Economic Growth Through Constitutional Safeguards: The Canadian Experience *

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I. Introduction

This paper will examine the question of economic development through constitutional safeguards from another perspective: the perspective of federalism. Hopefully, Canadian experience in this area will provide ample lessons which you may consider in your task of designing a constitutional regime that will encourage or sustain economic development in your countries.

Canada's constitution, The British North America Act of 1867,[1] contains no explicit qualitative safeguards against the exercise of governmental power that could serve as a framework for the encouragement of economic growth. The sections of the Act that establish the federal system in Canada, more than any other provision, have functioned as constitutional guarantees to economic interest, thus aiding Canada's development into an economically advanced and industrialized country in today's world standard. The task of this paper is to chart the operation of some of these quantitative safeguards.

II. Historical Background

Unlike the organic laws of other countries, the Act was not drafted along any neat and articulate ideological or political theories. The Fathers of Confederation [2] were not persons armed with theoret-

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* Paper presented at the 1970 Conference of the International Society for the Study of Comparative Public Law, Nairobi, Kenya, August 4-6, 1970. While this article was at the galley stage, the continuing Constitutional Conference of Provincial Premiers and the Prime Minister of Canada announced the first major accomplishment of the Conference with the conclusion of the so-called Victoria Charter. This paper was slightly revised to take into account this recent development.

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[1] 30-31 Vict, c. 3 (U.K. 1867). For full text of the B.N.A. Act and subsequent amendments, see 6 *Can. Rev. Stat.* Appendix 3, at pp. 6187-6428 (1952).

[2] In Canada, little or no distinction is made between "Confederation" and "Federation".

ical minds comparable to Jefferson or Hamilton. They were largely practical men, educated no doubt, but not philosophers or theorists. They, therefore, wrote the constitution in a style best known to them: "The job was done after the manner of carpenters, . . . , not after that of philosophers: Ship-carpenters, . . . who, taking a glance at the hull before them, plane off a bit here and give an extra inch to the swell of a rib there." [3] Nonetheless, they were intensely aware of their reasons for writing the constitution and of the objectives of the Confederation to be created by that constitution. To them, the American Civil War spelled danger to British North America; this powerful country south of the border, they believed, would sooner or later attempt to end their political and cultural identity. To establish security for British North America, they created the Confederation, a new political nationality.[4] It would have adequate means of survival: a national, largely self-sufficient economy.[5] "It was believed that the resources and industries of British North America were diversified and complementary: it was argued that integration of these various elements would provide the requisite basis of a stable economic life." [6] A transcontinental railway system would forge these resources, industries and markets together. Having abundant faith in their own strength, the Fathers of Confederation gave no thought to the role of capital from other countries — then more feared than befriended — in the economic develop-

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[3] A.R.M. Lower, *Theories of Canadian Federalism — Yesterday and Today, in Evolving Canadian Federalism* 3, at p. 7 (1958).

[4] Bk. 1 *Report of Royal Commission on Dominion-Provincial Relations* at pp. 29-30 (1940).

[5] D. Creighton states:

> The central economic ambition of the Fathers of Confederation was to increase the production, to hasten expansion and to promote the prosperity of the British North American provinces by the establishment of a new national economy. The other economic hopes of Confederation were, in the main, included within or dependent upon this major expectation; the other economic decisions taken at Confederation were meant, on the whole, to serve this major purpose. The creation of a national economy was the economic counterpart of the establishment of a new political nationality. In both designs then was the same element of grandeur; both equally were novelties in the history of British North America, and both, it could be argued, were made necessary by the exacting conditions of the time. Thus, in the minds at its authors, the creation of the new national economy occupied a place of central importance. It was an enterprise which was consciously adopted and deliberatly put into execution.
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> *British North America at Confederation* 40 (Study prepared for the Royal Commission on Dominion-Provincial Relations 1939).

[6] *Id.*

ment of Canada. Rather, they intended to insulate Canada from the effects of economic policies pursued by the United States and Great Britain.[7]

III. Divided Competence in Canada: A Quantitative Guarantee

A. *General Considerations*

It is not necessary to discuss here the basic character of Canadian federalism. It is enough to state that the powers of government in Canada are divided between the federal Parliament and provincial legislatures.[8] In very broad terms, the Fathers of Confederation based the division of powers on the vague distinction between matters of general or national importance and matters of purely local or private nature. The former were assigned to Parliament; the latter, to the provinces. Section 91 opens with a broad statement of Parliament's power — the residuary clause — to make laws for the "Peace, Order and Good Government of Canada." It then provides twenty-nine subjects as illustrative instances of federal competence. Section 92 defines provincial competence, naming sixteen specific enumerations, of which clause 13, "Property and Civil Rights in the Province," is the most significant.

The obscure and somewhat unsystematic character of this distribution of powers offers a wide range of quantitative safeguards to economic interest. The strategy to invoke these safeguards is amazingly simple: skilfully playing the power of one government against the power of the other. The fact that the B.N.A. Act is simply a British statute, thus subject to the usual rules of statutory interpretation,[9] makes it easy for business to play the game with

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[7] *Supra,* note 4.

[8] Sophisticated philosophical and historical discussion under rubrics "Compact Theory" and "Centralist Theory" abound in Canada. The first argues for the dominance of provincial power, whereas the latter that of federal power.

[9] In Bank of Toronto v. Lambe, 12 App. Cas. 575 (P.C. 1887) Lord Hobhouse rejected the rules of construction laid down for the United States Constitution by Mrs. Chief Justice Marshall in *Marbury v. Madison,* 5 U.S. 137 (1803). For details see Jennings, *Constitutional Interpretation — The Experience of Canada,* 51 *Harv. L. Rev.* 1 (1937). Because the British North America Act was passed by the Parliament of Great Britain, it did not provide for any machinery for amendment, the assumption being that the Parliament of Great Britain could amend the Act in the ordinary course of legislation. This fact now haunts Canadians, and the search for an amending formula

outstanding success. I will survey the operation of this strategy in three main fields of power: the regulation of trade and commerce, the tax power and the criminal-law power.

B. *The Regulation of Trade and Commerce*

Section 91(2) allocates to Parliament the broad power for "The Regulation of Trade and Commerce." [10] In writing this clause into the Act, the Fathers of Confederation noted that the "weaknesses or defects" of the United States constitution in this regard can be blamed for the Civil War. To avoid these "errors," they established a strong federal government with ample power to regulate, not only "interstate commerce," but all trade and commerce.[11] If there was any constitutional norm that could have forged British North America into a nation along the design of the Fathers, this clause offered the greatest potential. The less extensive interstate commerce clause in the United States constitution built America into a nation; the Canadian trade and commerce clause, broader in scope, therefore, had more promise. But the destiny of section 91(2) is an irony of Hegelian dialectic; today, its ambit is even narrower than that of the American interstate commerce clause.

Business's search for a constitutional argument to avoid regulation was a major factor in this process of judicial confinement. At first, the argument appeared innocent enough, but it laid the foundation for provincial control over some aspects of commerce through the property and civil rights clause. In *Citizens Insurance Co. v. Parsons*,[12] the insurance companies, in attempting to evade liability under policies issued by them, challenged the validity of provincial legislation by invoking the federal trade and commerce power. The Privy Council rejected their contention, making some

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has been one of difficulties in our effort to reform Canada's constitution. For discussion, see, P. GÉRIN-LAJOIE, *Constitutional Amendment in Canada* (1950); G. FAVREAU, *The Amendment of the Constitution of Canada* (1965). For a brief discussion, see E.R. ALEXANDER, *A Constitutional Strait Jacket for Canada*, 43 *Can. B. Rev.* 262 (1965). The Victoria Chart provides for an amending formula found acceptable by all parties, aside from a number of significant constitutional reforms. The Charter, conceived as a package, was, however, subsequently rejected by Quebec due to an "uncertainty of the proposed rule" under §94 of the B.N.A. Act.

[10] For a detailed discussion, see A. SMITH, *The Commerce Power in Canada and the United States* 1-181 (1963).

