxes, which are direct taxes,[52] and customs duties, commodity taxes and export taxes, which are indirect taxes.[53] The courts have sometimes taken this into account in adopting a "categories test" in determining whether a particular tax is direct or indirect taxation.[54] According to this criterion, a new tax is categorized according to whether it resembles what were generally recognized as direct or indirect taxes at the time

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[51]La Forest, id., p. 79.

[52]See Attorney-General for British Columbia v. Esquimault and Nanaimo R.R., supra, n. 47; C.P.R. v. Attorney-General for Saskatchewan, [1952] 2 S.C.R. 231, [1952] 4 D.L.R. 11 (S.C.C.); Nickel Rim Mines Ltd. v. Attorney-General for Ontario, [1966] 1 O.R. 345, 53 D.L.R. (2d) 290 (O.C.A.), affirmed [1967] S.C.R. 270, 60 D.L.R. (2d) 576 (S.C.C.); Re Newfoundland & Labrador Corporation Ltd. and Attorney-General for Newfoundland, [1982] 138 D.L.R. (3d) 577 (S.C.C.).

[53]See Attorney-General for British Columbia v. C.P.R., [1927] A.C. 934, (1927) 4 D.L.R. 113 (P.C.); The King v. Caledonian Colieries Ltd., [1928] A.C. 358, [1928], 3 D.L.R. 657 (P.C.).

[54]Halifax v. Estate of Fairbanks, [1928] A.C. 117, [1927] 4 D.L.R. 945 (P.C.); The King v. Caledonian Colieries Ltd., id.; Attorney-General for British Columbia v. McDonald Murphy Lumber Co., [1930] A.C. 357, [1930] 2 D.L.R. 721 (P.C.).

of Confederation.[55] More frequently, however, the courts have adopted Mill's definition.[56]

Mill's definition has been further refined by distinguishing between whether a tax may be passed on by the person liable to pay it from whether the tax is economically recouped.[57] This enables the courts to dispense with economic evidence.[58] According to this criterion, whether in a particular case the tax is passed on or not is irrelevant to the determination of whether it is direct or indirect taxation. It is what is understood by the ordinary man in the street as to whether the tax has a general tendency to be passed on or not that is relevant to this determination and not the opinions of economists as to the ultimate incidence of the tax.[59]

The courts have certain room to manoeuvre in determining whether a new tax is direct taxation or indirect taxation since a

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[55]La Forest, supra, n.13, p.89. See also Magnet, supra, n. 13, p. 494.

[56]La Forest, id., pp. 90, 93-94.

[57]Id., pp. 40, 80-84; Magnet, supra, n. 13, pp. 486, 487. Mill's definition was refined in this way by Lord Hobhouse in Bank of Toronto v. Lambe, supra, n. 50, pp. 581, 582.

[58]Id., p. 80.

[59]Simpsons-Sears Ltd. v. Provincial Secretary of New Brunswick (1978), 82 D.L.R. (3d) 321 (S.C.C.), p. 326. See also Bank of Toronto v. Lambe, supra, n. 50, pp. 581, 582.

new tax often possesses characteristics of both types of taxation.[60] A court faced with determining whether a new tax is direct taxation or indirect taxation must decide whether it will use Mill's test or the categories test in making its determination.[61] The choice is often not made expressly. Mill's test gives the courts considerably more leeway in upholding provincial revenue raising measures as direct taxation.[62] There are often underlying policy reasons why the courts would want to do this, such as expanding the revenue base of the provinces, enabling them to take on heavier responsibilities such as social legislation and industrial promotion.[63] The categories test, on the other hand, can be used to cut down provincial legislation when it is felt that it is extra-provincial in scope or that it interferes with extra-provincial trade.[64]

An example of provincial legislation being held ultra vires on the ground that it constitutes indirect taxation is found in the case of Canadian Industrial Gas & Oil Ltd. v. Government of

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[60]A new tax is often called a hybrid tax for this reason. For further discussion, see Magnet, supra, n. 13, pp. 469-493.

[61]See La Forest, supra, n. 13, p. 89.

[62]Id., p. 93, 94.

[63]Id., p. 93.

[64]Id., p. 94.

Saskatchewan.[65] The legislation in question[66] was designed to appropriate to provincial coffers the increased revenues of the oil and gas industry that were caused by sharply escalating prices in the wake of the 1973-74 energy crisis. The legislation was comprised of the following three major elements: 1) it expropriated most of the mineral rights on freehold producing lands in the province; 2) it levied a royalty surcharge on the oil produced from Crown lands equal to the difference between the world price and the price before the energy crisis; and 3) it levied a mineral income tax that was equivalent to the royalty surcharge on the remaining freehold producing lands in the province.

In declaring the legislation to be ultra vires the Province of Saskatchewan, except for the expropriation provisions, the Supreme Court of Canada seemed to rely on both the categories test and Mill's test.[67] Justice Martland's opinion for the majority of the Court found that both the royalty and the taxation measures were export taxes because most of the oil and gas

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[65]Supra, n. 47.

[66]The Oil and Gas Conservation, Stabilization and Development Act. 1973, S.S. 1973-74, c. 72.

[67]See La Forest, supra, n. 13, p. 91; Magnet, supra, n. 13, p. 490.

upon which they were imposed had a destination that was outside of the province.[68] The fact that the producers, being unable to affect the world price for petroleum, were unable to economically recoup their losses from the levies was considered to be irrelevant by Justice Martland. What he did consider important was that the general tendency of the levies was that they were passed on to out-of-province consumers.[69]

Mr. Justice Martland also considered it important that the Minister was given powers to set prices under certain circumstances, even though these powers were only meant to be used as anti-tax avoidance measures.[70] On the basis of this consideration and his characterization of the provincial levies as export taxes, the secondary ground for Justice Martland's decision is that the provincial levies infringed upon the federal govern-

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[68] Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan, 80 D.L.R. (3d) 449, p. 461. In support of this finding, Justice Martland relied on Attorney-General for British Columbia v. McDonald Murphy Lumber Co., supra, n. 54.

[69] Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan, id., p. 463.

[70] Id., p. 460. See also William D. Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980), 18 Osgoode Hall Law Journal. 1, p. 24.

ment's legislative power over the regulation of trade and commerce.[71]

Mr. Justice Martland would have been ill-advised to rely solely on the categories test to invalidate the provincial levies in view of, among other things,[72] the classic statement describing this test, which was delivered by Lord Cave in Halifax v. Estate of Fairbanks[73] as follows:

> 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 customs or excise duty on services would ordinarily be regarded as indirect taxation, and although new forms of

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[71]Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan, 80 D.L.R. (3d) 449, p. 460.

[72]See infra test accompanying note 98.

[73]Supra, n. 54, [1927] 4 D.L.R. 945, pp. 949, 950. See also Professor La Forest, as he then was, and Professor Magnet, supra, n. 55, wherein the use of the categories test is criticized.

> 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.

Lord Cave, in delivering this statement, was rejecting the argument that the probability of a tax being passed on in a particular case by arrangement renders the tax an indirect one.[74] The corollary of this argument is that the probability of a tax not being passed on in a particular case renders the tax a direct one. Neither the argument[75] nor its corollary applies to the tax involved in Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan[76] in so far as that tax was levied on oil producers generally and the probability of the tax being passed on by arrangement was not an issue in the case. Mr Justice Martland, nonetheless, must not have regarded the tax as an unfamiliar and hybrid form of taxation when he characterized it as an export

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[74]Lord Cave was dealing with a business tax on occupiers of real property that, in the particular circumstances of the case, was capable of being passed on to a tenant. He held the tax to be a direct one. Id., [1927] 4 D.L.R. 945, p. 951.

[75]As was pointed out by Lord Thankerton Judicial Committee of the Privy Council in Attorney-General for British Columbia v. Kingcome Navigation Co. Ltd., [1934] A.C. 45, p. 57, [1934] 1 D.L.R. 31, p.39, the rejection by Lord Cave of this argument was consistent with previous judicial decisions.

[76]Supra, n. 47.

tax,[77] but even if he did so regard it, he still would have relied on Mill's test to invalidate the tax on the ground that there was a general tendency for the tax to be passed on to out-of-province consumers.[78]

An example of provincial legislation being upheld in the face of arguments that are premised on the categories test is found in the case of Attorney-General of British Columbia v. Kingcome Navigation Co. Ltd.[79] The legislation involved in this case, the Fuel-oil Tax Act,[80] imposed a tax of one-half cent per gallon of fuel-oil consumed in the Province. It was argued on behalf of the Attorney-General that this was direct taxation on the ground that the tax could not be passed on by the taxpayer as consumer.[81] Besides arguing that the tax could, indeed, be passed on,[82] the defendant company challenged the tax by arguing, "that in its nature it is either an import duty or a duty of

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[77]Supra, n. 68.

[78]Supra, n. 69.

[79][1934] A.C. 45, [1934] 1 D.L.R. 31 (P.C.), rev'g [1933] 3 D.L.R. 364 (B.C.C.A.) and [1933] 1 D.L.R. 688 (B.C.S.C.).

[80]S.B.C. 1930, c. 71, as amended by the Fuel-Oil Tax Amendment Act, B.C. 1932, c. 51.

[81]See [1933] 3 D.L.R. 364, p. 379.

[82]It was argued that the tax was a transaction tax that was passed on to the consumer and also that the consumer could make private arrangements to pass on the tax. See [1934] 1 D.L.R. 31, p. 42.

excise, and therefore falls into the category of indirect taxes"[83] and "that it invades the legislative sphere of the Dominion Parliament in regard to regulation of trade and commerce".[84] These arguments prevailed in the lower Courts,[85] where it was held that the power to impose excise taxes belongs exclusively to the Dominion Parliament.[86] It was also found that the imposition of the tax interfered with and impaired the power of the Dominion Parliament to regulate trade and commerce.[87] In reversing the Lower Courts and upholding the tax, the Judicial Committee rejected the holding that the power to impose excise taxes belongs exclusively to the Dominion Parliament[88] and then went on to hold that the tax met the requirements of a direct tax

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[83] Id., pp. 33, 34.

[84] Id.

[85] See supra, n. 79.

[86] See [1933] 1 D.L.R. 688 (B.C.S.C., per Morrison, C.J.), p. 690 and [1933] 3 D.L.R. 364 (B.C.C.A., per MacDonald, C.J.B.C., Martin, J.A. and MacDonald, J.A., concurring, and McPhillips, J.A., dissenting), pp. 364, 378, 382, 383.

[87] [1933] 1 D.L.R. 688, p. 69; [1933] 3 D.L.R. 364, pp. 365, 380, 381.

[88] [1934] 1 D.L.R. 31, pp. 41, 42.

under Mill's test[89] and did not infringe upon the Dominion power to regulate trade and commerce.[90]

One of the arguments advanced on behalf of the defendant company as to why the tax was made to apply to the consumption of fuel oil only was that this was a facade to conceal the real character of the tax.[91] According to the argument, a facade was necessary because similar legislation taxing fuel oil was invalidated in the case of Attorney-General for British Columbia v. C.P.R.[92] on the ground that it constituted indirect taxation. As opposed to levying a tax on the consumption of fuel oil, the legislation involved in this case[93] levied a tax of one-half cent per gallon of fuel-oil purchased by a person for the first time after the manufacture or importation of the fuel-oil into the Province. Even though there were comparatively few cases of resale in the Province[94] and it was abundantly clear that the defendant company in the case held the fuel-oil for consumption

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[89]Id., p. 42.

[90]Id., pp. 42, 43.

[91]See [1933] 3 D.L.R. 364, p. 379.

[92][1927] A.C. 934, [1927] 4 D.L.R. 113 (P.C.) aff'g [1927] 2 D.L.R. 257 (S.C.C.) and [1926] 4 D.L.R. 147, 37 B.C.R. 481 (B.C.C.A.) and [1926] 2 D.L.R. 674, 36 B.C.R. 551 (B.C.S.C.).

[93]Fuel-Oil Tax Act, S.B.C. 1923, c. 71.

[94][1927] 2 D.L.R. 257, p. 260.

in its own operations,[95] it was held that the tax was an indirect tax because there was a possibility that the circumstances of the fuel-oil business in the Province could change in such a way as to make the resale of fuel-oil more common.[96] As was explicitly acknowledged by both the Judicial Committee[97] and the Supreme Court of Canada,[98] this was an application of Mill's test for indirect taxation. Thus the decisions in the Kingcome Navigation Co. Ltd.[99] and the C.P.R.[100] cases are consistent with one another in so far as there was no possibility of the tax being passed on in the Kingcome Navigation Co. Ltd. case. In other words, both cases relied on Mill's test.

With respect to whether the legislation in the Kingcome Navigation Co. Ltd. case involved the regulation of trade and commerce, it was stated by the Judicial Committee[101] that there was nothing to indicate this other than extrinsic circumstances.

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[95] Id., p.257.

[96] Id. (S.C.C., per Anglin, C.J.C.), p. 260; [1927] 4 D.L.R. 113 (P.C., per Viscount Haldane), p. 116.

[97] [1927] 4 D.L.R. 113, p. 115.

[98] [1927] 2 D.L.R. 257, p. 260.

[99] Supra, n. 79.

[100] Supra, n. 92.

[101] [1934] 1 D.L.R. 31, p.42.

The extrinsic circumstances of the case indicated that the consumption and use of fuel-oil in the Province was in competition with that of coal,[102] which was produced in large commercial quantities in the Province whereas the crude oil from which the fuel-oil was produced was imported into the Province free of duty and Dominion excise taxes.[103] On the basis of these circumstances, it was submitted on behalf of the defendant company[104] that the primary purpose of the provincial tax on fuel-oil was to protect the coal industry and that such a purpose was in conflict with Dominion commercial policy in both domestic and foreign affairs. After considering the above mentioned submissions, the British Columbia Court of Appeal concluded that if it were permissible to apply similar imposts:[105]

> to all commodities manufactured in the Province where the raw material is imported from abroad it would impair the free exercise of the right of the Dominion Parliament to regulate trade and commerce and to pursue consistent commercial policies.

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[102] Id.

[103] [1933] 3 D.L.R. 364, p. 379.

[104] Id., pp. 379, 381.

[105] Id., p. 381.

The Judicial Committee, on the other hand, dismissed this conclusion with the following passage from Bank of Toronto v. Lambe:[106]

> If they find that on the due construction of the Act a legislative power falls within sect. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limits the range which otherwise would be open to the Dominion Parliament.

The holdings in the Kingcome Navigation Co. Ltd. case that a tax on the consumption of a commodity is a direct tax and that the test to be used in determining whether a tax is direct or indirect is Mill's test was confirmed in the case of Atlantic Smoke Shops, Limited v. Conlon.[107] Furthermore, the tax on tobacco consumption that was involved in this case,[108] which applied to both retail purchasers of tobacco and to persons receiving delivery of tobacco into the Province for the purpose

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[106]Supra, n. 50, p. 587, as quoted by Viscount Haldane at [1934] 1 D.L.R. 31, pp. 42, 43.

[107][1943] A.C. 550, 4 D.L.R. 81 (P.C.), aff'g with a var'n [1941] S.C.R. 670, 4 D.L.R. 129 (S.C.C.), which aff'd with a var'n 15 M.P.R. 278, [1941] 1 D.L.R. 416 (sub nom., Atlantic Smoke Shops Ltd. v. Attorney-General for New Brunswick).

[108]The Tobacco Tax Act, 1940 (N.B.), c. 44, sec. 4, which imposed a tax on the consumption of tobacco of 10% of the retail price of the tobacco purchased.

of consumption as opposed to resale,[109] was held not to constitute a duty of customs[110] or to offend against the restrictions contained in section 121 of the Constitution Act, 1867.[111,112]

The expansion of the scope of provincial taxing power that was brought about by such cases as Kingcome Navigation Co. Ltd. and Atlantic Smoke Shops Limited[113] did more than assist the Provinces in meeting their growing revenue requirements.[114] It is

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[109] Id., secs. 4, 5.

[110] [1943] A.C. 550, p. 569.

[111] 30 & 31 Vict., c. 3 (U.K.). Section 121 thereof provides as follows:

> 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.

