CONSTITUTIONAL LAW OF CANADA

Fifth Edition Supplemented

Volume 1

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Publisher's Note

2013 — Release 1 **FILING COPY**

Previous release was 2012-1

Hogg

Constitutional Law of Canada

This publication is the definitive work on Canadian constitutional law, written by a respected constitutional law scholar. All aspects of the subject are thoroughly analyzed, including: basic constitutional concepts, distribution of powers, civil liberties and practice-related issues.

This release features updates to case law and commentary in Chapters 1 (Sources), 2 (Reception), 3 (Independence), 4 (Amendment), 5 (Federalism), 6 (Financial Arrangements), 7 (Courts), 8 (Supreme Court of Canada), 9 (Responsible Government), 12 (Parliamentary Sovereignty), 15 (Judicial Review on Federal Grounds), 16 (Paramountcy), 18 (Criminal Law), 20 (Trade and Commerce), 22 (Transportation and Communication), 28 (Aboriginal Peoples), 33 (Social Security), 36 (Charter of Rights), 37 (Application of Charter), 38 (Limitation of Rights), 40 (Enforcement of Rights), 41 (Exclusion of Evidence), 42 (Religion), 43 (Expression), 45 (Voting), 46 (Mobility), 47 (Fundamental Justice), 48 (Unreasonable Search or Seizure), 51 (Rights on Being Charged), 54 (Self-incrimination), 55 (Equality), 56 (Language) and 59 (Procedure). The index has been updated accordingly.

Case Law Highlights

- **Aboriginal Peoples — Section 35 — Remedies for breach of s. 35** — The Manitoba Act, 1870, provided for the distribution of Crown land to the children of Métis families. This complex and lengthy process was finally completed in 1885. The Manitoba Métis Federation and individual Métis plaintiffs alleged that the long process of implementation infringed the

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if that was indeed its purpose. McLachlin C.J. for the Court held that this was an impermissible inquiry into the efficacy of the law: "The purpose of legislation cannot be challenged by proposing an alternate, allegedly better, method for achieving that purpose."[74]

(g) Colourability

The courts are, of course, concerned with the substance of the legislation to be characterized and not merely its form. The "colourability" doctrine is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction. In the *Alberta Bank Taxation Reference*,[75] for example, the Privy Council held that the legislation, although ostensibly designed as a taxation measure, was in reality directed at banking. Similarly, attempts by the federal Parliament to regulate insurance (a provincial matter) by incorporating provisions into the Criminal Code (criminal law being federal), or by enacting special taxing measures, have been struck down as colourable.[76] A provincial attempt to relieve debtors from the payment of interest (a federal matter) by forgiving part of the principal of the loan has also been condemned as colourable,[77] as has been a provincial attempt to prohibit the propagation of communism (speech being a federal matter) by controlling the use of property.[78]

In *Re Upper Churchill Water Rights* (1984),[79] the Supreme Court of Canada struck down a Newfoundland statute that expropriated the assets of a company that generated hydro-electricity at Churchill Falls in Labrador. On the face of it, the statute seemed valid, because it was clear that Newfoundland had the power to expropriate property situated within its borders. But the Court held that the pith and substance of the statute was to deprive the company of the capacity to fulfil a long-term contract to supply power to Hydro-Quebec at below-market rates. The nullification of this contract was outside the power of Newfoundland, because the contract created rights in Quebec. The statute made no mention of the power contract or of any rights outside the province, and was thus "cloaked in the proper constitutional form".[80] The statute was nevertheless held to be invalid as "a colourable attempt to interfere with the power contract".[81]

In *R. v. Morgentaler (No. 3)* (1993),[82] the Supreme Court of Canada struck down a Nova Scotia statute that required "designated" medical procedures to be

74 *Id.*, para. 26.
75 Note 28 and accompanying text, above.
76 *A.-G. Ont. v. Reciprocal Insurers* [1924] A.C. 328; *Re Insurance Act of Can.* [1932] A.C. 41.
77 *A.-G. Sask. v. A.-G. Can.* (Sask. Farm Security) [1949] A.C. 110.
78 *Switzman v. Elbling* [1957] S.C.R. 285.
79 [1984] 1 S.C.R. 297.
80 *Id.*, 332.
81 *Id.*, 333.
82 [1993] 3 S.C.R. 463.

performed in a hospital. The designation had been accomplished by a regulation, which listed nine medical procedures, of which the fourth was abortion. The statute declared that its purpose was "to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians". On the face of it, the statute seemed to be a health measure, which would be within the constitutional power of the province. The Supreme Court of Canada, in a unanimous opinion by Sopinka J., pointed to uncontradicted testimony that the stimulus for the statute came from a proposal by Dr. Henry Morgentaler to establish an abortion clinic in the province, and the Court quoted extensively from the legislative history of the statute to show the legislators' preoccupation with stopping the establishment of the Morgentaler clinic. None of this was literally inconsistent with the stated purpose of the legislation. Nor did the Court attempt to resolve "the intractable dispute between the parties as to whether this legislation will in fact restrict access to abortion in Nova Scotia".[83] Nevertheless, the Court held that the statute and regulation "were aimed primarily at suppressing the perceived harm or evil of abortion clinics", and that they were properly characterized as invalid criminal laws.[84] The Court struck down the statute and regulation in their entirety, despite the fact that eight of the nine designated hospital procedures had nothing to do with abortion. By this holding, the Court made clear that it regarded the designation of the eight non-abortion procedures as a smokescreen to conceal from a reviewing court the true purpose of the legislation. This is a remarkable application of the colourability doctrine.[85]

In these colourability cases there is a very fine line between adjudication on policy and adjudication on validity. Indeed, the adjective "colourable" carries a strong connotation of judicial disapproval, if not of the policy of the statute, at least of the means by which the legislative body sought to carry out the policy. Such disapproval is entirely out of place, serving only to cast doubt on the neutrality of judicial review. The colourability doctrine can and should be stated without impugning the legislative branch: it simply means that "form is not controlling in the determination of essential character".[86]

The colourability doctrine applies the maxim that a legislative body cannot do indirectly what it cannot do directly. However, as is suggested by the paucity of citations in this section of the chapter, arguments of colourability are rarely successful. Often, a legislative body will find a way to do indirectly what it cannot do directly. For example, the federal Parliament cannot regulate the delivery of health care in the provinces, but it can transfer cash and tax points to only those

83 *Id.*, 515.

84 *Id.*, 512.

85 Sopinka J. (at 496) denied that he was applying the colourability doctrine. This is one of those occasions where the text-writer must rely on what the Court has done rather than on what the Court says it has done!

86 A.S. Abel, "The Neglected Logic of 91 and 92" (1969) 19 U. Toronto L.J. 487, 494.

provinces whose health care plans comply with federal standards of universality, accessibility and mobility.[87] Neither the federal Parliament nor the provincial Legislatures can delegate powers to each other, but each can delegate powers to agencies created by the other.[88] A provincial Legislature cannot regulate television programmes or advertising, but it can prohibit certain kinds of advertising in all media, and the prohibition will be valid and effective as a bar to television advertising.[89] A provincial Legislature cannot levy a sales tax on the vendor of a good, because such a tax would be indirect, but the Legislature can impose on the vendor an obligation to collect a tax that is formally levied on the consumer of the good.[90]

(h) Criteria of choice

The characterization of a statute is often decisive of its validity, and the Court will obviously be aware of that fact. The choice between competing characteristics of the statute, in order to identify the most important one as the "matter", may be nothing less than a choice between validity or invalidity. What are the criteria of importance that will control or at least guide this crucial choice? No doubt, full understanding of the legislative scheme, informed by relevant extrinsic material, will often reveal one dominant statutory policy to which other features are subordinate. No doubt, too, judicial decisions on similar kinds of statutes will often provide some guide. But in the hardest cases the choice is not compelled by either the nature of the statute or the prior judicial decisions. The choice is inevitably one of policy.

The policy choice that lies at the base of a characterization decision is bound to be related to the ultimate consequence of the choice which is, I am assuming, the validity or invalidity of the statute. The choice must be guided by a concept of federalism. Is this the kind of law that should be enacted at the federal or the provincial level?[91] The reasoning at this point should not be affected by judicial approval or disapproval of the particular statute in issue; nor by the political situation which provided the controversy, let alone the political allegiances of the contending parties. The only "political" values which may be accepted as legitimate to judicial review are those that have a constitutional dimension to them, that is, values that may reasonably be asserted to be enduring considerations in the allocation of power between the two levels of government.[92]

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87 See ch. 6, Financial Arrangements, under heading 6.8, "Spending power", above.

88 See ch. 14, Delegation, under heading 14.3, "Federal inter-delegation", above.

89 *Irwin Toy v. Quebec* [1989] 1 S.C.R. 927, 953 (expressly rejecting colourability argument).

90 See ch. 31, Taxation, under heading 31.7, "Sales taxes", below.

91 Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), 241.

92 This seems to me to be the thesis of H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1, but his use of the word "neutral" was unfortunate, since it implied a value-free process of reasoning which Wechsler did not intend. His article was an attempt to defend the legitimacy of judicial review by emphasizing the rational side of adju-

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TAXATION

31.1 Distribution of powers

(a) The primary powers

The distribution of powers over taxation[1] has already been briefly described, and their co-operative exercise has been considered, in chapter 6, Financial Arrangements.

