*THE CONSTITUTIONAL POSITION OF LOCAL GOVERNMENT IN CANADA**

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In Canada there are three major tiers of government: federal, provincial, and municipal. That is the reality. In the eyes of the constitution, however, there are only two tiers. Local government has no constitutional status of its own and functions as a mere delegate of the senior orders of government, primarily the provincial.

When Canada's constitution, the *British North America Act,* was being negotiated, it was readily agreed that the provinces should be responsible for "municipal institutions in the province".[1] The Parliament of Canada retains responsibility, of course, for municipal institutions in Canadian territories which have not yet attained provincial status.[2]

The term "municipal institutions" has been given a rather narrow judicial interpretation. While it certainly covers such matters as the creation of municipal corporations, the determination of qualifications for holding municipal office,[3] and the re-organization of financially-troubled municipalities,[4] it is not the primary source of constitutional authority for the great bulk of activities in which local government engages.

There was a time when a different view prevailed. For almost thirty years following Confederation it was widely believed that section 92(8) of the *B.N.A. Act* empowered the provinces to endow municipal governments with authority over any matter that fell within the ambit of local government prior to Confederation, including matters now under federal control. As one Ontario judge put it:

> In using the term municipal institutions . . . it must have been the contemplation of the Legislature that existing laws relating to municipal institutions should not be affected, and that Local Legislatures should have power to alter and amend these laws . . .[5]

However, the Judicial Committee of the Privy Council made it clear in an 1896 decision that the post-Confederation provincial jurisdiction over "municipal institutions" cannot authorize local governments to become involved in activities that are outside the constitutional scope of the provincial order of government. The case involved both federal and provincial temperance legislation. One of the disputed provincial provisions was a section empowering municipalities to prohibit the sale of liquor within their

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1. (1867), 30 & 31 Vict., c.3, s. 92(8) [hereinafter referred to as the *B.N.A. Act.* All subsequent statutory references are to this Act]. The Charlottetown Conference agreed to provincial responsibility over "municipal laws". This was changed to "municipal institutions" in the first draft considered by the Quebec Conference in October, 1864, and remained virtually unchanged thereafter until the passage of the *B.N.A. Act:* G.P. Browne, *Documents on the Confederation of British North America* (1969). The "Confederation Debates" of the Legislature of Canada in 1865 made no reference to this head of jurisdiction: *Parliamentary Debates on Confederation of the British North American Provinces* (1951).

2. *Dinner* v. *Humberstone* (1896), 26 S.C.R. 252. *See Report of Advisory Commission on the Development of Government in the Northwest Territories* (1966) Vol. 1, at p. 50, ff.

3. *Samson* v. *Drolet,* [1928] S.C.R. 96.

4. *Ladore* v. *Bennett,* [1939] A.C. 468 (P.C.); *Day* v. *City of Victoria,* [1938] 3 W.W.R. 161 (B.C.C.A.); *Quebec Municipal Commission v.* Town of Aylmer, [1933] 2 D.L.R. 638 (Que.S.C.).

5. *Re Harris and the City of Hamilton* (1879), 44 U.C.Q.B. 641, at 644, per Armour, J. *See also In Re Slavin and the Village of Orillia* (1875), 36 U.C.Q.B. 159 and *Huson* v. *Township of South Norwich* (1895), 24 S.C.R. 145, at 150, per Strong, C.J.C.

boundaries. The province pointed out that such powers had been possessed by some municipalities prior to Confederation, and that this provision was, therefore, to be regarded as legislation relating to "municipal institutions". This argument was rejected by the Judicial Committee. Although the provincial legislation was upheld in part on other grounds, section 92(8) was held not to be relevant to the question.

> . . . [section 92(8)] . . . simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until confederation the Legislature of each province as then constituted could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date a provincial Legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislature authority which it derives from the provisions of s. 92 other than No. 8.[6]

The practical significance of this restriction should not be exaggerated, however. The provinces have, independently of section 92(8), extensive jurisdiction over most matters with which local government is likely to concern itself. Provincial control over local works and undertakings[7] permits municipalities to be given authority over most utilities and services. The provincial education power[8] sanctions local administration of school systems. "Administration of justice in the province"[9], supplemented by "establishment, maintenance, and management of public and reformatory prisons"[10] covers local police, courts, and jails. "The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions"[11] embraces many of the health and welfare activities in which local governments engage. The licensing of businesses is authorized in part at least by: "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue"[12]. Important forms of local taxation are sanctioned by the power to impose direct taxation.[13] Any gaps left between these various specific heads of jurisdiction (the power to license businesses and other activities for purely regulatory rather than revenue-raising purposes, for example) can usually be plugged by relying on the two major general grants of provincial competence: "property and civil rights"[14] and "generally all matters of a merely local and private nature."[15] Finally, there is an express power to stipulate penalties or punishments for the breach of any law made pursuant to most heads of provincial jurisdiction: "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law . . . made in relation to any matter coming within any of the classes of subjects enumerated in this section."[16] In short, since the *B.N.A.*

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6. *A.-G. Ontario* v. *A.G. Canada and Distillers and Brewers Association of Ontario*, [1896] A.C. 348, at 364 (P.C.).
7. S. 92(10). *See e.g., Smith* v. *City of London* (1909), 20 O.L.R. 133 (C.A.).
8. S. 93. *See e.g., Jones* v. *Trustees of Edmonton Catholic School District Number 7* (1977), 70 D.L.R.(3d) 1 (S.C.C.).
9. S. 92(14). *See e.g., Re Charlottetown Police* (1977), 74 D.L.R. (3d) 422 (P.E.I.C.A.).
10. S. 92(6).
11. S. 92(7).
12. S. 92(9). *See Infra* n. 113.
13. S. 92(2). *See Infra* n. 103.
14. S. 92(13). *See e.g., Cal Investments Ltd.* v. *Winnipeg* (1978), 84 D.L.R. (3d) 699 (Man.C.A.) (massage parlours).
15. S. 92(16). *See e.g., Re Nova Scotia Board of Censors and McNeil* (1978), 84 D.L.R. (3d) 1 (S.C.C.) (film censorship). and *A.G. Canada* v. *Dupond* (1978), 84 D.L.R. (3d) 420 (S.C.C.) (parades and demonstrations).
16. S. 92(15). *See e.g., Re Nakishima and the Queen* (1975), 51 D.L.R. (3d) 578 (B.C.S.C.) (Re Noise By-law). It should be noted that this power is restricted to those sources of provincial jurisdiction which are founded on s. 92 itself; it does not apply to other heads of provincial jurisdiction, such as education.

Act is quite generous in its allocation of jurisdiction to the provinces, it does not place very serious limitations on the range of activities which the provinces may in turn place within the ambit of local government regulation.