[11] Severn v. The Queen, 2 S.C.R. 70 (1878); City of Fredericton v. The Queen, 3 S.C.R. 505 (1880); *In re* Prohibitory Liquor Laws, 24 S.C.R. 170 (1895).

[12] 7 App. Cas. 96 (P.C. 1881).

casual statements that yielded in subsequent cases formidable qualifications on Parliament's power over trade and commerce. To reach this result in subsequent cases, the courts followed a number of techniques. First, they established the property and civil rights clause as a limitation on the federal power over trade and commerce. Federal competence is, thus, not "unlimited"; it does not include the authority to legislate on contracts of business or trade in a single province. Second, the rules of statutory interpretation were found to be a handy device: a literal reading of section 91(2) allows only "regulation," but not "prohibition" of trade.[13] Third, by interpreting its interpretation of the B.N.A. Act in *Parsons:* section 91(2) is ineffective not only as to "contracts of a particular business or trade" as held in *Parsons,* but also as to the "business or trade itself."[14] A licensing regulation of trade or commerce operating within a province is thus beyond the reach of section 91(2).[15] The justifications offered were technically and historically implausible; they range from the physical location of the various enumerations in sections 91 and 92[16] to a cliché of provincial sovereignty.[17]

The operation of these limitations on federal regulation had far reaching effect in insurance business. Insurance business is now virtually immune from federal standards respecting licensing of companies, conditions of incorporation, terms and conditions of insurance contracts, and supervision to secure the solvency of insurers.[18]

In *Attorney-General for Canada* v. *Attorney-General for Alberta,*[19] insurance companies actively supported provincial power over insurance. They charged before the Privy Council that sections 4 and 70 of the Dominion Insurance Act, 1910, encroached upon

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[13] Toronto v. Virgo, [1896] A.C. 88, at p. 93 (P.C. 1895); Attorney-General for Ontario v. Attorney-General for Canada, [1896] A.C. 348, at pp. 362-63 (P.C.).

[14] Attorney-General for Canada v. Attorney-General for Alberta, [1916] A.C. 588, at 596 (P.C.).

[15] *See also In re* the Board of Commerce Act, 1919, [1922] 1 A.C. 191, at p. 198 (P.C. 1921); Toronto Elec. Comm'rs v. Snider, [1925] A.C. 396, at pp. 409-10 (P.C.).

[16] See authority in note 12 *supra.*

[17] Montreal v. Montreal Street Ry., [1912] A.C. 333, at p. 344 (P.C.).

[18] Bk. 2 *Report of Royal Commission on Dominion-Provincial Relations* pp. 59-62 (1940); MacDonald, *The Regulation of Insurance in Canada,* 24 *Can. B. Rev.* 257 (1946).

[19] [1916] 1 A.C. 588 (P.C.).

provincial competence over property and civil rights because this legislation penalized the selling of insurance by life insurance companies unless they possessed a federal license. The Board agreed: neither the trade and commerce clause nor the residuary clause provided authority for the legislation. Although the Board admitted that "the business of insurance is a very important one, which has attained to great dimensions in Canada," it refused to sustain federal jurisdiction. Construing the enumerations under section 91, not as mere illustrative instances of the scope of federal power, it argued: "Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words."[20] To the Board, this would have been unnecessary had the federal claim on the ambit of the trade and commerce clause been well founded.

Parliament's attempt to achieve the same objective through its criminal-law power under section 91(27) was also rejected in *Attorney-General for Ontario* v. *Reciprocal Insurers*.[21] The federal Insurance Act, 1917, established a comprehensive licensing system for any insurance business operated by foreign, Canadian and British companies or persons. To enforce the regulation, a penalty provision was inserted in the Criminal Code. The American reciprocal insurance association, licensed under an Ontario law, urged that the conviction under the Criminal Code be reversed because the licensing scheme and penalty provision were beyond federal competence. The Privy Council held the two laws *ultra vires*, finding them to be "complementary parts of a single legislative plan" constituting an "attempt to produce by a different legislative procedure the results arrived at by the authors of the Insurance Act of 1910," earlier pronounced *ultra vires*.[22] It condemned the penal provision as a colourable use of the criminal-law power to intrude into provincial domain.[23]

The infirmity of federal power over insurance was later extended to foreign insurance companies. In 1916, the Privy Council conceded Parliament's authority to require foreign companies, *by properly framed legislation*, to take out a federal license even in cases where their business was confined in a single province; federal trade and commerce power and control over aliens under section

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[20] *Id.* at p. 597.

[21] [1924] A.C. 328 (P.C.).

[22] *Id.* at p. 332.

[23] *Id.* at pp. 339-43.

91(25) provided ample authority.[24] In *Reciprocal Insurers,* decided eight years later, the Board's attitude, though not an unequivocal rejection, was ominously hostile to the federal claim. In *In re The Insurance Act of Canada,*[25] decided in 1931, the Board's attitude had turned full circle. The insurance companies teamed with a number of provinces in urging the Privy Council to condemn the contested Insurance Act and the Special War Revenue Act. The Board obliged and held the federal arguments without merit; the legislations were not "properly framed." The alien clause was inapplicable; the laws did not deal with aliens as such, but they sought to intermeddle with the conduct of insurance under the guise of legislation as to aliens.[26] The immigration authority provided no support; Parliament was merely attempting to saddle British immigrants with a different law as to the conduct of insurance business from that which has been held to be the law — the provincial law.[27] The tax power was no shield; the tax was linked with an object which was illegal to tax because it falls within provincial domain.

The Board's statement on the last point shows that the federal struggle to regulate insurance was long lost since *Parsons* was decided in 1881:

> Section 16 clearly assumes that a Dominion license to prosecute insurance business is a valid license all over Canada and carries with it the right to transact insurance business. But it has been already decided that this is not so; that a Dominion license so far as authorizing transactions of insurance business in a Province is concerned, is an idle piece of paper conferring no rights which the party transacting in accordance with Provincial legislation has not already got, if he has complied with Provincial requirements. It is really the same old attempt in another way.[28]

The courts have been incredibly able to read into many federal legislations that invalidating poison of "colourable purpose", a presumptuous imputation of motive that the courts themselves have always professed to reject. The true basis of Parliament's authority to regulate insurance is the trade and commerce clause, but since it has suffered substantial strictures, Parliament's resort to other constitutional powers is understandable. But even this avenue had been foreclosed: the effort of Parliament to write

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[24] Attorney-General for Canada v. Attorney-General for Alberta, [1916] A.C. 588, at p. 597 (P.C.).
[25] [1932] A.C. 41 (P.C. 1931).
[26] *Id.* at p. 51.
[27] *Id.* at p. 52.
[28] *Id.* at pp. 52-53.

a "properly framed" legislation to bring insurance within the ambit of other powers had been a futile pursuit of a "shadow." [29] The net effect of these decisions was the establishment of "intra-provincial trade and commerce" within provincial domain. Thus, federal trade and commerce power includes only the following categories: *a*) interprovincial trade and commerce, *b*) international trade and commerce, and *c*) trade and commerce affecting "the whole Dominion of Canada." [30] The third category is a mystery whose scope has not yet been defined by the courts.[31] Business, however, had successfully invoked it to neutralize the impact of provincial regulation: *John Deere Plow Co.* v. *Wharton*.[32] John Deere Plow Company, a federally incorporated business authorized to deal with agricultural implements throughout Canada, was sued by Wharton, a shareholder in the company, to restrain the company from carrying on business in British Columbia because it was not licensed or registered under the province's companies act. The company replied that the provincial regulation was not justified by section 92(11)

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[29] See *Editorial Note, Re* Section 16 of the Special War Revenue Act, [1942] 4 D.L.R. 145, at p. 146 (Sup. Ct.). In Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 355 (P.C.), the Privy Council invalidated the federal Employment and Social Insurance Act, 1935, because it, "in pith and substance," affected civil rights of employers and employees in each province. To remedy this, we needed a constitutional amendment in 1940, B.N.A. Act § 2A, added by B.N.A. Act, 1940, 3-4 Geo. VI, c. 36 (U.K.). *In Re* Section 16 of the Special War Revenue Act, [1942] S.C.R. 429, [1942] 4 D.L.R. 145, the Supreme Court struck down a taxing provision of a federal law because it dealt with the business of insurance within a province. Insurance business was, as a result, freed from federal deposit requirements to be licensed to do business and from safeguards against insolvency. The case, inspite of the tax angle raised, did not even discuss the federal taxing power.