The federal Parliament, under s. 91(3) of the Constitution Act, 1867, has the power to make laws in relation to "the raising of money by any mode or system of taxation". This power[2] extends to any kind of taxation, whether direct or indirect.[3]

The provincial Legislatures, under s. 92(2) of the Constitution Act, 1867, have the power to make laws in relation to "direct taxation within the province in order to the raising of a revenue for provincial purposes". This power limits the provinces in three ways: to "direct" taxation, to taxation "within the province" and to taxation "for provincial purposes". These three limitations, which apply only to provincial power, will be examined later in this chapter. The Constitution Act, 1982 conferred another taxing power on the provincial Legislatures: a power to employ "any mode or system of taxation" in respect of natural resources in the province. This new power, which extends to indirect as well as direct taxation of resources, will also be examined later in this chapter.

Needless to say, both the federal and provincial taxing powers are subject to the ordinary principles of classification[4] and colourability[5] that apply to all legislative powers. The pith and substance of a law that imposes a charge or a levy may be held to be some matter other than taxation, for example, insurance,[6]

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1 See Kennedy and Wells, *The Law of the Taxing Power in Canada* (1931); Laskin, *Canadian Constitutional Law* (5th ed., 1986 by Finkelstein), ch. 13; J.E. Magnet, "The Constitutional Distribution of Taxation Powers in Canada" (1978) 10 Ottawa L. Rev. 473; La Forest, *The Allocation of Taxing Power under the Canadian Constitution* (2nd ed., 1981) Ip and Mintz, *Dividing the Spoils: the Federal-Provincial Allocation of Taxing Powers* (1992).

2 Note the doubt whether the taxing power may be delegated as freely as other legislative powers: see ch. 14, Delegation, under heading 14.2(a), "Delegation of legislative power", above.

3 La Forest, note 1, above.

4 For example, the collection measures authorized by federal taxing legislation have been upheld as validly incidental to the raising of revenue, despite their effect on property and civil rights: *Re GST* [1992] 2 S.C.R. 445; *TransGas v. Mid-Plains Contractors* [1994] 3 S.C.R. 753.

5 In *Re Anti-Inflation Act* [1976] 2 S.C.R. 373, 390, Laskin C.J. said: "The Parliament of Canada is authorized to raise money 'by any mode or system of taxation' and it would be an unusual case where this power, so apparently limitless, could be challenged as colourably used and thus make it appropriate for the Court to consider extrinsic material to show colourability". However, the colourability doctrine has been used to strike down a federal tax, which was classified as a disguised attempt to regulate insurance: see next note.

6 *Re Insurance Act of Can.* [1932] A.C. 41.

unemployment insurance,[7] banking,[8] export trade,[9] labour standards[10] or marketing.[11] In such cases, the validity of the law turns on whether the enacting legislative body had legislative authority over the true matter of the law. The enacting body's taxing power is irrelevant.[12]

(b) For provincial purposes

We have noticed that the provincial power of taxation in s. 92(2) is subject to three limitations: (1) the tax must be "direct"; (2) the tax must be "within the province"; and (3) the tax must be "for provincial purposes". The first two limitations are of great importance, and are examined at length later in this chapter. The third — that the tax be "in order to the raising of a revenue for provincial purposes" — has turned out to be unimportant. It will be described now so that it can be put aside.

In *Dow v. Black* (1875),[13] the Privy Council held that a province could levy a tax to finance the building of an interprovincial railway, although such an undertaking would be outside the legislative power of the province. It was no doubt this case and others like it that led Duff C.J. to assert that the phrase "for provincial purposes" meant only that "the taxing power is given to them [the provinces] for the exclusive disposition of the Legislature".[14] This dictum, although uttered in dissent, is now the established position. In other words, the phrase "for provincial purposes" imports no limits on the purposes for which a province may raise taxes.[15] This is consistent with the rule that the spending power of the provinces is comparable to that of a natural person, extending to purposes that are outside the legislative authority of the provinces.[16]

Nor does the phrase "for provincial purposes" in s. 92(2) constitute an implied restriction on the federal taxing power of s. 91(3). In *Winterhaven Stables v. Canada* (1988),[17] it was argued that the federal Income Tax Act was invalid on the ground that the income tax was used for the raising of a revenue for provincial purposes. In support of the argument, it was pointed out that the revenues raised by the income tax contributed to the grants that were made to the provinces out of the Consolidated Revenue fund to subsidize provincial programmes of post-

7 *A.-G. Can. v. A.-G. Ont.* (Unemployment Insurance) [1937] A.C. 355.
8 *A.-G. Alta. v. A.-G. Can.* (Bank Taxation) [1939] A.C. 117.
9 *Texada Mines v. A.-G. B.C.* [1960] S.C.R. 713.
10 *Commn. du Salaire Minimum v. Bell Telephone Co.* [1966] S.C.R. 767.
11 *Re Agricultural Products Marketing Act* [1978] 2 S.C.R. 1198.
12 See also sec. 31.10, "Taxes and charges", below.
13 (1875) L.R. 6 P.C. 272.
14 *Re Employment and Social Insurance Act* [1936] S.C.R. 427, 434, per Duff C.J. dissenting. On appeal, the Privy Council did not address the point: [1937] A.C. 355.
15 *Air Can. v. B.C.* [1989] 1 S.C.R. 1161, 1189; Laskin, note 1, above, 838-839; La Forest, note 1, above, 75-76.
16 Chapter 6, Financial Arrangements, under heading 6.8, "Spending power", above.
17 (1988) 53 D.L.R. (4th) 413 (Alta. C.A.).

secondary education, health care and welfare. The Alberta Court of Appeal rejected the argument, holding that it was not an objection to a federal taxing statute that some part of the revenue would ultimately be used for provincial purposes. This decision confirmed that there are no limits on the purposes for which the federal Parliament may raise taxes.[18] The decision also confirmed the corollary proposition that the spending power of the Dominion (like that of the provinces) is comparable to that of a natural person, extending to purposes that are outside the legislative authority of the federal Parliament.[19]

(c) The provincial licensing power

The provinces also have power, under s. 92(9), to make laws in relation to "shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes". Note that this power is explicitly limited to "the raising of a revenue". It is a taxing power, not a regulatory power.[20] The provinces can, of course, regulate occupations or activities by licensing, but only under other powers, such as those in respect of natural resources (s. 92A(1)), municipal institutions in the province (s. 92(8)), local works and undertakings (s. 92(10)), property and civil rights in the province (s. 92(13)) or matters of a merely local or private nature in the province (s. 92(16)).[21]

Section 92(9) is not explicitly limited to the raising of a revenue by direct means, which invites the question: to what extent, if at all, does s. 92(9) enlarge s. 92(2) by authorizing indirect taxation in the form of licence fees? There have been considerable, but inconclusive, judicial dicta on this point. La Forest's careful study of the cases leads him to the conclusion that s. 92(9) authorizes indirect licence fees only if they are directed to defraying the expense of an otherwise valid regulatory scheme.[22] It may be objected that the provinces have this power anyway, as an incident to the regulatory scheme,[23] and so this interpretation leaves s. 92(9) with no independent force of its own. But it does seem

18 La Forest, note 1, above, 52. Contra, Laskin, note 1, above, 788. The question whether Parliament may impose indirect taxation for provincial purposes was raised and left open in *Caron v. The King* [1924] A.C. 999, 1004 and in *Re Agricultural Products Marketing Act* [1978] 2 S.C.R. 1198, 1233. But the *Winterhaven* decision, previous note, although dealing with direct taxation, would also apply to indirect taxation, suggesting an affirmative answer.

19 Note 16, above.

20 La Forest, note 1, above, 162-165.

21 E.g., *Hodge v. The Queen* (1884) 9 App. Cas. 117.

22 La Forest, note 1, above, 155-165. Magnet, note 1, above, 522-527 reaches a similar conclusion, except that he considers that indirect licence fees are not necessarily limited to expenses.

23 Section 31.10, "Taxes and charges", below.

to be the better view, because of "the overriding implication of sections 91 and 92 that the power to levy indirect taxation should be reserved to Parliament".[24]

(d) Limitations on the powers

There are two provisions of the Constitution Act, 1867 which impose restraints on both federal and provincial taxes. Section 121 provides that:

> All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the other provinces.

The purpose of s. 121, supplemented by a common external tariff and common citizenship, was to make Canada a common market. Section 121 certainly precludes customs duties between the provinces.[25] The question whether it goes further and precludes non-fiscal impediments to interprovincial trade has not been definitely decided.[26]

The other express restraint on the taxing powers is s. 125, which provides that:

> No lands or property belonging to Canada or any province shall be liable to taxation.

The purpose of this provision is to exempt each level of government from land or property taxes levied by other levels of government. This provision is considered later in this chapter.[27]

(e) Paramountcy

Federal and provincial powers overlap in the field of direct taxation, which includes the two most lucrative taxes, namely, income taxes and retail sales taxes. Therefore, both levels of government do in fact exploit the same tax bases. For example, the resident of Canada pays an income tax to both the federal government and his or her provincial government; and the taxes are calculated on the same income or, in the case of Quebec, virtually the same income. There is no constitutional objection to this "double taxation"; nor does it attract the application of the paramountcy doctrine. As Lord Macmillan put it, in a case upholding a Manitoba income tax: "Both income taxes may be enforced without clashing. The Dominion reaps part of the field of the Manitoba citizen's income. The

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24 La Forest, note 1, above, 164. Section 92(9) authorizes indirect levies provided they are limited to defraying the expenses of a valid regulatory scheme: *Allard Contractors v. Coquitlam* [1993] 4 S.C.R. 371, 404; *Ont. Home Builders' Assn. v. v. York Region Bd. of Ed.* [1996] 2 S.C.R. 929, paras. 53, 114.

