CANADIAN INSTITUTE
FOR THE ADMINISTRATION
OF JUSTICE

INSTITUT CANADIEN
D'ADMINISTRATION
DE LA JUSTICE

Faculté de droit, Université de Montréal
3101, Chemin de la tour, bureau 3421
C.P. 6128, Succursale Centre-ville
Montréal, Qc H3C 3J7
Téléphone: (514) 343-6157
Télécopieur: (514) 343-6296

CIAJ

ICAJ

ciaj@ciaj-icaj.ca
icaj@ciaj-icaj.ca

"HANDS IN OUR POCKETS": A TALE OF LEVIES, TAXES AND PROVINCES

Murray Rankin

Thursday, May 3, 2007
Jeudi, 3, mai 2007
9:00 A.M. – 3:30 P.M.
9 H – 15 H 30

Coast Place, Vancouver, B.C.
Room Shoreline/Horizon
Salon Shoreline/Horizon

"Hands in Our Pockets":
A Tale of Levies, Taxes and Provinces

Murray Rankin, QC*

Heenan Blaikie LLP

May 3, 2007

* The author gratefully acknowledges the superb assistance of Renée Miller of the Victoria, BC office of Heenan Blaikie LLP in the preparation of this paper

Introduction

At first blush, or even after more reflection, this paper may seem somewhat like a rather odd contribution in a conference meant to explore the judicial review of administrative legislation. I agree wholeheartedly with the conference organizers that the topic of "administrative legislation" – statutory instruments , rules, directives, guidelines, and the like – generally get short shrift at administrative law gatherings[1] and that it has not always received the attention it deserves. Yet even within this broader context, this paper may seem an odd fit. This conference is also intended to provide an overview of current developments in the law of judicial review. In addition to developing and applying an often flexible (if that is not too kind a word) standard of review, Canadian courts have also drawn equally flexible distinctions between indirect and direct taxation and between taxes and levies. This paper will address these often tortured distinctions.

Almost since Confederation, the Courts have grappled with the distinction between direct and indirect taxes. Naturally, the importance of the distinction between the two kinds of taxes is critically important to Canadian federalism, in light of the division of legislative powers between the federal and provincial governments. It is my contention that the current delineation between direct and indirect taxes, and the conflation between levies and indirect taxation implemented by the provinces, is taking place at the same time that increasing legislative responsibilities have been assumed by the provinces. Present cries of "fiscal imbalance" are not entirely new. Additionally, it occurs at a time when modern governments, both Federal and Provincial, are finding it increasingly attractive to implement user-pay, cost-recovery schemes as an alternative to adding to the general tax burden imposed upon Canadians in all parts of the country.

At Confederation, it was thought that the provinces would have limited need to raise revenues for local purposes and so they were denied the right to tax indirectly. This

[1] Although I hasten to reference a major exception to this rule: Dussault and Borgeat, *Administrative Law: A Treatise* (Carswell, 2nd ed., 1995). See especially chapter 2, of Volume 1 of this four-volume work, which I had the honour of translating.

restriction that was imposed by the Fathers of Confederation was intended to keep our democratic process transparent and accountable: the hallowed phrase "no taxation without representation" had reverberated across battle fields south of the border and also found its way into the halls of colonial legislatures that were also preoccupied with responsible government.

Little did the Fathers of Confederation anticipate that at the dawn of the 21st century, Canadians would live in a time where the increasing responsibilities assumed by the provinces would have led to an urgent need for the provinces to raise revenues. Although provinces are entitled to raise revenues by direct taxation and to "levy" in accordance with the legislative powers assigned by s. 92 of the *Constitution Act, 1867*, a troubling third head of taxation has become part of the provincial arsenal – namely, the possibility of taxation by indirect means.

Is this shocking? Will the provinces' power to tax indirectly strike at the very core of federalism? What does the devolution of direct and indirect taxes mean for our constitutional democracy? Is this all just semantics? It is these questions I wish to explore with you today.