[30] The third category was recognized as early as *Parsons* and affirmed in subsequent cases. *See, e.g.*, Russell v. The Queen, 7 App. Cas. 829 (P.C. 1882); Hodge v. The Queen, 9 App. Cas. 117 (P.C. 1883); Bank of Toronto v. Lambe, 12 App. Cas. 575 (P.C. 1887); and Toronto Elec. Comm'rs v. Snider, [1925] A.C. 396 (P.C.).

[31] A. SMITH, *supra*, note 10, at p. 77.

[32] [1915] A.C. 330 (P.C. 1914). Before *John Deere* came before the Privy Council, the power of Parliament to incorporate companies with objects other than provincial was recognizied as one falling under the residuary clause. These companies, however, are subject, not only to federal regulation on the conduct of their business, but also to provincial regulation. Citizens Insurance Co. of Canada v. Parsons, 7 App. Cas. 96 (P.C. 1881); Colonial Bldg. & Inv. Ass'n v. Attorney-General of Quebec, 9 App. Cas. 157 (P.C. 1883). For an affirmation after *John Deere*, see Great West Saddlery Co. v. The King, [1921] 2 A.C. 91 (P.C.).

or 92(13); further, it violated federal power over trade and commerce, or at least, the residuary clause. The Privy Council agreed with John Deere Plow Company. The residuary clause grants to Parliament the power to incorporate companies whose objects are other than provincial; Parliament's power to regulate trade and commerce affecting the whole Dominion of Canada supported Parliament's grant to such companies of the usual corporate powers.[33]

The scope given to the residuary clause in *John Deere* is somewhat surprising. In later cases, this clause, thought by many to be the spring from which all governmental powers flow, had also fallen victim to the expansion of provincial power through the property and civil rights clause and was reduced to a simple statement of federal emergency power.[34] There are good reasons to charge that the residuary clause, in the hands of the courts, had been assimilated by the property and civil rights clause. The assertion of the residuary clause in this case is, however, understandable at that time. The main economic activity at the time *John Deere* was decided affected the whole Dominion. From 1896 until some years after World War I, Canada enjoyed prosperity in

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[33] [1915] A.C. 330, where at p. 340 Lord Haldane said:

> [T]he power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. Their Lordships are therefore of the opinion that the Parliament of Canada had power to enact the sections relied on in this case in the Dominion Companies Act and the Interpretation Act.

He qualified, however, that the power to regulate trade and commerce cannot be exercised, with respect to these companies, to encroach on provincial jurisdiction on civil rights. The holding is thus limited:

> It is enough for present purposes to say that the Province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation.

Id. at p. 341.

[34] The "emergency doctrine" was advanced in 1921, *In re The Board of Commerce Act*, 1919, [1922] 1 A.C. 191 (P.C. 1921).

For a recent re-interpretation of the scope of the residuary clause, see National Capital Commission v. Munro, [1966] S.C.R. 663.

the agricultural economy, especially in wheat farming. The opening of the West, where agricultural prosperity was most remarkable, was largely due to federal initiative in capital investment, transportation, immigration and export. "The development of the West was a national achievement and the participation of all areas in a common effort fostered a new sense of nationhood." [35] At that time, even the problems of provincial adjustment, regional interest, local and cultural diversities were either solved or overshadowed by the Western expansion under the leadership of the federal government.

To the courts, however, *John Deere* seems now too remote in the past and too exceptional in its historical setting to inspire the development of new grounds for the assertion of federal power over trade and commerce. As late as 1955, Mr. Justice Rand was forced to admit that the third category of trade and commerce was as yet "undefined." [36]

Even federal authority over interprovincial and international trade and commerce did not escape judicial confinement. The courts have never disputed the existence of federal power over these two categories of commerce.[37] But its confinement was all the more disturbing because the area carved out by the courts was not open to the provinces. The reason can be traced to their static conception of the division of legislative competence: the conception that federal and provincial competence are contained in watertight compartments conceptually incapable of interacting and supplementing each other. For business, this meant an unregulated paradise in certain areas of commerce. The Supreme Court, then only a "captive court" that saw its task, not in interpreting the constitution but in interpreting what the Privy Council said the constitution meant,[38] can claim credit for introducing this naive conception into the stream of business life. The time when this unregulated paradise was created made its impact doubly disastrous. When *The King* v. *Eastern Terminal Elevator Co.*[39] was decided, the spectre of the

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[35] Bk. 1 *Report of Royal Commission on Dominion-Provincial Relations* 66. For detailed discussion, see W. MACKINTOSH, *The Economic Background of Dominion-Provincial Relations* ch. 4 (1964).

[36] *Re* Validity of the Industrial Relations and Disputes Investigations Act, [1955] S.C.R. 529, p. 551.

[37] *See* Attorney-General of British Columbia v. Attorney-General of Canada, [1924] A.C. 222 (P.C. 1923).

[38] Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians*, 29 *Can. B. Rev.* 1038, at p. 1069 (1951).

[39] [1925] S.C.R. 434.

great depression which began with the crisis of 1929 was emerging on the horizon.[40] Canada's export of agricultural products from the West, the chief factor in Canadian economic growth in previous years, was on the decline, gaining crisis proportion as the depression gathered strength. Parliament and the provinces attempted to alleviate the severity of the crisis by providing for an orderly marketing system of agricultural products. The various marketing systems established by the governments were challenged in the courts.

Eastern Terminal Elevator Co. involved a federal scheme to regulate marketing, grading and shipping of Canadian grain. Although the scheme was primarily directed to the regulation of interprovincial and international trade, the Court condemned it because it also incidentally affected grain destined for intra-provincial trade. The ancillary effect of the scheme on provincial trade was thus found fatal. On the other hand, the Court also invalidated a provincial marketing system: *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction.*[41] It argued that the British Columbia legislation was *ultra vires* because it did not only affect local trade but also interprovincial trade.

Lawson, in spite of *Eastern Terminal Elevator,* sounded like an invitation to Parliament to re-enter the field. It then passed The Natural Products Marketing Act, 1934, with the view of cooperating with the provinces. But in *Re The Natural Products Marketing Act, 1934,*[42] both the Supreme Court and the Privy Council told Parliament that it was wrong in reading *Lawson* as an invitation to re-enter the field. In declaring the legislation invalid, they insisted that the incidental effect of the legislation upon provincial trade is a jurisdictional defect sufficient in itself to render the whole legislation *ultra vires.*

To stamp a jurisdictional label on each grain of wheat is, of course, impossible. Besides, grading and marketing efficiency, not to say conventional business wisdom, shows that to implement what the courts are demanding is a commercial folly. What is true with respect to a grain of wheat applies to most agricultural products. Faced with this reality, governmental regulation of agricultural products destined both to local and interprovincial or export market is unthinkable: "The courts, ... have [thus] created

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[40] W. MACKINTOSH, *supra,* note 35, at ch. 6.

[41] [1931] S.C.R. 357.

[42] [1937] A.C. 377 (P.C.).

a no man's land in the constitution."[43] The eventual introduction of governmental presence in this area of commerce required not only the cooperation of the governments; it also required an ingenious way of rendering the courts an obsolete institution in the solution of other jurisdictional problems.[44]

C. *The Exercise of the Tax Power*

To draw an adequate picture of the constitutional limitations on the exercise of the tax power in Canada, I must preface my discussion of details. Tax measures today are utilized for a variety of reasons. To raise revenue to finance governmental operation, of course, remains prominent, but tax laws are also often invoked to regulate the economy in general or a line of business in particular. These two purposes are particularly relevant in Canada because the power to tax a certain object may come within the competence of one level of government but the power to regulate it may not, or *vice versa.* Further, taxation is usually sensitive to political climate. The national impact of the exercise of provincial tax powers may, therefore, be uneven or conflicting. As a result, the federal power over foreign trade, banking, and fiscal matters may be undermined by the exercise of the tax power by the provinces. With respect to confiscatory taxation, two points are worthwhile to note. First, as a practical matter, governments will seldom kill the goose that lays the golden egg; what they often do is to take the goose, thus resorting to expropriation rather than taxation. In Canada, these powers have separate constitutional sources, and the limitation that applies to one may not necessarily apply to the other. The second point stems from the concurrent powers of taxation. The determination of the confiscatory nature of a tax burden is thus somewhat more complex: a number of taxes, minimal in themselves, imposed by several governments may become confiscatory in their cumulative effect.