However, the federal order of government has also been given jurisdiction over many matters which can have a very serious local impact. Reference has already been made to the fact that within the non-provincial territories Parliament has the same jurisdiction as a provincial legislature.[17] Even within the provinces, Parliament's power to affect local matters is extensive. Federal laws may be made to deal with local conditions within the national capital district.[18] Federal control over aviation, navigation and shipping, and other forms of extra-provincial transportation places such vital planning decisions as the location of airports, port facilities, and rail lines beyond the reach of local planners.[19] Inter-provincial communications is another field of federal responsibility that can have serious local consequences, for example, on the location of telephone lines.[20] Federal defence[21] and penal[22] establishments affect local life, as does the quality of local federal postal services.[23] The relationship of Indian reservations to surrounding municipalities is under federal jurisdiction.[24] Federal responsibility for "criminal law" can interfere with local attempts to prohibit or regulate certain forms of undesired activities.[25] Municipal laws regulating billboard advertising cannot be applied to political advertisements by candidates in federal elections.[26] The Federal Government often uses its "spending power" to influence matters of provincial or local concern over which it has no direct constitutional control.[27] There is an immunity of federal Crown property from local or provincial taxation.[28] There is, in other words, a vast area of interface between matters of national and local concern.

The existence of this interface complicates the constitutional picture enormously. Space does not permit an exhaustive examination of all the difficulties to which it gives rise, or all the cases in which they have been dealt with.[29] All that can be attempted in the following commentary is an explanation of the major constitutional principles employed by the courts to resolve jurisdictional disputes, together with a few illustrative cases.

Principles of Constitutional Interpretation

To understand many of the judicial decisions relating to the constitutional validity of Canadian legislation it is necessary to have some acquaintance with three major interpretive principles:

17. *Supra* n.2.
18. *Munro* v. *National Capital Commission* (1966), 57 D.L.R. (2d) 753 (S.C.C.).
19. *Johannesson and Johannesson* v. *West St. Paul*, [1952] 1 S.C.R. 292.
20. *City of Toronto* v. *Bell Telephone Company*, [1905] A.C. 52 (P.C.).
21. S. 91(7).
22. S. 91(28).
23. S. 91(5).
24. S. 91(24).
25. S. 91(27).
26. *McKay* v. *The Queen* (1966), 53 D.L.R. (2d) 532 (S.C.C.).
27. *See Infra* n. 119.
28. S. 125. *See Infra* n. 91.
29. For a thorough examination of the cases see I.M. Rogers, *The Law of Canadian Municipal Corporations* (2d ed 1971), Vol. I, 311, ff.

1. Legislation is characterized for constitutional purposes by its general "pith and substance", rather than by its details.
2. A subject matter of legislation may have, in pith and substance, a "dual aspect", one facet of which is within provincial competence and the other within the federal domain.
3. Where, in a dual aspect situation, federal legislation on the subject in question conflicts with provincial legislation, there is "federal paramountcy".

These principles will be examined in turn.

1. *Pith and Substance*

Most statutes are complex documents, dealing with a great variety of details. If in classifying legislative provisions for constitutional purposes each of these details were taken into account, many provisions would be found to be within *both* federal and provincial jurisdiction. Suppose, for example, that a municipal by-law requires that no person who has been convicted of a crime relating to sex, morals or drugs shall be employed by the municipality, or permitted to enter the precincts of any school, without first obtaining a certificate of good character from the local chief of police or the commanding officer of the local R.C.M.P. detachment. Such a provision could be said to relate to "criminal law", which is a federal responsibility, or to "education", "municipal institutions", "property and civil rights", or "administration of justice", which are provincial concerns. For the purpose of constitutional classification, it is necessary to identify the dominant characteristic of the provision (in this case, probably criminal law, though there would be room for argument) and to ignore the other features. The dominant characteristic is usually referred to as the "pith and substance" of the provision. The other, secondary, characteristics, which are spoken of as "incidental", "ancillary", or "collateral", are not determinative of the constitutional question.

The case of *Ladore* v. *Bennett*[30] provides a good illustration of the "pith and substance" principle. Four Ontario municipalities became insolvent during the great depression of the 1930's. The situation was remedied by two Ontario statutes, one of which abolished the municipalities and replaced them with a new legal entity, the City of Windsor, the other of which empowered an administrative authority to specify the conditions (including variation of the rate of interest) under which the new city would undertake the financial obligations of the former municipalities. Because the new finanancial arrangement purported to reduce the interest payable to bondholders of the former municipalities, an action was brought on behalf of the bondholders. They claimed that the legislation was beyond the constitutional powers of the province because it dealt with two subjects under exclusive federal competence: "insolvency"[31] and "interest";[32] and also because it derogated from rights enforceable outside the province (several of the bonds being payable in Montreal or New York, and many bondholders living outside Ontario). The Privy Council rejected this attack, holding that:

30. *Supra* n. 4.
31. S. 91(21).
32. S. 91(19).

> . . . the pith and substance of both the . . . Act[s] . . . are that the Acts are passed in relation to municipal institutions in the Province . . . . The statutes are not directed to insolvency legislation; they pick out insolvency as one reason for dealing in a particular way with unsuccessful institutions; and though they affect rights outside the Province they only so affect them collaterally . . .
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> The question of interest does not present difficulties. The above reasoning sufficiently disposes of the objection. If the Provincial Legislature can dissolve a municipal corporation and create a new one to take its place, it can invest the new corporation with such powers of incurring obligations as it pleases, and incidentally may define the amount of interest which such obligations may bear.[33]

Another case, decided by the same tribunal the following year in a somewhat similar fact situation, indicates the flexibility which the "pith and substance" notion offers to the courts. In *Lethbridge Irrigation District Trustees* v. *I.O.F.*[34] the Privy Council was asked to rule on the constitutionality of an Alberta statute halving the interest owing on provincially guaranteed bonds from six per cent to three per cent. In some ways the legislation resembled that which had been upheld in the *Ladore* case. It was prompted by the economic crisis of the great depression, and many if not most of the bonds affected by the statute were those of municipal corporations. Yet the Privy Council held the statute to be invalid on the ground that "the pith and substance of the Act deals directly with interest, and only incidentally or indirectly with . . ." municipal institutions or other matters under provincial jurisdiction.[35] The *Ladore* case was distinguished in that the emphasis of the impugned legislation in that case had been on "municipal institutions", rather than "interest".[36] If their Lordships were merely responding to the difference in the *form* of the two pieces of legislation this distinction might be criticized, but another consequence of the "pith and substance" doctrine is that the courts concern themselves with the substance of legislation rather than its form. It would appear from the background of the Alberta legislation that the legislators did not act, as their Ontario counterparts had, primarily out of a concern for municipal organization. They seem to have been more concerned with: a) the province's own liability as guarantor, and b) the general Social Credit distaste for high interest rates.[37] The "pith and substance" principle enabled the Privy Council, discerning this important difference in emphasis between the two statutes, to arrive at different conclusions.