25 But see *Atlantic Smoke Shops v. Conlon* [1943] A.C. 550; note 44, below.

26 See ch. 46, Mobility, under heading 46.2(b), "Section 121 of the Constitution Act, 1867," below.

27 Section 31.13, "Section 125", below.

Province reaps another part of it".[28] As explained earlier,[29] the Dominion and the provinces have entered into agreements for the "sharing" of common tax fields, and for the definition and collection of the taxes, so that double taxation is in practice not much more oppressive or complex than is any system of modern taxation.

31.2 The meaning of direct taxation

(a) Mill's definition

It will be recalled that s. 92(2) of the Constitution Act, 1867 confines the provinces to "direct" taxes.[30] John Stuart Mill, writing in 1848, defined direct and indirect taxes in these terms:[31]

> 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.

The courts have accepted this language as the authoritative explanation of the words "direct taxation" in s. 92(2).[32] Although economists would no longer accept the validity of Mill's distinction, the Constitution requires a distinction of some kind to be drawn, and Mill's definition has served as a reasonably justiciable formula. In fact most kinds of taxation can now be confidently assigned to one class or the other, and the room for controversy is accordingly quite limited.[33]

The distinction between a direct and indirect tax has been held to lie in "the general tendencies of the tax and the common understandings of men as to those

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28 *Forbes v. A.-G. Man.* [1937] A.C. 260, 274; see generally ch. 16, Paramountcy, above.

29 Chapter 6, Financial Arrangements, above.

30 In Australia, where the states are not confined to direct taxation, they are precluded from levying "duties of customs and of excise" (Constitution, s. 90) and a broad judicial definition of excise has in fact withdrawn from the states most kinds of indirect taxation. In the United States, there is a limitation on federal taxing power in that "direct" taxes must be apportioned among the states in proportion to population (Constitution, art. 1, s. 2(3); art. 1, s. 9(4); not applicable to income tax: 16th amdmt.); but there is no comparable limitation on state taxing power, although implications from the federal commerce clause (Constitution art. 1, s. 8(3)) and the due process clause (14th amdmt.), together with the prohibition on "imposts or duties on imports or exports" (Constitution, art. 1, s. 10(2)), preclude some forms of indirect taxation.

31 J.S. Mill, *Principles of Political Economy* (1848), Book V, ch. 3.

32 *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575 is the leading case, but Mill's definition is relied upon in nearly all the cases.

33 In *Ont. Home Builders' Assn. v. York Region Bd. of Ed.* [1996] 2 S.C.R. 929, paras. 126-146, La Forest J., concurring in the result, held that where a tax falls within an established "direct" category (in that case, land taxes), then it is no longer correct to apply the Mill passing-on test; any variant of the established category is direct regardless of its tendency to be passed on. Iacobucci J. for the majority rejected this view, holding that a tendency to be passed on made even a tax on land indirect.

tendencies".[34] If the general tendency is for the tax to be paid by the very person taxed, then the tax is direct; if the general tendency is for the tax to be paid by someone else, then the tax is indirect. The courts have said that they are not concerned with whether the tax is in fact recouped by the taxpayer in a particular case.[35] In fact, of course, whenever a tax is levied upon a person in business, the proprietor will seek to recoup the tax as part of the price of the goods or services which he produces. Indeed, he has to do so if he is to make a profit and stay in business. If this recoupment were given constitutional significance, most taxes would be indirect and the tax bases available to the provinces would be seriously inadequate to supply provincial revenue. What the courts have done is to distinguish between, on the one hand, a tax which is likely to be recouped only because, like other expenses, it is a cost of doing business, and, on the other hand, a tax which is likely to be "passed on" as an element of the very good or service or transaction which is taxed.[35a]

The most useful description of the passing-on characteristic that will make a tax indirect[36] is a dictum of Rand J.'s, as follows:[37]

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

Take, for example, a tax on the removal of gravel from a quarry. In a case where such a tax was levied on a volumetric basis (26 cents per cubic metres of gravel was the rate of one such tax), the tax was held to be indirect,[38] because the tax would tend to cling to the gravel as part of the resale price when the gravel was sold by the quarry company. The purchaser of the gravel was likely to end up bearing the burden of the tax, because the purchaser was likely to have to pay 26 cents more per cubic metre for the gravel than the price that would have been acceptable to the quarry company had there been no tax. If, on the other hand, the tax on the removal of the gravel had been levied on a flat basis (unrelated to the volume of

34 *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575, 582.

35 *Id.*, 581; *Brewers' and Maltsters' Assn. of Ont. v. A.-G. Ont.* [1897] A.C. 231; *A.-G. B.C. v. Kingcome Navigation Co.* [1934] A.C. 45; *Cairns Construction v. Govt. of Sask.* [1960] S.C.R. 619.

35a E.g., *Out-Of-Home Marketing Assn. v. Toronto* (2012) 348 D.L.R. (4th) 288 (Ont. C.A.) (flat annual tax on advertising signs not related to revenue from advertising or commodity being advertised; held, tax direct).

36 In *Re Que. Sales Tax* [1994] 2 S.C.R. 715, 726, Gonthier J. for the Court suggested that "transparency" ("everyone know[ing] how much tax they really pay") was also a characteristic of a direct tax. This does not find support in Mill's definition. Query whether it is correct. If a value-added tax or other form of retail sales tax were embedded in the retail price instead of being charged separately by the retailer, surely this would not convert a direct tax into an indirect one.

37 *C.P.R. v. A.-G. Sask.* [1952] 2 S.C.R. 231, 251-252.

38 *Allard Contractors v. Coquitlam* [1993] 4 S.C.R. 371, 398 (the impost, although indirect, was upheld as a regulatory charge); folld. in *Ont. Home Builders' Assn. v. York Region Bd. of Ed.* [1996] 2 S.C.R. 929 (education development charge imposed on land under development held to be indirect, but upheld as a regulatory charge).

gravel removed), the tax would have been direct,[39] because it could not be related to each unit of the gravel. A flat tax would form part of the quarry company's expenses of doing business, and, like all such expenses, would if possible be reflected in the quarry company's prices; but that recovery of the tax would not make the tax indirect.

If a tax is related to a unit of a good, the tax will still be direct if it is impossible for the payer of the tax to pass it on to anyone else. That is why Rand J.'s above-quoted test stipulates that an indirect tax is "imposed when the commodity is in course of being manufactured or marketed"; in that case, the manufacturer or wholesaler will normally be able to pass on the tax when the good is resold. But if the tax is imposed on the consumer (the last purchaser) of the good, who is not going to resell the good, then the payer of the tax has no way of shifting the burden to anyone else, and the tax is direct. This is the rationale under which the provinces have been able to levy a retail sales tax; it is discussed later in the chapter.[40] A similar rationale supports the directness of a value-added tax imposed on the purchaser of goods or services. Although a value-added tax is imposed at each stage of production and marketing, the tax is reimbursed to each payer in the chain of distribution except for the final purchaser for consumption. Only the final purchaser is not reimbursed; and of course the final purchaser is the only payer who cannot pass the tax on to anyone else. The value-added tax is therefore direct.[41]

(b) Rationale for restricting provincial power

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

As noticed earlier, even a direct tax will be circuitously recouped if it forms part of the overhead of a business. But it is obviously neither possible nor desir-

39 *Id.*, 394.
40 Section 31.7, "Sales taxes", below.
41 *Ibid.*

able to exclude from the provincial taxing power all taxes that are in fact recouped by the initial taxpayer. The test of directness is a justiciable means of excluding from

(Continued on page 31-9)

provincial power at least those taxes that are most likely to be passed on, and thereby confining provincial power to those taxes the burden of which is most likely to remain within the province.

31.3 Customs and excise duties

A customs duty is a tax on the import of goods. An excise duty is a tax on the manufacture or distribution of goods. These two taxes have been described as the "classical examples of indirect taxation".[42] A customs or excise duty is payable by the importer or manufacturer or distributor, but he will pass it on as part of the price which he charges for the imported or manufactured or distributed goods.[43] Customs and excise duties are therefore competent only to the federal Parliament.[44]

An export tax is a tax on the export of goods. It is analogous to a customs duty, and is sometimes called a customs duty. An export tax is also an indirect tax.[45]

A sales tax, which is discussed more fully later on,[46] is, if imposed on the seller, analogous to an excise tax, and is sometimes called an excise tax. It is also an indirect tax. Other excise-type taxes that have been held to be indirect taxes are: a tax on insurers computed as a percentage of each premium,[47] a tax on building contractors computed as a percentage of each contract price,[48] a tax on the seller of grain futures computed as a percentage of each contract.[49] A tax on the gross revenue of a coal mine has also been held indirect, on the basis that gross revenue is the sum of all of the taxpayer's sales of coal, and is no different from a tax on each sale.[50]

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42 *Atlantic Smoke Shops v. Conlon* [1943] A.C. 550, 568.

43 Customs and excise were expressly transferred from the provinces to the Dominion by s. 122 of the Constitution Act, 1867, but s. 122 is now spent and the present power derives from s. 91(3): La Forest, note 1, above, 94-96; Laskin, note 1, above, 782. It has been suggested that customs duties also come within s. 91(2) (trade and commerce): *A.-G. B.C. v. A.-G. Can.* (Johnnie Walker) [1924] A.C. 222; and certainly there is a close connection between regulating and taxing the importation of goods.

44 However, notwithstanding this rule, and s. 121 of the Constitution Act, 1867, provincial retail sales taxes may be levied on goods brought into the province along with goods purchased in the province: *Atlantic Smoke Shops v. Conlon* [1943] A.C. 550; *Re Marine Petrobulk* (1985) 18 D.L.R. (4th) 451 (B.C.C.A.); see also S.M. Beck, Comment (1964) 42 Can. Bar Rev. 490.