Around these considerations numberless constitutional issues can arise; I will discuss only some of these issues.

The B.N.A. Act, consistent with its design of strong central government and extensive federal responsibility, grants to Parliament a broad tax power and the use of main revenue sources.

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[43] Scott, *The Privy Council and Mr. Bennett's "New Deal" Legislation,* 3 *Can. J. Eco. & Pol. Sc.* 234, at p. 240 (1937).

[44] The cooperative scheme established by the Agricultural Products Marketing Act, 1949, *Can. Rev. Stat.* c. 6 (1952), was sustained in P.E.I. Potatoe Marketing Board v. H.B. Willis, Inc., [1952] 2 S.C.R. 392.

Parliament has the power of "The raising of Money by any Mode or System of Taxation," [45] and the exclusive use of customs and excise taxes.[46] To challenge, therefore, a federal tax measure on an alleged absence of the power to tax the burdened object is virtually precluded. The favoured strategy is to play up the regulatory effect of the tax measure, thus inviting the application of some of the limitations discussed under the trade and commerce clause. A classic example of the use of this strategy is *In re The Insurance Act of Canada*,[47] where the insurance companies were able to dodge the tax imposed by the Special War Revenue Act. The Privy Council held that since a federal license for insurance companies doing business in a province was unnecessary, the tax must fall. The Board stressed the licensing feature of the act over an object which was held to be beyond the reach of federal competence.[48]

The Privy Council affirmed the vitality of this strategy when it struck down the Employment and Social Insurance Act of 1935.[49] The act provided for a comprehensive system of compulsory insurance in Canada to alleviate the difficulties resulting from unemployment brought about by the depression. The Board refused to accept the argument that the obligation imposed by the act upon employers and employees was a mode of taxation, although it evaded expressing an opinion on whether the act was a tax measure or not. Nonetheless, it considered the legislation a regulatory measure which imposed a statutory obligation to pay insurance premiums to the state or to an insurance company.

Other avenues to contest the constitutionality of a federal tax measure have not yet been conclusively determined. The courts, however, have suggested that they are willing to yield to some of these approaches. Foremost is the suggestion in *In re The Insurance Act of Canada* that "if the tax as imposed is linked with an object which is illegal the tax for that purpose must fall." For instance, a tax measure that is inseparably linked with an illegal spending programme would fall along with the spending programme. The Privy Council added credibility to this approach when it condemned the Employment and Social Insurance Act of 1935. It stated that even if the tax measure, as such, were valid, the legislation that disposes of the revenue collected may not be. If the tax feature is

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[45] B.N.A. Act § 91(3).

[46] *Id.* at § 122.

[47] [1932] A.C. 41 (P.C. 1931).

[48] *Id.* at p. 52.

[49] Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 355 (P.C.).

not severable from the spending feature of the legislation, the tax must fall. Another approach was suggested in *Caron* v. *The King*:[50] the federal government may not validly impose a tax for provincial purposes. Both limitations have never been clarified by the courts; I have the feeling that these are judicial conjectures uttered at unguarded moments and without adequate reflection.

The provinces have a restricted power of "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes";[51] they may also charge license fees on certain forms of business.[52] Provincial tax power has various limitations: 1) the province can only impose a direct tax; 2) a regulatory tax measure cannot intrude into federal domain; 3) the tax must be "within the Province"; 4) it must be for "Provincial Purposes"; 5) it must not impede the free admission of goods from one province to another.[53]

Business has not been successful in urging the "direct tax" restriction as a shield against provincial tax measures. In *Bank of Toronto* v. *Lambe*,[54] a number of leading banks contended that the tax imposed on commercial corporations operating in Quebec was invalid on the ground, among others, that it was not a direct tax. The Privy Council adopted John Stuart Mill's definition of direct tax as "one which is demanded from the very person who it is intended or desired should pay it." Tested by this definition, the tax was found to be direct. A sales tax imposed on producers, however, is indirect because the producer could shift the tax to the consumer;[55] it would meet the "directness" criterion if it is demanded from the consumer.[56] Thus, in *Atlantic Smoke Shops Ltd.* v. *Conlon and Others*,[57] the Privy Council sanctioned the validity of the sales tax imposed on the purchaser or importer of tobacco for consumption in New Brunswick. Since then, no serious challenge on the basis of the "direct tax" limitation has been leveled against provincial tax measures.[58]

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[50] [1924] A.C. 999 (P.C.).
[51] B.N.A. Act § 92(2).
[52] B.N.A. Act § 92(9).
[53] B.N.A. Act § 121.
[54] 12 App. Cas. 535 (P.C. 1887).
[55] The King v. Caledonian Collieries Ltd., [1928] A.C. 358 (P.C.).
[56] Attorney-General for British Columbia v. Kingcome Navigation Co., [1934] A.C. 45 (P.C. 1933).
[57] [1943] A.C. 550 (P.C.).
[58] In *Cairns Constr. Ltd.* v. *Government of Saskatchewan*, [1960] S.C.R. 619, the Supreme Court leaned on *Atlantic Smoke Shops* to sustain a Saskatchewan tax measure.

The other limitations can be treated briefly. The second limitation is the converse of the limitation applied to the federal tax power. Based on this restriction, it has been held that a provincial tax imposed on banks having the effect of preventing banks to operate within a province is regulatory, and, because it encroached upon federal competence over banking, *ultra vires*.[59] The third limitation requires the provinces to have an adequate factual connection to the object being taxed. It has not been difficult for provinces to find a defensible factual basis for the exercise of the tax power. The fourth limitation has doubtful application. As in the case of the federal tax power, it is difficult to imagine a situation where a valid provincial purpose cannot be demonstrated. The fifth limitation was thought by the Fathers of Confederation to create a free trade area in Canada. *Atlantic Smoke Shops Ltd.*, however, permitted the provinces to create customs barriers when it sanctioned a tax on goods imported into a province.[60] How far the courts will permit the erection of further impediments to interprovincial trade in the fact of this limitation is not possible to predict.

Qualitative safeguards against confiscatory taxation are difficult to support in Canada; the doctrine of legislative supremacy seems to bar such safeguards. In the late thirties, however, a case which can be interpreted as an embryonic venture to establish qualitative safeguards was decided: *Attorney-General for Alberta* v. *Attorney-General for Canada*.[61] At that time, the western farmers were bitterly dissatisfied with the lending practices of banking institutions — mostly controlled from the urban centres of the East. Farmers' distrust of eastern money and fear of exploitation by commercial banks sparked a demand for "soft money" and abundant credit for farmers.[62] In Alberta, this was translated into a political force that immediately legislated social credit philosophy in banking business. Alberta's "Act respecting the Taxation of Banks" was intended to prevent the operation of banking institutions in the province by imposing a prohibitive tax on their paid-up capital and reserve fund wherever located. The Chartered Banks of Canada and the federal government succeeded in persuading the Supreme Court and the Privy Council to declare the act *ultra vires*. On the point of excessive taxation, the Board said:

> It does not seem to be necessary to set out the undisputed tables of figures showing the particulars of this gigantic increase in the taxation of banks

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[59] *Attorney-General for Alberta* v. *Attorney-General for Canada*, [1939] A.C. 117 (P.C.).

[60] Scott, Note, 12 *Can. Bar Rev.* 303 (1934).

[61] [1939] A.C. 117 (P.C.).

[62] *W. Easterbrook & H. Aitken, Canadian Economic History* 506-13 (1956).

