A GENERAL PERSPECTIVE OF CANADIAN CONSTITUTIONAL INTERPRETATION AS ILLUSTRATED BY THE CRIMINAL LAW POWER

by

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ABSTRACT

'A GENERAL PERSPECTIVE OF CANADIAN CONSTITUTIONAL INTERPRETATION AS ILLUSTRATED BY THE CRIMINAL LAW POWER'

The thesis is divided into four sections. The first section lays down a method of interpretation of S.91 and S.92 of the B.N.A. Act. The suggested method is comprised of making three enquiries:- Is the statute in question within S.92 --- is the statute within a S.91 enumerated power and is the statute within the residuary general power?

The validity of this method rests on four propositions viz:- S.91 comprises the residue of powers after the provinces have been given certain basic heads of powers; the enumerated powers in S.91 are supreme over those contained in S.92; where the subject matter of the statute in question goes beyond local or provincial concern or interest it will fall within the general federal power under S.91 even though it might otherwise appear to come within S.92; where neither S.92 nor S.91 enumerated powers apply the statute in question falls under the residuary federal power in S.91. Each one of these propositions is examined and supported.

The second section deals with the general rules of construction of the powers in S.91 and S.92. The matter is approached from the idea of a dichotomy between factors and formulae in constitutional interpretation. The factors are those matters that guide the court in answering the questions posed in the first section and the formulae are the rationales given for the decisions. This approach is inseverably connected with the concept of constitutional decisions being evaluative judgments. The evaluative judgment made in answering the original questions is referred to as the 'nexus' judgment. The place of precedent, evidence and extrinsic material in relation to the factors is then examined and the general ideas prevalent in Canadian constitutional interpretation such as the double aspect, ancillary, trenching, paramountcy and severability doctrines are looked at in the light of this 'nexus' judgment.

The strength and identity of the factors will vary from individual power to power and the criminal law power is adopted as an illustration of the use of the factorial approach. This illustrative use comprises the third section of the thesis. The lack of logical limits to the power is first shown and then the general factors of construction, purpose and effect are used to provide a

basis for constitutional prediction. The evaluation of factors is viewed both from the standpoint of federal legislation and that of the provinces. No attempt is made to give an exhaustive survey of the interpretation of the criminal law power. It is merely given as an illustration of the use of the factorial approach.

The final section is the conclusion and recapitulates the major principles contained in the earlier sections.

TABLE OF CONTENTS

In any federation based on a written division of powers the method of interpretation is going to assume a prominent position in the construction of the constitution. This position will be more quickly reached where a system of stare decisis prevails. Accordingly it is intended to look at a method by which meaning can be given to the division of powers in Canada. Subsequently the general principles inside this method will be examined and finally the criminal law power will be used an an example of the particular canons of interpretation here advanced. It is important to realize at the outset that the treatment of the criminal law power is not intended to be exhaustive but merely illustrative.

I. METHOD OF INTERPRETATION

Viewed analytically there are three parts of S.91 of the British North America Act 1867 as amended, that serve as indicators to a consistent methodology. The first of these indicators is the opening words of S.91: "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons to make laws for the Peace, Order and Good Government of Canada in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the

Provinces .....". Ex facie this provision implies that the method of interpreting the federal parliament's powers shall be to interpret fully the exclusive powers of the Provinces and allow the residue of powers to fall to the federal parliament.

However the first indicator is succeeded immediately by the words: "and for greater Certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the Classes of Subjects next hereinafter enumerated; that is to say---.....". Now this portion of S.91 is pointing to a method of interpretation whereby one first fully interprets the enumerated powers and then looks elsewhere for the provincial powers. The second indicator then is diametrically opposed to the first.

The third indicator is the closing words of S.91: "And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Regardless of whether one holds as the

Judicial Committee of the Privy Council held in A-G for Ontario v. A-G for Canada[1] that the paragraph applies to all S.92 powers and not only to S.92(16) it also supports a method of full interpretation of federal powers before considering those of the provinces.