2. *Dual Aspect*

Sometimes a subject is found to have, in pith and substance, equally dominant federal and provincial characteristics. In that event it is said to have a "dual aspect" and to be susceptible of legislation by either order of government.

Sunday closing laws offer an illustration. It has long been held that statutes like the federal *Lord's Day Act*,[38] which prohibits certain business

33. *Ladore* v. *Bennett*, *Supra* n. 4, at 482-3.
34. [1940] A.C. 513 (P.C.).
35. *Id.*, at 531.
36. *Id.*, at 531-2.
37. J.R. Mallory, *Social Credit and the Federal Power in Canada* (1954), Chapter 6.
38. R.S.C. 1970, c.L13.

and other activities on Sundays, fall within the exclusive federal jurisdiction over "criminal law"[39] if the purpose is essentially religious — to prevent the profanation of the sabbath.[40] Despite the fact that many modern supporters of such legislation now do so for social or economic, rather than religious, reasons, the federal Act is still being upheld judicially because of its religious roots.[41] On the other hand, provincial legislation relating to Sunday closing has also been held to be constitutionally valid, provided that it is passed to advance secular objects — for example, employee welfare, leisure and recreational opportunities — rather than religious values.[42] The subject of Sunday closing has, in other words, two equally prominent aspects: a religious aspect which has been held to place the subject within the "criminal law" power of the Parliament of Canada, and a secular aspect, which can be dealt with by the provinces under their responsibility for "property and civil rights", "licenses", or "matters of merely local or private nature".

Because many heads of both federal and provincial competence under the *B.N.A. Act* are expressed in very general language, these situations of jurisdictional overlap are common. The area of federal responsibility with which legislation by or concerning local government overlaps most frequently seems to be the field of "criminal law." Although "criminal law" is a very important source of federal authority, and although Canadian courts were rather cautious at one time about permitting the provinces to enter the field where significant civil liberties were involved, the Supreme Court of Canada has recently seemed more favourably disposed to tolerate extensive jurisdictional duality.

Provincial censorship of movies in the interest of morality was upheld in 1978, despite undoubted federal criminal jurisdiction to prohibit and punish obscenity. Although "criminal law" permits Parliament to set national minimum standards of decency in the *Criminal Code*, the provincial heads of "property and civil rights" and "local or private" matters sanctions the establishment of higher local standards:

> In a country as vast and diverse as Canada, where tastes and standards vary from one area to another, the determination of what is and what is not acceptable for public exhibition on moral grounds may be viewed as a matter of a "local or private nature in the Province . . ."[43]

A Montreal city by-law authorizing the prohibition of public assemblies in city streets and other public places whenever "there are reasonable grounds to believe that the holding of assemblies . . . will cause tumult, endanger safety, peace or public order . . ." was also upheld recently by the

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39. S. 91(27).

40. *A.-G. Ontario* v. *Hamilton Street Railway Company*, [1903] A.C. 524 (P.C.). This has also been held to be the case where enforced closing on other religious holidays is involved. *See Birks* v. *Montreal and A.G. Quebec*, [1955] 5 D.L.R. 321 (S.C.C.).

41. *R.* v. *Boardwalk Merchandise Mart Ltd.* (1973), 31 D.L.R.(3d) 452 (Alta. S.C. App. Div.); *Robertson and Rosetanni* v. *The Queen* (1963), 41 D.L.R. (2d) 485 (S.C.C.) The latter case also held that the statute does not interfere with the "freedom of religion" protected by the *Canadian Bill of Rights.*

42. *Lieberman* v. *The Queen* (1963), 41 D.L.R. (2d) 125 (S.C.C.). Some provincial legislation has also been upheld on the ground that it merely permits certain Sunday activities which the federal Act leaves to provincial option. *See Lord's Day Alliance* v. *A.-G. British Columbia*, [1959] S.C.R. 497.

43. *Re Nova Scotia Board of Censors and McNeil, Supra* n.15, at 28, per Ritchie, J. A municipal by-law pertaining to the dress of massage parlour operators was upheld on similar grounds in *Cal Investments Ltd.* v. *City of Winnipeg, Supra* n. 14.

Supreme Court of Canada.[44] The majority of the Court pointed out that the *preventative* nature of the by-law differed from the *punitive* measures relating to riots and other unlawful assembles in the federal *Criminal Code:*

> This preventive character is illustrated by the fact that the ordinance prohibits the holding on the public doman of *any* assembly, parade or gathering, including those of the most innocent and innocuous kind.[45]

Although Parliament's criminal law jurisdiction might authorize federal preventative provisions ancillary to the federal punitive measures,[46] no such provisions exist, and in the meantime the "local" and "administration of justice" aspects of the matter justify local legislation.

These and similar recent decisions of the Supreme Court seem to indicate a significant change of direction. Until recently there was a considerable body of opinion, rooted in a number of cases decided by the Supreme Court during its celebrated "libertarian" phase in the 1950's,[47] that a local or provincial law which infringed seriously on basic fundamental freedoms, such as freedom of expression, religion or assembly, would be found, in pith and substance, to relate *solely* to criminal law, and therefore to be beyond provincial competence. For example, a by-law of a British Columbia municipality denying entry to the municipality to a group of Doukhobors who were reported to be marching to the municipality for the purpose of staging a demonstration at a prison in the municipality, was invalidated in 1962 on the ground that it was in pith and substance a "criminal law".[48] Since the by-law was prompted by virtually the same motive as the Montreal by-law discussed above — the avoidance of apprehended breaches of the peace — the case should logically be regarded as overruled by the recent Supreme Court decision.[49]

If the trend apparent in the Supreme Court decisions of the past few years continues it could be concluded that local legislation will be permitted a broader ambit than hitherto in the many areas that intersect with the vast federal domain of criminal law. There are at least two reasons for remaining a little cautious on the question, however. In the first place, the recent decisions were for the most part determined by very narrow margins, and accompanied by strong dissenting opinions. Small changes in the membership of the Court could bring a reversal of the trend at any time. In the second place, not even the majority judges have openly rejected the earlier decisions. In the Montreal by-law case, for example, Beetz, J., speaking for the majority, denied that the facts of the Doukhobor case were similar,[50] or that the by-law interfered with the freedoms of religion, press or speech in any way that would contradict the principles enunciated in the civil liberties cases of the 1950's.[51] While the spirit of the new decisions differs markedly

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44. *A.G. Canada* v. *Dupond, Supra* n. 15.
45. *Id.*, at 435, per Beetz, J.
46. *Id.*, at 437, per Beetz, J.
47. *Birks* v. *Montreal and A.G. Quebec, Supra* n. 40; *Switzman* v. *Elbling and A.G. Quebec* (1957), 7 D.L.R. (2d) 337 (S.C.C.).
48. *District of Kent* v. *Storgoff and A.G. British Columbia* (1962), 38 D.L.R. (2d) 362 (B.C.S.C.).
49. *See Infra* n. 49.
50. *A.G. Canada* v. *Dupond, Supra* n. 15, at 436. *But see* p. 426 for a contrary opinion in the dissenting reasons for judgment of Laskin C.J.C. which is more persuasive.
51. *Id.*, at 437-8. His argument that the by-law was valid because it prevented *all* assemblies, regardless of purpose or effect, was devastatingly criticized by Laskin C.J.C. at 427-8.

from that of the earlier cases, therefore, there has not been any formal acknowledgment of a change in direction. This situation provides telling evidence, if any were needed, that the "dual aspect" doctrine, by creating a judicial discretion to decide whether a subject of legislation has one predominant aspect or two, equips the courts with still further flexibility, and contributes substantially to the difficulty of predicting the outcome of constitutional legislation.