45 *A.-G. B.C. v. McDonald Murphy Lumber Co.* [1930] A.C. 357; *Can. Industrial Gas and Oil v. Govt. of Sask.* [1978] 2 S.C.R. 545.

46 Section 31.7, "Sales taxes", below.

47 *A.-G. Que. v. Queen Ins. Co.* (1878) 3 App. Cas. 1090.

48 *Charlottetown v. Foundation Maritime* [1932] S.C.R. 589.

49 *A.-G. Man. v. A.-G. Can.* (Grain Futures) [1925] A.C. 561.

50 *The King v. Caledonian Collieries* [1928] A.C. 358. Contra, *Harbour Grace v. Community Cable* (1993) 103 Nfld. & P.E.I.R. 1 (Nfld. C.A.) (upholding a provincial business tax taking the form of a percentage of the gross revenue of the business); but surely a percentage of gross

31.4 Income taxes

An income tax is normally a tax on net income, that is, income after deduction of the expenses incurred in gaining the income. A tax on net income is direct.[51] Indeed, "an income tax is the most typical form of direct taxation".[52] This is so, even if the tax is only on a particular type of income, for example, income from mining.[53]

A tax on gross income would also be direct if the tax could not be passed on to another. For example, a tax on income from employment would be direct, whether the base was defined as gross or net income. The recipient of employment income has no obvious way of passing on the burden of the tax. However, as noted earlier, a tax on the gross revenue from the sale of goods or services is so similar to a tax on each sale that it will tend to cling to the product; it is therefore classified as indirect.[54]

31.5 Business taxes

Business taxes taking the form of a flat fee,[55] or of a fee that varies with amount of capital and number of places of business[56] (or any factor other than volume of transactions)[57] have been held to be direct; these taxes are no doubt recouped from the customers of the business, but they are not different in this respect from other costs of production.[58]

31.6 Property taxes

Taxes on land or other fixed assets[59] are direct. Municipal real property taxes fall into this category.[60] Such taxes are of course levied not only on owner-occupiers but also on landlords, and landlords will seek recoupment from their tenants; but this recoupment does not make the tax indirect, being regarded as an

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revenue is no different from a tax on the sale of every good and service supplied by a vendor, which is an indirect tax.

51 *Nickel Rim Mines v. A.-G. Ont.* [1966] 1 O.R. 345 (C.A.); affd. [1967] S.C.R. 270; La Forest, note 1, above, 101-103.

52 *Forbes v. A.-G. Man.* [1937] A.C. 260, 268; and see *Abbott v. St. John* (1908) 40 S.C.R. 597; *Caron v. The Queen* [1924] A.C. 999; *Kerr v. Supt. of Income Tax* [1942] S.C.R. 435.

53 *Nfld. & Labrador Corp. v. A.-G. Nfld.* [1982] 2 S.C.R. 260.

54 Note 50, above.

55 *Brewers' and Maltsters' Assn. v. A.-G. Ont.* [1897] A.C. 231.

56 *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575.

57 La Forest, note 1, above, 103-104.

58 Text accompanying note 34, above.

59 *A.-G. B.C. v. E. & N. Ry.* [1950] A.C. 87; *CPR v. A.-G. Sask.* [1952] 2 S.C.R. 231; La Forest, note 1, above, 104-106.

60 *Ont. English Catholic Teachers' Assn. v. Ont.* [2001] 1 S.C.R. 470, para. 79.

overhead expense like the cost of repairs or heating.[61] Even a tax on the stock-in-trade of a business has been held to be direct.[62]

In *Ontario Home Builders' Association v. York Region Board of Education* (1996),[63] the taxes in issue were "education development charges", which were imposed under statutory authority by school boards in Ontario. The charges were levied on land undergoing development for residential housing, and were paid on each residential unit on the issue of a building permit. Iacobucci J., for the majority of the Supreme Court of Canada, acknowledged that the charges were "land taxes", a category of tax that in the past had been held to be direct. In this case, however, he held that the charges were indirect, because there would be a tendency for the charges to be passed on by the developer to the ultimate purchasers of the new houses. Therefore, the charges were indirect taxes, and were incompetent to the province under the main taxing power of s. 92(2). However, Iacobucci J. upheld the charges on the basis that they were regulatory charges that had been levied for the purpose of defraying the cost of the new school construction that would be entailed by new housing developments.[64] La Forest J. wrote a concurring opinion in which he upheld the charges under the province's main taxing power of s. 92(2). In his view, the education development charges were land taxes and not regulatory charges. The prior cases established that the category of land taxes was a direct category, regardless of the incidence of any particular variant of the tax. In the case of an established direct category, it was not correct to revisit the issue of directness by reference to Mill's passing-on definition. He agreed that the charges were probably indirect on the basis of the passing-on definition,[65] but that was not a relevant question in the case of an established direct category.

31.7 Sales taxes

A sales tax, if imposed upon the seller, is analogous to an excise tax, and it is obvious that the tax will usually tend to enter into the price charged to the purchaser. Such a tax is indirect.[66] If a sales tax is imposed upon the purchaser, the indirect character of the tax is less obvious, although there is an analogy with a customs duty. In *A.-G. B.C. v. CPR* (1927),[67] the Privy Council held that a

61 *Candow v. City of Corner Brook* (1983) 147 D.L.R. (3d) 165 (Nfld. C.A.); *Germain v. Montreal* [1997] 1 S.C.R. 1144.

62 *Fortier v. Lambe* (1894) 25 S.C.R. 422; *Colpitts Ranches v. A.-G. Alta.* [1954] 3 D.L.R. 121 (Alta. S.C.).

63 [1996] 2 S.C.R. 929. The Court was unanimous. Iacobucci J. wrote the majority opinion, which was agreed with by Lamer C.J., Sopinka, Cory and Major JJ. La Forest J. wrote a concurring opinion, which was agreed with by L'Heureux-Dubé, Gonthier and McLachlin JJ.

64 The regulatory-charge issue in the case is discussed in section 31.10(b), "Regulatory charges", below.

65 [1996] 2 S.C.R. 929, para. 146.

66 Section 31.3, "Customs and excise duties", above.

67 [1927] A.C. 934. Followed in *Air Can. v. B.C.* [1989] 1 S.C.R. 1191 (similar statute).

provincial tax on the purchaser of fuel oil (one-half cent on each gallon purchased) was indirect. Fuel oil was a marketable commodity; it could be resold by the initial purchaser, and on resale the tax would enter into the price charged. It was established that the Canadian Pacific Railway, the taxpayer, consumed the oil and did not resell it, but their lordships refused to be distracted by what they described as "the special circumstances of individual cases". Because it was "practicable" to pass the tax along, the tax should be classified as indirect and therefore unconstitutional.

After the *Canadian Pacific* case, British Columbia amended its legislation so that the tax on fuel oil (at the same rate as before) was levied on the consumer instead of the purchaser. In *A.-G. B.C. v. Kingcombe Navigation Co.* (1933),[68] the Privy Council upheld the tax as direct. The distinction between this tax and the old one was that a consumer, unlike a purchaser, cannot resell, and therefore cannot pass along the tax. Of course, commercial users of fuel oil would no doubt recoup the tax as part of the price of their service or product, but their lordships held that because the tax did not fasten onto any transaction with the oil any such subsequent recoupment did not make the tax direct.[69]

In *Kingcombe*, the tax had been levied in accordance with the amount of oil consumed. This emphasized that the tax was levied on consumption, but it made the tax a difficult one to collect. In *Atlantic Smoke Shops v. Conlon* (1943),[70] the Privy Council upheld a provincial tax which was levied at the point of retail sale. New Brunswick's tobacco tax was to be paid at the rate of ten per cent of the retail price by any person who purchased for his own consumption, or for the consumption of others at his expense. The tax was also payable by a person who purchased as agent for another, although the agent would obviously be reimbursed by his principal. The problem of collection was solved by the ingenious device of requiring all sellers of tobacco to collect the tax as agents of the provincial government. Indeed, the constitutional challenge was made by a smoke shop which was prosecuted for failing to fulfil its role as provincial tax-collector. The Privy Council held that the tax was direct. Because it was to be paid by the consumer, there was "no question of further re-sale", and the tax could not be "passed on to any other person by subsequent dealing".[71]

These decisions opened up to the provinces the field of retail sales taxes.[72] All provinces except Alberta have availed themselves of the opportunity to levy a low-rate (but high-yield) general retail sales tax. While rates and exemptions

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68 [1934] A.C. 45. Followed in *Air Can. v. B.C.* [1989] 1 S.C.R. 1191 (similar statute).

69 See also *Cairns Construction v. Sask.* [1960] S.C.R. 619, upholding a retail sales tax in respect of building materials, which were not to be resold as such, but which were to be incorporated by the purchaser into houses build for sale.

70 [1943] A.C. 550.

71 Id., 563.

72 Compare *Dickenson's Arcade v. Tasmania* (1974) 130 C.L.R. 177 (H.C. Aust.), holding that a consumption tax is not a duty of excise and is therefore competent to the states: see note 30, above.

vary, the taxes cover most kinds of "tangible personal property" which are purchased at retail sale in the province. They follow the *Conlon* model in applying to purchases for consumption, in providing for the licensing of all retailers, and in constituting each retailer as agent of the province to collect the tax.[73] There is no doubt that these taxes are constitutional.