Thus the Act itself suggests a method of construction whereby one would fully interpret the enumerated powers in S.91 before considering any provincial powers. This follows from the second and third indicators. The general federal power contained in S.91 is not included as it is postponed to S.92 because neither the second nor the third indicator applies to it.[2] The next step suggested by the indicators would be to interpret the powers in S.92 given to the provinces, having regard only to the enumerated federal powers in S.91. This stems from the word 'exclusively' in S.92 and the first indicator which would make the S.92 powers first in priority but for the second and third indicators. The final step would be to fully interpret

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1 [1896] A.C. 348 (Local Prohibitions Case).

2 This is not to suggest that the 31 enumerated powers in S.91 are to be regarded as sources of federal power additional to the opening words of the section but rather that the portion of the federal power comprised in the enumerations is different in its relation to S.92 powers than the residue of the federal power which for convenience is termed hereafter the residuary federal power.

the residuary federal power contained in the opening words of S.91 having regard to the enumerated powers in both S.91 and S.92.

Such a method of interpretation whilst implied from the terms of the Act is fraught with practical difficulties. These difficulties were alluded to in Citizens Insurance Co. v. Parsons[3] where the Privy Council stated[4] "Notwithstanding this endeavour (i.e.: the non obstante clause in S.91) to give pre-eminence to the Dominion Parliament in cases of a conflict of powers it is obvious that in some cases where this apparent conflict exists the (Imperial) legislature could not have intended that the powers exclusively assigned to the provincial legislatures should be absorbed in those given to the Dominion Parliament. Take as one instance the subject 'marriage and divorce' contained in the enumeration of subjects in S.91; it is evident that solemnization of marriage would come within this general description; yet 'solemnization of marriage in the province' is enumerated among the classes of subjects in S.92 and no one can doubt notwithstanding the general language of S.91, that this subject is still within the exclusive authority of the

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3 (1881) 7 App. Cas. 96.

4 ibid p. 108.

legislatures of the provinces. So 'the raising of money by any mode or system of taxation' is enumerated amongst the classes of subjects in S.91; but, though the description is sufficiently large and general to include 'direct taxation within the province in order to the raising of a revenue for provincial purposes' assigned to the provincial legislatures by S.92, it obviously could not have been intended that in this instance also, the general power should override the particular one."

Thus it is not possible to fully interpret the enumerated powers in S.91 without paying regard to S.92 powers and still give some effect to each of the powers in the latter section. The Privy Council in Parsons Case[5] having perceived the difficulty and asserted that the two sections should be read together went further and laid down a method of interpretation of the two groups of powers. "The first question to be decided," it said, "is whether the Act impeached in the present appeal falls within any of the classes of subjects enumerated in S.92, and assigned exclusively to the legislatures of the provinces, for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial

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5 ibid.

legislature prima facie falls within one of these classes of subjects that the further questions arise, viz: whether, notwithstanding this is so, the subject of the Act, does not also fall within one of the enumerated classes in S.91 and whether the power of the provincial legislature is or is not thereby overborne."[6] This concept of interpretation was expressly adopted and applied in Russell v. The Queen[7] and Toronto Electric Commissioners v. Snider.[8]

The practical difficulty and the authority of the three Privy Council decisions force the scheme or method of interpretation drawn from the indicators in the Act itself to be amended. The modified method of interpretation would be to firstly fully interpret the S.92 powers and secondly to interpret the enumerated powers in S.91 having regard to the S.92 powers. Finally the residuary federal power would need to be interpreted having regard to both S.92 and S.91 enumerated powers. This method which applies to both federal and provincial legislation and involves asking three questions was laid down by Viscount Haldane in

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6 ibid p. 109.

7 (1882) 7 App. Cas. 829.

8 [1925] A.C. 396.