In Gold Seal Limited v. Dominion Express Company and Attorney-General for Alberta, (1921), 62 S.C.R. 424, 62 D.L.R. 62 (S.C.C.), the majority of the Supreme Court of Canada (Duff, J., Anglin, J. and Mignault, J.) held that the interpretation to be given to section 121 is that it, "prohibit[s] the establishment of customs duties affecting inter-provincial trade in the products of any Province of the Union": 62 S.C.R. 424, p. 456, 62 D.L.R. 62, p. 79 (per Duff, J.).

[112] [1943] A.C. 550, pp. 569, 570.

[113] See also Bank of Toronto v. Lambe, supra, n. 50; Brewers & Malsters Association v. Attorney-General for Ontario, [1897] A.C. 231 (P.C.); Attorney-General for British Columbia v. Esquimault and Nanaimo Railway Company, supra, n. 47.

[114] For further discussion of how the judiciary has assisted the Provinces in meeting their revenue requirements by liberally interpreting the scope of provincial taxing power, see Magnet, supra, n. 13, pp. 498-500

respectfully submitted that the said expansion of provincial taxing power incidentally contributed to an expansion of the scope of provincial regulatory power.[115] Prior to these expansions of legislative power, provincial taxes in respect of commodities had simply been invalidated on the ground that these taxes were indirect. An expanded provincial taxing power brought the regulatory aspects of these taxes into sharper focus. For example, sometimes the only dividing line between validity and invalidity of an impugned provincial levy is whether the levy constitutes an infringement upon federal regulatory power. With the said increase of provincial taxing power it became more difficult for the courts to dismiss such regulatory issues by holding legislation authorizing a levy invalid on the ground that it constitutes indirect taxation. As a result, provincial regulatory power was increased in those cases in which the regulatory aspects of the impugned legislation were insufficient to support a finding of invalidity. In other cases in which the regulatory aspects of the impugned legislation were more pronounced, as was the case in Canadian Industrial Gas and Oil Limited v. Government of Saskatchewan,[116] the legislation was

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[115]See text accompanying footnote 106.

[116]Supra, n. 47.

often held to be invalid on the ground that it infringed upon federal regulatory power.

2. The Resource Amendment

In language similar to that used in section 91(3), subsection 92A(4), part of the so-called "resource amendment", augments the provincial taxing power by granting to the provinces the power to impose indirect taxes as well as direct taxes in respect of natural resources. The power is limited by the prohibition that a province may not impose taxes that differentiate between different regions of Canada. Subsection 92A(4) provides as follows:[117]

> 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.

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[117] Supra, n. 11.

This provision allows the provinces to raise "money by any mode or system of taxation" in relation to both "non-renewable natural resources" in situ and the "primary production" therefrom. Thus the provinces are allowed for the first time to impose indirect taxes on freehold resources in the province. They are no longer restricted to extracting royalties from Crown-owned resources and to imposing direct taxes on freehold resources. Furthermore, this new taxing power extends to the "primary production" from "non-renewable natural resources", which pursuant to subsection 92A(5) includes any product derived from the refining or processing of a "non-renewable natural resource", but not including a manufactured product and products derived from the refining of crude oil and certain of its equivalents.[118]

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[118]Pursuant to subsection 92A(5) the expression "primary production" has the meaning assigned by the Sixth Schedule to the Constitution, which is section 51 of the Constitution Act, 1982, supra, n. 11. The Sixth Schedule provides as follows:

> 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, or
> (ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil.

The new taxing power granted to the provinces by the "resource amendment" is not without its limitations. For example, the federal power to impose both direct and indirect taxes on natural resources is in no way limited by the "resource amendment" while, as previously mentioned, the new provincial taxing power is limited by the prohibition that a province may not impose taxes that differentiate between different regions of Canada.[119] In addition, the case law distinguishing between taxation and regulation acts as a constraint on provincial levies involving a measure of regulation of a matter not within provincial competence.[120]

The new provincial taxing power conferred by subsection 92A(4) does not include the power to levy export taxes on production exported to another part of Canada. Even though indirect taxation is authorized "whether or not such production is exported in whole or in part from the province", the following proviso stipulates that "taxation that differentiates between production exported to another part of Canada and production not exported from the province" is not authorized. Thus production

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[119]See text accompanying footnote 121.

[120]On the other hand, the increase in provincial regulatory power given by the "resource amendment" lessens the impact of this constraint. See infra, pp. 40, 44.

exported to another part of Canada may only be taxed uniformly with production not exported from the province . Export taxes and taxes which differentiate between the two kinds of production are not permissible.

It has been suggested that the same would hold true with respect to production exported to another country.[121] The anti-discrimination proviso in subsection 92A(4) only specifies production exported to another part of Canada and production not exported from the province. It does not explicitly mention production exported from the province and to another country. This raises the possibility that differential tax treatment of production exported from Canada is possible under subsection 92A(4).[122] On the other hand, any tax aimed at singling out

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[121]See W.D. Moull, "Section 92A of the Constitution Act, 1867" (1983), 61 Can. Bar. Rev. 715, p. 719. Professor Moull points out at pp. 719, 720, 723, 724 some of the problems involved in distinguishing between exports destined for another part of Canada from exports destined for another country.

[122]For further discussion, see id., p.719; 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(eds.), Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources (The Institute for Research on Public Policy, Montreal, 1985), pp. 44, 45; Hogg, supra, n. 7, p. 612. It should also be noted that differential tax treatment of production exported from Canada is not permissible under Article 408 of the Canada - U.S. Free Trade Agreement, which provides as follows:

> Neither Party shall maintain or introduce any tax, duty, or charge on the export of any good to the territory of the other Party; unless such tax, duty, or charge is also maintained or introduced on such good when

(continued...)

exports of a resource from Canada for special treatment could be characterized as being in relation to the regulation of exports rather than the raising of revenue and, therefore, would be ultra vires the provincial legislature. Furthermore, subsection 92A(2) would be of no assistance to the province in this regard because, as will be discussed,[123] it only confers concurrent jurisdiction with respect to exports from the province of non-renewable resources to another part of Canada.

Besides dealing with taxing power, the "resource amendment" by virtue of subsections 92A(1) and 92A(2) grants to the provinces an increase in regulatory power with respect to their natural resources. Subsection 92A(1) gives to the provincial legislatures the exclusive power to make laws in relation to the exploration, development, conservation and management of resources in the province.[124] It is not necessary to discuss this pro-

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[122](...continued)
destined for home consumption.

See also Article 903, which prohibits export taxes on energy goods. Department of External Affairs, The Canada - U.S. Free Trade Agreement, Copy 21/02/88 (1988).

[123]See text accompanying footnote 127.

[124]It specifies non-renewable natural resources, forestry resources and sites and facilities for the generation and production of electrical energy. Subsection 92A(1) provides as follows:

(continued...)

vision any further for the purposes of this thesis other than to say that it aims at conferring on the provinces a control over their freehold resources analogous to their proprietary control over Crown-owned resources.[125] Instead, we will be more concerned with subsection 92A(2), which gives to provincial legislatures the power to make laws in relation to exports of natural resources from the province to another part of Canada. Subsection 92A(2) 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

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[124](...continued)

> (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.

[125]Proprietary power with respect to Crown-owned resources is conferred on the provinces by virtue of sections 109, 117 and 92(5) of the Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.). For further discussion of the provincial proprietary power see W.D. Moull, "Natural Resources: Provincial Proprietary Rights, the Supreme Court of Canada and the Resource Amendment to the Constitution" (1983), 21 Alta L. Rev. 472; B.W. Semkow, "Energy and the New Constitution" (1985), 12 Alberta L. Rev. 99; R. Harrison, "The Legal Character of Petroleum Licenses" (1980), 58 Can. Bar Rev. 483; D.E. Thring, "Alberta , Oil and The Constitution" (1979), 27 Alberta L. Rev. 69; and Bushnell, "Constitutional Law - Proprietary Rights and Control of Natural Resources" (1980), 58 Can. Bar Rev. 157.

> 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.

Thus, pursuant to subsection 92A(2), provincial legislation relating to the export of non-renewable natural resources to another part of Canada is valid as long as it does not discriminate in prices or in supplies.

It should be mentioned that the power conferred by subsection 92A(2) on the provinces over the regulation of exports of natural resources from the province in no way limits the legislative jurisdiction of the federal Parliament over the regulation of trade and commerce. This is because the power conferred by subsection 92A(2) is not an exclusive power, which means that it is concurrent with the federal power to regulate trade and commerce, and it is expressly stipulated by subsection 92A(3) that subsection 92A(2) is subject to federal paramountcy to the extent that a provincial law conflicts with a federal law.[126]

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[126]It is interesting to note that the "best efforts" draft proposal on natural resources, which was discussed at the federal-provincial conference on the Constitution held in Ottawa on February 5th and 6th, 1979, and upon which the "resource amendment" was based, gave paramountcy to the provinces with respect to laws regulating the export of natural resources from (continued...)

Furthermore, since subsection 92A(2) does not apply to exports to another country,[127] the exclusive legislative power of the federal Parliament over the regulation of exports from the country is preserved.

A possible limitation with respect to the non-discrimination proviso in subsection 92A(2) is that, unlike the situation with respect to the non-differentiation proviso in subsection 92A(4), there is some uncertainty as to whether it prohibits discrimination as between the producing province and the rest of Canada as well as between various destinations in Canada. The language in the proviso is consistent with both interpretations. It has been pointed out, however, that legislation discriminating in prices or in supplies as between a producing province and the rest of Canada is likely to be interpreted as discriminating "in prices or in supplies exported to another part of Canada".[128]

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[126](...continued)
the province, subject only to the exceptions of laws in relation to a compelling national interest and laws in relation to the regulation of international trade and commerce. The "best efforts" draft proposal is set out in R. Harrison, "Natural Resources and the Constitution: Some Recent Developments and Their Implications for the Future Regulation of the Resource Industries" (1980), 18 Alta. L. Rev. 1, Appendix A, pp. 22-24. See also Moull, supra, n. 121, p. 723.

[127]Provincial regulatory authority did extend to exports of natural resources to another country pursuant to the "best efforts" draft proposal. Harrison, id., pp. 7-10, 22-24.

[128]Moull, supra, n. 121, pp. 724, 725.

In contrast to the increase in the scope of provincial regulatory power that was incidentally caused by the judicial increase of the scope of provincial power to raise taxes,[129] the increase of regulatory power brought about by the "resource amendment" is made explicitly and there is, therefore, more certainty in assessing the validity of provincial legislation involving elements of both taxation and regulation. This greater certainty is illustrated by the case of Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan,[130] (hereinafter referred to as CIGOL), which is discussed next.

It is practically certain that the CIGOL case would be decided differently today under the "resource amendment".[131] Considering only the first ground of the decision, the "resource amendment" gives the power to the provinces to levy indirect taxes in respect of non-renewable resources and the primary production therefrom. It does not matter whether such production is exported in whole or in part from the province. Furthermore, the impugned legislation in the CIGOL case is in conformity with the non-differentiation clause in subsection 92A(4), since the

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[129]See text accompanying footnotes 114 and 115.

[130]Supra, n. 47.

[131]See Moull, supra, n. 121, pp. 728-730; Semkow, supra, n. 125, p.127.

taxation did not differentiate between exports from the province and production not exported from the province and most of the exports were to another part of Canada.

With respect to the second ground of the CIGOL decision, provincial legislation relating to the export of natural resources from the province is specifically addressed by subsection 92A(2), which we have already seen authorizes such legislation as long as it does not discriminate in prices or in supplies exported to another part of Canada. Since the impugned legislation in the CIGOL case was non-discriminatory and to the extent that it related to oil and gas production destined for another province, it would be valid if it were enacted today.

The increase in provincial regulatory power caused by the "resource amendment" is less significant than the increase in provincial taxing power in so far as the provinces are not given regulatory power over international trade and commerce. This difference in the treatment of the two powers accorded by the "resource amendment" is highlighted by the unanimous decision of the Supreme Court of Canada in the case of Central Canada Potash Co. Ltd. v. Government of Saskatchewan,[132] in which provincial

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[132][1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609 (S.C.C.), rev'g (1977), 79 D.L.R. (3d) 203, [1977] 1 W.W.R. 487 (Sask. C.A.), (continued...)

legislation and regulations[133] authorizing a prorationing scheme with respect to the potash industry in the province was invalidated on the ground that the pith and substance of the legislation and regulations dealt with the creation of a marketing scheme that aimed at the fixing of the price of potash in the export market.[134] As was the case in CIGOL, Central Canada Potash was concerned with the export of natural resources from the province. Unlike the disposition of the CIGOL case, however, it is unlikely that the "resource amendment" would have changed the disposition of the Central Canada Potash case because the exports that were involved in that case were mostly destined for the United States as opposed to another part of Canada and the legislation that regulated these exports could not be characterized as taxing legislation. If, instead, the legislation had authorized a tax on potash being exported to the United States for the purpose of raising provincial revenue, it is possible that the effect of the "resource amendment" on the legislation

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[132](...continued)
which rev'd (1975), 57 D.L.R. (3d) 7, [1975] 5 W.W.R. 193 (Sask. Q.B.).

[133]Potash Conservation Regulations, 1969, Sask. Reg. 287/69, as amended, adopted pursuant to the Mineral Resources Act, R.S.S. 1965, c. 50, as amended.

[134][1979] 1 S.C.R. 42, p. 75, 88 D.L.R. (3d) 609, p. 631 (per Laskin, C.J.C.). For further discussion of this case, see Moull, supra, n. 121.

would be different. This is because subsection 92A(4) does not prohibit taxing legislation that differentiates between production exported from the country and production not exported from the province. Furthermore, there is no objection under section 92A(4) to a uniform tax on both kinds of production.

It may be concluded that the "resource amendment" expands to a great extent the scope of provincial taxing power by giving to the provinces the power to impose indirect taxes in respect of certain natural resources. This taxing power, however, may not be used to regulate the trade and commerce of a resource when that resource is exported from Canada or to differentiate between production exported to another part of Canada and production not exported from the province. Indeed, subsection 92A(2) only authorizes laws in relation to exports of natural resources from the province to another part of Canada that do not discriminate in prices or in supplies exported to another part of Canada. Thus, the increase in the scope of provincial regulatory power accompanying the "resource amendment" is clearly defined.

It is respectfully submitted that the "resource amendment" puts to rest much of the uncertainty that once existed in distinguishing between what constitutes the taxation of natural resources as opposed to their regulation and that it is a

valuable precedent for any constitutional amendment aimed at expanding provincial taxing power in fields other than natural resources.[135] This is because the "resource amendment" makes explicit the increase in regulatory power that is necessary to support an increase in taxing power. Nonetheless, there is still the problem of distinguishing between taxing legislation and regulatory legislation that is left unresolved by the "resource amendment". As one commentator pointed out while describing this problem with the "resource amendment":[136]

> The chief problem with it may be in the proper characterization of "taxation" legislation that purports to fall within its scope. Thus, the courts may well be faced with the unenviable task of trying to determine whether what appears on its face to be taxation legislation in fact has some other primary motivation that requires it to be characterized as something else. This is not always an easy line to draw.

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[135]See Magnet, supra, n. 13, pp. 496, 497, wherein the idea of a constitutional amendment to authorize a provincial indirect sales tax at the retail level is criticized. Professor Magnet is more in favour of basing the constitutional inquiry as to the validity of a tax on the "measure of tax" as opposed to the jurisdictional competence to tax. See id., pp. 504, 505.

[136]Moull, supra, n. 121, p. 720.

The remainder of this thesis is concerned with distinguishing the constitutional substance of legislation in relation to taxation from that of legislation in relation to regulation.

II. THE PROVINCIAL MARKETING BOARD CASES

Provincial Legislatures are only authorized pursuant to section 92(2) to levy direct taxes. One of the early issues which arose in connection with the provincial taxing power, therefore, was whether provincial levies which could not be upheld as taxes because their incidence was indirect could nonetheless be upheld as exercises of provincial regulatory power. At one time this was always a possibility on the ground that the levies were fees for services rendered.[137] Moreover, if the incidence of a levy was direct,the courts simply upheld it as a tax.[138] No further inquiry was made as to whether the pith and substance of the legislation authorizing the levy related to a provincial regulatory matter. No further inquiry was necessary because for the purpose of characterizing these levies, the provincial taxing power and the provincial regulatory powers were

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[137]For example, see Dow v. Black (1875), L.R. 6 P.C. 272; Attorney-General for Quebec v. Reed (1884), 10 A.C. 141 (P.C.). See also La Forest, supra, n.13, p. 60.