The competence of the federal Parliament under s. 91(3) to levy a sales tax — whether direct or indirect — is not in doubt: a sales tax is a "mode of system of taxation". However, in *Re GST* (1992),[74] the government of Alberta brought proceedings to challenge the power of the federal Parliament to levy the Goods and Services Tax, which had been introduced in 1991.[75] The Goods and Services Tax is a value-added tax, which is a type of sales tax, but one that is levied on the value added to a good or service at each stage of production and distribution. Each payer of the tax is reimbursed by the government (through the mechanism of an "input tax credit") for the tax paid at each stage of production and distribution except for the final retail sale. This is a characteristic of all value-added taxes, which are constructed to avoid the "cascading" of tax (the levying of tax on tax) as a good or service moves through the chain of production and distribution. The burden of tax is borne only once, at the point of final retail sale, where the payer (who is, under the GST, the purchaser for consumption) has no right to be reimbursed. It was argued against the tax that, since no revenue was retained by government from the imposition of the GST at stages prior to the final sale, the collection provisions of the tax were not really revenue-raising measures, and were an invalid interference with property and civil rights. The Supreme Court of Canada rejected this argument, holding that the multi-stage collection provisions that were characteristic of value-added taxes was "simply part and parcel of the mode or system of taxation adopted by Parliament".[76]

In *Re GST*, it did not matter whether the GST was a direct or indirect tax, because it had been imposed by the federal Parliament. When the GST was introduced in 1991, it replaced a federal sales tax that was imposed at the wholesale level, and that was undoubtedly indirect. However, the GST is imposed on the final purchaser for consumption, and is therefore a direct tax that could be adopted by the provinces. It is true that the GST is also imposed at every stage of production

73 Even a tax collected by the wholesaler from the retailer and remitted to the Crown in advance of the retail sale (when the tax was actually imposed) as been held to be direct: *Chehalis Indian Band v. B.C.* (1988) 53 D.L.R. (4th) 761 (B.C.C.A.).

74 [1992] 2 S.C.R. 445. Lamer C.J. wrote the majority opinion with the agreement of five others, La Forest J. wrote a separate concurring opinion with the agreement of one other.

75 S.C. 1990, c. 45, amending the Excise Tax Act.

76 [1992] 2 S.C.R. 445, 492. The Court also rejected an argument that the federal government was under a constitutional obligation to compensate all suppliers of taxable goods and services for the costs involved in collecting the tax as agents of the federal government. The Court held that s. 103 of the Constitution Act, 1867, which was claimed to be the source of this obligation, was simply an appropriation provision, providing authority to pay the costs of tax collection, but imposing no obligation to do so.

and distribution prior to the point of final retail sale, but this feature would not make the tax indirect. As explained above, each payer of the tax, except for the final purchaser, is reimbursed for the tax paid. The persons who are entitled to reimbursement are really tax collectors rather than taxpayers. They will not pass on the cost of the tax, because they do not bear the cost of the tax. The final purchaser at retail (the consumer) is the only person who bears the cost of the tax, and that person cannot pass it on. In effect, the value-added form of taxation is a method of collecting a retail sales tax in instalments, instead of in a single lump sum at the point of retail sale. The tax remains a retail sales tax, and, being imposed on the consumer, it is a direct tax.[77]

31.8 Death taxes

Death taxes[78] come in essentially two forms. An "estate tax" is levied on all the property of a deceased person, irrespective of its location and irrespective of who will inherit it. An "inheritance tax" (or succession duty) is levied on the inheritance received by each beneficiary. There are Canadian precedents for both kinds of tax. The federal Parliament levied a succession duty in 1941, and replaced it with an estate tax in 1958; the estate tax was abolished at the end of 1971 when a capital gains tax, effective on death, was introduced. Various provinces have levied succession duties intermittently since 1892; at the time of writing, there has been a general withdrawal from the field, and no province now levies a succession duty.

An estate tax is incompetent to the provinces, because it is indirect. It is indirect because it must of necessity be levied on the executor (or administrator) of the estate, and it is of course contemplated that he will reimburse himself from the assets of the estate and thereby pass the tax on to the beneficiaries. A further constitutional difficulty with an estate tax is that it will ordinarily include property outside the province and exceed the limitation in s. 92(2) to taxation "in the province"; this point is taken up later in this chapter.[79]

An inheritance tax, or succession duty, is competent to the provinces, because it can be levied directly on the beneficiary, in which case it is direct.[80] However, even an inheritance tax has to be carefully framed to avoid the trap of indirectness (as well as extraterritoriality). Early provincial legislation imposed a liability on

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77 *Re Que. Sales Tax* [1994] 2 S.C.R. 715, upholding amendments to Quebec's sales tax to transform it into a value-added tax similar to the federal GST. A small-supplier exemption, relieving persons with revenue of less than $30,000 per annum from the obligation to collect and remit the tax and denying them input tax credits, did create a small element of indirectness, but that was "an incidental element of the efficient administration of the proposed consumption tax" (p. 740); the exemption did not make the general tendency of the tax indirect.

78 La Forest, note 1, above 106-109.

79 Section 31.11, "Territorial limitation", below.

80 *A.-G. B.C. v. Can. Trust Co.* [1980] 2 S.C.R. 466, 472.

the executor and was struck down as indirect.[81] In the case of an inheritance tax, this vice can be corrected by exempting the executor from personal liability and imposing the liability exclusively on each beneficiary whose inheritance is taxed.[82] The collection problem can be resolved by placing the executor under a duty to deduct and remit the tax before distributing the estate, and the executor may probably even be penalized an amount equal to or in excess of the full amount of the tax if he or she fails in the duty of collection.[83] This became the general pattern of succession duty legislation. The history bears a close affinity to that of the retail sales tax,[84] and it is perhaps unnecessary to comment that the limitation to direct taxation is in most contexts now one of form rather than substance, a mere requirement of careful drafting.

In *Re Eurig Estate* (1998),[85] the Supreme Court of Canada had to determine the validity of Ontario's "probate fee", which was levied on the estate of a deceased person at the rate of .5 per cent of the first $50,000 of the assets of the estate and 1.5 per cent of the value of the rest of the assets. The Court held that this ad valorem "fee" was really a tax, because it bore no relationship to the cost of issuing letters probate, which was the service for which the fee was ostensibly levied. This raised the question whether it was a direct tax. It was argued that the tax was indirect, because the person initially liable to pay the tax, namely, the executor, would always reimburse herself from the assets of the estate, thereby passing the burden of the tax on to the beneficiaries. Major J., speaking for a Court that was unanimous on this point, rejected that argument on the basis that the executor was not "personally liable" to pay the fee, but paid it "only in his or her representative capacity".[86] Therefore, he held, the probate fee was a direct tax and competent to the province. With respect, this reasoning is confused. It is true that the executor pays in a "representative capacity" in the sense that the executor will always seek reimbursement from the assets of the estate, but that is the characteristic of an indirect tax, not a direct one. The beneficiary who ultimately bears the burden of the tax in the form of a reduced distribution from the estate may not reside in the province, and indeed the assets of the estate may not be located in the province. In other words, the probate fee can be exported to

81 *Cotton v. The King* [1914] A.C. 176; *Burland v. The King* [1922] 1 A.C. 215; *Prov. Treas. Alta. v. Kerr* [1933] A.C. 710.

82 *Alleyn v. Barthe* [1992] 1 A.C. 215. The liability in this case attached to the "transmission" to the beneficiary, but in light of the executor's exemption it could only be paid by the beneficiary.

83 This has not been decided, but so long as the provision avoided the charge of colourability it would be valid under s. 92(15) of the Constitution Act, 1867, which authorizes the provinces to add penalties to provincial laws.

84 Section 31.7, "Sales taxes", above.

85 [1998] 2 S.C.R. 565. On the direct tax issue, the Court was unanimous; the concurring opinion of Binnie J. and the dissenting opinion of Bastarache J. both agreed with the majority opinion of Major J. that the probate fee was a tax, and that it was a direct tax. I disclose that I was one of the counsel for the executor of the estate arguing that the fee was invalid as an indirect tax.

86 *Id.*, para. 26.

beneficiaries in other provinces — the very mischief that the prohibition on indirect taxation is intended to cure.

The actual decision in the *Eurig* case was that the probate fee was invalid, because it had been levied by the Lieutenant Governor in Council and not by the Legislature itself. This holding is taken up in the earlier chapter on Delegation.[87] But the ruling that the probate fee was a direct tax made the invalidity easily remediable. The province of Ontario immediately enacted the Estate Administration Tax Act, 1998,[88] which was made retroactive to 1950 (when the probate fee was first imposed by the Lieutenant Governor in Council), and which simply reimposed the probate fee under the name of an estate administration tax. This tax, like the former probate fee, is an estate tax in all but name. The tax is not confined to property situated in Ontario or to property inherited by beneficiaries in Ontario, but is applied to the value "of all of the property that belonged to the deceased person at the time of his or her death". On the basis of the old cases,[89] one would have confidently said that the tax was unconstitutional. But the Act repeats the magic formula from Major J.'s opinion that the tax is payable by the executor in a "representative capacity". Provided this formula is used, the *Eurig* case seems to decide that an estate tax is now competent to the provinces, and all the rules that were carefully constructed in the old cases to prevent the export from the provinces of death taxes can easily be bypassed.