Snider's Case.[9] The mode of application is:- Is the statute in question within one of the powers in S.92? If it is not then it can only be passed by the federal parliament either under one of the enumerated heads of power in S.91 or under the residuary federal power. This result follows from the overall residuary character of S.91. If it is a federal statute that is being considered it will be necessary to decide under which branch of S.91 it was passed. This is achieved by construing the S.91 enumerated powers. If the statute is not under one of them it will fall within the residuary federal power.

Where the statute in question is prima facie within a S.92 power it is presumed that it can only be passed by a provincial legislature. This flows from the word 'exclusively' in S.92. The presumption can be rebutted by either the enumerated heads of power in S.91 or by the application of the residuary power in S.91. In order to ascertain whether the presumption is rebutted by one of the enumerated heads of power in S.91 it is necessary to ask the second question viz:- Is the statute within one of the enumerated heads of power in S.91? If it is then because of the second and third indicators the presumption is rebutted and the statute

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9 ibid p.406.

can only be passed by the federal parliament. In determining the answer to this question however the existence of a narrower S.92 power must give rise to the implication that the Imperial parliament did not intend it to be absorbed by a wider S.91 power and hence the S.91 power should be interpreted so as not to include the narrower S.92 power. If the S.91 enumerated powers do not apply the third question must be asked viz:- Is the statute in question within the residuary federal power under S.91? The answer to this question will depend on whether the subject matter of the legislation goes beyond matters of mere local or provincial concern. If the statute is within the federal residuary power it must be passed by the federal parliament as the presumption in favour of the provincial power is again overruled.

This method of interpretation is structured upon the accuracy of four propositions; firstly, that S.91 comprises the residue of powers after the provinces have been given certain basic heads of powers. This proposition is necessary as the justification for looking to S.92 before S.91 and for the concept that if the statute does not fall within a S.92 power it must ex hypothesi be passed by the federal parliament to be intra vires. It is clear from the phrasing of the Act that S.91 is a residuary clause as it gives the

power to make laws in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. The Privy Council recognized this in Citizens Insurance Co. v. Parsons[10] where it stated[11] "the scheme of this legislation expressed in the first branch of S.91 is to give the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature."

The second proposition is that the enumerated powers under S.91 are supreme over those contained in S.92. This proposition substantiates the affirmative answer to the first question as rebutting the presumption in favour of provincial competence. If it was not correct then the fact that the statute in question came under a S.91 enumerated power would not give the authority to enact it to the federal parliament if it also came within a S.92 power. The cases clearly establish the supremacy of S.91 enumerated powers. Thus in Tennant v. Union Bank of Canada[12] the plaintiff was suing for damages for the conversion of some

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10 op. cit.

11 ibid p. 107.

12 [1894] A.C. 31.

timber that was under certain warehouse receipts. These receipts were made out by a firm to itself and endorsed to the defendant as security for advances. The firm became insolvent and the assignee of its estate sued the defendants who had taken possession of the timber. Recovery depended on the effect of the Bank Act and whether that Act was intra vires the Dominion parliament. The Privy Council advised that the Bank Act was a good defence and then considered its constitutional validity. The appellant argued that S.92(13) gave the exclusive right to make laws in relation to property and civil rights in the province to each provincial legislature and therefore despite S.91(15) which declared that the Legislative Authority of the Parliament of Canada extended to Banking, Incorporation of Banks and the issue of paper money, the parliament of the Dominion could not validly enact the Bank Act as it affected property and civil rights in the Province. The Privy Council dismissed this contention and upheld the validity of the Act. Lord Watson in delivering the tribunal's advice stated[13] "The objection taken by the appellant would be unanswerable if it could be shown that by the Act of 1867 the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters

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13 ibid p. 45.

assigned to the provincial legislatures by S.92. But S.91 expressly declares that 'notwithstanding anything in this Act' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament so long as it strictly relates to those matters is to be of paramount authority. To refuse effect to the declaration would render negatory some of the legislative powers specially assigned to the Canadian parliament. For example among the enumerated classes of subjects in S.91 are 'Patents of Invention and Discovery' and 'Copyrights'. It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces."