[138]For example, in Workmen's Compensation Board v. C.P.R., [1920] A.C. 184, 48 D.L.R. 218, the Privy Council upheld employers' contributions to a workmen's compensation fund as direct taxation without consideration as to whether the contributions were sustainable as an exercise of provincial regulatory authority. See also Workmen's Compensation Board v. Bathurst Co., [1923] 4 D.L.R. 84, 50 N.B.R. 246 (N.B.C.A.); Royal Bank of Canada v. Workmen's Compensation Board of N.S., [1936] S.C.R. 560, [1936], 4 D.L.R. 9 (S.C.C.).

viewed by the courts as overlapping with one another.[139] Later on, when taxation and regulation came to be regarded as mutually exclusive categories, it became more difficult for the courts to characterize legislation authorizing a levy as being in relation to both taxation and regulation.[140] It was in this context that the provincial marketing board cases arose.[141]

This Part of the thesis describes a line of cases[142] on provincial marketing board legislation in which the courts had to come to grips with the difference between taxation and regulation for constitutional purposes. In the earliest cases[143] the courts struck down provincial legislation authorizing the imposition of levies for the purpose of defraying the expenses of administering a marketing scheme and for the purpose of equalizing the returns among producers subject to a scheme on the ground that the levies

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[139]See supra, n. 137.

[140]La Forest, supra, n. 13, p. 60.

[141]For example, see infra, n. 142.

[142]See infra, notes 143, 144, 145.

[143]See Lawson v. Interior Tree, Fruit and Vegetable Committee, [1931] S.C.R. 357, [1931] 1 D.L.R. 193 (S.C.C.), rev'g [1930] 4 D.L.R. 1027, [1930] 2 W.W.R. 23 (B.C.S.C.T.D); Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd., [1933] A.C. 168, [1933] 1 D.L.R. 82 (P.C.), aff'g [1932] 2 D.L.R. 277 (B.C.C.A), aff'g 44 B.C.R. 508 (B.C.S.C.T.D.); Lower Mainland Dairy Products Board v. Turner's Dairy Ltd., [1941] S.C.R. 573, [1941] 4 D.L.R. 209 (S.C.C.), aff'g [1941] 2 D.L.R. 279, [1941] 3 W.W.R. 342 (B.C.C.A.).

were indirect taxation. It is respectfully submitted that this legislation should have been upheld as being within provincial regulatory authority. Indeed, the judicial concept of what constitutes valid regulation as opposed to invalid taxation underwent an evolution as the holdings in the earliest provincial marketing board cases were attenuated[144] and finally overruled.[145]

A. The Earliest Cases

A very broad definition of a tax was relied upon by the Supreme Court of Canada in Lawson v. Interior Tree, Fruit & Vegetable Committee[146] to invalidate provincial legislation authorizing levies for defraying the expenses of a provincial marketing scheme. According to this definition, a tax is a levy which is: 1) enforceable by law; 2) imposed under the authority of legislation; 3) imposed by a public body; 4) for a public

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[144]See Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708, [1938] 4 D.L.R. 81 (P.C.), aff'g (1937) 52 B.C.R. 179 (B.C.C.A); Reference re the Ontario Farm Products Marketing Act, [1957] S.C.R. 198 7 D.L.R. (2d) 257 (S.C.C.); Crawford and Hillside Farm Dairy Ltd. v. Attorney-General for British Columbia [1960] S.C.R. 346, 11 D.L.R. (2d) 321 (S.C.C.), aff'g (1959), 17 D.L.R. (2d) 637 (B.C.C.A.).

[145]Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, (1978), 84 D.L.R. (3d) 257 (S.C.C.), rev'g in part (1977), 78 D.L.R. (3d) 477, 16 O.R. (2d) 451 (Ont. C.A.).

[146]Supra, n. 143.

purpose.[147] This definition is too broad, for constitutional purposes at least, because it does not pay proper heed to the terminology used in section 92(2) that provincial taxes are authorized "in order to the raising of a Revenue for Provincial Purposes". Thus levies enacted for virtually any purpose would be within the definition of a tax given in the Lawson Case[148] and not just levies designed to raise revenue for provincial purposes.

One of the two grounds of decision for invalidating the expense levies in the Lawson Case was that they were not authorized by either one of sections 92(2), "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes", and 92(9), "Shop, Saloon, Tavern, Auctioneer, and other licenses in order to the raising of a Revenue for Provincial, Local or Municipal Purposes".[149] In delivering the opinion of the Supreme Court of Canada, Duff J. held that the levies were

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[147][1931] 2 D.L.R. 193, at p. 197 (per Duff J.). See also Magnet, supra, n. 13, p. 515.

[148]This definition is helpful in distinguishing a tax from certain kinds of payment such as a Crown royalty, but it does not go very far in distinguishing a tax from compulsory levies such as charges under a regulatory scheme or fees for services rendered. For an example of where a tax was distinguished from a Crown royalty, see Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan, supra, n. 47.

[149][1931] 2 D.L.R. 193, at p. 198.

not sustainable under section 92(2) because they were indirect taxes.[150] What is curious in this holding is that no mention is made that for the purpose of coming within section 92(2) a tax must be enacted "in order to the raising of a Revenue".[151] In other words, Duff J. didn't deal with the issue of the validity of a tax having a regulatory purpose. That Duff J. was aware that the expense levies were not enacted primarily to raise revenue is indicated in his reason for rejecting the contention that they fell within section 92(9), namely, that this class of subjects does not authorize the imposition of levies the primary purpose of which is the "control of trade-even local or provincial trade".[152] As he stated in commenting upon the purpose for imposing the levies:[153]

> The imposition of these levies is merely ancillary, having for its object the creation

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[150] Id.

[151] The trial judge, Murphy J., held that the levies were not taxes because the pith and substance of the legislation authorizing them was "not to raise revenue to be used for public or governmental purposes but for services rendered to the parties by whom it is paid". This holding was ignored by Duff J. in the Supreme Court of Canada. Murphy J. went on to point out that: "No evidence was given that any part of said levy reached or could reach directly or indirectly the public coffers". See [1930] 4 D.L.R. 1027, at p. 1027, [1930] 2 W.W.R. 23, at p. 24 (B.C.S.C.T.D.).

[152] Supra, n. 147.

[153] Id.

> of a fund to defray the expenses of working the machinery of the substantive scheme for the regulation of trade.

Thus he was under no illusion as to the true substance of the levies, but he chose form over substance by relying on an overly broad definition of a tax in order to strike down the levies as indirect taxes.

After holding that the part of the legislation in question that authorized the levies was not sustainable under either of sections 92(2) and 92(9), Duff J. went on to hold that the rest of the legislation was invalid on the ground that its pith and substance, which included the regulation of interprovincial as well as intra-provincial marketing of certain natural products, fell within section 91(2), the federal regulation of trade and commerce.[154] Since it was Duff J.'s view that the part of the legislation authorizing the levies was ancillary to the rest of the legislation, his other ground for invalidating the levies was that they were enacted pursuant to ancillary legislation coming within section 91(2). As to whether the levies would have been

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[154]Duff J., in commenting upon this legislation, stated as follows: "It is sufficient, for our present purpose, that in its characteristic and ruling provisions..., it aims at control of trade in matters of inter-provincial concern, in such a degree as to exclude it from the category of legislation in respect of matters local in the provincial sense". See id., at p. 205.

upheld as ancillary legislation had the provincial marketing scheme been upheld as coming within one of the classes of subject within section 92, namely, "Property and Civil Rights in the Province",[155] was left to be decided on a later day.

Duff J.'s characterization of the expense levies in the Lawson Case as taxes was relied on heavily by all three courts involved in Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.[156] in deciding that legislation[157] authorizing both expense levies and adjustment or equalization levies with respect to a provincial marketing scheme for dairy products was ultra vires the Provincial Legislature. Since there was no judicial finding that the marketing scheme with which the Crystal Dairy Case was concerned interfered with the federal power to regulate trade and commerce, the only ground upon which the decision was based was that the expense levies and the adjustment levies were both indirect taxes. No consideration was given to the possibility that the levies were merely ancillary to

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[155]Constitution Act, 1867, 30 & 31 Vic., c. 3 (U.K.), sec. 92(13).

[156]Supra, n. 143.

[157]Dairy Products Sales Adjustment Act, 1929 (B.C.), c. 20.

a valid regulatory scheme, even though the trial judge characterized the legislation as follows:[158]

> The true pith and substance of the legislation is, in my opinion, to prevent the operation of this economic law [the law of supply and demand] by eliminating competition, thus lessening supply and thereby creating a monopoly market to keep up price for the benefit not of a particular body of dairy farmers who supply the manufactured products market, for apart from the Act no such body existed, but for the benefit of all dairy farmers in any given area where the Act was brought into force.

The substantive provision of the marketing scheme involved in the Crystal Dairy Case was the adjustment levy, which was aimed at equalizing the returns of dairy farmers selling into the fluid milk market with those of dairy farmers selling into the less lucrative manufactured milk products' market. The markets were different from one another in that fluid milk was sold into a regional market, Greater Vancouver, whereas the manufactured milk products were sold into the world market. Since the price for milk products was depressed in the world market, farmers

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[158](1931), 44 B.C.R. 508, at p. 512. The trial judge who made this statement, Murphy J., also presided in the Lawson Case, supra, n. 143. Here, however, he was obliged to abide by the definition of a tax given in that case, thereby holding the expense levies and the adjustment levies to be taxes, (1931), 44 B.C.R. 508, at p. 509.

attempted to sell all of their milk in the Greater Vancouver fluid milk market, with the result that this market was destabilized by downward pressure on the price of milk. The adjustment levy counter-acted the downward pressure by collecting from farmers selling in the fluid milk market the excess in the price of milk sold in this market over the price of milk sold in the manufactured milk products market. The receipts from the levy were then distributed on a pro rata basis among dairy farmers producing milk for the two different markets in order to equalize their returns.

Lord Thankerton, in delivering the judgment on behalf of the Privy Council, described the substantive effect of the legislation as follows:[159]

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[159][1933] 1 D.L.R. 82, at p. 84. He then went on to characterize the legislation as being in relation to taxation, at p. 85, and invalidated it for levying indirect taxes, at p. 87. One of the cases relied upon by Lord Thankerton in characterizing the marketing levies as taxation, at p. 87, was Workmen's Compensation Bd. v. C.P.R., supra, n. 138. The employer's contributions in that case were upheld as direct taxation within the province. However, Professor Laskin, as he then was, supra, n. 9, at p. 7, would have characterized the legislation in that case as a "scheme of social insurance in which any revenue aspect for a province is purely a bookkeeping or accounting matter". Since the adjustment levies in the Crystal Dairy Case differed from the employers' contributions in Workmen's Compensation Bd. v. C.P.R. in that they did not find their way into provincial coffers and their disbursement did not involve an element of discretion, this was all the more reason for characterizing the adjustment levies as regulatory in nature.

> the substantive provision of the Act of 1929 is to transfer compulsorily a portion of the returns obtained by the traders in the fluid milk market to the traders in the manufactured products market.

This description of the legislation differs from the trial judge's finding that the legislation existed for the benefit of all dairy farmers, and not for the benefit of any particular group of them.[160] The difference, however, should not be a material one for the purpose of characterizing legislation as being in relation to either taxation or regulation.[161] This is because the transferral of benefits from one group to another is an obvious means of regulatory control. It encourages one group's activities at the expense of those of the other group's. That this is regulation and not taxation was recognized by the United States Supreme Court in United States v. Butler.[162] Mr. Justice Butler,

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[160]See text accompanying footnote 158.

[161]It will be recalled that the trial judge only reluctantly characterized the legislation as being in relation to taxation, supra, n. 158, because of the definition of tax given by Duff J. in the Lawson Case, supra, n. 147.

[162](1935) 297 U.S. 1. In this case the agricultural adjustment levies imposed by the federal government were held to be invalid on the grounds that they were regulation and not taxation. See also Laskin, supra, n. 9, at pp. 23, 24.

in delivering the judgment for the Court's majority, stated this as follows:[163]

> It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated as excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand.

Following the decisions in the Lawson and Crystal Dairy cases, an attempt was made to bring order and stability to the markets for natural products in the Province of British Columbia with the enactment of the Natural Products Marketing (British Columbia) Act.[164] This statute provided for the establishment of

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[163](1935) 297 U.S. 1, at p. 61.

[164]R.S.B.C. 1936, c. 165.

provincial marketing schemes for natural products to be administered by provincial marketing boards and authorized the boards to fix and collect licence fees "to use in carrying out the purposes of the scheme and paying the expenses of the board".[165] In upholding the validity of these licensing fees in Shannon v. Lower Mainland Dairy Products Board,[166] the Privy Council, in effect, overturned Duff J.'s holding in the Lawson Case that section 92(9) does not authorize the levying of licence fees for a regulatory purpose. In delivering the judgment on behalf of the Privy Council, Lord Atkin stated as follows:[167]

> 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

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[165] Id., sec. 5. As originally enacted, the powers of the provincial marketing boards were to be exercised in cooperation and conjointly with those of a Dominion Marketing Board, which was established under the Natural Products Marketing Act, 1934 (Can.), c. 57. This aspect of the provincial legislation was subsequently amended when the Dominion legislation was declared ultra vires on the ground that its pith and substance was an encroachment upon the rights of the Province in Attorney-General for British Columbia v. Attorney-General for Canada [1937] A.C. 377, [1937] 1 D.L.R. 691 (P.C.), aff'g [1936] S.C.R. 398, [1936] 3 D.L.R. 622 (S.C.C.). See Shannon v. Lower Mainland Dairy Products Bd. [1938] A.C. 708, at p. 717.

[166] Supra, n. 144.

[167] [1938] A.C. 708, at p. 721.

> 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... 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.

Furthermore, the Privy Council also upheld the licence fees on the ground that they were fees for services rendered by the Province.[168] Thus they were ancillary to legislation in relation to "property and civil rights in the Province", pursuant to section 92(13), and "matters of a merely local or private nature in the Province", pursuant to section 92(16).

The holdings in the Lawson and Crystal Dairy cases regarding expense levies were further rejected in several judgments of the Supreme Court of Canada holding that the imposition of these levies is a valid means of paying for the costs of administering a regulatory scheme.[169] What the Shannon Case and the later cases

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[168] Id.

[169] For example, see Tolton Mfg. Co. Ltd. v. The Advisory Committee (sub. nom., Ontario Boys' Wear Ltd. v. The Advisory Committee), [1944] 4 D.L.R. 273, [1944] S.C.R. 349 (S.C.C.); P.E.I. Potato Marketing Board v. H.B. Willis Inc., [1952] 4 D.L.R. 146, [1952] 2 S.C.R. 392 (S.C.C.); Reference re Farm Products Marketing Act (1957), 7 D.L.R. (2d) 257, [1957] S.C.R. 198 (S.C.C.). See also Magnet, supra, n. 13, p. 515.

did not change, however, was the holding in the Crystal Dairy Case that an adjustment levy to equalize returns among producers constitutes indirect taxation. This holding was confirmed in Lower Mainland Dairy Products Bd. v. Turner's Dairy Ltd.,[170] a case involving a marketing scheme for dairy products that was implemented pursuant to the same legislation which was upheld in the Shannon Case.[171] Even though the marketing scheme in the Turner's Case relied on price fixing by a central purchasing agency rather than the imposition of adjustment levies in order to equalize returns among producers, it was still held that this was a colourable attempt to do what had been forbidden in the Crystal Dairy Case, namely, impose indirect taxes on producers selling into the fluid milk market.[172] Thus it seemed, for the time being at least, that any attempt to equalize returns among the producers of a regulated product would constitute indirect taxation.

What indicated colourability to the judges in Turner's Case was that the effect of the marketing scheme in equalizing returns among producers was substantially the same as the effect of the

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[170] Supra, n. 143.

