

# THE PROVINCES' POWER TO TAX

BY PETER W. HOGG

The *Charter of Rights* so dominates the work of the Supreme Court of Canada that we may be excused for forgetting that the federal division of powers is an equally important characteristic of the Constitution of Canada. Indeed, until the *Charter* was adopted in 1982, the division of powers was the only important source of judicial review of legislation in Canada. The division of powers has never produced the flood of litigation that was unleashed by the *Charter of Rights*, but there continue to be several cases each year that reach the Supreme Court of Canada.

*The distinction between direct and indirect taxation is said by the courts (relying on a statement by John Stuart Mill in 1848) to depend on the tendency of the tax to be passed on from the person upon whom the tax is levied.*

One issue that never entirely goes away is the definition of the provinces' power to levy taxes. While section 91(3) of the *Constitution Act, 1867* confers an unlimited power of taxation on the federal Parliament, the provincial Legislatures are, by virtue of section 92(2), confined to "direct" taxation. The distinction between direct and indirect taxation is said by the courts (relying on a statement by John

Stuart Mill in 1848) to depend on the tendency of the tax to be passed on from the person upon whom the tax is levied.

*[A]s the provinces have cast about for new sources of revenue, new taxes have sprouted like mushrooms, and there is often room for doubt as to whether a new tax is a valid direct tax or an invalid indirect tax. It only takes the resistance of one taxpayer to carry the issue to the courts for a ruling.*

For example, a tax such as an income tax is not usually passed on from the initial taxpayer to anyone else, and is therefore direct. A tax such as a customs or excise duty is likely to be passed on from the importer or manufacturer to the consumer, and is therefore indirect. The reason why indirect taxation is incompetent to the provinces is that the burden of the tax may end up being exported from the province to persons (consumers, for example) in another province. That would offend federal principles that confine provincial powers to the territory of the province.

All the standard taxes have been the subject of litigation at some time since 1867, and have each been accorded a


direct or indirect classification. However, as the provinces have cast about for new sources of revenue, new taxes have sprouted like mushrooms, and there is often room for doubt as to whether a new tax is a valid direct tax or an invalid indirect tax. It only takes the resistance of one taxpayer to carry the issue to the courts for a ruling. In many of the cases that have reached the courts, the new tax has been disguised as a "fee" or a "charge", rather than a tax, and, as we shall see, this has turned out to be the saving grace for some levies that look and smell like indirect taxes.

In 1996, the Supreme Court of Canada decided the latest of these provincial taxation cases. In *Ontario Home Builders' Association v. York Region Board of Education*, the taxes in issue were "educational development charges", which were levied by school boards in Ontario under the authority of a provincial statute. The charges were levied on land undergoing residential development, and were paid on the issue of each building permit. A majority of the Supreme Court of Canada held that these charges were indirect, because they would likely be passed on to the purchasers of the new homes.

The indirectness of the educational development charges did not prove fatal to their validity. Iacobucci J., for the majority of the Court, upheld the charges on the basis that they were not really taxes at all, but "regulatory charges". The purpose of the charges was to create a fund for the construction of the new schools, and the amount of the charges was fixed by estimating the cost of the new school construction that would be entailed by the new housing development. This was a "regulatory scheme", he held, and it could

properly be financed by a system of charges, even if the charges were indirect.

In upholding the educational development charges as regulatory charges rather than taxes, Iacobucci J. relied on a 1993 decision of the Court in *Allard Contractors v. Coquitlam*. In that case, the Court upheld the validity of gravel extraction fees that were levied by a municipality under the authority of a provincial statute. These levies were indirect, because the fees would tend to be absorbed into the price of the gravel when it was sold by the extractor. But the municipality established that the fees had been calculated by reference to the additional wear and tear on the municipal roads that would be caused by the gravel haulage trucks. So the Court took the view that this was a regulatory scheme, and the gravel extraction fees were regulatory charges to finance the maintenance of the roads.

The *Ontario Home Builders* case looked a lot like *Allard*. Once the Court found that the educational development charges were part of a regulatory scheme, and that the charges were imposed as the price of a governmental service (the construction of new schools), the charges did not need to meet the test of directness. They were therefore upheld as valid, and another source of provincial revenue received the blessing of the Court. 

*Peter W. Hogg is a Professor of Law at Osgoode Hall Law School, York University.*