3. *Federal Paramountcy*

Where a subject is found to possess a dual aspect, either order of government may legislate. However, if they both do so and there is an inconsistency between the federal and provincial provisions, the federal law is "paramount", and the provincial law becomes inoperative to the extent of the inconsistency. The federal provision is said to have "occupied the field".

In the movie censorship case, for example, although the provincial legislation was upheld in most respects, one particular regulation which was found to be in conflict with *Criminal Code* provisions concerning obscenity, was invalidated and severed from the remainder of the legislation.[52] In an early Saskatchewan case a by-law of the City of Regina fixing the percentage of butterfat in milk sold in the city was held to be *ultra vires* because it was, among other things, inconsistent with the federal *Adulteration Act.*[53]

In deciding whether or not an inconsistency exists between parallel federal and provincial provisions the courts have another opportunity to exercise considerable discretion. Two cases concerning the constitutionality of municipal noise by-laws illustrate the point. In *R.* v. *Rice*[54] the accused was acquitted of contravening such a by-law by conducting a noisy race of outboard motorboats. The court held that the field had been occupied, so far as boat racing was concerned, by regulations under the *Canada Shipping Act* that, by specifying certain safety precautions to be taken during boat races, impliedly authorized races to be held. This decision should be contrasted with a ruling in *R.* v. *Young*[55] that a similar municipal noise by-law was not in conflict with the "public disturbance" section of the federal *Criminal Code,* even though both provisions explicitly prohibited "shouting" and laid down rather different penal consequences. Although the cases can undoubtedly be distinguished in their facts, they represent different approaches to the question of whether a conflict exists between federal and provincial legislation on a subject: while some courts are willing to recognize implied conflicts as grounds for invalidating provincial laws, others will seize upon minute differences between the two sets of legislation to justify their parallel existence.

Most Canadian courts normally adopt the latter approach. The *Young* decision is much more typical of their attitude than the *Rice* ruling. In neither the movie censorship case nor the Montreal public assembly by-law

52. *Re Nova Scotia Board of Censors and McNeil. Supra* n. 15, at 27-8.

53. *City of Regina* v. *Sharley* (1912), 5 D.L.R. 877(Sask. Mag. Ct.). The magistrate also found an absence of authorization in the provincial enabling legislation. *See also Re By-Law No. 3587 of City of Vancouver* (1956), 6 D.L.R. (2d) 221 (B.C.S.C.).

54. [1963] 1 C.C.C. 108 (Ont. Mag. Ct.).

55. (1974), 42 D.L.R. (3d) 622 (Ont. C.A.).

case, for example, was the existence of federal legislation on closely related matters regarded as occupying the field,[56] and in another fairly recent decision the Supreme Court refused to find a conflict between extremely similar federal and provincial provisions relating to the suspension of driving privileges in consequence of impaired driving.[57]. It would appear, therefore, that the principle of federal paramountcy is not as serious an obstacle to effective local legislation as it might appear at first blush to be.

Subordinate Position of Local Government

The fact that local government enjoys no autonomous status under the *B.N.A. Act* is a source of additional complications. With the exception of a few that can trace their authority back to pre-Confederation statutes or charters,[58] all municipal corporations in Canada owe their existence to legislation of the senior orders of government, and without exception their existence and powers are subject to abolition or alteration by such legislation.

Four ramifications of the subordinate status of municipalities will be dealt with separately: the *ultra vires* principle, the paramountcy of senior legislation, the illegality principle and problems of delegation.

1. *The Ultra Vires Principle*

The legality of the actions of any body possessing restricted jurisdiction is open to attack on the ground that the actions are *ultra vires* — beyond the powers of the body in question. We have already seen that the principle applies to the senior legislatures themselves if they should exceed their constitutional jurisdiction under the *B.N.A. Act;* but in the case of municipal corporations it offers the additional opportunity to challenge by-laws not fully authorized by the statute or charter creating the corporation.

Corporations, whether municipal or general, fall into two categories: those whose powers are restricted to those set out in their statute or charter of incorporation, and those possessing a plenary capacity, analogous to that of human beings, to exercise any power not denied them. The *ultra vires* principle is more important to the first group than to the second, since their range of permitted activities is likely to be narrower. That is not always the case, however; it is entirely possible for corporations of the first type to be given extremely broad express powers, and for those of the second type to be placed under exceedingly restrictive express limitations.

Almost all municipal corporations in Canada belong to the first group. Apart from the City of St. John, New Brunswick, which was created by a royal charter in 1785, and perhaps one or two other special exceptions, all Canadian municipal institutions are creatures of statute.[59] Whereas chartered corporations have unlimited legal capacity in the absence of contrary indications, statutory corporations are restricted to the powers ex-

56. In the *McNeil* case, *supra* n.51, one portion of the regulation, which was found to conflict with the obscenity provisions of the *Criminal Code*, was held to be constitutionally valid, but severable from the remainder of the regulations.

57. *Ross* v. *Registrar Motor Vehicles* (1974), 42 D.L.R. (3d) 68 (S.C.C.).

58. Section 129 of the *B.N.A. Act* provides for the continuation of pre-Confederation laws until altered by the appropriate legislature.

59. Rogers, *Supra* n. 29, at 111, ff.

pressly or impliedly set out in their incorporating statutes. Some statutes authorize the creation of corporations with powers as sweeping as those established by royal charter, but few municipal corporations fall into that category.[60] For the most part, therefore, local governments in Canada must keep a constant weather eye on their incorporating statutes to ensure that each activity in which they engage is fully authorized. In *Ottawa Electric Light Co.* v. *City of Ottawa,*[61] for example, a by-law authorizing an agreement by a city to purchase electrical power from a private company was declared to be *ultra vires* because the city's statute empowered it to "produce, manufacture and use" electrical energy, but not to purchase it.

Most enabling statutes for institutions of local government bestow ample express jurisdiction, however. Moreover, the courts are willing to expand the expressly granted powers by interpretation to include matters which, though not explicitly mentioned, are necessarily implied. Thus the statute in the *Ottawa Electric* case would probably have been held to authorize, without explicit reference, the purchase of property on which to construct the necessary generating equipment, as well as the expenditure of money to advertise the service, the employment of necessary personnel and so on.[62] Practically speaking, therefore, the *ultra vires* problem is not always as troublesome as it could be.