[171] Supra, n. 144.

[172] [1941] 4 D.L.R. 215 (S.C.C.), at pp. 215, 216.

legislation held to be ultra vires in the Crystal Dairy Case.[173] Since there was nothing objectionable on the face of the marketing orders implementing the scheme, being authorized by the same legislation upheld in the Shannon Case,[174] extrinsic materials were relied upon[175] in order to show that the motives of the members of the marketing board who issued the orders were improper in so far as the orders were issued with the intention of circumventing the result of invalidity in the Crystal Dairy Case by changing the form and not the effect of the scheme in that case. As was pointed out in a powerful dissent by Macdonald C.J.B.C., in the British Columbia Court of Appeal, however, there is no constitutional impropriety in seeking to avoid conflict with previous case law.[176] Any impropriety, as was suggested by Macdonald C.J.B.C.,[177] was on the part of the trial Court for

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[173] Id., at p. 215.

[174] Natural Products Marketing (British Columbia) Act, R.S.B.C. 1936, c. 165.

[175] Among the extrinsic materials relied upon was testimony given at trial and discovery evidence of certain members of the marketing board that issued the orders including its chairman. See [1941] 2 D.L.R. 279 (B.C.C.A.), at p. 315.

[176] Id., at p. 289.

[177] Id., at p. 284.

doing indirectly what it could not do directly, namely, frustrate the policy of a properly constituted government board.[178]

The immediate effect of the Crystal Dairy and Turner cases was that a roadblock was created in the way of realizing the policy objective of stabilizing certain markets for natural products by means of provincial trade regulation. The Crystal Dairy Case outrightly prohibited the enactment of provincial marketing legislation that equalized returns among producers by means of adjustment levies on the ground that equalization of returns by such means was indirect taxation. The Turner's Case made it probable that equalization of returns by any other means such as price fixing would be similarly regarded by the courts. These results were made possible by an enlarged view of the scope of the provincial taxing power so as to enable it to include legislative matters other than those in relation to raising revenue for government purposes.

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[178]In describing the early marketing board cases, Professor Laskin, as he then was, was of the same view that the results achieved in these cases may have been based on policy considerations when he stated: "The wooden style of the decisions in which these results were reached, especially by the Judicial Committee, tends to lend credence to the suspicion that unconstitutionality was merely the cover for a disapproval of policy." Supra, n. 9, at p. 3. It is interesting to note that the result of invalidity in the Crystal Dairy Case may very well be the same if the case were decided today in the light of the greater scope given by contemporary courts to the federal power to regulate trade and commerce.

B. The Attenuation and Overruling of the Crystal Dairy Doctrine

The adoption of an enlarged view of the scope of provincial taxing power was not the only means available to the courts to strike down trade legislation. It has been suggested[179], for example, that the courts adopted a larger view of the scope of the federal power over the regulation of trade and commerce for the purpose of striking down provincial legislation rather than for the purpose of upholding federal legislation[180] and that this flexible judicial approach to the interpretation of the scope of the federal power was the principal means relied upon by the courts to strike down trade laws that they disapproved of.[181] Sometimes, however, the scope of provincial authority in relation to trade matters was sufficient to sustain the trade aspects of

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[179]See A. Smith, The Commerce Power in Canada and the United States (Butterworths, Toronto, 1963), pp. 149, 150.

[180]This appears to have been the approach of Chief Justice Duff in interpreting the commerce clause. For cases in which he restrictively interpreted it for the purpose of invalidating federal legislation, see R. v. Eastern Terminal Elevator Co. [1925] S.C.R. 434, [1925] 3 D.L.R. 1 (S.C.C.); Reference re Natural Products Marketing Act [1936] S.C.R. 398, [1936] 3 D.L.R. 622 (S.C.C.); Reference re Section 16 of the Special War Revenue Act, [1942] S.C.R. 429, [1942] 4 D.L.R. 145 (S.C.C). For cases in which he broadly interpreted it for the purpose of invalidating provincial legislation, see Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357, [1931] 2 D.L.R. 193 (S.C.C.); Reference re Alberta Statutes, [1938] S.C.R. 100, [1938] 2 D.L.R. 81 (S.C.C.).

[181]See Smith, supra, n. 179, pp. 1-10.

provincial legislation no matter how great a view of the federal power one took.[182] It, therefore, became necessary to find other grounds for striking down the legislation such as by characterizing it as legislation in relation to indirect taxation.

Aside from any possible judicial disapproval of trade legislation, it became apparent that neither level of government was equipped with sufficient power to legislate effectively in relation to trade matters. It was therefore necessary that cooperative action between the two levels of government be undertaken in order to achieve a joint responsibility for these activities. As Lord Atkin stated in delivering the judgment in Attorney-General for British Columbia v. Attorney-General for Canada:[183]

> Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by cooperation. But the legislation will have to be carefully framed and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

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[182]For example, see Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd., supra, n. 143; Shannon v. Lower Mainland Dairy Products Bd., supra, n.144.

[183][1937] A.C. 377, at p. 389.

Cooperation with respect to the marketing of agricultural products was finally achieved in 1949 when Parliament enacted The Agricultural Products Marketing Act.[184] This carefully framed statute delegated to provincial marketing agencies federal authority in relation to the marketing of certain agricultural products in interprovincial and international trade. The validity of The Agricultural Products Marketing Act was upheld in P.E.I. Potato Marketing Bd. v. H.B. Willis Inc.,[185] a decision that largely resolved the problem of the two levels of government each having insufficient jurisdiction in relation to trade matters to unilaterally enact effective laws regulating agricultural trade.

The problem in relation to trade regulation that still needed to be resolved was the ruling in the Crystal Dairy Case that prevented provincial marketing legislation from equalizing returns among producers. This ruling of the Privy Council had become somewhat of a doctrine as the courts continued to sla-

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[184]1949 S.C., c. 16.

[185][1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146 (S.C.C), rev'g in part, [1952] 2 D.L.R. 726 (P.E.I.S.C.).

vishly apply it.[186] With the abolition of appeals to the Privy Council, however, both the doctrine of stare decisis and the Crystal Dairy doctrine loosened their grips on the Supreme Court of Canada. The Supreme Court of Canada attenuated the Crystal Dairy doctrine in Reference re Farm Products Marketing Act[187] and Crawford and Hillside Farm Dairy Ltd. v. Attorney-General for British Columbia[188] and finally overruled it in Reference re Agricultural Products Marketing Act.[189]

The Crystal Dairy doctrine was just one of the constitutional issues in connection with agricultural marketing legislation that still needed to be resolved after the decision of the Supreme Court of Canada in P.E.I. Potato Marketing Bd. v. H.B. Willis Inc.[190] Another issue was the extent to which provincial regulatory authority over agricultural marketing could be exercised without trenching upon federal authority over the regulation of trade and commerce. Both of these issues came up for

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[186]For example, see Lower Mainland Dairy Products Bd., Turner's Dairy Ltd., supra, n. 143; Reference re Ontario Farm Products Marketing Act, supra, n. 144. See also Magnet, supra, n. 13, pp. 515-520.

[187]Supra, n. 144.

[188]Supra, n. 144.

[189]Supra, n. 145.

[190]Supra, n. 185.

decision in Reference re Farm Products Marketing Act.[191] For the purposes of this thesis, however, it is only necessary to discuss the issue in connection with the Crystal Dairy doctrine.[192]

The provisions of the legislation under consideration in the case which raised an issue in connection with the Crystal Dairy doctrine authorized pooling arrangements of all receipts from the sale of regulated products and impositions of licence fees for the purposes of equalizing returns among producers and of covering the losses in marketing the regulated products.[193] Other provisions authorized licence fees and service charges for the purpose of covering the expenses in administering a marketing scheme,[194] but the Court had little difficulty in upholding these provisions in the light of the rulings in the Shannon Case.[195]

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[191] Supra, n. 144.

[192] The legislation and regulations under consideration in Reference re Farm Products Marketing Act, supra, n. 144, were upheld by the Supreme Court of Canada in a 7/1 decision as being within provincial regulatory authority. Four of the seven judges sustaining the legislation,however, adopted a more liberal approach to the interpretation of the federal commerce clause as covering the regulation of intraprovincial transactions in respect of goods which have entered into the flow of interprovincial or international trade. For further comment, see Smith, supra, n.179 pp. 161-169.

[193] The Farm Products Marketing Act, R.S.O. 1950, c. 131, as amended, para. 3(1)(1).

[194] See [1957] S.C.R. 198, at pp. 198-200.

[195] See text accompanying footnote 166.

Unlike the legislation in the Crystal Dairy Case which distinguished between milk sold into the fluid milk market and milk sold into the manufactured products' market, the legislation in Reference re Farm Products Marketing Act applied to the undifferentiated marketing of regulated products.

The legislation further provided that the proceeds of a pooling arrangement would be distributed in such manner that each producer would receive a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him.[196] In the almost unanimous opinion of the Court, Cartwright J. alone dissenting, this provision was not in conflict with the prohibition against equalization of returns in the Crystal Dairy case. The majority of the Court distinguished the provision from what was provided by the marketing scheme considered in the Crystal Dairy case on the purely constructional ground that the provision was aimed at the more advantageous marketing of regulated products rather than the equalization of returns among producers.[197] As pointed out by Fauteux J., with whom Taschereau and Abbott J. concurred and

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[196] Supra, n. 193.

[197] [1957] S.C.R. 198, at p. 252; 7 D.L.R. (2d) 257, at p. 309.

Locke J., with whom Nolan J. concurred, did not disagree with on this point:[198]

> In its normal operation... the Act, in pith and substance, does not contemplate that one producer or one class of producers should contribute part of his or its returns to another producer or class of producers.

Locke J. further stressed the distinction between compulsory marketing through an exclusive agency and a producer who sells his own product on the market.[199] It was only in the latter case that he raised an objection to compulsory contributions for the purpose of equalizing returns among producers.[200] Rand J., on the other hand, was more explicit in his rejection of the application of the Crystal Dairy doctrine to the impugned provision. In his opinion, there was no constitutional objection to equalization of returns by means of cooperative disposal, regardless of whether or not the provision authorizing cooperative disposal aimed at equalization of returns.[201] Kerwin C.J.C.

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[198] Id.

[199] Id., at p. 238; at p. 295.

[200] Id.

[201] Id., at p. 214; at p. 273.

simply upheld the provision as falling within provincial authority in relation to intraprovincial trade.[202]

On the issue of whether licence fees could be imposed for the purposes of equalizing returns among producers and of covering the losses of an authorized marketing agency in marketing a regulated product, the Court unanimously held that this would be in violation of the Crystal Dairy doctrine. In the final analysis, therefore, the Court was bound by precedent. Nonetheless, by upholding the validity of the provision authorizing compulsory pooling arrangements, the Court confined the application of the Crystal Dairy doctrine with respect to such arrangements to those clearly aimed at an equalization of returns among producers such as an arrangement equalizing returns among producers selling into differentiated markets.

The case of Crawford and Hillside Farm Dairy Ltd. v. Attorney-General for British Columbia[203] attenuated the Crystal Dairy doctrine even further. The price fixing and adjustment scheme for producers and distributors of fluid milk that was upheld in this case was similar to the schemes considered in the

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[202] Id., at p. 206; at p. 265.

[203] Supra, n. 144.

Turner's Dairy and Reference re Farm Products Marketing Act cases.[204] According to the scheme, producers were paid a blended price for their milk by a centralized marketing agency, which also set the price of milk that the distributors had to pay. The distributors were then free to sell their milk at any price. However, the returns of the distributors selling into the manufactured products market were equalized with those of the distributors selling into the fluid milk market with a payment made by the agency from the funds received for its milk to the distributors selling into the manufactured products' market.

In the majority of the opinions delivered in the British Columbia Court of Appeal[205] and in the unanimous opinion of the Supreme Court of Canada,[206] this pooling of the producers' returns and adjustment of the distributors' returns did not involve an element of taxation. Any amounts that producers otherwise would have received for their milk in a free market belonged to the central marketing agency as a matter of contract and were not

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[204]The marketing schemes involved in these cases, however, did not contemplate a pooling or adjustment of returns among both producers and distributors of the regulated product. See text following this footnote.

[205]All five justices who heard the appeal rendered an opinion with only one justice dissenting. See supra, n. 144.

[206]See supra, n. 144.

taxes. Similarly, amounts paid by distributors to the agency were in satisfaction of contractual obligations. They were not taxes.[207] That the transactions between the producers, the distributors and the central marketing agency were not sham transactions arising out of colourable legislation, as the impugned transactions in the Turner's Dairy case were characterized, was suggested by the preamble to the legislation and the Report of the Royal Commissioner[208] recommending the legislation, both of which indicated that the legislation was regulation and not taxation.[209] Thus it was held that a pooling and adjustment of returns between different classes of a regulated product was not taxation.

The Crystal Dairy doctrine was finally overruled in Reference re Agricultural Products Marketing Act.[210] This case involved an amendment to the Agricultural Products Marketing Act[211] which delegated to provincial boards or agencies authority

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[207]See (1960), 22 D.L.R. (2d) 329 (S.C.C.), at p. 329 (per Locke J.).

[208]The inquiry was conducted by the Honourable Mr. Justice Clyne. See id., at p. 322.

[209]Similar materials were not available in the Turner's Dairy case, supra, n. 143.

[210]Supra, n. 145.

[211]Supra, n. 37.

to impose marketing levies in respect of agricultural products marketed either locally within the province or in interprovincial or export trade for such purposes as the equalization of returns among the producers of the products.[212] The purpose of the amendment was to overcome the ruling in Reference re Farm Products Marketing Act[213] that the imposition of licence fees by a Province to cover losses in marketing a regulated product was

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[212]The Agricultural Products Marketing Act, R.S.C. 1970, c. A-7, subsec. 2(2), added by 1957 (Can.), c. 16, sec. 2, provides as follows:

> (2)The Governor in Council may by order grant to any board or agency mentioned in subsection (1) authority
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> (a) in relation to the powers granted to such board or agency under the laws of any province with respect to the marketing of any agricultural product locally within the province, and
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> (b) in relation to the powers that may be granted to such board or agency under this Act with respect to the marketing of any agricultural product in interprovincial and export trade,
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> to fix, impose and collect levies or charges from persons engaged in the production or marketing of the whole or any part of any agricultural product and for such purpose to classify such persons into groups and fix the levies or charges payable by the members of the different groups in different amounts, to use such levies or charges for the purposes of such board or agency, including the creation of reserves, and the payment of expenses and losses resulting from the sale or disposal of any such agricultural product, and the equalization or adjustment among producers of any agricultural product of moneys realized from the sale thereof during such period or periods of time as the board or agency may determine.

[213]Supra, n. 144.

indirect taxation.[214] Those opposing the amendment argued that it was beyond federal competence to legislate in relation to the regulation of intraprovincial trade or, alternatively, if the amendment was legislation in relation to taxation, then it was beyond federal competence to legislate in relation to indirect taxation for provincial purposes.[215] In the unanimous opinion of the Supreme Court of Canada the amendment was not taxing legislation. In characterizing the amendment as legislation in relation to an intraprovincial marketing scheme, Laskin C.J.C., in delivering the minority opinion of the Court, described this view of the legislation as follows:[216]

> This view is at variance with what was said by the Privy Council in the Crystal Dairy case, but that case was itself reduced by later cases and, in my opinion, ought no longer to be regarded as stating the law on the subject of marketing levies.

Pigeon J., who delivered the majority opinion of the Court, concurred with Laskin's C.J.C. conclusion that what was left of

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[214]See comments of Laskin C.J.C. in this regard in Reference re Agricultural Products Marketing Act (1978), 84 D.L.R. (3d) 257 at p. 275. See also text accompanying footnote 38.

[215]See id., at pp. 278-284.

[216]Id., at p. 284.

the Crystal Dairy doctrine should be overruled.[217] Thus it was not necessary to rule on whether it was within federal competence to legislate in relation to indirect taxation for provincial purposes.[218] Laskin C.J.C. did express the view,[219] however, that if the amendment was a taxing statute then he thought the principle stated in Reference re Employment and Social Insurance Act[220] applicable to it, namely, that the use of the federal taxing power to finance a regulatory scheme which is itself beyond Parliament's authority cannot rectify the invalidity.