Subsequently this case and Cushing v. Dupuy[14] which had established the same principle were adopted in the Fish Canneries Case[15] where Lord Tomlin laid down four propositions of interpretation of the B.N.A. Act. The first of these was:-[16] "the legislation of the Parliament of the Dominion so long as

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14 5 App. Cas. 409.

15 A-G Can. v. A-G B.C. [1930] A.C. 111.

16 ibid p. 118.

it strictly relates to subjects of legislation expressly enumerated in S.91 is of paramount authority even though it trenches upon matters assigned to the provincial legislatures by S.92." This principle was expressly adopted as good law in In Re Aeronautics Reference[17]; In Re Silver Brothers[18] and in C.P.R. v. A-G B.C.[19]

Whilst the authority of these decisions establishes the principle that the enumerated powers in S.91 override those in S.92 this does not imply that in determining whether a particular statute falls within a S.91 power no regard should be paid to the fact that it also falls within a S.92 power. As was pointed out in Parsons Case[20] the sections must be read together and in certain cases, notably marriage and divorce, the S.91 power must be taken not to include the narrower power bestowed on the provincial legislature.

The third proposition is that where the subject matter of the statute in question goes beyond local or provincial concern or interest it will fall within the residuary federal power under S.91 even though it might otherwise

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17 [1932] A.C. 54.

18 [1932] A.C. 514

19 [1950] A.C. 122.

20 op. cit. and see infra.

appear to come within S.92. This proposition is the basis of the third question. In A-G for Ontario v. Canada Temperance Federation[21] Viscount Simon declared[22] "the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole .... then it will fall within the competence of the Dominion Parliament as a matter affecting the peace order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures." It has been assumed[23] that this decision is a departure from the earlier views of the Privy Council. However when the previous cases are examined it is apparent that this decision is merely a restatement of a principle rather than a new departure. In Russell v. The Queen[24] the Privy Council laid down that where a federal Act fell within the residuary power of the Dominion it was not rendered ultra vires by

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21 [1946] A.C. 193.

22 ibid p. 205.

23 e.g. - B. Laskin - Book - "Canadian Constitutional Law" 3rd Edition, pages 269 and 270.

24 op. cit.

reason of its incidentally affecting a S.92 power. Later in the Local Prohibitions Case[25] it was stated that there would be matters under S.91 that were not within the enumerated classes in that section and that Acts passed under this residuary power could not encroach upon the S.92 powers of the provincial legislatures. However Lord Watson who delivered the judgment went on to say that the Privy Council recognized that some matters in origin local or provincial might attain such dimensions as to justify federal legislation under residuary power. The result then of the cases prior to 1916 was that as a general rule the residuary federal power could not encroach on the S.92 powers but as an exception to this general rule where the matter attained certain national dimensions it could be the subject of federal legislation even though it was originally within the provincial power under S.92.

In 1916 in the Insurance Reference[26] the Privy Council recognized this general rule as follows--[27] "the initial part of S.91 of the British North America Act .... does not

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25 op. cit.

26 A-G Can. v. A-G Alta. [1916] 1 A.C. 588.

27 ibid p. 595.

unless the subject matter of legislation falls within one of the enumerated heads which follow enable the Dominion parliament to trench on the subject matters entrusted to the provinces by the enumeration in S.92." However the Court went on to say that the only exception to the rule that the federal parliament cannot effectively legislate for the provinces under the residuary power was where the subject matter was not within one of the S.92 powers. Russell v. The Queen[28] was explained on this basis. Hence after the Insurance Reference[29] there was no doubt as to the general rule but considerable question as to the existence of the exception.