31.9 Resource taxes

A tax on the production of a natural resource,[90] such as oil or gas, is an excise

87 Chapter 14, Delegation, under heading 14.2(a), "Delegation of legislative power", above.

88 S.O. 1998, c. 34.

89 Note 81, above.

90 With respect to natural resources, the provincial power to tax is usually necessary only where the resources are privately owned. Where resources are owned by the province, the province as proprietor may impose royalties or other charges on their exploitation; and these charges will be valid as an exercise of proprietary right, even if they would have been invalid if imposed as taxes. In the *CIGOL* case, note 92, below, the province of Saskatchewan imposed a "royalty surcharge" on oil produced from Crown land and a "mineral income tax" on oil produced from private land. The idea was that the royalty surcharge would not have to meet the test of directness. However, the oil produced from Crown land was being produced under leases which already provided for a royalty and did not authorize the additional "royalty surcharge". Therefore, the additional levy could not be imposed by proprietary right. The royalty surcharge had to satisfy the same test of directness as the mineral income tax. Since 1982, the new s. 92A(4) authorizes indirect provincial resource taxes, and the distinction between Crown royalties and taxation has become much less significant.

tax,[90a] which naturally tends to be incorporated into the price of the resource when

(*Continued on page 31-17*)

90a A "carbon tax", designed to discourage activity that causes greenhouse gas emissions, may be imposed on carbon-based natural resources, although "downstream" taxes on distributors or consumers of fossil fuels are also possible. It has been argued that a carbon tax would probably have to be characterized as a law in relation to the environment rather than as a tax: N.J. Chalifour, "Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes" (2007) 22 Nat. J. Con. Law 119. On this theory, non-tax powers have to be invoked to authorize a carbon tax. However, as Chalifour acknowledges (p. 152), a tax that is revenue-neutral, that is, accompanied by reductions in other taxes, has as a major purpose the raising of money for general revenues, and should probably be characterized as a tax.

it is sold by the producer.[91] Such a tax is indirect, and before 1982 was incompetent to the provinces.[92]

The Constitution Act, 1982 added a new s. 92A to the Constitution Act, 1867.[93] The new s. 92A, which augmented provincial power over natural resources, included as subsection (4) the following taxing power:

> (4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
>
> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
>
> (b) sites and facilities in the province for the generation of electrical energy and the production therefrom
>
> whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

This new power authorizes the taxation of non-renewable natural resources, forestry resources and electricity facilities. These resources may be taxed in place, or their primary production may be taxed. The phrase, "any mode or system of taxation", which is the same language as appears in the federal taxing power of s. 91(3), is apt to include indirect as well as direct taxation. A tax on a resource in place would be a direct tax, which before 1982 would in any event have been competent to the provinces under s. 92(2).[94] But a tax on the production of a resource would be an indirect tax, which before 1982 would have been incompetent to the provinces under s. 92(2). Such a tax is now competent to the provinces under s. 92A(4).

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91 E.g., *Allard Contractors v. Coquitlam* [1993] 4 S.C.R. 371 (impost on extraction of gravel held to be indirect; but upheld as regulatory charge; s. 92A(4) not considered).

92 *Can. Industrial Gas and Oil v. Govt. of Sask.* [1978] 2 S.C.R. 545. In that case, ingenious drafting provided a powerful argument that the normal indirect classification did not apply. In 1974, the province of Saskatchewan appropriated to itself the sudden rise in the international price of oil by levying a tax on every barrel of oil produced in Saskatchewan. The tax was the difference between the cost of producing a barrel of oil before the price increase (a figure specified in the taxing legislation) and the actual well-head price received by the producer. This tax could not be recouped by the producer from the purchaser because any increase in the well-head price would simply increase the tax payable by the producer. The price determined the tax, rather than the other way around. The Saskatchewan Court of Appeal accordingly held the tax to be direct and valid. The Supreme Court of Canada reversed, holding by a majority that the tax formed part of the price paid by the purchaser, and that the tax was indirect.

93 For commentary on s. 92A, see W.D. Moull, "Section 92A of the Constitution Act, 1867" (1983) 61 Can. Bar. Rev. 715; R.D. Cairns, M.A. Chandler and W.D. Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23 Osgoode Hall L.J. 253; R.D. Cairns, M.A. Chandler and W.D. Moull, "Constitutional Change and the Private Sector: The Case of the Resource Amendment" (1986) 24 Osgoode Hall L.J. 299.

94 Section 31.6, "Property taxes", above.

The closing language of s. 92A(4) makes clear that a tax on the production of a resource is valid even if the production is exported in whole or in part from the province.[95] If the tax is indirect, and if the resource is mainly exported, the burden of the tax will fall on the out-of-province purchasers, to whom the taxing government is not accountable. Nevertheless, such a tax is authorized by s. 92A(4).

The proviso to the closing language of s. 92A(4) prohibits taxation that discriminates between "production exported to another part of Canada" and "production not exported from the province". This anti-discrimination proviso would not affect a tax that applied uniformly to all production, regardless of whether or not the production was exported. Nor would the proviso affect a tax that applied only to production that was exported to another country (as opposed "to another part of Canada"). However, although such a tax is not caught by the anti-discrimination proviso, its validity would not be perfectly clear. A law imposing a tax on resources exported from Canada could be classified as a regulatory measure — an attempt to regulate the export of resources[96] — in which case the law would be unconstitutional.[97] If, however, the taxing law were classified as a revenue measure, then it would be valid under s. 92A(4).

31.10 Taxes and charges

(a) Proprietary charges

Not every impost levied by a province has to satisfy the requirement of being "direct". If the charge is not "taxation" within the meaning of s. 92(2), and is constitutionally justified under some other provincial power, then it is no objection that the charge is indirect. The most obvious category of permissible charges are those levied by a province in the exercise of proprietary rights over its public

95 In the *CIGOL* case, note 92, above, the Court characterized the tax as an export tax, because, although the tax applied uniformly to all oil produced in the province, 98 per cent of the oil was in fact exported. Section 92A(4) seems to be expressed in terms that would validate such a tax.

96 This is a risk even with respect to the universal tax, where the taxed resource is in fact nearly all exported: *Central Can. Potash v. Govt. of Sask.* [1979] 1 S.C.R. 42 (universal production and pricing controls on potash held to be a regulation of export trade, because province's entire production exported).

97 Before 1982, the provinces were incompetent to regulate the export of resources: *CIGOL* case, note 92, above; *Central Can. Potash* case, note 96, above. Since 1982, s. 92A(2) has authorized provincial laws in relation to the export of resources "to another part of Canada", but not to a foreign country. For discussion, see ch. 21, Property and Civil Rights, under heading 21.9, "Marketing", above.

property.[98] Thus, a province may levy charges in the form of licence fees, rents or royalties as the price for the private exploitation of provincially-owned natural resources; and a province may charge for the sale of books, liquor, electricity, rail travel or other goods or services which it supplies in a commercial way.[99] Some of these charges are undoubtedly indirect,[100] but they are valid nonetheless, because they are not taxes.

(b) Regulatory charges

A second category of charges are those of a more governmental or compulsory character, which require legislation for their imposition.[101] These charges are not necessarily taxes, and, if they are not, they need not be direct, even if imposed by a province. They are not taxes if they can be supported as regulatory charges imposed under one of the province's regulatory powers, such as natural resources (s. 92A(1)), municipal institutions in the province (s. 92(8)), local works and undertakings (s. 92(10)), property and civil rights in the province (s. 92(13)) or matters of a merely local or private nature in the province (s. 92(16)).[102] Examples of such charges might be licence fees, registration fees, bridge tolls or water rates. These can be supported as regulatory charges if they are taken in payment for a specific governmental service, and if they bear a reasonable relation to the cost

98 Note that once private rights have been created in provincial public property, for example, by the grant of a lease without the reservation of a provincial power of amendment, legislation is then necessary to derogate from the private rights. This is illustrated by the holding with respect to the "royalty surcharge" in the *CIGOL* case, note 92, above. This problem is avoided if the Crown lease includes a "variable royalty clause": see ch. 30, Natural Resources, under heading 30.1(a), "Provincial public property", above.

99 See ch. 29, Public Property, under heading 29.2, "Executive power over public property", above.

100 For example, royalties based on production of a resource: note 92, above.

101 The concepts of "governmental" or "compulsory" charges are intended to be opposed to "commercial" or "voluntary". These words are all admittedly very slippery. There is no principled distinction between the governmental and commercial functions of government; and the distinction between a compulsory and voluntary charge is nearly always a question of degree: even income or sales taxes are voluntary in the sense that they can be avoided by not earning income or buying goods.

102 It is probably better not to describe regulatory charges as "taxes" on the basis that they lack the revenue-raising purpose that characterizes a tax. However, it can certainly be argued that they have a revenue-raising purpose, albeit one that is dedicated to defraying the costs of regulation. In *Allard*, note 108, below, Iacobucci J. for the unanimous Court consistently described the gravel-extraction fees as "fees". In *Ontario Home Builders*, note 112, below, Iacobucci J. for the majority described the educational development charges as "indirect taxation" (para. 49), but upheld them as ancillary to a valid regulatory scheme; La Forest J., concurring, was careful to distinguish a regulatory charge from a tax. While outcomes do not seem to vary with the terminology, the question whether s. 92(9) is needed to sustain a regulatory charge may turn on whether the charge is a tax: see note 24, above.

of providing the service — whether it be the issue of a licence,[103] the registration of a deed,[104] the provision of a bridge, or the supply of water.[105] These charges are not taxes because their purpose is to defray expenses, not to raise revenue. Even if a charge proves to be too high and produces a surplus of revenue which is available for general governmental purposes, the charge will still not be characterized as a tax so long as the court is satisfied that it is not a colourable attempt to levy an indirect tax.[106] In other words, the Legislature is permitted "reasonable leeway" in fixing its charges for services.[107]

In *Allard Contractors v. Coquitlam* (1993),[108] the Supreme Court of Canada upheld fees imposed by by-law by several municipalities in British Columbia on the extraction of gravel. The fees were calculated in accordance with the volume of gravel extracted, and they would have been invalid for indirectness if they were taxes.[109] The authority to impose the fees was conferred by the province's Municipal Act, which did not link the fees to the regulation of the roads or their repair, and which did not require that the funds raised by the fees be used for road repair (or any other purpose). The municipal by-laws that imposed the fees also made no reference to the purpose of the fees. In short, the fees appeared to be free-standing taxes, lacking the connection to a regulatory scheme that would be required to sustain the fees as regulatory charges. Surprisingly, the Supreme Court of Canada held that the fees were regulatory charges. According to Iacobucci J. for the Court, a connection to road repair could be inferred from various scattered provisions of the Municipal Act, and from testimony by municipal officials that they had tried to fix the level of the fees by reference to the cost of repairing the roads over which the gravel trucks would operate. (Iacobucci J. acknowledged that other evidence suggested that the fees raised "considerably more" than was needed for the repair of the roads, but he dismissed that as irrelevant on the basis of the reasonable leeway rule.)[110] From these premises, the Court concluded that

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103 *Shannon v. Lower Mainland Dairy Products Bd.* [1938] A.C. 708; *Re Farm Products Marketing Act Reference* [1957] S.C.R. 198; *Re Falardeau* (1985) 21 D.L.R. (4th) 477 (Alta. C.A.). The licensing power in s. 92(9) appears to have little or no independent content, and is usually referred to in the cases in conjunction with other provincial powers. It does not by itself authorize the levying of indirect taxes through licence fees; and it does not by itself authorize the regulation of business activity through licence fees: see text at note 20, above.