In summary, the Crystal Dairy line of cases[221] characterized provincial exercises of regulatory authority as invalid taxation measures. Form triumphed over substance in these cases in so far as the existence of a regulatory levy in legislation was a sufficient ground for characterizing the legislation as being in relation to taxation. The Turner's Dairy Case went so far as to describe the regulatory orders considered in that case as a

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[217]"I find it quite proper for us to overrule what may be left of the judgment in Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd ...", id., at p. 322 (per Pigeon J.).

[218]Laskin, C.J.C. expressly stated that he was leaving this question open, id., at p. 283.

[219]Id., at p. 253.

[220]Supra, n. 3.

[221]See supra, n. 143.

colourable exercise of provincial regulatory authority for the purpose of imposing indirect taxes, even though the regulatory orders were designed to fix prices and not to raise revenue. This unfortunate line of decision was gradually narrowed and finally overruled in Reference re Agricultural Products Marketing Act, a case in which a regulatory levy was struck down on the ground that it was incidental to an invalid regulatory scheme. In this case the regulatory levy was characterized by the regulatory scheme to which it belonged and not the other way around.[222]

The characterization of incidental legislation by reference to the legislation to which it relates is an application of the pith and substance doctrine.[223] The pith and substance doctrine is discussed in the next part of the thesis.

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[222]See supra, n.145, 84 D.L.R. (3d) 257, at p. 280.

[223]See P. Hogg, Constitutional Law Canada (Carswell & Company Ltd., 1977), at pp. 80-82.

III. THE TRIUMPH OF SUBSTANCE OVER FORM: THE PITH AND SUBSTANCE DOCTRINE

This Part of the thesis examines a number of cases in which the validity or invalidity of impugned taxing provisions was explicitly ascertained by the Courts on the basis of the pith and substance of the legislation to which the taxing provisions were related. As opposed to the cases in which provincial taxes were rendered invalid on the ground that they were indirect taxes, most of the cases considered in this part of the thesis involve taxes which have been rendered invalid on the ground that they were enacted pursuant to an invalid regulatory scheme.

What is instructive from the consideration of these cases is that some guidance is provided as to the circumstances under which courts are prepared to characterize purported exercises of taxing power as regulation. For example, among the circumstances considered by the courts is whether a purported exercise of taxing power has a regulatory purpose or a regulatory effect. In addition, we will see that in many of the cases an unauthorized regulatory purpose of a tax has been disguised by placing

reliance on what the judiciary has described as a colourable exercise of taxing power.[224]

[224]For example, see In re The Insurance Act of Canada [1932] A.C. 41, [1932] 1 D.L.R. 97 (P.C.); Reference re Section 16 of the Special War Revenue Act, [1942] S.C.R. 429, [1942] 4 D.L.R. 145 (S.C.C). There is no such thing as a "pure" tax in the sense that all taxes to some extent impose an impediment on economic activity. It therefore comes as no surprise that the case law is filled with numerous instances in which taxation has been used to effect a regulatory purpose. For example, see also Reader's Digest Assoc. (Canada) Ltd. v. Attorney-General for Canada, [1966] B.R. 725, (1967), 59 D.L.R. (2d) 54 (Que. Q.B. App. Side), aff'g (1963), 37 D.L.R. (2d) 239 (Que. Q.B. Tr. Div.). A constitutional problem arises, however, when the regulatory purpose is not otherwise within the jurisdiction of the taxing Legislature. An example of this is when legislation in the guise of a taxing statute colourably aims at an unauthorized regulatory purpose.

A. The Use of Taxing Power for an Improper Purpose: The Regulation of the Insurance Industry

One of the early instances of the colourable use of taxing power arose in connection with the federal regulation of the insurance industry. The legislation in question, the Special War Revenue Act,[225] imposed a tax on every person resident in Canada with property insured by a British or foreign insurer not licensed under the provisions of the Insurance Act.[226] This tax and the licensing provisions of the Insurance Act to which it related were both struck down by the Judicial Committee in In re The Insurance Act of Canada[227] on the ground that they aimed at the regulation of the conduct of the business of insurance within the Province, a matter which had previously been held by the Judicial Committee to fall within the exclusive jurisdiction of the Provincial Legislature under the class of subjects of property and civil rights within the Province.[228] The conclusion that the tax aimed at the regulation of the conduct of the

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[225]R.S.C. 1927, c. 101.

[226]R.S.C. 1927, c. 179.

[227]Supra, n. 224.

[228]See Citizens Insurance Co. v. Parsons (1881) 7 App. Cas. 96; Attorney-General for Canada v. Attorney-General for Alberta [1916] 1 A.C. 588, 26 D.L.R. 288.

business of insurance within the Province was based on the reasoning of Viscount Dunedin, who delivered the judgment on behalf of the Judicial Committee, that since the purpose of the tax was to give effect to the licensing provisions, the tax and the licensing provisions constituted a legislative scheme.[229] He then went on to hold that the licensing provisions, and so also the taxes as being part of the same scheme, were invalid as being in relation to a matter coming within property and civil rights within the Province. As he pointed out in commenting upon the power of Parliament to impose taxation:[230]

> But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall.

It was argued on behalf of the validity of the licensing provisions that they were legislation in relation to aliens falling within section 91(25) of the Constitution Act, 1867.[231] There was strong support in favour of this argument. In Attor-

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[229]See [1932] A.C. 41, at p. 53.

[230]Id., at p. 52. However, there is no constitutional objection to the Government of Canada spending the money that it raises by taxation on a matter that is otherwise within the exclusive legislative competence of the Provincial Legislature. For further discussion of the spending power, see infra, pp. 89, 90 and La Forest, supra, n.13, pp. 45-51.

[231]30 & 31 Vic., c. 3 (U.K.). See also [1932] A.C. 41, at p. 47.

ney-General for Canada v. Attorney-General for Alberta,[232] Lord Haldane, after striking down the licensing provisions in the Insurance Act[233] of 1910 that did not apply to foreign and British insurers, declined to express an opinion on the validity of the licensing provisions applicable to foreign and British insurers.[234] He did observe, however, that "it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction" and that Parliament's legislative power over aliens could support such legislation.[235] Furthermore, Mr. Justice Duff also declined to express an opinion on the validity of the same licensing provisions in Attorney-General for Ontario v. Reciprocal Insurers[236] and, in so doing, he referred to Lord Haldane's observation on "properly framed legislation"[237] with approval. It was these same licensing provisions that Viscount Dunedin held were not "properly framed legislation" in relation to aliens in In re The Insurance Act of

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[232] Supra, n. 228.

[233] 9 & 10 Edw. 7, c. 32 (Can.).

[234] (1916), 26 D.L.R. 288, at p. 193.

[235] Id.

[236] [1924] A.C. 328, 53 O.L.R. 195 (P.C.)

[237] Id., at p. 347.

Canada.[238] According to Viscount Dunedin, in spite of Duff J. having declined to express an opinion on the validity of these provisions in Attorney-General for Ontario v. Reciprocal Insurers,[239] what that case had really decided was that the licensing provisions were a disguised intermeddling, in the guise of alien legislation or legislation in relation to immigration, with the conduct of the business of insurance within the Province.[240] As a result, Viscount Dunedin reasoned, the sanctions in that case giving effect to the licensing provisions, although in the form of a criminal enactment, were invalidated on the ground that in substance they were "an enactment in regulation of contracts of insurance and the business of insurance, subjects not within the legislative sphere of the Dominion."[241]

After Viscount Dunedin's decision in In re The Insurance Act of Canada,[242] Parliament made an attempt at "properly framed legislation" with the enactment of the Canadian and British

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[238][1932] A.C. 41, at p. 51.

[239]Supra, n. 236.

[240]Supra, n. 238.

[241][1924] A.C. 328, at p. 346.

[242]Supra, n. 2242.

Insurance Companies Act[243] and the Foreign Insurance Companies Act[244] in 1932. Pursuant to this legislation, British and foreign insurers were prohibited from engaging in the business of insurance in Canada unless they were registered with the Minister of Finance. In contrast to the regulatory conditions for the obtaining of a licence under the legislation held to be invalid in In re The Insurance Act of Canada,[245] the condition for obtaining a certificate of registry was merely the payment of a deposit of security. Nonetheless, this legislation was struck down by the Supreme Court of Canada in Reference re Section 16 of the Special War Revenue Act[246] on the ground that the business of insurance within the Province is within exclusive provincial control. In the opinion of Duff C.J.C., who delivered the judgment on behalf of the Supreme Court of Canada, the payment of a deposit of security was in the same category as those conditions for a licence "relating to the forms of contracts and those governing transactions between an insurance company and its

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[243]S.C. 1932, c. 46.

[244]S.C. 1932, c. 47.

[245]Supra, n. 224.

[246][1942] S.C.R. 429, 4 D.L.R. 145 (S.C.C.).

agents" which were invalidated in In re The Insurance Act of Canada.[247],[248]

What is interesting about the decision in Reference re Section 16 of the Special War Revenue Act[249] for the purposes of this thesis is that the validity of a federal tax of 10% of the net premiums paid by a person resident in Canada to a British or foreign insurer not registered under federal law was made to depend on the validity of the registration provisions. Even though the question as to the validity of the registration provisions had not been placed before the Court, Duff C.J.C. rejected the argument that their validity was immaterial to the determination of whether the tax was valid.[250] As was the case with the impugned tax and the licensing provision in In re The Insurance Act of Canada,[251] the 10% tax on premiums was so related to the registration provisions that substantively, in the opinion of the Chief Justice, the two sets of provisions were in relation to the same matter.[252]

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[247] Supra, n. 224.

[248] [1942], 4 D.L.R. 145, at p. 149.

[249] Supra, n. 244.

[250] [1942], 4 D.L.R. 145, at p. 147.

[251] Supra, n. 224.

[252] Supra, n. 250.

B. Levies Incidental to a Scheme of Social Insurance

The plenary nature of the taxing power was qualified by the decisions in In re Insurance Act of Canada[253] and Reference re Section 16 of the Special War Revenue Act[254] to the extent that colourable exercises of taxing power were held to be invalid. It was qualified even further by the decision of the Judicial Committee and the Supreme Court of Canada in Reference re Employment and Social Insurance Act[255] that legislation authorizing the imposition of compulsory contributions on the part of employers and employees to an unemployment insurance fund was not a constitutional exercise of federal taxing power on the ground that the legislation disposing of the money raised was an invasion of civil rights within the Province.[256] It did not matter that the

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[253] Supra, n. 224.

[254] Supra, n. 224.

[255] [1937] A.C. 355, [1937] 1 D.L.R. 684 (P.C.), aff'g [1936] S.C.R. 427, [1936] 3 D.L.R. 644 (S.C.C.).

[256] As was stated by Lord Atkin in delivering the opinion on behalf of the Judicial Committee at [1937] 1 D.L.R. 684, at p. 687:

> That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied.... But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

(continued...)

legislation in question in this case, the Employment and Social Insurance Act,[257] did not involve a colourable exercise of taxing power in order for it to be invalid. In the majority opinion of Kerwin J. in the Supreme Court of Canada, this was an even more cogent argument against the legislation's validity than had the legislation been colourable. As he stated in commenting upon Viscount Dunedin's remark in In re Insurance Act of Canada that taxes linked up with illegal objects must fall:[258]

> If this be the case where the Court decides that Parliament has colourably invaded the field of provincial jurisdiction, how much more cogent is the reasoning if one comes to the conclusion that the legislation in question does not even purport to be a taxing Act.

In the dissenting opinion of Duff C.J.C. in the Supreme Court of Canada, the Employment and Social Insurance Act[259] was supportable under the federal government's taxing and spending

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[256](...continued)

"Unemployment insurance" was later added to the list of federal powers in section 91 of the Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) as head 2A by the Constitution Act, 1940 (U.K.), c. 36, s.1.

[257]S.C. 1935, c. 38.

[258][1936], 3 D.L.R. 644, at p. 672.

[259]Supra, n. 257.

powers.[260] According to Duff C.J.C., these grants of power are "plenary" in nature in the broadest sense of the term.[261] For example, he stated that the spending power in subdivision 1A of section 91:[262]

> endows the High Court of Parliament with full discretionary authority to dispose of the public assets of the Dominion, and no other court is invested with jurisdiction to examine any purported exercise of that authority with a view to pronouncing upon its validity, subject only to the rule that the courts are always entitled to determine whether, in truth, any given enactment of Parliament professing to be an exercise of a given authority is not really an enactment of that character, but one relating to a subject over which Parliament has no jurisdiction.

According to Duff C.J.C., the same rule is applicable to the exercise of the taxing power.[263] Since the Employment and Social Insurance Act[264] was not a colourable exercise of Parliament's

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[260][1936], 3 D.L.R. 644, at p. 660.

[261]See id., at pp. 646-650.

[262]Id., at p. 659.

[263]He stated that, "Parliament has exclusive authority to raise money by any mode a system of taxation for disposition by Parliament for any purpose for which it is competent to Parliament to apply the assets of the Dominion in virtue of subdivision 1". Id., at pp. 658, 659.

[264]Supra, n. 257.

taxing and spending powers,[265] there was no ground, in his opinion, for holding that its enactment, either in purpose or immediate effect, was outside the scope of these powers.[266]

By reading subdivisions 1A and 3 of section 91 together, Duff C.J.C. observed that the only limitation on the purpose to which the money raised by the federal taxing power may be used is that it must be used for the exclusive disposition of Parliament.[267] This attribution of an unlimited scope to the federal taxing power is consistent with the definition of a tax given by Duff J., as he then was, in the Lawson Case in which the purpose for which the money raised by taxation may be used is only limited by having to be a public purpose.[268] Indeed, Duff C.J.C. relied on the Lawson Case, along with the Crystal Dairy Case and Workmen's Compensation Board v. C.P.R.,[269] as examples of cases in which legislation authorizing levies similar to the compulsory contributions by the employers and employees into the unemploy-

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[265] Id., at p. 660.

[266] Id., at p. 659.

[267] Supra, n. 263.

[268] See text accompanying footnote 148.

[269] [1920] A.C. 184, 48 D.L.R. 218 (P.C.), rev'g 47 D.L.R. 487 (B.C.C.A.).

ment insurance fund was characterized as taxing legislation.[270] The Crystal Dairy Case and the Workmen's Compensation Board Case were also relevant to Duff C.J.C. from the standpoint that the legislation involved in these cases also authorized schemes whereby benefits were paid from funds obtained from the levies to qualifying persons subject to the schemes.

Rinfret J. and Kerwin J., who delivered the two concurring majority opinions in the Supreme Court of Canada, declined to express their views on the scope of the taxing and spending powers. It was not necessary for them to do so in the light of their decision that the pith and substance of the Employment and Social Insurance Act[271] was the regulation of employment service and unemployment insurance by means of attaching statutory terms to contracts of employment[272] and that the compulsory contributions made pursuant to this legislation were mere incidents of the regulation.[273] In their opinion, the pith and substance of

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[270][1936], 3 D.L.R. 644, at pp. 653-658.

[271]Supra, n. 257.

[272][1936], 3 D.L.R. 644, at p. 666.

[273]Id.

the legislation was a matter falling exclusively within the legislative competence of the Provincial Legislatures.[274]

By not extending the applicability of the Crystal Dairy doctrine beyond the field of marketing regulation, the decision in Reference re Employment and Social Insurance Act[275] affirmed the pith and substance doctrine as the proper procedure for constitutionally characterizing legislation. As a result, the decision in this case, in contrast to the decision in the Crystal Dairy Case, was able to make the distinction between taxation and regulation for constitutional purposes. Furthermore, the validity of an exercise of taxing power was no longer made to depend on the criterion of colourability. All of this was done at some expense to the plenary nature of taxing power, a view of the taxing power, however, which directly contributed to the Crystal Dairy doctrine.

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[274]See id., at pp. 666, 672. In the opinion of Rinfret J., the compulsory contributions were more in the nature of insurance premiums or payments for services rendered than of taxes, even though he did not think it necessary to finally decide this question. Id., at pp. 667.

[275]Supra, n. 255.