2. *Paramountcy of Senior Legislation*

Because the legislation of local governments is subordinate to that of the senior orders of government, it will be inoperative if and to the extent that it conflicts with any provincial or federal statute. In *St. Leonard* v. *Fournier*[63] a town by-law relating to the licensing of theatres was found to be invalid on the ground that it was inconsistent with both the provincial *Theatres Act* and certain provisions of the federal *Criminal Code* relating to indecent performances. This is similar to the "paramountcy" which, as we have seen, federal legislation enjoys over incompatible provincial statutes.

A by-law is not invalidated by the mere fact that senior legislation exists on the same general subject, however. It has already been explained that different orders and levels of government are permitted to enact complementary laws on the same subject. Only where the laws are mutually inconsistent will the paramountcy principle be invoked, and courts are normally quite tolerant in deciding whether an inconsistency exists. In *R. ex rel Rankin* v. *Pendray,*[64] for example, a by-law prohibiting the firing of firearms within a municipality was held not to conflict with a provincial statute permitting (as an exception to the general prohibition of hunting out of season) the shooting of pheasants found to be damaging crops.

3. *Illegality*

A municipal by-law which is *ultra-vires,* or which conflicts with senior legislation, is, of course, illegal. Those forms of illegality can be applied to the senior orders of government as well as to municipalities. The forms of il-

60. *Ibid.*
61. (1906), 12 O.L.R. 290 (C.A.).
62. Rogers, *Supra* n. 59, s. 63.32 offers several examples.
63. (1956), 115 C.C.C. 366 (N.B.S.C. — App. Div.).
64. [1929] 1 W.W.R. 30 (B.C.S.C. — App. Div.).

legality to be discussed in this section are peculiar to local government, and derive from its subordinate status.

The courts are unable to look behind the legislation of a sovereign legislature. They are required to give effect to a federal or provincial statute even if it can be proved that the legislature was misled,[65] or that its rules were breached; that the statute was introduced for corrupt motives, or that its terms are grossly unfair or discriminatory.[66] In the case of subordinate legislatures, on the other hand, the courts are empowered to perform a supervisory function which sometimes impairs local autonomy significantly.

Municipal by-laws can be set aside as "illegal" if it can be established that they were enacted for corrupt or personal motives,[67] that they were made in breach of fundamental procedural requirements,[68] that they are discriminatory in their operation,[69] or that they are unreasonable.[70] In recent years the courts have been somewhat slower than in the past to exercise this supervisory authority, especially on the ground of unreasonableness; they often exhibit great concern to preserve the autonomy of local legislators. Nevertheless, the illegality principle continues to expose municipal legislation to the risk of attack on grounds from which the senior legislatures are immune.[71]

4. *Delegation*

It is a principle of statutory interpretation that a person or body to whom a function is delegated by legislation may not themselves delegate the function further unless the statute authorizes such further delegation expressly or by necessary implication. This principle does not stand in the way of any delegation of responsibility by provincial legislatures to municipal authorities, because the legislatures are themselves sovereign law-making bodies rather than mere delegates.[72] It does, however, constrain the extent to which municipalities can pass on their responsibilities. In *Outdoor Neon Displays Ltd.* v. *Toronto*[73] the majority of the Ontario Court of Appeal invalidated on this ground what they construed to be a delegation of uncontrolled discretion to a Building Commissioner by the Toronto City Council:

> By-Law No. 9868 leaves the approval of the location of a proposed roof sign in any area in the absolute discretion of the Building Commissioner. It contains no *indicii* to be applied by him in reaching his conclusion . . . this is an illegal delegation to the Commissioner of a power exercisable only by the Municipal Council. Whether or not, as a matter of civic planning, a sign in a given area should or should not be permitted, is a matter on which the Municipal Council . . . must apply its own judgment; it cannot delegate that function to a municipal official.[74]

65. *British Railways Board* v. *Pickin*, [1974] 1 All E.R. 609 (H.L.).

66. There are, of course, presumptions of interpretation which sometimes assist the courts to avoid unfair or discriminatory application of a statute. *The Canadian Bill of Rights*, S.C. 1960, c.44, also provides a degree of protection. Neither of these types of protection places very difficult obstacles in the way of a determined legislature, however.

67. *Re Burns* (1965), 52 D.L.R. (2d) 101 (Ont. C.A.).

68. *Re Ostron and Sidney* (1888), 15 O.A.R. 372 (C.A.).

69. *Re Howard and Swansea*, [1947] 3 D.L.R. 597 (Ont. C.A.).

70. *Re Angus and Widdifield* (1911), 24 O.L.R. 318 (C.A.). Rogers, *Supra* n. 29, Vol. II, s. 193.52 points out that unreasonableness is seldom used any longer as a ground for invalidating by-laws and that it has, in fact, been legislatively abolished in some jurisdictions.

71. Rogers, *Supra*, n. 29, s. 193.1, ff, contains a useful compendium of cases on the subject.

72. *Hodge* v. *R.*, [1883-4] A.C. 117 (P.C.).

73. (1959), 16 D.L.R. (2d) 624 (Ont. C.A.); affirmed on other grounds [1960] S.C.R. 307.

74. *Id.* at 639, per Roach J.A.

In practice this constraint does not appear to have created many major difficulties; such powers of delegation as a municipal corporation may properly require are usually found embedded, expressly or impliedly, in the incorporating statute.

There is a school of thought to the effect that a delegation of responsibility which is so extensive as to be regarded as an "abdication" of authority over the subject in question is not permissible, even on the part of a sovereign legislature. The majority of the Ontario Court of Appeal expressed this point of view in the *Outdoor Neon* case. The by-law in question had been approved by the Ontario Municipal Board, acting under the authority of a provincial statute which stated that the by-law, as well as all future by-laws on the same subject, would be valid if approved by the Municipal Board. The City argued, therefore, that any illegality in the by-law had been cured by legislative sanction. The majority of the Court rejected this argument, however:

> When . . . the Legislature purported to confer on the Ontario Municipal Board the power to validate what was otherwise illegal, it thereby attempted to confer on that Board a jurisdiction to create a power to be exercised by the municipality. In so doing it attempted to transfer to that Board a jurisdiction which the Legislature alone possesses and which it alone can exercise.[75]

In seeking to distinguish the earlier cases in which it had been established that provincial legislatures may delegate subordinate responsibilities to administrative or municipal authorities, the Court seemed to indicate that proper delegation involves relatively narrow discretion, to be exercised in accordance with the general principles or policy guidelines enacted by the legislature itself; the power to formulate these basic guidelines themselves is not delegable. Unfortunately, the validity of this "abdication" theory has never been ruled upon conclusively.[76] Support for it can be found in a number of high-ranking *dicta* over the years, but the *Outdoor Neon* case stands alone as an actual application of the notion in Canada. There was a strong dissent in that case, and the Supreme Court of Canada, in affirming the result on other grounds, declined to comment on the constitutional question.[77]

One form of delegation that has been unequivocally held to be unconstitutional in Canada is a delegation of law-making powers from the Parliament of Canada to the provincial legislatures, or *vice versa*. When an experiment along these lines, designed to overcome some of the constitutional rigidity resulting from the difficulty of amending the *B.N.A. Act*, was proposed 30 years ago, it was declared by the Supreme Court of Canada to be constitutionally invalid, since it would amount to a virtual amendment by indirect means of the constitutional distribution of legislative powers.[78] This means, then, that the provinces may not delegate responsibility for "municipal institutions" to the Parliament of Canada,

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75. *Id.*, at 644, per Roach J.A.