104 *A.-G. Can. v. Registrar of Titles* [1934] 4 D.L.R. 764 (B.C. C.A.).

105 *Min. of Justice (Can.) v. Levis* [1919] A.C. 505. This case and the one in the previous note arose under s. 125 of the Constitution Act, 1867 (sec. 31.13, "Section 125", below), but the same principles apply: text at note 126, below.

106 *Re Farm Products Marketing Act* [1957] S.C.R. 198, 260; *A.-G. Can. v. Registrar of Titles* [1934] 4 D.L.R. 764, 774 (B.C. C.A.).

107 *Allard Contractors v. Coquitlam* [1993] 4 S.C.R. 371, 411-412; La Forest, note 1, above, 65.

108 [1993] 4 S.C.R. 371. The opinion of the Court was written by Iacobucci J.

109 Note 38, above.

110 Note 107, above.

the extraction fees were ancillary to a regulatory scheme for the repair of the roads and were, despite their indirectness, valid regulatory charges.[111]

In *Ontario Home Builders' Association v. York Region Board of Education* (1996),[112] the Supreme Court of Canada upheld "education development charges", which were levied by school boards (under statutory authority) on land undergoing development. The purpose of the charges was to fund the construction of new schools. The fees were imposed on the issue of building permits, and their amount was based on the estimated cost of the new schools that would be needed as the result of the development of the land. Iacobucci J., for the majority of the Court, held that the charges were indirect and could not be supported under the main provincial taxing power of s. 92(2). However, he upheld the charges on the ground that they were "ancillary to a valid regulatory scheme for the provision of educational facilities as a component of land use planning, pursuant to ss. 92(9), (13) and (16)".[113] The statutory policy was to make new development bear the costs of the infrastructure necessitated by the development. The connection to the regulatory scheme was "easier" to find than it had been in *Allard*, because the authorizing statute and regulations expressly required that the amount of the charges be based on the estimated costs of building new schools, and also required that the proceeds of the charges could only be used for that purpose.[114] These requirements also ensured that the charges did not raise revenue in excess of the funds required for the regulatory purpose; there was "no question of excessive recovery".[115] La Forest J. concurred in the result, but disagreed with the majority's reasoning. In La Forest J.'s view, the charges were not ancillary to any regulatory scheme. The link between land development and new schools was not as close as the link between gravel extraction and road maintenance in *Allard*. However, the charges could be upheld under s. 92(2) as direct taxes, because they were taxes on land, and taxes on land were direct taxes.[116]

In *620 Connaught v. Canada* (2008),[116a] the federal Minister of Canadian Heritage had the power, granted by the federal Parks Canada Agency Act, to impose "fees" in respect of rights or privileges provided by the Parks Canada Agency, which was the statutory body that administered Canada's national park

111 In view of the difficulty in upholding the fees as regulatory charges, it is surprising that the Court did not consider s. 92A(4) (taxation of the primary production of non-renewable natural resources) as an alternative constitutional basis for the fees; but Iacobucci J. said (at p. 413) that, since he had found the fees to be valid as regulatory charges, it was not necessary to consider s. 92A(4).

112 [1996] 2 S.C.R. 929. The Court was unanimous. Iacobucci J. wrote the majority opinion, which was agreed with by Lamer C.J., Sopinka, Cory and Major JJ. La Forest J. wrote a concurring opinion, which was agreed with by L'Heureux-Dubé, Gonthier and McLachlin JJ.

113 *Id.*, para. 50.

114 *Id.*, para. 54.

115 *Ibid.*

116 The appropriate classification of taxes on land is discussed under heading 31.6, "Property taxes", above.

116a [2008] 1 S.C.R. 131. Rothstein J. wrote the opinion of the Court.

system. Pursuant to this power, the Minister imposed the requirement of a business licence on hotels, restaurants and bars selling alcoholic drinks in Jasper National Park, and charged a fee for the licence based on the value of the alcoholic beverages purchased by the licensee. If the business licence fee were a tax, it would be indirect, but that was not an issue, since the enabling legislation was federal. However, if the business licence fee were a tax, it would be still be invalid because the Minister had been delegated the power to impose a "fee" not a tax.[116b] The company that owned most of the drinking establishments in the Park challenged the validity of the fee. The Supreme Court of Canada upheld the fee as a regulatory charge.[116c] The regulatory scheme was the administration and operation of Jasper National Park.[116d] The fee was connected to the regulatory scheme because the revenue from the fees was dedicated to the costs of running the Park, and the company benefited from the Park in that its customers were visitors to the Park. The revenue from the fees did not exceed the costs of administering and operating the park.[116e] All of the indicia of a regulatory charge were therefore present, and the challenge to the fee accordingly failed.

In *Canadian Assn. of Broadcasters v. Canada* (2008),[116f] licensed television broadcasters challenged a fee that was imposed on them by the Canadian Radio-television and Telecommunications Commission (CRTC), which was the licensing body and which had statutory power to impose "fees" on the licensees. The CRTC imposed two annual fees, a Part I fee, which represented each licensee's

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116b *Id.*, para. 6, relying on s. 53 of the Constitution Act, 1867. Rothstein J. did not elaborate, but the statute had presumably not been enacted as a taxing statute, and in any case only authorized the Minister to impose "fees". For discussion of the delegation of the taxing power, see ch. 14, Delegation, under heading 14.2(a), "Delegation of legislative power", above.

116c Rothstein J. pointed out (para. 49) that a licence fee to occupy Crown land in the Park for the purpose of selling alcohol could be characterized as a "proprietary charge" (sec. 31.10(a), above), in which case no connection to a regulatory scheme would be necessary to avoid the characterization of a tax. However, the Court did not consider this line of argument because it had not been relied on by the government.

116d Rothstein J. (para. 30) relied on *Westbank First Nation v. B.C. Hydro* [1999] 3 S.C.R. 134 for the proposition that a regulatory scheme must have a "complete, complex and detailed code of regulation". It seems a considerable stretch to find that code of regulation in either *Allard* (note 108, above) or *Ontario Home Builders* (note 112, above), but in this case Rothstein J. found (para. 30) that the applicable statutes and regulations "form a complete and detailed scheme of how Jasper National Park should operate".

116e The evidence on this point was incredibly deficient. The challenged business licence fees raised $87,625, which was less than .05 per cent of the $20.4 million cost of running the Park, but there was no evidence of the amount of the revenue from the entrance fee and all the other fees that were collected in the Park. There was evidence that in all the Mountain Parks (in aggregate) there was a shortfall between the fees collected and the costs incurred, and Rothstein J., invoking the "reasonable leeway" rule (para. 40), was "prepared to infer . . . that the fee revenues from Jasper National Park likely did not exceed, and certainly did not significantly succeed, the cost of the regulatory scheme for the Park" (para. 44).

116f [2009] 1 F.C.R. 3 (C.A.). Ryer J.A. wrote the main opinion. Létourneau and Pelletier JJ.A each wrote short concurring opinions. Leave to appeal to the Supreme Court of Canada was granted, but the case settled and the appeal was abandoned.

share of the total regulatory costs of the Commission in a given year (a total of $182 million for the year in issue), and a Part II fee, which was 1.365% of the licensee's revenue from broadcasting activities in the year (a total of $682 million for the year in issue). The broadcasters challenged the Part II fee, pointing out that the regulator's costs were defrayed by the Part I fee (which they did not challenge),[116g] and the Part II fee was simply a percentage of revenue, unrelated to any regulatory costs. The Federal Court of Appeal held that the defraying of regulatory costs was not the only connection to a regulatory scheme that would support a regulatory charge. The regulation of the broadcasting system conferred on the licensed broadcasters a valuable benefit by allowing them to operate for profit protected from full-blown competition. There was no reason why that benefit should be granted for nothing, and the capture of some part of the economic rent created by the closed regulatory system was a legitimate regulatory purpose. A revenue-based fee was a "reasonable proxy" for the value of the licence to that licensee.[116h] The Part II fee was accordingly upheld as a regulatory charge. This line of reasoning would have provided an easy answer to *620 Connaught*, where the charge for the business licence admitted the licensee to the profit-earning business of selling liquor in Jasper National Park. But in *620 Connaught*, the Supreme Court relied only on the defraying of regulatory costs as the non-tax justification for the charge.