C. Prohibitory and Discriminatory Taxes

The pith and substance doctrine was applied again in Reference re Alberta Statutes[276] to strike down a proposed taxing bill of the Alberta Legislature, An Act respecting the Taxation of Banks,[277] which provided for an annual tax on banks of ½% on their paid-up capital and 1% on their reserve funds and undivided profits, calculated by reference to the paid-up capital and reserves of the banks throughout Canada and abroad. Unlike the impugned legislation in the insurance cases,[278] the taxing bill in Reference re Alberta Statutes[279] was not dependant for its operation on any other legislation. Nonetheless, in the unanimous opinion of the Supreme Court of Canada, the taxing bill was found to be part of a legislative scheme, the substance of which was not in relation to a matter within Provincial authority. Kerwin J. described the substance of the scheme as:[280]

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[276][1938] S.C.R. 100, [1938] 2 D.L.R. 81 (S.C.C.); aff'd [1939] A.C. 117, [1938] 4 D.L.R. 433 (P.C.) (sub nom. Attorney - General for Alberta v. Attorney - General for Canada).

[277]Alberta Legislature, third session, 1937, Bill No. 1.

[278]Attorney - General for Ontario v. Reciprocal Insurers, supra, n. 236; In re Insurance Act of Canada, supra, n. 224, and Reference re Section 16 of the Special War Revenue Act, supra, n. 224.

[279]Supra, n. 276.

[280][1938] 2 D.L.R. 81, at p. 124.

> a legislative plan to prevent the operation within the Province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada.

In the opinion of Lord Maugham on behalf of the Judicial Committee of the Privy Council, this was sufficient ground for holding the taxing bill ultra vires along with the other parts of the legislative scheme.[281]

One of the considerations that led the Supreme Court of Canada and the Privy Council to characterize the taxing bill as part of a legislative scheme to prevent banking institutions from conducting their business within the Province was the practical effect of the bill if it came into operation.[282] In the opinion of Duff C.J.C., which was concurred in by Davis J. and Hudson J. and Lord Maugham in the Privy Council on this point,[283] in

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[281][1939] A.C. 117, at p. 133.

[282]For the purpose of ascertaining the pith and substance of legislation, its practical effect may be examined in a case of difficulty. See Union Colliery Co. of British Columbia Ltd. v. Bryden [1896] A.C. 348 (P.C.).

[283]See [1939] A.C. 117, at pp. 130-132.

considering the rate of taxation provided for in the bill, the facts were sufficient to show:[284]

> that such a rate of taxation must be prohibitive in fact and must be known to the Alberta Legislature to be prohibitive.

This led Duff C.J.C. to conclude that the taxing bill, under the colour of an exercise of Provincial power, was in substance directed to and interfered with the Dominion power over Banking and the Incorporation of Banks.[285] [286]

Other considerations were relied upon by Duff C.J.C. in the Supreme Court of Canada to show that the proposed tax on banks was part of an ultra vires legislative scheme. Detailed consideration was given by him to the question of the constitutionality of the central measure of the scheme, the Alberta Social Credit Act,[287] [288] even though this question had not been referred

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[284] [1938] 2 D.L.R. 81, at p. 103.

[285] Constitution Act, 1867, 30-31 Vic., c.3 (U.K.), sec. 91(15).

[286] Supra, n. 280. He was assisted in this conclusion by reference to the Privy Council decisions in John Deere Plow Co. v. Wharton [1915] A.C. 330, 18 D.L.R. 353 and Great West Saddlery Co. v. The King, [1921] A.C. 91, 58 D.L.R. 1.

[287] S.A. 1937, c. 10.

[288] See [1938] 2 D.L.R. 81, at pp. 83-97.

to the Court. He described the substance of this legislation as follows:[289]

> ...speaking in general terms, the statute sets up the machinery of a financial system which is to be administered by statutory authority and the predominant function of which is to provide a form of credit designated as "Alberta Credit" which is to be made accessible to consumers and others through the channels created by the Act, and which is to circulate as a medium of exchange and payment.

That the purpose of this financial system was to replace the banking system was made clear in the following declaration contained in section 31 of the Act:[290]

> It is the intent of this Act to control the volume of the means of payment for goods and services ... so that excess expansion of credit and a consequent undue advance in the price level shall not occur, and that the present system of issuing credit through private initiative for profit resulting in recurrent deflations and inflations shall cease.

In his opinion, such legislation was concerned with matters falling within Dominion authority over banking, currency and the

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[289] Id., at p. 86.

[290] Alberta Social Credit Act, S.A. 1937, c. 10, sec. 31.

regulation of trade and commerce.[291] Furthermore, he also held that two other parts of the legislative scheme, An Act to Amend and Consolidate the Credit of Alberta Regulation Act[292] and An Act to Ensure the Publication of Accurate Laws and Information,[293] were ultra vires as legislation ancillary and dependent upon the Alberta Social Credit Act.[294] [295]

Besides the prohibitory effect of the banking tax, the legislative history of an Act Respecting the Taxation of Banks[296] proved definitively, in the mind of Kerwin J. at least,[297] that the bill was part of a legislative scheme to prevent banks from operating in the Province of Alberta. His lordship found it particularly significant that the bill was passed on the same day in the Alberta Legislature, October 5, 1937, as the Credit of Alberta Regulation Act[298] and that both of these bills were only passed after similar legislation had been disallowed by the

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[291] Supra, n. 284.

[292] Alberta Legislature, third session, 1937, Bill No. 8.

[293] Alberta Legislature, third session, 1937, Bill No. 9.

[294] Supra, n. 290.

[295] [1938] 2 D.L.R. 81, at pp. 98, 100.

[296] Supra, n. 277.

[297] See [1938] 2 D.L.R. 81, at pp. 122-125.

[298] Supra, n. 292.

Governor General in Council on August 17, 1937.[299] On the basis of this sequence of events, His Lordship concluded that both sets of bills were designed to achieve a common purpose.[300]

The pith and substance of a discriminatory tax under Part II of the Excise Tax Act,[301] which amounted to 20% of the value of advertising material contained in any "special edition of a non-Canadian periodical published in Canada",[302] was considered by the Courts in Reader's Digest Association (Can.) Ltd. v. Attorney-General of Canada.[303] Instead of arguing that the tax was prohibitive in effect,[304] it was the appellant's contention that the legislation in question:[305]

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[299]See [1938] 2 D.L.R. 81, at p. 123.

[300]Id., at p. 124.

[301]R.S.C. 1952, Chapter 100 (as amended by S.C. 1956, Chapter 37, sec. 3), sec. 9.

[302]Pursuant to para. 8 (e)(i) of the Excise Tax Act, R.S.C. 1952, Chapter 100 (as amended by S.C. 1956, Chapter 37), sec. 3, the tax was applicable to a "special edition of a non-Canadian periodical ... containing editorial material at least twenty-five per cent of which is the same or substantially the same as editorial material contained in one or more copies of a particular non-Canadian periodical...".

[303][1966] B.R. 725, (1967), 59 D.L.R. (2d) 54 (Que. Q.B. App. Side), aff'g (1963), 37 D.L.R. (2d) 239 (Que. Q.B.T.D.).

[304]Appellants argued that the discriminatory nature of the tax showed that, "its real nature or purpose was other than the raising of money". See [1966] B.R. 725, at pp. 742, 743.

[305]Id., at p. 727.

> tout en ayant l'apparence ou la forme d'une loi imnposant une taxe, n'est autre chose qu'une façon de protéger un secteur de l'industrie de la publicité au Canada au detriment d'un autre secteur de la même industrie et que, ce faisant, le Parlement canadien a empiété sur les pouvoirs exclusifs des legislatures provinciales ayant trait à la "propriété et aux droits civil".

In rejecting this contention, Rinfret J., with whom the majority of the Quebec Court of Appeal agreed,[306] was of the opinion that the tax involved a matter of "extraprovincial interest or concern"[307] and that it constituted:[308]

> a genuine determination by Parliament to suppress commercial activities in the public interest or at least what it feels to be in the public interest.

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[306] Tremblay, C.J.Q., Hyde and Taschereau, J. Owen, J. dissented on the technicality that the publication in question did not fall within the definition of a "periodical" contained in the statute. See id., at pp. 744-746.

[307] [1966] B.R. 725, at p. 737.

[308] Id.,

Thus there was no objection to a tax being regulative, either in effect or in purpose,[309] as long as the regulation was substantively within the jurisdiction of the taxing Legislature.[310]

Although the impugned tax in the Reader's Digest Case was upheld,[311] this case does provide some guidance as to the circumstances under which a Court would be prepared to strike down a tax as being regulative of a matter not within the jurisdiction of the taxing Legislature. For example, Rinfret J. approvingly referred to Viscount Dunedin's remarks in Re Insurance Act[312] concerning a tax being invalid if linked up with an illegal object "to dominate the exercise of the business of insurance ... to intermeddle with the conduct of insurance business"[313] and to Duff, C.J.C.'s remark in Reference re Natural Products Marketing Act[314] that:[315]

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[309]The Attorney - General argued that, "nothing prevents a statute having a two-fold purpose, in this case the raising of revenues through taxation, and the regulation of international and interprovincial commerce." Id., at p.62.

[310]Id.

[311]Supra, n. 303. The tax, however, had already been repealed by S.C. 1958, Chapter 30, secs. 1, 9.

[312][1932] A.C. 41, 1 D.L.R. 97 (P.C.).

[313][1932] 1 D.L.R. 97, at p. 105.

[314][1936] S.C.R. 398, 3 D.L.R. 622 (S.C.C.), aff'd [1937] A.C. 377, 1 D.L.R. 691 (P.C.).

> Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority.

By applying the principles contained in such remarks, Rinfret J. was unable to find that the federal tax on advertising revenue subjected the appellant's business to federal control or inter-meddled with the conduct of appellant's business.[316] Thus it was unnecessary for him to find that the tax was not discriminatory in effect in order for him to sustain its validity.

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[315](...continued)

[315][1936] 3 D.L.R. 622, at p. 631. These remarks were quoted by Lord Atkin in the Privy Council with approval. See [1937] 1 D.L.R. 691, at pp. 692, 693.

[316](1965), 59 D.L.R. (2d) 54, at p. 70.

D. Export Taxes

Export taxes have a regulatory effect on economic activity by discouraging the exportation of unprocessed commodities from the country.[317] It is therefore not surprising that the Courts, besides holding that such taxes are incompetent to a Provincial Legislature on the ground that they are a species of indirect taxation[318] have invalidated them on the ground that they trench upon Parliament's exclusive authority over the regulation of trade and commerce.[319] Provincial export taxes have also been found by the courts to be a matter within Parliament's exclusive authority over customs and excise duties by virtue of section 122 of the Constitution Act, 1867.[320]

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[317]See, infra, notes 318 and 319.

[318]For example, see Attorney-General for British Columbia v. McDonald Murphy Lumber Co., [1930] A.C. 357, [1930] 2 D.L.R. 721 (P.C.), aff'g [1929] 4 D.L.R. 954, 2 W.W.R. 529 (B.C.S.C.).

[319]For example, see Texada Mines Ltd. v. Attorney-General for British Columbia, [1960] S.C.R. 713, 24 D.L.R. (2d) 81 (S.C.C.), rev'g (1959), 19 D.L.R. (2d) 705 (B.C.C.A.), rev'g (1958), 17 D.L.R. (2d) 16 (B.C.S.C.); Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan, supra, n. 47. See also, supra, n. 122.

[320]See Attorney-General for British Columbia v. McDonald Murphy Lumber Co., supra, n. 318. Section 122 of the Constitution Act, 1867, 30 & 31 Vic., c.3 (U.K.) provides that:

> 122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

(continued...)

A regulatory issue arose in connection with a provincial tax upon all timber cut within the Province of British Columbia in Attorney-General for British Columbia v. McDonald Murphy Lumber Company.[321] This tax was calculated in accordance with schedules to the authorizing legislation,[322] which also provided for a rebate of most of the tax when the timber was used in the Province as opposed to being exported from the Province. Although it was contended on behalf of the plaintiff lumber company that the tax trenched upon Parliament's power over the regulation of trade and commerce, it was not necessary for either the British Columbia Supreme Court or the Judicial Committee of the Privy Council to deal with this issue in their disposition of the case. The issue that did matter was whether the true nature of the timber tax was "direct taxation within the Province in order to the raising of a revenue for Provincial purposes" or a regulatory tax designed to encourage the further processing of cut timber in the Province. The practical effect of the tax showed that it was

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[320](...continued)
This provision, however, is spent now that customs and excise laws are covered by the Customs Act, R.S.C. 1970, c. C-40, the Customs Tariff Act, R.S.C. 1970, c. C-41, the Excise Act, R.S.C. 1970, c. E-12 and the Excise Tax Act, R.S.C. 1970, c. E-13.

[321]Supra, n. 318.

[322]Forest Act, R.S.B.C. 1924, c. 93, sec. 58.

regulatory in nature.[323] As Lord Macmillan, who delivered the judgment on behalf of the Privy Council, stated:[324]

> The economic and, presumably, the object of the tax is to encourage the utilization within the Province of its home-grown timber and to discourage its exportation. The success of the tax if this be its object, will thus be measured inversely by the revenue which it yields, which is not the normal characteristic of a tax imposed "in order to the raising of a revenue for Provincial purposes."

The Judicial Committee then went on to hold that the timber tax in effect, though perhaps not in form, was an export tax and therefore ultra vires the Provincial Legislature not only because as an export tax it was within Parliament's authority over customs and excise laws by virtue of section 122 of the Constitution Act, 1867[325] but also because it was an indirect tax.[326]

A fact situation similar to the one in the McDonald Murphy case arose in Texada Mines Ltd. v. Attorney-General for British

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[323] In addition, for the purpose of ascertaining the true nature of the tax, judicial notice was taken by the Judicial Committee that the rebated taxes on timber used within the Province had not been collected since 1914 and that the Royal Commission of Inquiry on Timber and Forestry, 1909-10, had described the tax as "the timber tax on export". See supra, n. 318, [1930] 2 D.L.R. 721, at p. 723.

[324] Id., at p.. 723, 724.

[325] 30 & 31 Vict., c. 3 (U.K.).

[326] [1930] 2 D.L.R. 721, at p. 725.

Columbia.[327] The provincial tax involved in this case was an annual tax of 8% of the assessed value of minerals in three producing iron ore mines in the Province of British Columbia.[328] A separate enactment of the Provincial Legislature provided for a bounty in respect of iron charged directly to a steel furnace from iron smelted within the Province.[329] However, as there were no steel processing facilities within the Province, the produce from the three mines was destined for the export market. The facts of the case further showed that the burden of the tax was prohibitive of further operation of the mines unless the produce therefrom qualified for the bounty.[330]

The British Columbia Court of Appeal disregarded the above facts in their holding that the iron ore tax was a valid land tax on minerals in the ground.[331] This was because the Court regarded the issue in the case not as whether the tax was a regulatory tax on exports but rather whether it was an indirect tax on

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[327][1960] S.C.R. 713, 24 D.L.R. (2d) 81 (S.C.C.), rev'g 17 D.L.R. (2d) 16, 26 W.W.R. 481 (B.C.C.A.), rev'g 17 D.L.R. (2d) 16 (B.C.S.C.).

[328]Mineral Property Taxation Act, 1957 (B.C.), c. 60.

[329]Iron Bounty Act, 1957 (B.C.), c. 9.

[330]24 D.L.R. (2d) 81, at p. 90.

[331]19 D.L.R. (2d) 705, at p. 735 (per O'Halloran, Davey and Sheppard J.J.A.).

commodities or a land tax. The MacDonald Murphy case was distinguished as involving an indirect tax on timber severed from the land.[332]

To Locke J., who delivered the judgment on behalf of the Supreme Court of Canada, it was not improper for the Court to consider the combined effect of the legislation authorizing the iron ore tax and bounty,[333] which His Lordship regarded as related legislation, in characterizing the pith and substance of the iron ore tax. In considering the combined effect of the iron ore tax and bounty, he held the tax to be invalid on the ground that it was an export tax designed to encourage the domestic production of steel.[334] He did not consider it necessary to decide whether the tax was invalid on the additional ground of trenching upon Parliament's legislative power over the regulation of trade and commerce, although he had earlier stated that this was an issue being considered in the case.[335]

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[332] Id.