A. Direct vs. Indirect Taxes: What is the difference?

At the outset, let us examine the difference between direct and indirect taxes. The Courts continue to rely on John Stuart Mill for guidance[2] with the initial determination of whether a tax is direct or indirect:

> A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.

[2] *The Principles of Political Economy* (1848), Book V, c. III, at p. 371.

The intention behind the distinction was purportedly to enhance democracy because the electorate would be better able to perceive direct taxes. It was apparently thought that with greater scrutiny by the citizenry, more resistance to public expenditure and more accountability from public authorities would result.[3]

It is common ground that the question of whether a direct tax is passed on to someone else is in no way determinative of whether the tax is direct or indirect. Instead, it is the "general tendencies of the tax and the common understanding of men as to those tendencies" that is said to be relevant.[4] The indicia of a direct tax[5] include the following:

> 1. Who should bear the tax is clear. "The taxing authority is not indifferent as to which of the parties to the transaction ultimately bears the burden, but intends it as a 'peculiar contribution' on the particular party selected to pay the tax"[6].
>
> 2. Everyone knows how much tax they really pay.[7]At Confederation, the intention to limit the provinces to direct taxation under s. 92(2) was aimed at transparency and political accountability.
>
> 3. The nature of a tax is not affected by the system of collection. The fact that a retailer collects the tax from a consumer on behalf of the government and then physically pays the money over to the government does not alter the characterization of such a tax as direct. The person intended to bear the burden of the tax, the consumer, is still the one who in reality pays it, even though the retailer acts as agent for the government in collecting it.

To illustrate what would constitute an indirect tax, Justice Rand in *Canadian Pacific Railway Co. v. Saskatchewan* asked "is the tax related or relatable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in the course of

---

[3] Magnet, Joseph. Chapter 7 "Taxation, Democracy and the Constitution" in *Modern Constitutionalism: Identity, Equality and Democracy* (2004).

[4] *Canadian Industrial Gas & Oil Ltd. v. Saskatchewan*, [1978] 2 SCR 545 (per Martland, J. citing Dickson, J).

[5] *Reference re Quebec Sales Tax* [1994] 2 SCR 715, (per Gonthier, J.)

[6] from *Atlantic Smoke Shops v. Conlon*, [1943] AC 550.

[7] J. S. Mill, cited with approval in *Atlantic Smoke.*

being manufactured or marketed?"[8] Where the tax "clings" to the product, in the sense that its amount attaches to the good and moves together with the good through the chain of supply, an element of indirectness may be present. The best examples include customs duties and excise taxes.

Given the increasing jurisdiction of the provinces as well as the increasing jurisdiction of municipalities within the provinces, it may be argued that there is a correlative necessity for Courts to ensure that the principle "no taxation without representation" does not become a casualty of the voracious appetite of these governments for revenues. Professor Joseph Magnet believes that the increase in the occurrence and justification of indirect taxation by the provinces is yet another troubling step in the direction of public power no longer deriving its authority from a legal rule, as required by the Supreme Court of Canada's stirring commitment to the rule of law articulated in the *Quebec Reference*.[9]

Although Mill's definition of direct and indirect taxes seems straightforward, the distinction between the two taxes has never been black and white. With increasing delegation of powers to the provinces, and the correlative need for provinces to increase revenues, the line between direct and indirect taxes has become blurred. In fact, in his dissent in *CIGOL v. Saskatchewan,* Mr. Justice Dickson (as he then was) went so far as to state that Mill's once influential theory "is of minor importance today." The "today" at the time of the *CIGOL* decision was almost 30 years ago: few would deny that by 2007, we are considerably further along the path of increased powers and responsibilities being assumed by the provinces.

In *CIGOL,* the Supreme Court was concerned with the distinction of a tax that Saskatchewan had applied to oil producers in that province. The concern in that decision was that the tax affected not only producers inside the province but would also affect consumers outside of the province; as such, it was concluded by the majority that this

[8] in *Canadian Pacific Railway Co. v. Attorney General for Saskatchewan*, [1952] 2 SCR 231.

[9] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

constituted an impermissible form of export taxation. The majority of the Court held that the tax was indirect, and thus was *ultra vires*.