The succeeding cases of Fort Francis Pulp & Power Co. Ltd. v. Manitoba Free Press[30] and Toronto Electric Commissioners v. Snider[31] saw the resuscitation of the exception to the general rule under a different formulation. The principle laid down in these decisions was that in cases of emergency the Dominion parliament could legislate under its residuary power even though it encroached on the S.92 powers of the

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28 op. cit.

29 op. cit.

30 [1923] A.C. 695.

31 op. cit.

provinces. Under this formulation of the exception intemperance in 1881 was held to have been regarded as a national emergency and Russell's Case[32] was explained on this ground.

Despite criticism[33] the emergency doctrine as the basis for the exception to the general rule remained extant until 1946. The general rule and the exception were stated by Lord Tomlin in the Fish Canneries Case[34] as the second of his four propositions thus:- "the general power of legislation conferred upon the Parliament of the Dominion by S.91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance and must not trench on any of the subjects enumerated in S.92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion."[35] It is interesting to note that Lord Tomlin preferred Lord Watson's description of the exception to that of

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32 op. cit.

33 vide for example Anglin C.J. in The King v. Eastern Terminal Elevator Co. [1925] S.C.R. 434 at 438.

34 op. cit.

35 ibid. p. 118.

Viscount Haldane in the 'emergency' cases. This statement of Lord Tomlin's was approved in the Aeronautics Reference[36] in In Re Silver Bros.[37] and in C.P.R. v. A-G B.C.[38]

The emergency doctrine was repudiated in A-G Ontario v. Canada Temperance Federation[39] and the dimensions rationale of the exception revived in a modified form. In this case a similar statute to that upheld in Russell's Case[40] was under attack and Viscount Simon in delivering the Privy Council's advice, after denying that the existence of an emergency gave "power to the Dominion parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the Provincial Legislatures,"[41] went on to hold that "the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the Aeronautics Case and the Radio Case) then it will fall within the competence

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36 op. cit.

37 op. cit.

38 op. cit.

39 op. cit.

40 op. cit.

41 ibid p. 205.

of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures."[42]

The emergency doctrine however was not yet dead as in Japanese-Canadians v. A-G Canada[43] Lord Wright said[44] "the Parliament of the Dominion in a sufficiently great emergency such as that arising out of war, has power to deal adequately with that emergency for the safety of the Dominion as a whole." Nevertheless the statement of Viscount Simon in the Canada Temperance Case[45] has received later judicial approval[46] and must now be taken to represent good law. On one point the statement is misleading and this has caused difficulties. Viscount Simon cited as examples of statutes where the subject matter of the legislation was beyond mere local or provincial concern and therefore within federal parliament's residuary power the Aeronautics Case[47]

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42 ibid p. 205.

43 [1947] A.C. 87.

44 ibid p. 101.

45 op. cit.

46 Johanneson v. West St. Paul [1952] 1 S.C.R. 292; and Munro v. National Capital Commission (1966) 57 D.L.R. (2d) 753 at 759.

47 op. cit.

and the Radio Case.[48] Now the major ground for the former decision was that stated by Lord Atkin in the Labour Conventions Case[49] viz:- whether S.132 entitled the federal government to implement treaty obligations even though they impinged on provincial powers. In the Radio Case[50] the basis for the decision was that stated by Lord Dunedin[51] viz:- legislation not falling under either S.92 or the enumerated heads of S.91 must come within the federal residuary power.

The position then would appear to be that as a general rule the residuary federal power under S.91 cannot encroach on matters falling within S.92 powers. An example of the exercise of this power is where the subject matter of the legislation is under neither the S.91 enumerations nor under S.92. To this general rule there is an exception that if the subject matter of any statute goes beyond mere local or provincial concern it will fall within the residuary federal power even if it does fall within a S.92 power.

The late F.P. Varcoe in his book 'The Constitution of Canada'[52] asserts "The powers of Parliament are not to be

48 [1932] A.C. 304.