[333] 24 D.L.R. (2d) 81 at p. 90. Locke J. also thought it was significant that the Mineral Property Taxation Act, 1957 (B.C.), c. 60 and the Iron Bounty Act, 1957 (B.C.), c. 9 were passed in the same year. Id., at p. 92.

[334] Id., at p. 92.

[335] Id., at pp. 88, 89.

A so-called "mineral income tax" and a "royalty surcharge" on crude oil were held by the Supreme Court of Canada to be ultra vires the Legislature of Saskatchewan on the ground that they trenched upon Parliament's legislative power over the regulation of trade and commerce as well as on the ground that they were export taxes in Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan.[336] [337] Both the tax and the surcharge were calculated in the same way by taking 100% of the difference in price between the basic well head price of crude oil, which was defined in the authorizing legislation to be approximately equal to the price of crude oil prevailing in the market just prior to the energy crisis in October, 1973, and the well head price of crude oil, which was defined to be the selling price of crude oil as determined in the market or by ministerial prescription.[338] The purpose of the legislation was to capture for the Province from the producers the increase in the price of crude oil resulting from the 1973-74 energy crisis.[339] In the opinion of Martland J., who delivered the majority judgment on behalf of the

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[336] Supra, n. 47.

[337] See 80 D.L.R. (3d) 449, at pp. 461-465 (per Martland, J.).

[338] See id., at p. 466.

[339] Id., pp. 456, 466.

Supreme Court of Canada, the tax and the surcharge were both indirect taxes in respect of sales of crude oil.[340] Since approximately 98% of the oil was destined for other parts of Canada and the United States,[341] he also characterized the tax and the surcharge as export taxes and, along with the price fixing powers of the Minister, as being legislation aimed at the regulation of trade and commerce.[342]

In the lower courts and in the minority opinion of the Supreme Court of Canada, it was held that the tax and the surcharge were direct taxes because they could not be passed on by the producer by an increase in the price to the purchaser.[343] Thus it was concluded that the incidence of the tax and the surcharge fell on the producer, which indicated that they were direct taxes.[344] This did not change Martland J.'s view of the matter that export taxes are a category of taxes that, according to the common understanding of men, have a general tendency of

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[340] Id., at p. 463.

[341] Id., at pp. 456, 466.

[342] Id., at pp. 461-465.

[343] 65 D.L.R. (3d) 79 (Sask. C.A.), at pp. 92, 93; 80 D.L.R. (3d) 449 (S.C.C.), at pp. 478, 479.

[344] 65 D.L.R. (3d) 79 (Sask. C.A.), at p. 93; 80 D.L.R. (3d) 449 (S.C.C.), at p. 479.

being passed on.[345] The only feature differentiating the particular export tax in question from other export taxes was that it had the effect of freezing the income of the producers, but this was insufficient, in Martland J.'s view,[346] to recharacterize the tax as anything but an export tax and, as such, an indirect tax. He found support for this view[347] from the following remarks by Lord Macmillan in the McDonald Murphy case concerning the incidence of export taxes:[348]

> Mr. Lawrence, however, contended that although the tax might accurately be described as an export duty, this did not necessarily negative its being a direct tax within the meaning of the Act. Without reviewing afresh the niceties of discrimination between direct and indirect taxation it is enough to point out that an export tax is normally collected on merchantable goods in course of transit in pursuance of commercial transactions. Whether the tax is ultimately borne by the exporting seller at home or by the importing buyer abroad depends on the terms of the contract between them. It may be borne by the one or by the other. It was said in the present case that the conditions of the competitive market in the United States compelled the exporter of timber from

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[345] 80 D.L.R. (3d) 449 (S.C.C.), at pp. 461, 462.

[346] Id., at p. 462.

[347] Id.

[348] Attorney-General for British Columbia v. McDonald Murphy Lumber Co., [1930] 2 D.L.R. 721, at pp. 724, 725, [1930] A.C. 357, at pp. 364, 365.

> British Columbia to that country to bear the whole burden of the tax himself. That, however, is a matter of the exigencies of a particular market, and is really irrelevant in determining the inherent character of the tax. While it is no doubt true that a tax levied on personal property, no less than a tax levied on real property may be a direct tax where the taxpayer's personal property is selected as the criterion of his ability to pay, a tax which, like the tax here in question, is levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions, cannot be described as a tax whose incidence is, by its nature, such that normally it is finally borne by the first payer, and is not susceptible of being passed on. On the contrary, the existence of an export tax is invariably an element in the fixing of prices, and the question whether it is to be borne by seller or purchaser in whole or in part is determined by the bargain made. The present tax thus exhibits the leading characteristic of an indirect tax as defined by authoritative decisions.

The important considerations in Martland J.'s holding that the legislation authorizing the "mineral income tax" and "royalty surcharge" trenched upon section 91(2) of the Constitution Act, 1867[349] were stated by him as follows:[350]

> ...the legislation is directly aimed at the production destined for export and has the effect of regulating the export price, since

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[349] 30 & 31 Vic., c. 3 (U.K.).

[350] 80 D.L.R. (3d) 449, at pp. 464, 465.

> the producer is effectively compelled to obtain that price on the sale of his product.

In other words, the legislation was directly aimed at the export trade and directly affected it through the regulation of the export price. Thus, the principle enunciated in Carnation Co. Ltd. v. Quebec Agricultural Marketing Board,[351] in Martland J.'s view,[352] that provincial legislation may incidentally affect goods in interprovincial or international trade so long as the pith and substance of the legislation falls within a valid head of provincial power, was not applicable.

In the dissenting opinion of Dickson J., on the other hand, rather than being aimed at the export trade, the legislation was aimed at raising a revenue for provincial purposes.[353] The effect of the ministerial power to fix prices on the export trade, if any, was therefore indirectly incidental to the revenue raising object of the legislation.[354] Moreover, Dickson J. viewed the

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[351][1968] S.C.R. 238, 67 D.L.R. (2d) 1 (S.C.C).

[352]80 D.L.R. (3d) 449, at p. 464 (per Martland J.).

[353]For example, at p. 487, id., he states that, "I can find nothing in the present case to lead me to conclude that the taxation measures imposed by the Province of Saskatchewan were merely a colourable device for assuming control of extra-provincial trade" and later at p. 489, id., he states that, "The effect, if any, on the extra-provincial trade in oil is merely indirectly and remotely incidental to the manifest revenue-producing object of the legislation under attack."

[354]Id., at pp. 485, 486.

ministerial power to fix prices as more of a tax avoidance provision than a regulatory provision.[355] Martland J.'s view of the power seems to have been the reverse.[356] It is submitted, however, that Dickson J.'s opinion that the power to fix prices did not trench upon Parliament's power over the regulation of trade and commerce depended on his opinion that the legislation was an exercise of the provincial taxing power.

In summary, one of the key considerations in the judicial characterization of the contested taxes in the McDonald Murphy and the Texada Mines cases as ultra vires the Provincial Legislature was the finding that the true nature of these taxes was the encouragement of the further processing of natural resources within the Province rather than the raising of a revenue for Provincial purposes. The judiciary did not find it necessary, in these cases, to hold that this involved a trenching upon Parliament's power over the regulation of trade and commerce. In Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan,[357] on the other hand, it was expressly held that the legislation authorizing the contested export taxes in that case

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[355] Id., at p. 481.

[356] Id., at p. 464.

[357] Supra, n. 47.

trenched upon Parliament's power over the regulation of trade and commerce.[358] This holding was based on the ground that the ministerial power to fix the price of crude oil, on which price the export tax was calculated, was not indirectly incidental to otherwise valid provincial legislation.[359]

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[358] See text accompanying footnote 342.

[359] Supra, n. 352.

IV. SECTION 125

The distinction between taxation and regulation also arose in connection with the application of a federal tax, called the "Natural Gas and Gas Liquids Tax" (hereinafter referred to as the NGGLT), to exported natural gas belonging to the Province of Alberta in Reference re Proposed Tax on Exported Natural Gas.[360] By section 25.12 of the legislation authorizing the tax, Part IV.1 of the Excise Tax Act,[361] it was provided that:

> 25.12 This part binds Her Majesty in right of Canada or a province and every person acting for or on behalf of Her Majesty in right of Canada or a province.

The issue in the case was whether the tax was, indeed, binding on Her Majesty in right of the Province of Alberta in view of section 125 of the Constitution Act, 1867,[362] which provides that "no lands or property belonging to Canada or any province shall be liable to taxation." It was contended on behalf of the Attorney-General of Canada that the impugned tax was enacted for regulatory purposes and, furthermore, based on the proposition

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[360](1982), 136 D.L.R. (3d) 385, [1982] 5 W.W.R. 577 (S.C.C.), aff'g (1981), 122 D.L.R. (3d) 48, [1981] 3 W.W.R. 408 (Alta. C. A.).

[361]Excise Tax Act, R.S.C. 1970, c. E-13, Part IV.1 as enacted by S.C. 1980-81, c. 68.

[362]30 & 31 Vic., c. 3 (U.K.).

that taxation for the purposes of section 125 means only taxation under sections 91(3) and 92(2) and is not inclusive of regulatory taxation under the other heads of sections 91 and 92, it was contended that the impugned tax was not covered by section 125.[363] The proposition that taxation for the purposes of section 125 means only taxation under sections 91(3) and 92(2) was unanimously accepted by both the Alberta Court of Appeal and the Supreme Court of Canada.[364] Nonetheless, in the per curiam opinion of the Alberta Court of Appeal and the majority opinion of the Supreme Court of Canada, the impugned tax was not a regulatory tax.[365] Both Courts then went on to hold that the tax was unconstitutional in so far as it was applicable to exports of natural gas belonging to the Province of Alberta on the ground that the tax was not aimed at exports and, even if it was, it was not aimed at the regulation of exports.[366]

Support for the proposition that taxation in section 125 means only taxation under sections 91(3) and 92(2) was found in

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[363]See 122 D.L.R. (3d) 48, at p. 56. For further discussion of section 125, see Magnet, supra, n. 13, pp. 531-533.

[364]See id., (Alta.C.A.), at p. 53; 136 D.L.R. (3d) 385 (S.C.C), at pp. 403, 436.

[365]122 D.L.R. (3d) 48 (Alta. C.A.) at p. 58; 136 D.L.R. (3d) 385 (S.C.C.), at p. 436.

[366]122 D.L.R. (3d) 48 (Alta. C.A.), at pp. 57, 58; 136 D.L.R. (3d) 385 (S.C.C.), pp. 438-440.

the case of Attorney-General for British Columbia v. Attorney-General for Canada (the Johnny Walker case).[367] The issue involved in this case was whether British Columbia was required to pay customs duties on a case of liquor that it had imported for sale in government liquor stores. The Privy Council expressed the opinion that the imposition of customs duties may have objects other than the raising of a revenue such as the regulation of trade and commerce in order to protect an infant industry[368] and concluded that section 125 cannot be interpreted so as to defeat one of these regulatory objects by creating a breach in the tariff wall.[369] Lord Buckmaster, who delivered the opinion on behalf of the Privy Council, in commenting upon the scope of section 125, stated:[370]

> But this does not exclude the operation of Dominion laws made in exercise of the authority conferred by sec. 91. The Dominion have the power to regulate trade and commerce throughout the Dominion, and, to the extent to which this power applies, there is no partiality in its operation. Section 125 must, therefore, be so considered as to

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[367][1924] A.C. 222, [1923] 4 D.L.R. 669 (P.C.), aff'g (1922), 64 S.C.R. 377, [1923] 1 D.L.R. 223 (S.C.C.), aff'g (1922), 21 Ex. C.R. 281, 63 D.L.R. 82 (Ex. Ct.).

[368][1923] 4 D.L.R. 668, at p. 670.

[369]Id.

[370]Id., at p. 271.

> prevent the paramount purpose thus declared from being defeated.

This opinion that section 125 is not applicable to an exercise of Dominion authority over the regulation of trade and commerce was supported in three of the five opinions delivered in the Supreme Court of Canada.[371]

Although the decision in the Johnny Walker case indicates that the distinction between taxation and regulation is important for the purpose of determining the applicability of section 125 to legislation, very little guidance is given in the case on how to make the distinction. Since most taxes are enacted with their regulatory effects in mind, as well as for the purpose of raising revenue,[372] the scope of section 125 would be far too narrow if it did not apply to such taxes. Peter Hogg has pointed out that the result in the Johnny Walker case seems unsatisfactory in this regard unless the Supreme Court of Canada and the Privy Council

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[371]See opinions of Duff, Anglin and Mignault, J.J., supra, n. 368. Brodeur, J. dissented and Idington J. was of the opinion that section 125 was only applicable to the lands and property described in Part VIII and the third and fourth schedules of the Constitution Act, 1867, 30 & 31 Vic., c. 3 (U.K.).

[372]For further discussion of this, see comment of Laskin, C.J.C., in Reference re Proposed Federal Tax on Exported Natural Gas (1982), 136 D.L.R. (3d) 385, at p. 392. See also infra, p. 2.

regarded the customs legislation as being primarily regulatory.[373] The majority opinion of the Supreme Court of Canada adopted this approach in Reference re Proposed Federal Tax on Exported Natural Gas.[374] It thus became necessary for the Court in this case to clearly articulate whether the pith and substance of the tax was taxation or regulation. As Dickson J., as he then was and who delivered the majority opinion on behalf of the Supreme Court of Canada, stated:[375]

> 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.... It is seldom necessary to assign a particular head of power if a matter clearly falls within several heads of ss. 91 or 92. In the present case, however, a specific assignment is necessary. This is because s. 125 is by its terms addressed only to s. 91(3), the power of taxation. It does not attenuate federal power to legislate under other heads in s. 91, such as "trade and commerce".

In the minority opinion of the Supreme Court of Canada the NGGLT was connected to a regulatory scheme bearing the name of

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[373]See P. Hogg, Constitutional Law of Canada (Carswell & Company Ltd., 1977), at p. 413.

[374](1982), 136 D.L.R. (3d) 385, at p. 438.

[375]Id., at p. 441.

the National Energy Program,[376] which, among other things, regulated the export of natural gas.[377] Indeed, by section 25.11 of the legislation authorizing the NGGLT, Part IV.1 of the Excise Tax Act,[378] it was declared that:

> 25.11 The purpose of this Part is to provide legislative authority for the imposition of a natural gas and gas liquids tax as an essential and integral element of the national oil and gas policy as expounded in the National Energy Program.

According to Laskin C.J.C., as he then was and who delivered the minority opinion on behalf of the Supreme Court of Canada, the NGGLT was a "blend of tax and regulatory policies" aimed at realizing the three objectives of the National Energy Program,[379] which were described in a government document bearing the same name as follows:[380]

> It must establish the basis for Canadians to seize control of their own energy future through security of supply and ultimate independence from the world oil market.

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[376]See Dept. of Energy, Mines and Resources, The National Energy Program (Report No. EP80/4E) (1980).

[377]See (1982), 136 D.L.R. (3d) 385, at pp. 395-400.

[378]R.S.C. 1970, c. E-13.

[379](1982), 136 D.L.R. (3d) 385, at p. 400.

[380]Supra, n. 376, at p. 17.

> It must offer to Canadians, all Canadians, the real opportunity to participate in the energy industry in general and the petroleum industry in particular, and to share in the benefits of industry expansion.
>
> It must establish a petroleum pricing and revenue-sharing regime that recognizes the requirement of fairness to all Canadians no matter where they live.

In the Chief Justice's view, the NGGLT and the other parts of the regulatory scheme envisaged by the National Energy Program were designed to realize the above-mentioned objectives by promoting what he described as:[381]

> the Canadianization of energy resources, the encouragement of energy conservation and the support of an allocation scheme under which tax money collected for natural gas and as well for oil as they go out will be used to help pay for oil as it comes in through importation.