> within the Province. Their Lordships do not disagree with the Chief Justice and Davis J. [of the Supreme Court] that the facts are sufficient (1) "to show that such a rate of taxation must be prohibitive in fact and must be known to the Alberta Legislature to be prohibitive" ... It must be remembered in this connection that the tax proposed is based on the paid-up capitals and on the reserve funds of banks wherever situate.[63]

The Board ignored the suggestion that it should not apply qualitative standards on the legislation by examining the wisdom of the legislation or the character of the tax as excessive. This argument, said the Board, should not prevail in a case where taxation in a practical business sense is prohibitive.[64]

In *Texada Mines Ltd.* v. *Attorney-General for British Columbia*,[65] the Supreme Court confirmed that prohibitive taxation may not have constitutional sanction. It struck down a tax of ten per cent of the value of minerals produced in the province on a showing that the mining costs plus the tax would make substantial loss in iron mining operations.

The difficulty of construing these decisions as recognition of qualitative safeguards stems from the fact that the regulatory aspect of the contested legislations was stressed by the courts. In the former case, prohibitive taxation was considered an attempt to regulate banking; in the latter, the legislation was viewed as an attempt to regulate exports. Both subjects are beyond provincial competence. Whether a prohibitive tax, admittedly not regulatory or regulatory only of provincial matters, is invalid or not, was not squarely decided.

A confiscatory tax resulting from cumulative taxation by the various governments presents a different question. If excessive taxation results from federal and provincial legislations, the doctrine of paramountcy will apply in the event of conflict: the federal tax will prevail. In the absence of conflict, both tax legislations will stand. The doctrine of paramountcy will invalidate the provincial tax only if a demonstrable conflict exists. As stated in *Forbes* v. *Attorney-General for Manitoba*:[66] "the doctrine of 'occupied field' applies only where there is a clash between Dominion legislation and provincial legislation within an area common to both. Here, there is no conflict. Both income taxes may co-exist and be enforced without clashing. The Dominion reaps part of the field of the Manitoba citizen's income. The Province reaps another part of it."[67]

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[63] [1939] A.C. 131 (P.C.).
[64] *Id.*
[65] [1960] S.C.R. 713, 24 D.L.R. 2d 81.
[66] [1937] A.C. 260 (P.C. 1936).
[67] *Id.* at 274.

Presumably, the conflict would arise only if the total tax is over 100 per cent.[68]

No solution has as yet been devised if the excessive taxation arises from a number of otherwise validly enacted provincial legislations. Three options are available. First, all the provincial legislations can be invalidated on the argument that excessive taxation is created by the combined effect of all legislations. Since excessive taxation is essentially regulatory in effect in that it would prohibit business operations, none of the legislations can stand. This solution is open to the objection that the doctrine of invalid regulatory taxation only applies if the subject matter regulated is itself beyond the taxing government's competence. The second option is to reduce proportionately all taxes so as to allow the operation of the burdened object. The difficulty here is to find authority for the courts to order the reduction. The third option is to invalidate some of the tax measures allowing others to stand. Aside from being politically risky, this option stands on slender ground: a priority can ouly be grounded on preferential jurisdictional connection or on time of enactment. The first ground is obviously untenable, the second is dubious. As stated in *Alberta Banks* Case:

> [T]he magnitude of the tax proposed for Alberta was such that, if it were applied by each of the other Provinces, it would have the effect of preventing banks from carrying on their business. It would be strange if each of the Provinces were successively to tax banks and the result on the question of *ultra vires* were to be that Acts of those Provinces who were earliest in the field were valid, whilst the Acts of those who came a little later were to be held *ultra vires*.[69]

This problem demonstrates the difficulty of finding solutions to prohibitive taxation in the absence of qualitative standards for the exercise of tax powers in a federal system. Hopefully, the Supreme Court will find the courage to fortify its doctrine in *Texada Mines Ltd.* to the extent of developing a qualitative standard that would enable it to insist on the first option.

D. *The Exercise of the Criminal-Law Power*

The B.N.A. Act, section 91(27), accords to Parliament competence in matters of criminal law including criminal procedure, whereas the provinces have, under section 92(15), the power "to impose punishment by fine, penalty, or imprisonment for enforcing any

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[68] B. LASKIN, *Constitutional Law* 670 (3d rev. ed. 1969).
[69] [1939] A.C. 132 (P.C.).

law of the province made in relation to matters" falling under section 92. Parliament's power over criminal law is plenary and broad; that of the provinces, limited and subordinate. Federal criminal legislation, however, can be attacked by showing that it is not, in pith and substance, a criminal measure, but rather an attempt to regulate property and civil rights. On the other hand, Parliament's criminal-law power can be used to invalidate a provincial criminal legislation.

The first argument was utilized to challenge federal combines and marketing legislations. The first combines investigation legislations passed by Parliament were struck down by the Privy Council on the strength of this argument.[70] The Board argued that these legislations interfered with property and civil rights and can neither be justified on the residuary clause, since this applies only in "special circumstances,"[71] nor on the criminal-law power, since these legislations were merely attempts to interfere with matters within provincial competence justified by making an ancillary penal provision.[72]

This decision is too sweeping in scope and too vague in phraseology. The Board failed to realize that criminal sanction is simply an enforcement technique for the protection of substantive interest. Thus, the thrust of this ruling can constitutionally wipe out more than half of the penal provisions of the Canadian Criminal Code. On its face, all traditional crimes against persons and property are beyond federal competence. The fact is the Board was again too swift to impute motive without considering the underlying policy of these legislations. This ruling, therefore, could not remain unqualified. In *Proprietary Articles Trade Association* v. *Attorney-General for Canada*,[73] the Privy Council made a considerable retreat. In this case, the association urged the invalidation of the Combines Investigation Act, 1927, and section 498 of the Criminal Code, 1927. In spite of Parliament's caution to avoid the criticisms in the earlier case in passing these laws, the association contended, these laws were invalid because they did not come within the traditional domain of criminal law, indeed they punished acts which were not necessarily civilly unlawful; thus, they intrude into provincial jurisdiction on property and civil rights. The Board replied:

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[70] *In re* Board of Commerce Act, 1919, [1922] 1 A.C. 191 (P.C.).
[71] *Id.* at 197-98.
[72] *Id.* at 199.
[73] [1931] A.C. 310 (P.C.).

> If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights.[74]

Since *Proprietary Articles Trade Association,* federal power over criminal law has shown a vitality that business found hard to overcome. In *the Matter of References as to whether the Parliament of Canada had Legislative Jurisdiction to enact section 498A of the Criminal Code, being chapter 56 of the Statutes of Canada, 1935,*[75] Mr. Justice Duff warned business:

> Whatever doubt may have previously existed, none can remain since... *Proprietary Articles Trade Association* v. *Attorney-General for Canada*... that, in enacting laws in relation to matters falling within the subject of criminal law,..., Parliament is not restricted by any rule limiting the acts declared to be criminal acts to such as would appear to a court of law to be 'in their own nature' criminal. The jurisdiction in relation to the criminal law is plenary; and enactments passed within the scope of that jurisdiction are not subject to review by the courts.[76]

Business was thus told that federal restraints on trade to prevent discrimination between competitors and resort to low prices to lessen competition is *intra vires.*

In *Goodyear Tire & Rubber Co. of Canada* v. *The Queen,*[77] business also discovered that a prohibition order following a conviction for illegal combination is justified by the criminal-law power. The giant rubber companies contended that a prohibition order enjoining them from continuing or repeating any illegal combinations was invalid because the criminal-law power refers only to punishment of crimes. The Supreme Court declared that the fact that these acts are also punishable in the Criminal Code does not exhaust Parliament's power over criminal law; this power extends to legislation designed for the prevention of crime as well as to punishing crimes.[78]

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[74] *Id.* at 326-27.

[75] [1936] S.C.R. 363.

[76] *Id.* at 366. *But see, Reference re Dominion Trade and Industry Commission Act, 1935,* [1936] S.C.R. 379; *Attorney-General for British Columbia* v. *Attorney-General for Canada,* [1936] S.C.R. 398.

[77] [1956] S.C.R. 303.