49 [1937] A.C. 326.

50 op. cit.

51 ibid p. 312.

52 2nd Edit. 1965.

considered as falling into two classes, first class and second class. The effect of the exercise of such powers must be regarded as uniform as regards paramountcy and exclusiveness."[53] The learned author bases these comments on the fact that the S.91 enumerated powers are only examples of the matters in relation to which the federal parliament can legislate under S.91. However such an interpretation whilst valid up to a point fails to give effect to the 'non obstante clause'. This clause purports to make a distinction between the residuary and the enumerated federal powers as it gives to the latter a precedence over S.92 powers which the latter, except to the extent that the statute passed thereunder has a subject matter of national importance, does not enjoy. This difference has been explicitly recognized since the Local Prohibitions Case,[54] and is fundamental to the division of the second and third questions in the suggested method of analysis. It should not be assumed however that Varcoe is entirely inaccurate and that the federal residuary power and the enumeration in S.91 are each conferring legislative authority on the federal parliament. There is only one source of federal power and

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53 ibid p. 18.

54 op. cit.

that is the opening words of S.91; the enumerations that follow are merely examples of matters included in that one source of federal power. However the examples have a different relation to the S.92 powers than does the remaining portion of the federal power. It is to keep the distinction clear between a doctrine of two sources of federal power (which is patently inaccurate) and a doctrine of one source but with different applications that the phrase 'residuary federal power' rather than 'general federal power' has been used here. All federal power is 'general federal power' but some of that federal power is illustrated by the examples (i.e. the S.91 enumerations) and the rest of it is residuary.

Under this analysis cases falling under the general rule relating to non encroachment would come within the negative answer to the first question in the general scheme whilst those cases falling within the exception would come within the affirmative answer to the third question. In other words the residuary federal power would have a twofold operation. Firstly those statutes dealing with matters not within either S.92 or the enumerations in S.91 and secondly those statutes on matters which prima facie are within S.92 but which because of their non local or provincial concern cease to be caught under that section. Before turning to the fourth proposition it is opportune to note how the court

slurred around between the general rule of non encroachment and the exception in Munro v. National Capital Commission?[55] In that case the question was whether the National Capital Act, 1958 was intra vires the federal parliament. The Supreme Court of Canada cited with approval the statements of Viscount Maugham and Viscount Dunedin in Reference Re the Debt Adjustment Act 1937[56] and Re Regulation and Control of Radio Communication.[57] In these statements the point was made that where the subject matter of any legislation is not within the S.91 enumerated powers or S.92 it falls within the residuary federal power. The court also approved the dictum of Viscount Simon in the Canada Temperance Federation Case[58] then proceeded to find that the subject matter of the Act was not in either S.92 or the S.91 enumerations and that it went beyond local or provincial concern. It is apparent that either approach would have given the same result viz:- that the statute was intra vires, and the court failed to differentiate between them or even admit that there were two grounds for its decision.

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55 op. cit.

56 [1943] A.C. 356.

57 op. cit.

58 op. cit.

The fourth proposition is that where neither S.92 nor the S.91 enumerated powers apply the statute in question falls under the residuary federal power in S.91. This proposition is connected with both the first and the third propositions earlier advanced. Under the suggested scheme of interpretation where S.92 does not apply and the statute which is having its validity determined is a federal statute, it will be necessary to determine whether it was passed under one of the enumerated powers in S.91 or under the residuary federal power. Once it has been decided that S.91 enumerated powers do not apply it follows logically that the residuary federal power does so apply. That is, assuming S.92 does not apply and therefore the statute in question can only be passed by the federal parliament, it must fall either within one of the S.91 examples or the residue of S.91 and if the former possibility is excluded then the authority for its enactment can only be the S.91 residue. This proposition is supported by the dicta already mentioned of Viscount Maugham in Reference Re the Debt Adjustment Act 1937[59] and of Viscount Dunedin in Re Regulation and Control of Radio Communication.[60] In the first of these

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59 op. cit.