In his dissent in *CIGOL*, Mr. Justice Dickson found the distinction between indirect and direct taxation, which had previously been relied upon, actually provided no real direction to decision-makers. He declared that taxes were often "hybrids", combining elements of both direct and indirect taxation. In order to determine whether a hybrid tax is properly direct or indirect, Justice Dickson asserted that the following requirements had to be satisfied:

1. the taxation was within the Province; and
2. the taxation was levied in order to raise a revenue for provincial purposes.

He stated that implicit in these two criteria, and more important than a vestige of indirectness, is the prohibition against a province imposing any tax upon citizens beyond its borders. Additionally, a province (or a First Nation) cannot invade fields that are beyond its constitutional powers.

Finally, Justice Dickson stated that in the nineteenth century, any element of indirectness in taxation was a stigma tending to obfuscate the actions of the legislature. Perhaps it is precisely this obfuscation that is now taking place between the acceptable provincial power to levy, and the "allegedly" impermissible power of indirect taxation (which leads to blurring the distinction between direct and indirect taxes, and may ultimately have deleterious effects upon federalism and the Constitution).

B. Levy vs. Tax: What is the difference?

So what then of levies? If the provinces have the power to levy under s. 92, what does that revenue source entitle the provinces to do? Although I will consider the distinction in parliamentary terms between levies and taxes shortly, suffice it to say that at present, the Speaker of the House looks to see if the "charge" is imposed on an industry and

whether it is imposed for the benefit of that industry. If the answers are yes, the "charge" is considered a levy and not a tax, at least in parliamentary parlance. The Appendix provides an illustration of an important BC levy.

If you surmised that the parliamentary definition of a levy and the Courts' definition of a levy are inconsistent, you would be right. If you also surmised that neither the Courts nor Parliament appear overly concerned about each others' definitions, you would be right again. Finally, if you surmised that the Courts' distinction between taxes and levies is much more complicated than Parliament's distinction, you would have been accurate on all counts. So how then do the Courts distinguish between levies and taxes?

In *Westbank First Nation v. British Columbia Hydro & Power Authority*, [10] Mr. Justice Gonthier dealt with the issue of whether the impugned by-laws imposed taxes or some other form of regulatory fee (i.e., a levy). He proposed as follows:

> 1. In all cases, a court should identify the primary aspect of the impugned levy; the "pith and substance" of the charge.
>
> 2. Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task is to determine whether the levy's primary purpose is, in pith and substance:
>
> a. to tax; i.e., to raise revenue for general purposes;
>
> b. to finance or constitute a regulatory scheme; i.e. to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme;
>
> c. to charge for services directly rendered, i.e., to be a user fee.[11]

[10] [1999] 3 SCR 134.

[11] Ibid, at para. 30.

Mr. Justice Evans in *602 Connaught Ltd. v. Canada*[12] confirmed that a third criteria has now been recognized:

> 3. Where the fee in question is for the provision of services, a nexus must exist between the quantum charged and the cost of the service provided, in order for a levy to be constitutionally valid.[13] However, in the case of business license fees, for instance, the nexus requirement will not be determinative.[14]

Mr. Justice Gonthier then went on to summarize the various indicia to apply in distinguishing taxes from regulatory charges. He asks whether the charge is:

1. Compulsory and enforceable by law?
2. Imposed under the authority of the legislature?
3. Levied by a public body?
4. Intended for a public purpose? and
5. Unconnected to any form of a regulatory scheme?[15]

If all of these questions can be answered in the affirmative, then the charge in question will generally be characterized as a tax.

How does one find a regulatory scheme that supports a "regulatory charge" or levy? The criteria may include some or all of the following:

---

[12] [2006] F.C.J. No, 1083, leave to appeal to the Supreme Court granted, [2006] S.C.C.A. No. 386.

[13] *Re Eurig Estate* [1998] 2 S.C.R. 565.

[14] *620 Connaught*, para. 37.

[15] [1999] 3 SCR 134 at para. 43.