76. *See* P. Blache, "Delegation et Federalisme Canadien" (1976), 6 Revue de Droit Universite de Sherbrooke 237.

77. "Counsel for the appellant and for the Attorney General of Ontario invited the Court to express an opinion as to the validity of the . . . statute . . . but I do not think that we ought to do this . . . . The dismissal of the appeal, of course, does not constitute an affirmation . . . on the constitutional point." [1960] S.C.R. 307, at 314, per Cartwright J.

78. *A.-G. Nova Scotia* v. *A.G. Canada* [1951] 1 S.C.R. 31.

and Parliament may not shift "criminal law" jurisdiction to the provincial legislatures.

Canada's leading authority on municipal law contends, on the authority of this case, that it is "doubtful" whether Parliament may delegate powers under its constitutional aegis to municipal authorities.[79] It is submitted that this is a mistaken view. It overlooks the fact that while delegation from one sovereign legislative body to another has been proscribed, delegation to a *subordinate* administrative agency of the other order of government has been tolerated. The year after deciding the above case the Supreme Court of Canada ruled that a delegation by Parliament to a provincially created marketing board of responsibility for administering extraprovincial marketing of potatoes was valid, and distinguished the earlier case: "delegations to a body subordinate to Parliament . . . were . . . of a character different from the delegation meant . . . in the . . . reference."[80] In the writer's view, Parliament could similarly delegate powers within its control to municipal bodies. It has been held that Parliament may impose *obligations* on municipalities,[81] and it is submitted that it could also invest them with *powers* extending beyond the reach of provincial legislatures.[82] This is, paradoxically, one respect in which the subordinate nature of local government actually results in *greater* power than the senior governments. The provinces have a similar right to delegate responsibility for municipal affairs to federal administrative agencies.

There is one potential impediment to federal-municipal delegation, however. As it was explained above, most municipal corporations, as creatures of statute, are limited in their legal *capacities* to those which are bestowed expressly or by necessary implication by their incorporating statutes. Parliament probably could not grant a power to a municipality which was beyond the municipality's capacity to accept under its incorporating statute. An old Ontario case provides a good example. The federal *Railway Act* empowered municipalities to construct street crossings over or under railway lines without compensation to the railway companies for the consequent use of their property. An attempt by the City of Toronto to use this federally-bestowed power was challenged on the ground that the Ontario Legislature had never given the City the capacity to accept such a power. In a careful judgment, Meredith, J. found that the capacity had in fact been conferred by provincial legislation, but he made it clear that if he had not so found the City's actions would have been *ultra vires:*

> The defendants are a provincial municipal corporation created by, and acquiring all their power under, Provincial legislation. By virtue of such creation and existence alone it can act. Federal legislation has no power over it in that respect. If Provincial legislation has not given the defendants the legal capacity to acquire and make new streets across Dominion railways, the Parliament of Canada cannot confer that capacity upon them.[83]

79. Rogers, *Supra* n. 29, Vol. 1, at 312.

80. *Prince Edward Island Potato Marketing Board* v. *Willis,* [1952] 2 S.C.R. 392, at 395, per Rinfret C.J.C.

81. *Re Dunne* (1962), 33 D.L.R. (2d) 190 (Ont. H.C.); *Re M and M* (1977), 72 D.L.R. (3d) 472 (Ont. Prov. Ct. - Fam. Div.).

82. Rogers, *Supra* n. 29, mentions a *dictum* to this effect by Sedgwick J. of the Supreme Court of Canada in *Re Prohibitory Liquor Laws* (1895), 24 S.C.R. 170, at 247. The Supreme Court decision was subsequently overruled by the Privy Council without reference to this point, however: [1896] A.C. 348 (P.C.). It is perhaps worth noting that in addition to the technique mentioned in the text, the courts have also permitted legislatures to use techniques of "incorporation by reference" and "conditional legislation", which often achieve virtually the same result as out-right delegation.

83. *Grand Trunk Railway Company* v. *Toronto* (1900), 32 O.R. 120, at 125 (H.C.).

If this statement is correct[84] it means that in situations of federal-municipal delegation a dual test of validity is imposed: a) Does the federal statute confer the *power* in question? and b) Does the provincial statute confer the *capacity* necessary to accept and exercise the power?

The delegation of *adjudicative* powers raises a special problem, which might conveniently be discussed at this point, although it does not flow from the subordinate nature of local government and constrains provincial legislatures as well. Section 96 of the *B.N.A. Act* stipulates that the appointment of judges to "Superior District and County Courts" in the provinces is an exclusively federal responsibility. This has been interpreted to mean that a provincial statute conferring on provincial appointees adjudicative powers similar to those possessed at Confederation by Superior, District or County Court judges, would be invalid. Numerous provincial and municipal tribunals have been attacked on this basis over the years. In *Toronto* v. *York,*[85] for example, the Ontario Municipal Board was challenged on the ground that it had been given the powers of a "section 96 court". The Privy Council held that although there probably were some respects in which the Board was empowered to play a judicial role akin to that of Superior, District or County Courts, those aspects of the statute were relatively minor, and were "severable" from the remainder of the Act, including the part in question in the case, which was "administrative" in pith and substance.

A rather careless use of words by Lord Atkin in this case has led to some confusion. The words could be read as stating that a province may confer only *administrative* functions on tribunals it creates; that all *judicial* jurisdiction must be derived from federal legislation.[86] In truth, it is only those judicial powers peculiar to Superior, District and County Courts that are beyond provincial reach. A recent decision of the Supreme Court of Canada has so ruled, holding that a provincial Act concerning municipal taxation may validly empower a Court of Revision to inquire into a complaint that a person has been assessed as a supporter of public rather than separate schools. Although such a power is judicial in nature, it is of a type that was exercised by inferior tribunals prior to Confederation.[87] Unfortunately, neither the distinction between "administrative" and "judicial", nor that between the functions of "inferior courts" and those of "Superior, District or County Courts" is easy to draw, and the result is a rather confusing body of case law concerning the powers of particular types of tribunals. A recent treatise describes, for example, the "curious and inconvenient result" of a series of decisions concerning the Ontario Municipal Board:

> while there is a valid appeal to the Ontario Municipal Board on the amount of a municipal assessment, and even as to the appropriate tax classification of a property owner, the Board has to decline jurisdiction when the issue is the liability to assessment . . .[88]

84. A plausible argument could be made to the contrary effect — that Parliament has, as a necessarily incidental part of its jurisdiction over the subject in question, the power to create or confer capacity upon municipal bodies.