[78] *Id.* at 308. In a perceptive concurring opinion, Mr. Justice Rand said:
> It is accepted that head 27 of s. 91 of the Confederation statute is to be interpreted in the widest sense, but that breadth of scope contemplates neither a static catalogue of offences nor order of sanctions. The evolving

The courts, however, have not supported federal criminal-law power in cases involving marketing legislations. As discussed under trade and commerce, the courts insist that the regulatory effect of the legislation on property and civil rights is decisive. The irony is that business found that even legislation designed for its protection can be invalidated by this doctrine. Thus, in *Canadian Federation of Agriculture* v. *Attorney-General for Quebec*,[79] the Privy Council struck down legislation passed to give trade protection to the dairy industry by prohibiting the manufacture, import or sale of dairy product substitute. The federation supported the validity of the legislation, but the Board stated that this protective legislation directly affected civil rights of individuals in relation to trade within a province.[80]

A province's authority to penalize certain acts or omissions can be supported under its limited criminal-law power in section 92(15) and its control over property and civil rights under section 92(13). In a number of cases, however, the courts have nullified provincial penal laws on the ground that the subject matter of these laws lies within federal jurisdiction. Puzzled by the concept of concurrent competence in a federal system, they constructed conceptual slots into which the powers of government can be conveniently assigned. As a result, some cases have held that criminal law is within the exclusive competence of Parliament, and the power granted to the provinces under section 92(15) to impose punishment is not, in constitutional terms, a criminal-law power. This denial of provincial

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and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and that new modes of enforcement and punishment adapted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously argueable.

What has called for the device of injunction and punishment for its contravention is undoubtedly the experience in dealing with these offences. The burden of proving the combination and its operation is, for obvious reasons, complicated and time consuming and the procedure of enforcement by conviction and fine has tended to exhibit a course of things bearing a close likeness to periodic licensing of illegality. That sanctions cannot be made more effective, that an offence by its nature continuing cannot be dealt with as criminal law by an enjoining decree that will facilitate enforcement, might go far towards enabling self-confessed lawlessness to set the will of Parliament at defiance.

Id. at 311-12.

[79] [1951] A.C. 179 (P.C. 1950).

[80] *Id.* at 196.

penal power is unjustified and wholly unfounded; its only limitation, in fact, is the doctrine of paramountcy. Unable to deny categorically that the provinces may punish crimes, they awkwardly attached the provincial power to punish on clause 13, property and civil rights. The contest was thus reduced to its traditional form: the confrontation between Parliament's plenary competence over criminal law and provincial competence over property and civil rights. As a constitutional strategy, therefore, business had to emphasize the criminal nature of the legislation to frustrate the provincial legislation.

Provincial securities legislation yields appropriate examples of the use of this strategy. In *Lymburn* v. *Mayland*,[81] a number of corporations sought to enjoin the Attorney-General of Alberta from investigating certain fraudulent securities transactions, claiming that his authority was derived from an invalid legislation. They contended that since the act penalized certain transactions not punishable by the Criminal Code, it encroached upon Parliament's exclusive criminal-law power. The Privy Council, however, upheld the act, noting that it was not a colourable attempt to encroach upon Parliament's power on criminal law and it can be supported on the province's jurisdiction over property and civil rights.[82] In 1960, the Securities Act of Ontario was attacked, again on the ground, among others, of federal criminal competence: *Smith* v. *The Queen*.[83] The accused, charged under the Ontario act with giving out false information in a prospectus, urged acquittal because the province cannot create this offence since the Criminal Code punishes a similar act. The Supreme Court ruled that the penalty provision was merely incidental to the main purpose of the act which is to insure the registration of persons and companies before they are permitted to trade in securities and the registration of securities before they are traded. Showing more perception of the nature of shared competence in a federal system than the Privy Council, the Court held that a prospectus may be, in one aspect and for one purpose, the subject of a valid provincial legislation, and in another aspect [84] and for another purpose, the subject of federal legislation. In view of the differing aspects and purposes of the Ontario act and the Criminal Code, both legislations can co-exist

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[81] [1932] A.C. 318 (P.C.).

[82] *Id.* at 327.

[83] 25 D.L.R. 2d 225.

[84] For the "aspect" doctrine, *see Provincial Secretary of P.E.I.* v. *Egan*, (1941) 3 D.L.R. 305.

and the Ontario law cannot be invalidated by the doctrine of paramountcy.[85]

IV. The Canadian Bill of Rights: A Source of Qualitative Safeguards?

The doctrine of legislative supremacy in Canada's constitutional regime is founded on the people's faith in the wisdom of governments and on the practical consideration that governments remain in power only as long as they are sensitive to the people's wishes and reflect these wishes in the affairs of government. The main protections to economic interest are, therefore, expected to be settled in the political arena. To date, we are convinced of the effectiveness of this machinery. For this reason, no significant popular movement has emerged demanding an entrenchment of qualitative guarantees against the abuse of governmental power.

The governments are ahead of the people in this regard. The reason, perhaps, is that their conscience is heavily burdened by the strictures they hastily imposed upon the Japanese-Canadians during World War II and upon the people at the height of communist hysteria. In Canada, therefore, the guarantees that one usually finds in the constitution of other countries are found in legislations. The most important of these legislations is the Canadian Bill of Rights.[86]

The Bill provides that it is recognized and declared that the freedom not to be deprived of life, liberty, security of person and enjoyment of property except by due process of law exists without discrimination.[87] The reach and effect of this ringing recognition and declaration are inherently limited due to two primary considerations: 1) The Bill is a federal statute, not a constitutional instrument. It can, therefore, be repealed, or exception to its operation created, by Parliament. In this regard, one can take some comfort from the Court's insistence that the exception to the Bill's operation must be expressly created. The Supreme Court, upsetting the traditional view that the Bill is simply a canon of construction,[88]

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[85] *See also Regina* v. *W. McKenzie Sec. Ltd.*, (1966) 56 D.L.R. 2d 56, where the invocation of federal trade and commerce power to evade the application of provincial securities legislation was rejected.

[86] Can. Stat. 1960 c. 44.

[87] *Id.* at § 1(*a*).

[88] *Regina* v. *Gonzales*, 37 W.W.R. 257, (1962) 32 D.L.R. 2d 290, 132 Can. Crim. Cas. Ann. 237 (B.C.); and the dissenting opinions of Cartwright, C.J.C., Abbott J. and Pigeon J., in *Regina* v. *Drybones*, (1969), 9 D.L.R. 3d 473, at 474, 477, and 487, respectively.

has recently ruled that the courts have the authority to declare a statute inoperative unless Parliament expressly excepted the statute from the ambit of the Bill of Rights.[89] 2) The Bill is effective only in matters within federal competence; it is ineffective against provincial action.

Because of the above limitations, the impact of the Bill of Rights upon the expropriation of property by the federal government is debatable. Some authors believe that the Bill's "due process" clause may render invalid a taking authorized by law if the law flagrantly violates reasonable standards of fair process and compensation.[90] Some lower courts deny to the Bill this far reaching effect: "due process" means simply "in accordance with law." A taking authorized by law thus satisfies the "due process" clause,[91] for the due process required is only a procedural concept.

The core of this controversy revolves around the juridical status of the "due process" clause. The doctrine of legislative supremacy implies the power of all governments to take property with or without compensation, effected through a judicial proceeding or not. The B.N.A. Act contains a number of provisions from which this power, without qualitative or procedural limitation, can be derived.[92] Those who insist that reasonable standards must be observed by the statute itself are, in effect, elevating the due process into a constitutional norm, a long accepted American doctrine. Thus, Mr. Justice Rand, after his retirement from the Supreme Court, was actually constitutionalizing the due process when he argued:

> 'Due process' is thus seen to be interpreted as a limitation on law which to a degree of unreasonableness affects personal liberties or property. Confining that limitation to the broadest sense of procedure is incompatible with the provisions of the Bill of Rights. Section 2 deals with specific matters of that nature in such detail as virtually to exhaust the items of importance...

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[89] *Regina* v. *Drybones*, [1970] S.C.R. 282, 9 D.L.R. 3d 473, at 477 (per Ritchie, J.) and at 486 (per Hall, J.); *Robertson* v. *The Queen*, [1963] S.C.R. 651, 41 D.L.R. 2d 485, [1964] 1 Can. Crim. Cas. 1 (1963) was distinguished in the majority decision.