1. A complete, complex and detailed code of regulation;

2. A regulatory purpose which seeks to affect some behaviour;

3. The presence of actual or properly estimated costs of regulation;

4. A relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.

5. The court must establish a relationship between the charge and the scheme itself, which will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour.[16]

More recently, it has been suggested by Parliament's Standing Committee for the Scrutiny of Regulations that the principles of a condition precedent and condition subsequent may be useful in determining, for instance, whether a business licence is a tax or levy. The Committee states that although a licence charge may be either a levy or a tax, it is generally stated that a licence charge (levy) is a condition precedent, while a business tax is a condition subsequent. A licence charge (levy) may be required before a certain business can be carried on, whereas a business tax is a charge on the business in which the licence authorizes one to engage in that business. Where the amount of the charge cannot be determined at the time of issuing a license, but rather is dependent upon future circumstances, the charge in question may properly be characterized as a tax upon the activity to be carried out under the authority of the license.[17]

The Standing Committee notes that a great deal of uncertainty surrounds the principles to be applied in distinguishing a fee from a tax and suggests that much of the blame for this can be attributed to the Courts' reluctance to invalidate levies, even where the levies are

---

[16] *Westbank* , *op. cit.*, at para. 44, per J. Gonthier, J.

17 See *Canadian Assn. of Broadcasters v. Canada* 2006 FC 1482, at para. 62.

clearly intended to be revenue-producing.[18] For instance in *Allard*, considered below, the Supreme Court concluded that the revenue-producing levy continued to be a valid provincial charge, notwithstanding that levies were not intended to be revenue-producing and tended to be indirect in nature.

C. The Parliamentary Process

It is important to remember that the Courts are not at the front-line in determining what is a tax and what is a levy. This responsibility has traditionally fallen to the Speaker of the House of Commons and his or her provincial counterparts. Although the Courts and legislatures differ in their approach to the distinction between levies and taxes, it may be of some solace to know that Speakers often have an equally difficult time of deciding whether a charge is a tax or a levy.

In order to determine whether a charge is a levy or a tax, Parliament places considerable reliance on *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*. This is, of course, the leading British text; it primarily addresses British parliamentary practice. According to May, the following matters are considered to be taxes, and thus subject to a ways and means motion, which is part of the procedural rules that apply to financial initiatives of the Crown:

> 1. the imposition of taxation, including the increase in rate, or extension in incidence (to include persons not already payers), of an existing tax, or the continuation of an expiring tax;
>
> 2. the repeal or reduction of existing alleviations of taxation, such as exemptions or drawbacks;

[18] Ibid.

3. the imposition of levies, charges or fees, which are similar to taxation in their effect and characteristics.[19]

In a very useful article[20], Keyes and Mekkunel state that the "pith and substance" approached employed by the Courts is different from the more flexible procedural approach taken by the Speaker in the parliamentary context. Unlike the Courts, Speakers do not look at the correlation between the cost of the program and the levy imposed. Rather, they look only at whether the levy is imposed on an industry and whether it is imposed for the benefit of that industry.

By way of example in distinguishing between the two, Keyes and Mekkunel indicate that levies used to fund a regulatory scheme created for the protection of the public generally would likely be considered taxes by the Speaker, but not by the Courts. To the contrary, if a levy were imposed to raise revenue for an industry, without any relationship to the costs incurred in regulating that industry, parliamentary practice suggests that it would be an industry levy, but the Courts would most likely find it to be a tax.

D. Section 53 of the *Constitution Act, 1867* to the Rescue?

So by now, one might ask, "What ever happened to no taxation without representation"? Section 53 of the *Constitution Act, 1867* provides:

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

The most notorious case involving the use of s. 53 is *Eurig Estate*.[21] There, the Supreme Court of Canada determined that the probate levy in question that was in force in Ontario

---

[19] *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22d ed. (London: Butterworths, 1997).

[20] "Traffic Problems at the Intersection of Parlimentary Procedure and Constitutional Law" (2001) 46 *McGill Law Journal*, 1037-1062.