85. [1938] A.C. 415 (P.C.).

86. Rogers, *Supra* n. 29, at 333, ff, seems to accept this interpretation. It is persuasively rejected by P.W. Hogg, *Constitutional Law of Canada* (1977) 136-7.

87. *Jones* v. *Edmonton* (1977), 70 D.L.R. (3d) 1 (S.C.C.), at 16-18.

88. Hogg, *Supra* n. 86, at 137.

If one attempts to examine the various cases on other municipal and related tribunals in Canada, an even "curiouser" picture emerges.[89]

Interjurisdictional Immunity

Even where a municipal corporation has been unmistakably authorized by its statute to deal with a certain subject matter within the undeniable jurisdiction of the provincial legislature, it may be powerless to enforce its laws against certain persons or organizations because they possess some form of special interjurisdictional immunity.[90]

The only immunity that is conferred expressly by the *B.N.A. Act* concerns taxation. Section 125 states that: "No lands or property belonging to Canada or to any province shall be liable to taxation.".[91] This means that local governments are powerless to tax the sometimes very substantial property holdings of the federal government and its various agencies and Crown corporations within their boundaries. While they may impose fees for services, such as running water,[92] it has been held that section 125 even prevents them from requiring federal authorities either to maintain their sidewalks in good condition or to reimburse the municipality for doing so.[93] The question of exactly what constitutes "Crown property" for the purpose of this section has been the subject of much litigation — too much to attempt to summarize here. An illustration of the type of disputes that arise is a Manitoba case holding that leasehold interests of non-Indians in Indian reservation lands are not protected from municipal taxation by section 125.[94] The Canadian Pacific Railway Company[95] and Hudson's Bay Company[96] also enjoy certain constitutionally guaranteed tax immunity in western Canada, although its practical significance no longer seems to be very great.[97]

The courts have created an even more significant form of immunity by holding that no provincial (or therefore municipal) law may be applied to a fundamental aspect of a project or undertaking that is under federal legislative jurisdiction. The location of airports within municipalities is thus free from local by-laws.[98] Radio and television operators cannot be required to take out local business licences before being permitted to operate in a municipality.[99] A company operating an interprovincial telephone system may ignore municipal regulations requiring municipal consent before erec-

89. Rogers, *Supra* n. 29, refers to many such cases.

90. *See generally*, D. Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969), 47 Can. Bar Rev. 40, and C.H.H. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (1977).

91. *See* McNairn, *id.*, 126, ff.

92. *Minister of Justice* v. *Levis*, [1919] A.C. 505 (P.C.).

93. *R.* v. *Breton* (1967), 65 D.L.R. (2d) 76 (S.C.C.).

94. *Re Provincial Municipal Assessor and R.M. of Harrison* (1971), 20 D.L.R. (3d) 208 (Man. Q.B.). Similar problems are examined in G.V. La Forest, *The Allocation of Taxing Power under the Canadian Constitution* (1967) 150, ff.

95. *A.-G. Saskatchewan* v. *C.P.R.*, [1953] A.C. 594 (P.C.).

96. *Hudson's Bay Company* v. *Bratts Lake R.M.*, [1919] A.C. 1006 (P.C.).

97. Another restriction on the taxing power, which does not seem to have much significance so far as local government is concerned, however, is s. 121 of the *B.N.A. Act*, which prohitibs import and export duties on products moving from one province to another. *See* La Forest, *Supra* n. 94, on this and generally.

98. *Johannesson* v. *West St. Paul*, [1952]. 1 S.C.R. 292.

99. A contrary conclusion was reached in *R.* v. *New Westminster, Ex. p. Canadian Wire Vision Limited* (1965), 55 D.L.R. (2d) 613 (B.C.C.A.). This decision should, however, be treated as overruled by *Re Public Service Board and Dionne* (1977), 83 D.L.R. (3d) 178 (S.C.C.).

ting poles and wires in the streets of the municipality.[100] An anti-smoke by-law is inapplicable to smoke produced by a ship in the course of its operation.[101]

This does not mean that no municipal by-law may ever be applied to federal enterprises. Laws of general application which have only an ancillary impact, and do not significantly affect the fundamental nature of the operation, are applicable. A federal railroad has been required, for example, to obey a general municipal by-law requiring occupiers of land in the municipality to keep clean any ditches on their property.[102] A federal harbour commission has been held to be subject to a city zoning by-law, except to the extent that it actually affects harbour activities.[103] A municipal business tax would probably be enforceable against federally regulated enterprises, so long as payment were not made a condition of doing business in the municipality. Nevertheless, interjurisdictional immunity poses considerable limitations on the legal powers of local governments effectively to control the matters over which they have been given governmental responsibility.

Taxation and Licensing

The Parliament of Canada has virtually unlimited taxing powers under the *B.N.A. Act:* "the raising of money by any mode or system of taxation".[104] The jurisdiction of the provinces in this regard overlaps with that of the federal authorities but is somewhat more restricted: "direct taxation within the province . . ."[105] Local governments, lacking constitutional status, have no guaranteed taxation powers and must depend in this area as in most others on delegation from the provincial legislatures.

There are a number of limitations to the taxing powers that may be exercised by the provinces or passed on by them to local governments. Reference has already been made to their inability to tax federal Crown property.[106] Because the ambit of provincial taxes is restricted to "within the province", they must be carefully designed to focus primarily on property, persons or transactions within the boundaries of the province.[107] Interprovincial import or export duties are prohibited.[108] The most significant restriction is the requirement that all provincial and local taxation be "direct".

A "direct" tas is usually defined as one which is likely to be ultimately borne by the persons from whom it is initially demanded, and not passed on by them to others in the form of increased prices or otherwise.[109] If a city imposed a 3 per cent sales tax on all retail sales made within its boundaries, it is probable that the retailers would simply raise their prices by a cor-

100. *Toronto* v. *Bell Telephone Company,* [1905] A.C. 52 (P.C.).

101. *R.* v. *C.S.L. Ltd.* [1960] O.W.N. 277 (C.C.).

102. *C.P.R.* v. *Notre Dame de Bonsecours,* [1899] A.C. 367 (P.C.).

103. *Hamilton Harbour Commissioners* v. *Hamilton* (1976), 1 M.P.L.R. 133 (Ont. H.C.).

104. S. 91(3). *See generally* La Forest, *Supra* n. 94.

105. S. 92(2).

106. S. 125. *See* McNairn, *Supra* n. 90, at 126, ff.

107. *See* La Forest, *Supra* n. 94, at 90, ff.