In *Re Eurig Estate* (1998),[117] the question arose whether Ontario's probate fee was a regulatory charge or a tax. It was imposed by law, and it was compulsory in that the executor of an estate had to pay the fee to obtain letters probate (an order formally approving the will), which was ordinarily necessary to administer the assets of the estate. However, the fee was listed in a schedule of court fees, it was levied by the courts, and the revenue from the fees was kept by the courts. Did that make the impost a fee (or a charge) rather than a tax? The Supreme Court of Canada answered no. The fee was an ad valorem one, being a percentage of the value of the estate, and it yielded substantial revenues to the province. The evidence made clear that the cost of issuing letters probate was small, and did not vary with the value of the estate. The probate fees did not "incidentally" provide a surplus for general revenue, but rather were "intended for that very purpose".[118]

116g There was some argument as to whether other regulatory costs could be properly regarded as financed by the Part II fees.

116h Both Létourneau and Pelletier JJ.A. emphasized the voluntary character of the licensees' participation in the system: "Money voluntarily paid to the government in exchange for a commercial right or for property is not a tax" (para. 110 per Pelletier J.A.). Compare the proprietary charges for the use of Crown property: sec. 31.10, "Proprietary charges", above. The difference is that, in the present case, licensees received a benefit, not from Crown property, but from a regulatory scheme that yielded economic rents to those permitted to trade within the closed system.

117 [1998] 2 S.C.R. 565. The Court was unanimous in the view that the probate fee was a tax rather than a regulatory charge; Major J.'s majority opinion was agreed to by Binnie J., who wrote a concurring opinion, and Bastarache J., who wrote a dissenting opinion.

118 *Id.*, para. 20 per Major J.

The revenue was "used for the public purpose of defraying the cost of court administration in general, and not simply to offset the costs of granting probate."[119] The revenue-producing purpose of the probate fee required the conclusion that the probate fee was not a charge for a governmental service, but was a tax. This characterization led to the invalidity of the probate fee, because it had been levied by the Lieutenant Governor in Council rather than by the Legislature itself. That part of the decision is taken up in the earlier chapter on Delegation.[120]

A similar result was reached with respect to employment insurance premiums in *Confédération des syndicats nationaux v. Canada* (2009).[120a] Employment Insurance (EI) in Canada is compulsory under the federal Employment Insurance Act (formerly the Unemployment Insurance Act), which is supported by the federal authority over "unemployment insurance" in s. 91(2A) of the Constitution Act, 1867. The system is financed by premiums that are levied under the Act on employers and employees. The premiums are not paid into a dedicated fund, but are paid into the Consolidated Revenue Fund, all of which is available for general government expenditures. The government maintains an Employment Insurance Account which keeps track of receipts (premiums) and expenditures (benefits and administration) that belong to the EI program. When the Account runs a surplus, the surplus is extra funding available to government for general expenditures. After a period of surpluses, a group of Quebec unions challenged the constitutionality of the use of EI surpluses, derived as they were from employer and employee contributions, for general government expenditures. The EI Act maintained a link between premiums and benefits, which authorized the accumulation of surpluses in order to maintain stable premium levels in bad economic times. However, the Act had been amended to provide a temporary power to the Governor in Council to set premiums without regard for the anticipated liability for benefits, and in 2002, 2003 and 2005 (the only years in which the temporary power was available) premiums were set that generated huge surpluses in the EI Account. The Supreme Court of Canada held that, in those three years, "the relationship between the levy and the regulatory scheme had disappeared"; the EI premiums, formerly a valid regulatory charge, had taken on a general revenue-raising purpose and "had been converted into a kind of payroll tax".[120b] There was no doubt that Parliament's broad taxation power extended to the levy of a payroll tax, but the *Eurig* problem defeated these levies. Because they had been imposed

119 *Ibid.* Compare *Airservices Australia v. Canadian Airlines* (2000) 202 C.L.R. 133 (charge to airlines imposed under statutory power by the Civil Aviation Authority upheld; purpose was to defray cost of services provided to airlines, even though charge also allowed for a rate of return to the Authority).

120 Chapter 14, Delegation, under heading 14.2(a), "Delegation of legislative power", above.

120a [2008] 3 S.C.R. 511. LeBel J. wrote the opinion of the Court.

120b *Id.*, para. 75.

by the Governor in Council, not Parliament itself, they were invalid.[120c] That part of the decision is taken up in the earlier chapter on delegation.[120d]

It is common for farm product marketing schemes to include levies on the farmers (producers of the regulated product), who are the beneficiaries of the schemes. Two kinds of levies may be involved. An "expenses" levy is designed to defray the expenses of administering the scheme, which in the more sophisticated schemes will include losses incurred by a marketing agency in selling off surpluses of the regulated product.[121] An "equalization" or "adjustment" levy is designed to effect a pooling of proceeds, so that returns to producers are equalized even if the product was actually sold in various markets at various prices. Marketing levies, being imposed on production, tend to be passed on to the consumers of the product. If they are taxes, they are therefore indirect. At first, the courts did classify marketing levies as taxes, and accordingly struck down provincial levies on the ground of indirectness. But the Supreme Court of Canada, overruling these decisions, has held that marketing levies are not taxes, because their function is regulatory rather than revenue-producing.[122] Therefore, marketing levies will be upheld if they are part of an otherwise valid marketing scheme.[123]

It is perhaps unnecessary to add that charges imposed by a province which cannot be upheld as direct taxation under s. 92(2) must come within some other head of provincial power. Charges of a direct character may of course be supportable under s. 92(2) as well as under a regulatory power. But the validity of a regulatory charge is likely to depend upon the validity of the regulatory scheme to which it is incident.[124] If the scheme is invalid, even a direct charge is unlikely to be severed off and upheld as a valid tax.

The federal Parliament, not being confined to direct taxation, can impose both direct and indirect charges under its taxation power (s. 91(3)), but a federal regulatory charge, like a provincial regulatory charge, may well have to stand or fall under some head of regulatory power. Thus, the distinction between taxes and charges may become relevant to the validity of a federal law. This is illustrated by *620 Connaught*,[124a] where a business licence fee that could have been imposed

120c *Id.*, para. 93 (no clear delegation by Parliament of a power to set the rate of a "tax").

120d Chapter 14, Delegation, under heading 14.2(a), "Delegation of legislative power", above.

121 The product that is surplus to the higher-priced table market (for home consumption) has to be sold in the lower-priced industrial market (for manufactured food products). In order to equalize returns to producers who have sold their products in one or the other or both markets, a scheme can provide for the equalization or adjustment levies that are discussed next. But, if all selling has been done by a central marketing agency, it can pay the same price to all producers and then levy all producers for losses incurred on sales in the industrial market. In this way, an expenses levy (the expenses being trading losses) serves the function of an equalization or adjustment levy.

122 *Re Agricultural Products Marketing Act* [1978] 2 S.C.R. 1198, 1234-1257, 1291.

123 *Wayvel Farms v. Alta. Pork Producers' Marketing Bd.* (1987) 46 D.L.R. (4th) 72 (Alta. C.A.); La Forest, note 1, above, 60-70.

124 Compare *Commn. du Salaire Minimum v. Bell Telephone Co.* [1966] S.C.R. 767.

124a Note 116a, above.

as an indirect tax was in fact imposed as a regulatory charge under the authority of the federal Parks Canada Agency Act. It is also illustrated by *Confédération*,[124b] where employment insurance premiums, which could be validly imposed as regulatory charges under the federal Employment Insurance Act, fell offside when they were converted into general revenue-raising measures (and therefore taxes) without the authority of Parliament.

The distinction between taxes and charges is relevant to both levels of government in another context as well. Section 125 of the Constitution Act, 1867 provides that "no lands or property belonging to Canada or any province shall be liable to taxation".[125] Section 125 will exempt a government from taxes levied by other governments on its lands or property, but not from regulatory charges such as water rates or deed registration fees.[126]

31.11 Territorial limitation

(a) General

The federal taxing power, like other federal powers, will authorize laws with extraterritorial effect.[127] But the provincial taxing power, like other provincial powers, is limited to the territory of the province.[128] This limitation is explicit in s. 92(2), which refers to direct taxation "within the province".[129]

Taxes are, of course, always paid by persons, and a narrow view of the territorial limitation on provincial taxing power would confine the power to taxes levied on persons in the province. But the courts have taken a more expansive view, holding that taxes may be levied not only upon persons, but also upon property or transactions or benefits. In determining the constitutionality of a provincial tax, the first step is to ask whether the tax is imposed upon persons or property or transactions or benefits. Having thereby ascertained the subject of the tax, the second step is to ask whether the subject of the tax is within the province.

(b) Persons

A provincial tax on persons in the province may obviously be levied on persons domiciled or resident there. But it may also be levied on persons with

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124b Note 120a, above.

125 See sec. 31.13, "Section 125", below.

126 *Min. of Justice (Can.) v. Levis* [1919] A.C. 505; *A.-G. Can. v. Registrar of Titles* [1934] 4 D.L.R. 764 (B.C. C.A.); La Forest, note 1, above, 187-189.

127 *B.C. Electric Ry. Co. v. The King* [1946] A.C. 527 (federal income tax on non-residents upheld). See generally ch. 13, Extraterritorial Competence, above.

128 Kennedy and Wells, note 1, above, ch. 5; Laskin, note 1, above, 822-838; La Forest, note 1, above, ch. 5. See generally ch. 13, Extraterritorial Competence, above.

129 Section 92(9) (licensing) is not so explicit, but the territorial limitation is implicit. Section 92A(4) (resource taxation) is explicitly confined to resources "in the province".