[21] [1998] 2 S.C.R. 565.

was a tax, not a fee. The majority determined that there was no correlation between the amount charged for the grants of letters probate and the cost of providing the service. The Court also determined that while the Ontario legislature had the authority to implement a direct tax, it must do so in accordance with the requirements set out in the Constitution.

More importantly for our purposes today, the Court found that s. 53 of the *Constitution Act, 1867* mandates that bills for imposing any tax shall originate in the House of Commons or, by virtue of section 90, by the provincial legislature. The probate fees in this case were found to be a tax imposed by the Lieutenant Governor in Council without having originated in the Ontario legislature. Since s. 53 was not expressly amended for implementation in Ontario, that province was obliged to abide by its terms; therefore, its failure to do so rendered the probate tax imposed under regulation unconstitutional. The relevant section of the Ontario *Administration of Justice Act* did delegate to the Lieutenant Governor in Council the power to make regulations relating to "fees" for court proceedings; however, it did not expressly delegate taxing authority to the Lieutenant Governor in Council.

The dissent in *Eurig* by Gonthier and Bastarache JJ raised the interesting point that the historical significance of s. 53 was to provide that bills concerning taxation originate in the House of Commons rather than the Senate. With the abolition of bicameral legislatures in the provinces, the dissenting Justices considered that s. 53 no longer had any significance at the provincial level. They reasoned that since the Act imposing probate fees was introduced in the Legislative Assembly, it could not violate s. 53.

In 2001, the majority judgment in *Eurig* was revisited in *Ontario English Catholic Teachers' Association* (OECTA)[22]. In that case, the Supreme Court reiterated that s. 53 is not constitutionally "entrenched" (since it is found within a part of the *Constitution*

[22] [2001] 1 SCR 470.

Act, 1867 that either Parliament or the provincial legislatures can amend[23]) and, if it does so clearly, that taxation can in fact be delegated to its subordinate bodies, so long as the tax can be characterized as a direct tax (since, of course, the provincial legislature cannot delegate a power that it does not have). A unanimous Supreme Court nevertheless "accept[ed] that there is a constitutional guarantee of "no taxation without representation".[24] It considered that this guarantee would be satisfied if the legislature conferred the taxing authority upon the delegated body expressly and clearly; the delegated authority would not be imposing a new tax but only one that the legislature had approved. The government enacting the delegating legislation remains fully accountable to the electorate at the next election.

Presumably it remains *ultra vires* for a provincial legislature to delegate power to levy an indirect tax where the subject of the tax is interprovincial or international trade. However, the Supreme Court does not appear concerned about the provinces' ability to use levies to raise revenues for a local purpose, in essence a form of indirect taxation that the provinces were not initially entitled to at Confederation. Is our electorate more sophisticated now than at the time of Confederation? Are we now better able to perceive both direct and indirect taxes? Or is it that at the local provincial level, there is no longer a compelling difference (if there ever was one) between direct and indirect taxes?

The OECTA decision is not far removed from the Supreme Court's earlier decision in *Allard Contractors*[25]. There, the Supreme Court in no uncertain terms stated that the provinces have limited powers of indirect taxation; if the regulatory scheme creates a fee that can be considered a form of indirect taxation, this can be sustained if it can be properly characterized as ancillary to a valid regulatory scheme. Even though there was

---

[23] Indeed, the Court recognized that BC has removed s. 53 from its provincial constitution, initially in *Constitution Act*, R.S.B.C. 1979, c. 62; now *Constitution Act*, R.S.B.C. 1996, c. 66.

[24] *OECTA*, at para. 70.

[25] *Allard Contractors Ltd. v. Coquitlam* [1993] 4 S.C.R. 371. The principle of provincial indirect taxation was reiterated by the British Columbia Court of Appeal in a companion decision, *Coquitlam v. Construction Aggregates* 2000 BCCA 301.

some evidence that much more money would be raised by the levy at issue than would be required to administer the regulatory scheme (there, based upon the volume of soil removed from the municipality) the Court expressly steered clear of making a rigorous analysis of the accounts. This of course begs the question: "Why not"? If the Courts are going to judicially review the imposition of a tax or levy, and if they believe, as they contend, that there should be "no taxation without representation," any levy that cannot demonstrate some correlation between the cost of regulation and the revenues received should be at risk of being characterized as an indirect tax and thus *ultra vires*.

