The taxing powers assigned to Canada's legislatures by the Constitution Act, 1867 provoke more division of powers litigation than any other provisions in the Constitution Act, 1867. What are the critical questions that must be answered in these cases? **Is taxation involved?** T he question that must first be asked is: does the legislation at issue impose a tax, or does it impose something else? Governments can charge money for many different reasons – when a law student pays $10.00 for a copy of a piece of legislation from Access Ontario, she is paying a charge, which raises revenue. But it would be difficult to characterize this as a tax – or even as a "regulatory charge". To be a tax, a charge must have some constitutionally-defined limits, form, and scope.

Is the taxation 'direct or indirect'?

Central to the design of the federal distribution of taxation powers is a distinction between direct and indirect taxes. This distinction comes from John Stuart Mill's 19th century classic, Principles of Political Economy (Book V, ch.3). Mill thought that distinguishing between direct and indirect taxes would enhance democracy because the electorate better perceives direct taxes. With greater scrutiny by the citizenry comes more resistance to public expenditure, more accountability from public authorities, and more control by the demos.

Canada's framers subscribed to this doctrine by restricting the provincial legislatures and their municipal subdivisions to "direct taxation".

Is the taxation 'within the province'?

Constitutional law prohibits the "imposition by a Province of any tax upon citizens beyond its borders." (CIGOL v. Saskatchewan, [1978] 2 S.C.R. 545). This is now a central explanation why provinces are limited to direct taxation.

In Manitoba v. Air Canada, [1980] 2 S.C.R. 303 at 316-319, Laskin C.J.C. voided a provincial taking statute which taxed individuals in aircrafts that temporarily landed in Manitoba on route to another destination. The Chief Justice ruled:

Merely going through the air space over Manitoba does not give the aircraft a situs there to support a tax which constitutionally must be “within the Province.” In the case of aircraft operations, there must be a substantial, at least more than a nominal, presence in the Province to provide a basis for imposing a tax in respect of the entry of aircraft into the Province. […] Moreover, there is, at best, merely a notional drawing into the taxation net of interprovincial and extraprovincial operations, and constitutional authority, which is limited to direct taxation within the Province, cannot be extended by self-servicing definitions.

In Air Canada v. Minister of Revenue et al. (1996), 28 O.R. (3d) 97 [leave to appal to SCC dismissed Sept. 26/96], the Ontario Court of Appeal considered whether the province could tax gasoline purchased and primarily consumed outside the province by Air Canada and Canadian Airlines. Morden A.C.J.O. held:

The subject-matter of the tax in the present case is a transaction or event – not the use of an aircraft – but rather the transfer of aviation fuel into the fuel tank of an aircraft. Clearly, both the transaction and the aviation fuel, as well as the taxpayer, are “within the province” and I do not think that the fact that the aviation fuel was, initially purchased outside the province, weakens the connection between the province and the transaction. […] Notwithstanding that the aviation fuel in question has been purchased outside Ontario and is, substantially, consumed outside the province, there is no extraprovincial aspect to the subject-matter of the tax in this case in the way there was in the Manitoba case.

The notion of a physical presence within the province upon which these cases determine the constitutional meaning of “within the Province” is unsatisfactory. This difficulty mirrors similar problems in determining “within the Province” in the property and civil rights cases. In Churchill Falls (Lab) Corp. v. A.G. Nfld., [1984] 1 S.C.R. 297 searching for a physical situs in answer to the question ‘where is taxation imposed or felt’ leads to unprincipled and sometimes unjust results. Intellectual concepts like taxation have no physical situs.

“Within the Province” is a constitutional (or intellectual notion), not a physical one. Accordingly, the appropriate analysis must be by constitutional method, not geography. The guiding value ought to be whether the province advances a sufficient “sphere of interest” to undergird the assertion of provincial legislative jurisdiction. To pour this concept into more familiar language of constitutional analysis: is the challenged taxing statute in object and purpose, pith and substance and effect in relation to direct taxation within the province?

Licenses, Levies and Regulatory Charges

If the imposition is neither direct nor indirect taxation, it becomes relevant to ask: what kind of charge is it? Section 92(9) supports a power to impose licensing charges. There are other permissible charges as well. A probate fee, for example, is neither a tax nor a licensing charge. It is supportable as being a charge “ancillary or adhesive to a regulatory scheme.” It is no objection to such charges that they possess a measure of indirectness.

The line between a “regulatory charge ancillary to a regulatory scheme” and an “indirect tax” is difficult to draw.

In Ontario Home Builders and Allard Contractors, the Supreme Court of Canada ruled that a charged can be levied to defray the costs of regulatory scheme, notwithstanding that it is indirect in the sense of the constitutional cases. The term “regulatory scheme” is a term of art in constitutional law that is discussed in Westbank First Nation v. B.C. Hydro and Kirkbi v. Ritvik Holdings.

Taxation of Natural Resources

This issue became a focal point of provincial concern following the decision of the Supreme Court of Canada in CIGOL v. Saskatchewan, [1978] 2 S.C.R. 545. This case considered a complex of Saskatchewan legislation and regulations by which Saskatchewan levied a “mineral income tax” at the wellhead on the price received by an oil producer, and a royalty surcharge imposed upon oil produced from existing crown lands or from newly expropriated lands. The mineral income tax and royalty surcharge were 100% of the difference between the new rising world price and the “basic wellhead price”, a price received by oil producers prior to the first spectacular rise in oil prices in 1973. The majority of the Supreme Court of Canada held that the tax and royalty surcharge to be beyond the powers of the province, since, as the Court found, they were indirect taxes designed to regulate the price of Saskatchewan oil in the export market.

Following the CIGOL decision, Saskatchewan and other provinces became determined to remove the “direct taxation” restriction on provincial taxing powers from Canada’s Constitution. The provincial case received some support from the Federal New Democratic Party in the

Constitutional discussions of the late 1970s and arly 1980s. As a result, new provincial taxation powers were included as section 92A(4) of the Constitution Act, 1982.

Section 92A(4) provides:

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

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

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

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

In Moull, “Section 92A of the Constitution Act, 1867” (1983), 61 Can. Bar. Rev. 715 at p.718 contends that “Subsection 92A(4) is a relatively straightforward attempt to give the provinces the power to levy indirect taxation in the resources field. … Under clause 92A(4)(a), the provinces will now be able to tax both the resource in place and its ‘primary production’, or in other words both the resource itself in situ and the product that results from its severance, by any system of taxation including indirect taxation.”

For more information download the taxation and spending powers sample chapter from Constitutional Law of Canada, Vol. II, 9th ed. here.