[90] W. TARNOPOLSKY, *The Canadian Bill of Rights* 156 (1966); Rand, *Except by Due Process of Law*, 2 *Osgoode Hall L.J.* 171 (1961).

[91] *Regina* v. *Jenson*, (1962), 39 W.W.R. 321, 38 Crim R. 234 (B.C. Mag. Ct.); *Regina* v. *Martin*, (1961), 35 W.W.R. 385 (Alta.).

[92] *See, e.g.*, B.N.A. Act §§ 92(10)(*a*), 91(2), for sources of federal power, and § 92(10), (13), (16), for sources of provincial power. For a brief discussion, see Strayer, *Constitutional Aspects of Nationalization of Industry*, 7 *Can. B.J.* 226 (1964).

....

> What, on its face, is indicated by the Act is the setting up for all law infringing rights, privileges and liberties, a standard of rational acceptability in the regulation of human conduct and relations.[93]

Although I consider it desirable to constitutionalize the due process, as well as other guarantees against legislative abuse, I cannot share the view that the Bill of Rights has constitutionalized the due process clause. To hold this view is to deny the fact that the Bill is simply a federal statute. The proposal of the federal government to include a Charter of Human Rights in the future constitution of Canada is an unmistakable evidence that the Bill cannot be construed as a constitutional instrument. The due process, however, is more than a mere procedural concept; it may, on the authority of *Drybones*, render inoperative a federal law that offends reasonable standards unless Parliament expressly exempts the law from the operation of the Bill of Rights.

V. The Effect of the B.N.A. Act Upon the Canadian Economy

In the main, the constitutional regime under the B.N.A. Act as interpreted by the courts had, until toward the beginning of World War II, encouraged economic growth. Divided competence, with all the jurisdictional barriers that the courts created, permitted business to develop virtually free from serious legal restraints in major areas of the economy. At a time pervaded by economic individualism, challenge against the imposition of national regulation was naturally abundant. Foreign investment, ignored by the Fathers as a positive factor, discharged a major role in the growth of the Canadian economy.

But the demand of economic development has drastically changed. Particularly in the last twenty years, the economic regime under the Act has proven itself stale and grossly inadequate. Since economic growth cannot be left in a legal vacuum, frustration of federal regulation invited the provinces to enter the field, bringing with it regionalism. With the infirmity of the trade and commerce clause to forge the country into a united economic regime, the fragmentation of the country emerged. Some provinces were even inclined to exaggerate: they exhorted their residents to buy products of their respective provinces and initiated governmental policies that discriminated against the goods and services from other

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[93] Rand *supra*, note 90, at 187.

provinces.[93a] On the other hand, business realized that interdependence and nationwide expansion are the logic of modern economic events. The initial rejection of the broad and orderly economic field offered by federalism thus proved to be a barrier

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[93a] *Attorney General for Manitoba* v. *Manitoba Egg and Poultry Ass'n* (Judgment pronounced June 28, 1971, *as yet unreported*), the Supreme Court sounded an unmistakable rejection of the provincial policy of discrimination against goods and services from other provinces. The case involved the ever escalating "chicken and egg war" between the provinces by establishing provincial boards that regulate marketing of poultry products. Mr. Justice Martland, speaking for the Chief Justice, Justices Abbott, Judson, Ritchie and Spence, anchored his decision on the commerce clause (B.N.A. Act §91(2)):

> It is my opinion that the Plan now in issue not only affects inter-provincial trade in eggs, but that it aims at the regulation of such trade. It is an essential part of this scheme, the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs, specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between provinces as such. Because of that, it constitutes an invasion of the exclusive legislature authority of the Parliament of Canada over the matter of the regulation of trade and commerce.

Martland judgment at p. 14.

Mr. Justice Laskin, concurred in by Mr. Justice Hall, conceded that provinces may validly enact legislation to control the marketing of various products, as previous cases have held. He found, however, that the Manitoba plan is too broad in scope, holding it *ultra vires* on the basis of B.N.A. Act §91(2):

> Assuming such controls to be open to a province, the scheme before this court is not so limited. It embraces products which are in the current of interprovincial trade and, ..., it embraces them in whatever degree they seek to enter the provincial market. ...I do not reach the question of discriminatory standards applied to out-of-province producers or distributors (that is, the question of a possibly illegal administration of the scheme as bearing on its validity) because I am of opinion that the scheme is on its face an invasion of federal power in relation to s. 91(2).
>
> There are several grounds upon which I base this conclusion. The proposed scheme has as a direct object the regulation of the importation of eggs, and it is not saved by the fact that the local market is under the same regime. Anglin J. said in *Gold Seal Ltd.* v. *Dominion Express Co.* (1921), 62 S.C.R. 424, at p. 465, that "it is common ground that the prohibition of importation is beyond the legislative jurisdiction of the province". Conversely, the general limitation upon provincial authority to exercise of its powers within or in the province precludes it from intercepting either goods moving into the province or goods moving out, subject to possible exceptions, as in the case of danger to life or health. Again, the Manitoba scheme cannot be considered in isolation from similar schemes in other provinces; and to permit each province to seek its own advantage, so to speak, through a figurative sealing of its borders to entry of goods from others would be to deny one of the objects of Confederation, evi-

to business's present ambition for national expansion. Business was compelled to re-assess its position:

> The men who control [business] are compelled to think in nationwide, if not national, terms. They do not want *laissez faire*, or the free fluctuating market, or the uncoordinated tinkering of many... provincial governments. Instead, they want stability in prices, in labour relations, in monetary, fiscal and other governmental policies, so that they can engage in longrange planning for their industry. They want the economy to be manageable and, within limits, to be managed with a foresight which takes their nationwide concerns into account. Because foresight on the scale that they want implicates the national government and its powers at many points, they want to be able to bring a persuasive influence to bear upon the national government.[94]

In the last twenty years, business had ceased to mount a serious assault on federal legislations.[95] Even the insurance companies, major parties to the confinement process of the federal trade and commerce power, shifted their strategy. They were vehement in urging federal action to stabilize public finance and to restore confidence and credit. Undoubtedly, the social credit adventure in Alberta was a factor in this shift.[96]

Even some of the provinces seemed to have changed their attitudes. They were not sure whether to mourn or to rejoice over the expanded powers that the courts had granted them. The courts were unaware that expanded powers mean heavier financial responsibility. Fortunately enough, the formula that brought about an expansion of provincial power was also applicable to the construction of provincial tax power, and the courts stumbled in the right direction. Had they stumbled elsewhere, the provinces would have been doomed to bankruptcy. But in spite of this expansion of provincial tax power by the judicial interpretation of "direct taxation," provincial revenue remains inadequate; they continue to

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denced by the catalogue of federal powers and by s. 121, namely, to form an economic unit of the whole of Canada: see the *Lawson* case [1931] S.C.R. 357, at p. 373. The existence of egg marketing schemes in more than one province, with objectives similar to the proposed Manitoba scheme, makes it clear that interprovincial trade in eggs is being struck at by the provincial barriers to this movement into various provincial markets. If it be thought necessary or desirable to arrest such movement at any provincial border then the aid of the Parliament of Canada must be sought, as was done through Part V of the *Canada Temperance Act*, R.S.C. 1952, c. 30 in respect of provincial regulation of intoxicating liquor.

[94] Corry, *Constitutional Trends and Federalism, in Evolving Canadian Federalism* 111 (1958).

[95] *Id.* at 112.