In *Allard*, Mr. Justice Iacobucci stated that in light of s. 92(9), in combination with ss. 92(13) and (16), that the *Constitution Act, 1867* comprehends a power of regulation through licenses. It is a power that is not confined to the requirement of direct taxation set out in s. 92(2). However, he went on to state that "in so far as it comprehends indirect taxation, these cases, either explicitly or upon their facts, have limited the power of indirect taxation such that it can only be used to defray the costs of regulation". It is unclear why Iacobucci J did not just say that the provinces have a virtually unfettered power to levy, as opposed to having a power of indirect taxation.

In the final analysis, although the Supreme Court in *Allard* reserves the right to judicially review legislation, it might be argued that the Court is only interested in paying lip service to what is considered to be a constitutionally important principle, "no taxation without representation." Perhaps the conclusion is that we cannot rely on the Supreme Court to keep the provinces' hand out of our pockets! Although Iacobucci J. concluded that it had yet to be determined whether s. 92(9) encompassed a power to levy indirect taxes for the purpose of raising revenues in excess of regulatory costs, in declining to monitor the correlation between revenues collected and the cost of administration, has the Supreme Court demonstrated complicity in opening the door to allow provinces to tax indirectly?

In *Nanaimo Immigrant Settlement Society v. British Columbia*[26], the BC Court of Appeal was faced with a claim that certain bingo licence fees imposed by the Province constituted indirect taxes. It upheld the lower court's conclusion that these licence fees were direct taxes, since there was no tendency to pass them on to the bingo players. The revenues raised were grossly disproportionate to the regulatory costs and the government only later realized that there was no provincial legislation that authorized these fees to be imposed. The Crown cross-appealed on the ground that the licence fees were not taxes but rather were fees ancillary to a regulatory scheme. The Court declined to set a precedent that money collected far in excess of regulatory costs could continue to be classified as a levy, notwithstanding the Supreme Court's permissive decision in *Allard*. Instead, the BC Court of Appeal classified the charge as a direct tax. Does this matter to the taxpayer? Should the taxpayer care whether a charge is a tax or a levy? I think it does matter. A levy is purportedly limited to industry, and should not, in principle, be applied like a blanket to all taxpayers.

Contrary to Professor Magnet's strongly held view on the importance of judicial review to ensure that Parliament is acting in accordance with the principles of s. 53 of the *Constitution Act, 1867*, it has been argued elsewhere that the Courts are overstepping their bounds and impinging on the parliamentary sphere by restricting the ability to delegate matters of taxation.[27] On one side of the debate, some argue the necessity of increased scrutiny in terms of judicial review; others argue that the Courts have no business fussing with the affairs of our elected Parliamentarians.

So the long and short of it seems to be that Provinces can:

1. Tax directly to raise revenues for a provincial purpose (s. 92(2))

---

[26] (2004) 242 D.L.R. (4th) 394. The author should disclose that his former law firm was counsel in this proceeding.

[27] See Keyes and Mekkunnel, "Traffic Problems at the Intersection of Parliamentary Procedure and Constitutional Law" (2001) 46 McGill L. J. 1037

2. Use a levy to defray the cost of regulation (s. 92(9))

3. Use indirect taxation to defray the costs of regulation; however, the Supreme Court claims not to have yet determined whether s. 92(9) encompasses a power to levy indirect taxes for the purpose of raising revenues in excess of regulatory costs (*Allard*).

4. Use a levy designed in fact to raise revenues for a valid provincial purpose.

So who is on the look out to make sure that there is no taxation without representation? Is the electorate to rely on increasingly money-hungry provincial governments to monitor this long-standing tenet of democratic societies? Is it sufficient that our provincial representatives are duly elected, notwithstanding that the provincial legislatures are allegedly not as equally transparent as the federal government with respect to indirect taxation? Why is it that the Fathers of Confederation felt that the federal government was in a better position to levy indirect taxes and is there any remaining rationale for this position?