Presumably, although he did not explicitly state this, the application of the NGGLT to exported natural gas, besides raising revenue to be used for the Canadianization of energy resources and to pay for oil and gas imported at world prices, encouraged energy conservation by making it more expensive to export natural

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[381] Supra, n. 379.

gas.[382] He did, however, explicitly state that the application of the NGGLT to exported natural gas was an export tax.[383] Since both the legislation authorizing the tax and the export and import licensing provisions of the National Energy Board Act,[384] as essential and integral elements of the National Energy Program, regulated the export of natural gas in the Chief Justice's opinion,[385] he found both of these legislative provisions to be related legislation and, moreover, legislation of the same character. Their pith and substance was in relation to matters falling within the federal power over the regulation of trade and commerce[386] or, given the scope and extent envisaged by the National Energy Program, the peace, order and good government of Canada.[387]

In the unanimous opinion of the Alberta Court of Appeal and in the majority opinion of the Supreme Court of Canada, the application of the NGGLT to exported natural gas was neither a

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[382]Energy conservation was one of the means to be used in the National Energy Program to achieve security of supply. See supra, n. 376.

[383](1982), 136 D.L.R. (3d) 385, at p. 404.

[384]R.S.C. 1970, c. N-6, as amended.

[385]See (1982), 136 D.L.R. (3d) 385, at pp. 400, 401, 411.

[386]Id.

[387]Id., at pp. 415-417.

regulatory tax nor an export tax.[388] The basis, in the opinion of the Supreme Court of Canada, for holding that the NGGLT was not an export tax was that it applied to all natural gas received by a distributor within the province, regardless of whether or not the gas was later exported.[389] In order to avoid engaging the limitation in section 125, it was still necessary to show that the tax was not imposed primarily for regulatory purposes and that it was not necessarily incidental to a broader regulatory scheme. In this regard, besides contending that the tax was an export tax in order to show that it was within the trade and commerce power, it was also contended on behalf of the Attorney-General of Canada, in order to show that the tax was part of a regulatory scheme, that the tax was a regulatory mechanism of the oil and gas industry[390] and that it was a source of funds for the National Energy Program.[391]

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[388] Supra, notes 365, 366.

[389] See (1982), 136 D.L.R. (3d) 385, at pp. 438, 439. In the view of Dickson, J., as he then was and who delivered the majority opinion on behalf of the Supreme Court of Canada, the substance of an export tax is not necessarily regulatory in nature in that it may be used strictly to raise revenue. See id., at pp. 439-440.

[390] Id., at pp. 440-444.

[391] (1981), 122 D.L.R. (3d) 48, at pp. 56.

The Alberta Court of Appeal rejected the contention that the use to which the funds from the tax were to be put showed that it was part of a regulatory scheme under the federal power to regulate trade and commerce on the ground that the imposition of a tax in order to further an object under a given federal power does not, by that fact alone, characterize the tax as a levy under that power.[392] This was illustrated by the inability of the federal Crown to tax provincial property in situ in Saskatchewan in order to build a lighthouse on Sable Island.[393] The Chief Justice correctly pointed out that this illustration missed the point because it was completely dissociated from a regulatory scheme.[394] In other words, the use to which the money raised by taxation was put did not necessarily give the taxation its character, but the regulatory scheme pursuant to which the taxation was imposed did. It was thus necessary to show that a tax was part of a regulatory scheme before anything could be said about whether the tax was of the same character as the use to which the money raised by the tax was put.

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[392] Id.

[393] Id.

[394] (1982), 136 D.L.R. (3d) 385, at p. 403.

Dickson J. was able to show that the tax on exported natural gas was neither part of a regulatory scheme nor a regulatory mechanism by examining whether the tax had a regulatory effect.[395] For the purpose of this examination, he defined regulation as a "restraint upon or channelling of economic behaviour in pursuit of policy goals".[396] He found that the tax had no such regulatory effect on economic behaviour.[397] When viewed on its own terms, the uniformity of the NGGLT belied any regulatory purpose of shifting economic effort from one activity into another since both exporters and domestic distributors of the gas were liable to pay the tax at a uniform rate.[398] When viewed in the light of other legislation touching the natural gas industry, it was evident that every major aspect of the industry was already subject to regulation.[399] This was especially true of the export of natural gas, which was subject to a complete scheme of regulation under the National Energy Board Act,[400] which regulated

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[395] Id., at pp. 441-442.

[396] Id., at p. 441.

[397] Id., at p. 442.

[398] Id., at pp. 441-442.

[399] Id., at p. 442.

[400] R.S.C. 1970, c. N-6, as amended.

the quantity of natural gas exported, and the Petroleum Administration Act,[401] which regulated the price of natural gas exported. Thus Part IV.1 of the Excise Tax Act[402] was neither conservation legislation nor price regulating legislation. Dickson J. concluded that its only effect was to reduce the revenue or "net backs" of those producers and marketers liable to pay the tax.[403]

Thus the decision in Reference re Proposed Federal Tax on Exported Natural Gas[404] effectively distinguished between taxation and regulation by examining whether the NGGLT had a regulatory effect in the light of other legislation touching upon the oil and gas industry. The absence of a regulatory effect was sufficient to show that the NGGLT was taxation and not regulation. Having no regulatory effect, it could be said that the NGGLT was not necessarily incidental to a broader regulatory scheme.[405] Moreover, even if the NGGLT did have a regulatory effect, it still would have been necessary to show, for the

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[401] 1974-75-76 (Can.), c. 47.

[402] R.S.C. 1970, c. E-13, as amended.

[403] (1982), 136 D.L.R. (3d) 385, at p. 142.

[404] Supra, n. 360.

[405] See (1982), 136 D.L.R. (3d) 385, at p. 443.

purpose of avoiding the limitation in section 125, that the pith and substance of the NGGLT was primarily a matter within the federal power over the regulation of trade and commerce. This would have been difficult to show in the light of the numerous statements in the explanatory materials to the National Energy Program indicating that the primary purpose of the NGGLT and of the other oil and gas levies proposed by the National Energy Program was to give to the Government of Canada a fairer share in the revenue from the oil and gas industry.[406]

The approach taken by the Supreme Court of Canada in Reference re Proposed Federal Tax on Exported Natural Gas[407] shows that the Court is more reluctant than it has been in the past to question or interfere with regulatory legislation. Not only was the Supreme Court of Canada unanimously of the view that the legislation in question could only be upheld if it was regulatory in nature, it would seem that the majority opinion of the Court was of the view that it is no longer sufficient that legislation be enacted pursuant to a regulatory scheme in order for the substance of that legislation to be characterized as regula-

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[406]See (1981), 122 D.L.R. (3d) 48, at pp. 54-56; (1982), 136 D.L.R. (3d) 385, at pp. 328-331.

[407]Supra, n. 360.

tory.[408] The legislation must have a regulatory effect that is ascertainable by the Court, and further than this, the substance of the legislation, for the purpose of ascertaining the applicability of section 125 at least, must be primarily regulatory.

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[408]Recall that in Reference re Employment and Social Insurance Act, supra, n. 255, Rinfret J. and Kerwin J. held that the compulsory contributions considered in that case were mere incidents of regulation and therefore ultra vires. See text accompanying footnote 272.

CONCLUSION

We have seen in this thesis that for constitutional purposes the meaning attributed to taxation by the Courts in Canada has undergone a considerable evolution over the years. The Courts have replaced formal definitions with substantive tests in determining whether a levy constitutes taxation for constitutional purposes. For example, no longer is any legislative levy that is imposed for a public purpose considered taxation by the Courts, as Duff J. considered the levy in dispute in Lawson v. Interior Tree, Fruit and Vegetable Committee.[409] Instead, in order for legislation imposing a levy to be considered taxation for constitutional purposes, the pith and substance of the legislation must be the raising of revenue for governmental purposes and not regulation.

Judicial emphasis on a formal definition of taxation for constitutional purposes arose in the context of a judiciary that was concerned with reconciling the language used in each of the two exclusive grants of taxing power in sections 91(3) and 92(2) of the Constitution Act, 1867.[410] The reconciliation of these two

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[409] Supra, n. 143.

[410] 30 & 31 Vic., c. 3 (U.K.).

exclusive grants of power was made by strictly confining the provincial taxing power to the raising of direct taxes for the exclusive disposition of the Provincial Legislatures.[411] Accordingly, the judiciary placed emphasis on a formal definition of taxation by the necessity of having to distinguish between direct taxation and indirect taxation.

The formal approach to defining taxation gave way to a substantive approach in a line of cases on provincial marketing board legislation in which the judiciary had to come to grips with the difference between taxation and regulation for constitutional purposes.[412] These cases arose in a context in which it had become more difficult for the judiciary to characterize taxing power and regulatory power as overlapping with one another.[413] Thus, by relying on a formal and an overly broad definition of taxation in the earliest of the provincial marketing board cases,[414] the Courts struck down provincial legislation authorizing the imposition of levies for the purposes of defraying the expenses of administering marketing schemes and of

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[411] Supra, pp. 6-14.

[412] Supra, p. 51.

[413] Supra, pp. 50, 51.

[414] See supra, n. 143.

equalizing the returns among producers subject to the schemes on the ground that the levies were indirect taxation. Gradually, this ground for invalidating provincial marketing board legislation, or what was described in this thesis as the Crystal Dairy doctrine,[415] was attenuated as it became judicially recognized that the pith and substance of the legislation involved regulation and not taxation. The Crystal Dairy doctrine was finally overruled in Reference re Agricultural Products Marketing Act.[416]

Interestingly, while the judiciary was striking down provincial marketing board legislation on the ground that it was indirect taxation, it displayed a somewhat different approach in striking down federal taxing legislation of the insurance industry on the ground that it was a colourable attempt to regulate the insurance industry.[417] An explanation for this difference in judicial approach to provincial marketing board legislation and federal legislation with respect to the insurance industry may either be policy bias on the part of the judiciary against government interference with economic relations or simply a manifestation of judicial reluctance to qualify the plenary

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[415]Supra, pp. 68-78.

[416]Supra, n. 145.

[417]See supra, pp. 82-87.

nature of taxing power in any way whatsoever other than in the case of a colourable exercise of taxing power. In any case, the validity of an alleged exercise of taxing power was no longer made to depend on the criterion of colourability when it was held in Reference re Employment and Social Insurance Act[418] that the compulsory contributions made pursuant to the legislation involved in this case were mere incidents of an invalid regulatory scheme and not a colourable exercise of taxing power.

By replacing the kind of view of the plenary nature of taxing power which gave rise to the Crystal Dairy doctrine with the pith and substance doctrine for the purpose of determining whether legislation is taxation or not, the Courts have had to come to grips with the difference between taxation and regulation. This distinction is not an easy one to make because legislation often has both regulatory and taxing aspects. For example, among the purported exercises of taxing power that have been held to be regulation are prohibitory levies,[419] levies

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[418] Supra, n. 255.

[419] For example, see Reference re Alberta Statutes, supra, n. 276; Texada Mines Ltd. v. Attorney-General for British Columbia, supra, n. 319.

incidental to regulatory schemes,[420] and colourable exercises of taxing power.[421] On the other hand, it has been held that a discriminatory tax having a regulatory effect is not sufficient to characterize the legislation authorizing the tax as regulatory[422] and that the use to which the money raised by a governmental levy is put is not important in distinguishing between taxation and regulation.[423] What the case law does indicate is that while the regulatory effect of a levy is not a sufficient factor in characterizing legislation, it is nonetheless an important factor, especially where it is very substantial in relation to the burden imposed by the levy on the levy payer.[424]

Thus one of the key considerations of the Courts in holding certain export taxes ultra vires the Provincial Legislatures was the regulatory effect of these taxes of encouraging the further

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[420]For example, see Reference re Employment and Social Insurance Act, supra, n. 255; Reference re Agricultural Products Marketing Act, supra, n. 145.

[421]For example, see In re The Insurance Act of Canada, supra, n. 224; Reference re Alberta Statutes, supra, n. 276.

[422]For example, see text accompanying footnote 303.

[423]For example, see Reference re Proposed Federal Tax on Exported Natural Gas, supra, n. 360.

[424]An example of a substantial regulatory effect would be one that subjected a business enterprise to regulatory control or substantially intermeddled with the conduct of the enterprise's business. See Reader's Digest Association (Can.) Ltd. v. Attorney-General for Canada (1965), 59 D.L.R. (2d) 54, at p. 70.

processing of natural resources within the Province rather than the raising of a revenue for Provincial purposes.[425] Likewise, one of the key judicial considerations in holding certain taxes of the insurance industry ultra vires the Parliament of Canada was the regulatory effect of these taxes of subjecting the insurance industry to federal regulatory control.[426] Moreover, in characterizing and invalidating both of the above mentioned kinds of taxes, the judiciary has not been reluctant to consider the combined regulatory effect of the legislation under consideration imposing the taxes and related legislation.[427]

In Reference re Proposed Federal Tax on Exported Natural Gas[428] the Supreme Court of Canada considered what the regulatory effect of the NGGLT would be in the light of other legislation affecting the natural gas industry. It was concluded that the NGGLT would have no regulatory effect whatsoever on the natural gas industry because every aspect of the industry was already

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[425]For example, see Texada Mines Ltd. v. Attorney-General of British Columbia, supra, n. 319; Attorney-General of British Columbia v. McDonald Murphy Lumber Co., supra, n. 318.

[426]See In re The Insurance Act of Canada, supra, n. 224; Reference re Section 16 of the Special War Revenue Act, supra, n. 224.

[427]For example, see Texada Mines Ltd. v. Attorney-General for British Columbia, supra, n. 319; In re The Insurance Act of Canada, supra, n. 224.

[428]Supra, n. 360.

fully regulated and, as a result, the NGGLT was not part of a legislative scheme to regulate the oil and gas industry.[429] Indeed, as the only effect of the NGGLT would be to reduce the revenue or "net backs" of those producers and marketers liable to pay the tax,[430] the NGGLT was strictly taxing legislation. It made no difference to this conclusion that the money raised by the tax would be used to promote the objectives of the National Energy Program.[431]

This thesis has examined the relationship between taxation and regulation for constitutional purposes in considerable detail. It is concluded that the judiciary is now explicitly recognizing the differences between these two constitutional heads of power in its task of constitutional decision-making.[432] It is therefore not surprising that the "resource amendment" of 1982 goes to considerable length to distinguish the grants of taxing power and regulatory power contained therein in order to make clear what exactly has been granted to the Provinces.[433]

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[429]See text accompanying footnote 399.

[430]See text accompanying footnote 403.

[431]Supra, pp. 123, 124.

[432]For a recent example, see opinion of La Forest in Air Canada v. B.C. [1989] 4 W.W.R. 97 (S.C.C.), at p. 122.

[433]Supra, pp. 36-49.

There are still constitutional problems remaining, however, in distinguishing between taxation and regulation, even under the "resource amendment". As the examination of the case law in this thesis has shown, the constitutional difference between taxation and regulation is still not clear enough to prevent suspect legislation from being enacted. For example, it is likely that purported exercises of taxing power under either the "resource amendment" or the other taxing powers will still be contested on the ground that what is being exercised is regulatory power and that purported exercises of regulatory power will still be contested on the ground that what is being exercised is taxing power. Moreover, even in spite of the "resource amendment", there is still the possibility that provincial levies on natural resources will be characterized as unconstitutional interferences with the federal power over the regulation of trade and commerce.[434] This is especially true with respect to the regulation of international trade and commerce because the "resource amendment" does not prevent the provinces from imposing taxes on exports of natural resources from the country.[435]

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[434] Supra, pp. 45-48. See also Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan, supra, n. 47.

[435] See, however, supra, n. 122.

What will likely be needed to resolve future problems of constitutionally distinguishing between taxation and regulation is further guidance from the courts. For example, further clarification is still necessary to solve the problem of what constitutes the taxation as opposed to the regulation of exports from the country. As we have seen, the "resource amendment" does not solve this problem with respect to the provincial taxation of exports of natural resources from the country.[436] Nonetheless, it is respectfully submitted that besides granting to the provinces more regulatory and taxing authority with respect to their natural resources, the "resource amendment" has put to rest much of the uncertainty that once existed in distinguishing between what constitutes the taxation of natural resources as opposed to their regulation.[437]

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[436] Id.

[437] The "resource amendment" would not be of any assistance in this respect with respect to the federal taxing power since the scope of the federal taxing power does not need to be increased.

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