[96] *Id.* at 112-13.

accumulate debts and operate on a deficit. The poorer provinces must rely on federal financial assistance; all provinces desire a renegotiation of the allocation of revenue sources to enable them to discharge their heavy responsibility.[97]

To the people of Canada, the economic regime under the B.N.A. Act is even less satisfactory. The effectiveness of stabilization policies of the federal government has gradually weakened, and cyclical downturns are becoming increasingly difficult to overcome.[98] Even the federal government's control over monetary policy cannot fully realize desirable national objectives due to the rigidity of divided competence and the growth of the provinces as independent economic units.[99] To mention just one harmful consequence, Canadians in different parts of the country do not share equally the price of fighting inflation. Our problems are further complicated by the fact that Canada's freedom to implement her economic policies independently of the United States is far more limited than of other nations. With respect to economic growth, the ability of the national government to pursue suitable economic policies is just as limited. More serious, the growth we have achieved is grossly unfair: it is so alarmingly pregnant with regional disparities that we seem to be moving to the future along Darwin's doctrine of natural selection.[100] Central Canada, favoured by a number of factors, has achieved prosperity that can only be considered a dream in other regions. Necessarily, provincial standards of essential services to the people differ vastly from region to region. If this is bad enough to some Canadians, it is disastrous to Canadian Eskimos and Indians. In fine, therefore, Canadians do not share equally in the costs and gains of economic growth under the B.N.A. Act.

Foreign investment, which abundantly flowed into Canada, now raises a difficult political problem. Not that we can no longer attract foreign capital, as Lester Pearson's Commission on International Development found to be the case in emerging nations.[101]

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[97] See the summary of the proposals submitted by provincial governments respecting the tax power in *Government of Canada, The Taxing Power and the Constitution of Canada* 60-63 (1969).

[98] See Parizeau, *Prospects for Economic Policy in a Federal Canada, in Canadian Federalism* 48-51.

[99] See Hood, *Economic Policy in our Federal State, in id.* at 59.

[100] For a detailed study of this disparity, see S. CHERNICK, *Interregional Disparities in Income* (Study No. 14 prepared for the Economic Council of Canada 1966).

[101] *Partners in Development* (1969).

Our problem rather is how to circumscribe foreign ownership and control of Canadian industries within manageable limits and to inspire in foreign companies a sense of layalty to Canada. The Watkins Commission Report, *Foreign Ownership of Canadian Industry*,[102] estimates that at the end of 1963, foreign ownership in most of the economy except agriculture and service industries totalled thirty-five per cent and the corresponding figure for foreign control was thirty-four per cent. These rates are considerably higher than those in any developed country in Western Europe, and Japan and Australia.[103] Due partly to our federal system as developed by the courts, Canadian policy toward foreign investment has been piecemeal, gradual,[104] and unnecessarily uncoordinated. We have never committed ourselves to the slogan of narrow-minded nationalism, but we cannot help asking ourselves whether foreign ownership and control of Canadian industries in such high proportion will not mean ultimately the disappearance of the political nationality and economic independence that the Fathers of Confederation established in British North America.

From the host of political, economic, cultural and other problems that seem insoluble under the regime of the B.N.A. Act came the realization that the courts' ability to play a creative role in our development is sadly limited. Although occasionally the courts have vehemently acknowledged that it is a constitution they were interpreting, they have not demonstrated that they are adequately equipped with any coherent and profound philosophy of politics, of economics, and — one would like to add — even of life to enable them to transform the B.N.A. Act into a flexible legal framework that will allow Canadians to attain a just and viable cultural, political and economic life. Many were, therefore, relieved that,[105] as a political response, appeal to the Privy Council was abolished in 1949,[106] thereby repatriating the final forum of constitutional litigation. We can still dimly hope that our Supreme Court can reverse the errors of the Privy Council and reshape our constitution.

Judicial process, however, is a slow machinery for reform and, in Canada, is still under the shadow of the doctrine of the finality

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[102] *Report of the Task Force on the Structure of Canadian Industry* (1968).

[103] *Id.* at 391-92.

[104] *Id.*

[105] Laskin, *The Supreme Court of Canada: A Final Court of Appeal of and for Canadians*, 29 *Can. Bar Rev.* 1038 (1951).

[106] *See* B.N.A. Act § 101 and Supreme Court Act, *Rev. Stat. Can.* c. 259, § 54 (1952). For a detailed discussion preceding the abolition of appeal to the Privy Council, see *Abolition of Appeals to the Privy Council — A Symposium*, 25 *Can. B. Rev.* 557 (1947).

of errors. Besides, it is so vastly fortuitous as to be unreliable to deal in a comprehensive manner with the doctrines of the past. Long before the installation of the Supreme Court as the highest court of the country, the governments had already initiated a machinery that may retire the courts from the constitutional arena: [107] negotiated federalism. The allocation of governmental power is becoming less and less a legal question and more and more a matter of political negotiation. The courts, in other words, are being replaced as arbiters of power by some sort of a "Continuing Constitutional Convention" between the federal and provincial governments.

To circumvent the constitutional strictures imposed by the courts upon the B.N.A. Act, the governments have resorted also to a number of devices. They have nullified decisions by the conventional method of constitutional amendment in the case of unemployment insurance [108] and old age pension.[109] To avoid the static conception of powers as watertight parcels, a number of techniques have been adopted since the 1930's: the delegation of power of one level of government to subordinate agencies of another level of government, referential incorporation of legislation of another government, and conditional legislation. To achieve coordination in the tax system, the federal government and provincial governments have concluded a series of tax agreements. In spite of the doubt on certain aspects of the federal spending power, the federal government has established with the cooperation of the provinces a number of programmes.[110] Through negotiated federalism, the governments have achieved progress in various fields in spite of the B.N.A. Act.

Negotiated federalism, however, is slow and cumbersome. The will to reach an agreement on broad criteria is often short, sometimes altogether wanting. Thus, it is psychologically agonizing to Canadians that we seem to put the destiny of our country at stake every time a controversial matter is negotiated. The negotiation of the Canada Pension Plan, to mention one example, shows the need for an almost godly patience, ingenuity and statemanship. But if the will to reach an agreement is generous, the danger of

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[107] Corry, *supra*, note 94, at 115-18.

[108] B.N.A. Act § 91(2a), added by B.N.A. Act, 1940, 3-4 Geo. VI, c. 36 (U.K.).

[109] B.N.A. Act § 94A, added by B.N.A. Act, 1964, 12-13 Eliz. II, c. 73 (U.K.), originally enacted by B.N.A. Act, 1951, 14-15 Geo. VI, c. 32 (U.K.).

[110] See *Federal-Provincial Grants and the Spending Power of Government* (Government of Canada Working Paper on the Constitution 1969), *Income Security and Social Services* (Government of Canada Working Paper on the Constitution 1969).

producing unsuitable compromises rather than workable programmes at the negotiating table is all too real.

The writing of a new constitution appears, therefore, imperative. Besides, having canadianized the judicial forum for constitutional dispute, it is simply logical to canadianize the constitution itself. Many times in the past, we have toyed with the idea of bringing home the constitution. But earnest work toward the preparation of a truly Canadian constitution only began in February, 1968. Unfortunately, I am skeptical of the suitability of the machinery adopted to write the new constitution: The Continuing Constitutional Conference of Provincial Premiers and the Prime Minister of Canada. These officials, have amply shown on the conference table that they are at heart mere politicians, not statesmen. Their overwhelming interest in the game of power is the major pillar of their constitutional positions, thus dooming the Conference to a futile, but expensive, exercise.[111] We will soon realize, I am sure, that some other machinery, perhaps a constitutional convention of delegates directly elected by the people, is more suitable than the Conference. The fate of the Victoria Charter seems to affirm this contention. In spite of the urgency of constitutional reform posed by the fact that Canada's prospect of remaining a united country seems slowly to be slipping out of reach as a particular activist political minority in Quebec gains respect and a consolidated philosophy, the three years work of the conference has gone no farther than "square one". Unless the people of Canada themselves soon assume the task of writing the constitution, the battle for a united Canada, I despair will be lost by default. As events that followed the demise of the Charter indicate. The crux of the constitutional issue is the division of powers. Unlike the politicians, who seem to be so certain, I am not sure that the people of Canada regard the division of powers as more important than a united country. In any event, the provincial politicians have no unequivocal mandate to represent their constitutional positions as that of their provincial citizens. Provincial elections have never been fought squarely on constitutional issues, and the people have always spoken with a great amount of ambivalence: voting to power a provincial party with a constitutional programme and a federal party with an almost opposing constitutional programme.

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[111] For a summary of the issues on Canadian constitutional reform, see *Federalism for the Future* (Government of Canada Working Paper on the Constitution), and *The Constitution and the People of Canada* (1969).