E. A Practical Suggestions to Ensure that Delegated Legislation prescribing Fees is Transparent

In *Canadian Assn. of Broadcasters v. Canada*[28], the Federal Court was called upon to review the CRTC, which had collected a "fee/levy" that far exceeded the cost of administration. The Court determined the charge was a tax. It further determined that the CRTC did not have the explicit delegated authority to impose a tax, and, as such, the amount collected was unauthorized.

In his judgment, Justice Shore cited the work of Parliament's Joint Committee for the Scrutiny of Regulations. The Committee made the following valuable recommendations designed to keep in check the charges arising by way of delegated legislation:

---

[28] [2006] F.C.J No. 1861

1. Delegated legislation prescribing fees should be accompanied by explanatory materials detailing the basis on which the amount of the fee, or the formula for its calculation, has been determined and whether fees are based on the principle of cost recovery.

2. If net revenue is anticipated, the expected amount thereof should be indicated.

3. The total anticipated amount of the fees to be collected should be stated.

4. Information regarding revenue and collection should be contained in the Regulatory Impact Analysis Statement published with each regulation in the *Canada Gazette*.

5. The purpose for which fees may be charged should be clearly expressed in the enabling legislation.

6. Enabling legislation should neither be drafted, nor interpreted so as to authorize the imposition or calculation of fees on an "administrative" basis.

The definition and scope of a regulatory scheme would be easier to determine if the above recommendations were more broadly applied. Should this parliamentary approach be applied by the Courts? For instance, Justice Evans writing for the Federal Court of Appeal in *602 Connaught* might have had an easier task in determining the scope of the regulatory scheme there at issue had he had occasion to consider this document. This is not to suggest that Justice Evans got it wrong; rather, instead of the Courts having to decide among a variety of possible schemes, Parliament's intention could be made more transparent. I am alive to the further argument that Parliament may err in defining its own regulatory scheme (or may describe it inaccurately for other reasons) but at least the above recommendations would serve as a reminder to Parliament of their duties towards

their electorate, and would perhaps assist the Courts when called upon to consider a particular regulatory regime.

F. Conclusion

If one accepts that the increase in the occurrence and justification of indirect taxation by the provinces is not just a matter of semantics and is in fact a troubling step, then it is submitted that the Courts should intervene where a levy no longer bears any relation to a regulatory scheme. While levies may be indirect, we should encourage Courts to remind legislatures of their duty of accountability to the electorate. Safeguards should be in place to ensure that levies imposed indirectly continue to be about revenues raised for a particular regulatory purpose, and subject to appropriate representation. At the end of the day, the difference between levies and taxes should stand to mean something. If not, which may well be the current situation, then short of revisiting the *Constitution Act, 1867*, the Courts must continue to play a critically important role in patrolling the borders of this hazy field of law.

APPENDIX: A BC Example of a Levy

Oil and Gas Commission Act, S.B.C. 1998, c. 39

22 (5) Without limiting subsection (2), the Lieutenant Governor in Council, for the purpose of recovering expenses arising out of the administration of this Act in a fiscal year, may make regulations as follows:

(a) requiring producers to pay a levy to the government;

(b) establishing the amount, or the method of determining the amount, of the levy;

(c) designating an employee of the government as the collector of the levy for payment under section 23 to the commission and providing for its collection;

(c.1) designating an employee of the government as the collector of the tax under section 6.4 and providing for the collection of the tax;

(d) providing for imposition of penalties to enforce payment of the levy, including cancellation of a permit, licence or lease granted under the *Petroleum and Natural Gas Act.*

Oil and Gas Commission Levy and Orphan Site Reclamation Fund Tax Regulation, B.C. Reg. 363/98

Levy rates

3 For the purposes of section 22 (5) of the Act, each producer must pay the following levy:

(a) $0.92 per cubic metre of petroleum;

(b) $0.46 per 1 000 cubic metres of marketable gas.

[am. B.C. Regs. 194/2004; 188/2005; 71/2006.]