108. S. 121. This restriction applies to federal legislation as well as provincial.

109. This test was borrowed from the classical political economist John Stuart Mill in *Bank of Toronto* v. *Lambe,* [1887] A.C. 575 (P.C.).

responding percentage, and the tax would ultimately be borne by the consumers.[110] Such a tax would be "indirect", and therefore beyond the powers of either provincial or local authorities.

The directness requirement does not constitute as formidable an obstacle to revenue raising at the local level as it might seem, however. In practice its impact has been softened by several factors. In the first place, clever draftsmen have devised ways of phrasing tax legislation that avoid the problem. The standard technique for imposing provincial sales tax schemes of the type mentioned above, for example, is simply to describe them as "purchase" taxes, openly directed at the ultimate consumer, with the retailer designated as a mere "collector" for the government.[111] Some provincial governments have gone so far as to impose such levies at the wholesale level, designating the wholesaler as the "collector" and the retailer as the "deputy collector".[112] Secondly, the traditional primary source of local government revenues — real property taxation — has been held by the courts to be direct, even where imposed in a form that is likely to be passed on. The fact that it was invariably so classified before Confederation overrides functional considerations.[113] Finally, the directness restriction does not seem to apply to the raising of money by means of provincial or local licensing schemes.

It was recognized from early stages of the discussions concerning Confederation that provincial jurisdiction should extend to: "shop, saloon, tavern, auctioneer and other licences in order to the raising of a revenue for provincial, local or municipal purposes."[114] The term "other licences" has been construed liberally, with the result that most forms of commercial activity fall within the scope of the provincial licensing power.[115] Because the directness requirement does not apply to licence fees,[116] this head of jurisdiction can sometimes be quite important to provincial and local governments. The task of distinguishing between "taxes" and "licence fees" is not always easy. The test seems to be the existence of some regulatory component over and above the revenue-raising aspect of the levy: if the sole purpose of the levy is to raise money, it is a tax, and must therefore be direct, but if it is also intended to regulate the activity in question, it is a licence and the fee may be indirect.[117]

The chief tax problems of the provinces are not constitutional. A province with a strong tax base has, generally speaking, adequate constitutional

110. The mere fact that a tax would cause a general increase in the overhead of the business in question, with resulting effects on prices, is not enough to render a tax "indirect". There must be a quite proximate relationship between the tax and the resulting price increase to satisfy the test.

111. This technique received judicial approval in *Atlantic Smoke Shops Ltd.* v. *Conlon*, [1943] A.C. 550 (P.C.).

112. *See e.g., Tobacco Tax Act*, R.S.M. 1970, c.T80.

113. *Halifax* v. *Fairbanks*, [1928] A.C. 117 (P.C.).

114. S. 92(9). The wording was not varied much during the discussions *(See* Browne, *Documents on the Confederation of British North America* (1969) and provoked no comment during the debates in the Canadian Legislature *(See Parliamentary Debates on Confederation of British North American Provinces* (1951).

115. *Brewers and Malsters Association* v. *A.-G. of Ontario*, [1897] A.C. 231 (P.C.). La Forest, *Supra* n. 94, at 124, ff, has a thorough discussion of the licensing power. At 127-8 he offers numerous examples of types of licence found to be within the ambit of the section.

116. *Nelson* v. *Dartmouth* (1964), 45 D.L.R. (2d) 183 (N.S.S.C.). La Forest, *Supra* n. 94. at 132 disputes this conclusion, but admits that a licence fee may be indirect if regulatory in nature.

117. *Re La Farge* (1972), 32 D.L.R. (3d) 459 (B.C.C.A.).

power to raise adequate revenues.[118] The difficulties currently being experienced by some of the provinces stem primarily from weaknesses in the provincial economies, and from the fact that the federal authorities are already reaching so deeply into the taxpayers' pockets as to limit what is left for other governments. Local governments share the problems of their provincial masters, but have the additional constitutional handicap that they have no guaranteed access to any source of revenue.

Federal Spending Power

Constitutions consist of more than formal lists of legal authority. The reality of constitutional arrangements is often influenced as much or more by sub-surface factors as by the legal text. In Canada, one of the most powerful extra-legal influences is the federal "spending power".

The almost limitless federal taxation power has been mentioned previously. So extensive is it that the government of Canada is easily able to raise much more money than it needs to carry out its formal responsibilities under the *B.N.A. Act*. Since about the end of World War II, the federal surplus has been used to help finance many projects that are legally under provincial jurisdiction — roads, education, health, welfare, and so on. The result is that many of the activities in which local governments engage, or which have a significant impact on local affairs, are funded at least in part from the federal purse. And since he who controls the purse-strings can regulate the activity in question by placing conditions on his financial involvement, this has given the government of Canada a much more influential voice on the local scene than would appear from a reading of the *B.N.A. Act* and the cases interpreting it.

It is sometimes asserted that this federal spending power is unconstitutional. Pierre Elliott Trudeau expressed that opinion when he was a law professor,[119] and there is a famous *dictum* of Lord Atkin in the *Unemployment Insurance Reference* that is sometimes so interpreted:

> . . . assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence. It may still be legislation affecting classes of subjects enumerated in s. 92, and, if so, would be *ultra vires*.[120]

The weight of academic opinion seems to support the legal validity of the spending power, however, [121] and a recent decision of the Ontario Court of Appeal upheld it.[122]

Unless the Supreme Court of Canada should reach a different conclusion, or constitutional reform negotiations should bring about a relinquishment or narrowing of the spending power,[123] therefore, its existence ensures

118. The statement may be too sweeping in the light of recent decisions by the Supreme Court of Canada in *Canadian Industrial Gas and Oil Ltd.* v. *Saskatchewan* (1977), 80 D.L.R. (3d) 449 (S.C.C.) and *Simpsons-Sears Ltd.* v. *Provincial Secretary New Brunswick* (1978), 82 D.L.R. (3d) 321 (S.C.C.), but neither case is likely to have much impact on taxation by local governments.

119. P.E. Trudeau, *Federalism and the French Canadians* (1968) 79, ff.

120. P.E. Trudeau, *Federalism and the French Canadians* (1968) 79, ff.

121. D.V. Smiley, *Conditional Grants and Canadian Federalism* (1963); La Forest, *Supra*, n. 94, at 36, ff; K. Hanssen, "The Constitutionality of Conditional Grant Legislation" (1967), 2 Man. L.J. 191.

122. *Central Mortgage and Housing Corp.* v. *Cooperative College Residences Inc.* (1975), 71 D.L.R. (3d) 183 (Ont. C.A.).

123. A tentative proposal for limiting the power was made in the federal government pamphlet *Federal Provincial Grants and the Spending Power of Parliament* (1969).

that virtually every major urban problem has at least the potentiality of three governmental dimensions: local, provincial and national.