60 op. cit.

the learned law lord said "It must not be forgotten that where the subject matter of any legislation is not within any of the enumerated heads of either S.91 or S.92, the sole power rests with the Dominion under the preliminary words of S.91 relative to "Laws for the Peace, Order and Good Government of Canada"[61] whilst in the second instance the dictum was: "Being therefore not explicitly mentioned in either S.91 or S.92 such legislation falls within the general words at the opening of S.91, which assign to the Government of the Dominion the power to make laws "for the Peace, Order and Good Government of Canada in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[62] Both these judicial pronouncements were approved and adopted in Munro v. National Capital Commission[63] and can therefore be regarded as good law.

Having established a method of interpretation of S.91 and S.92 of the B.N.A. Act it is now opportune to look at the general principles of construction that supply the means of answering the basic questions that comprise such method.

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61 op. cit p. 371.

62 op. cit p. 312.

63 op. cit p. 757.

II. GENERAL PRINCIPLES OF CONSTRUCTION

The courts have often stated that in interpreting the S.91 and S.92 powers it is essential to look at the real nature of the statute in question. The expressions of this idea have been as varied as they have been numerous. Thus in Russell v. The Queen[1] and A-G Saskatchewan v. A-G Canada[2] the Privy Council talked of 'true nature and character of the legislation' in Union Colliery Ltd. v. Bryden[3] it was 'the whole pith and substance of the enactments' and in Gold Seal Limited v. Dominion Express Co. and A-G Alta[4] Duff J. referred to a distinction between legislation 'affecting' and legislation 'in relation to' matters in the classes of powers. This distinction was subsequently applied in Munro v. National Capital Commission[5] These examples are capable of vast multiplication.[6]

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1 op. cit.

2 [1949] A.C. 110.

3 [1899] A.C. 580.

4 (1921) 62 S.C.R. 424.

5 op. cit.

6 vide e.g:- Lord Atkin in Ladore v. Bennett 1939 A.C. 468 at 482; Madden v. Nelson [1899] A.C. 626 at 627.

However all these dicta are mere verbal formulae. By relying on them a lawyer is not able to predict the outcome of any constitutional case except one on all fours with a previous decision. The vagueness of the language whilst permitting a rationalisation of decisions assists not one whit in trying to determine why a court came to a particular decision and, more importantly, what decision a future court will be likely to come to on another statute. These formulae are masking an evaluative judgment. This judgment is a decision as to whether a statute has or has not a sufficiently close nexus with the power under which it is being justified.

This idea of nexus is structured on the basic tenet that it is wrong to say that there are certain features of every statute that as a matter of logical necessity force one to treat it as falling within a particular head of power, i.e:- there is no necessary connection between the statute and the power---it is not a process of deduction but of selection.[7] The adoption of the general idea of nexus does not mean that the verbal formulae are redundant

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7 This is a similar position to the American Legal Realist school of jurisprudential thought. See J. Frank. "Law and the Modern Mind" 6th printing - 1949, and article by W.W. Cook, "Scientific Method and the Law" 13 American Bar Assoc. Journal 303.

and hence should be abandoned but only that the nexus should be determined and the formulae then selected to support the conclusion. That this process is what constitutional courts in a federal system already do either wittingly or unwittingly is clearly demonstrated by Lane in "Some Principles and Sources of Australian Constitutional Law".[8]

Furthermore the dangers of placing a literalistic interpretation on the formulae are shown by Laskin[9] when referring to the distinction drawn between consequential effects and legislative subject matter he says that "if the distinction is truly one between purpose and effect, it runs counter to other authority which holds that declared or asserted purpose will not necessarily conclude the question of validity on the basis thereof" and he cites A-G Man. v. A-G Can.[10] in support of his proposition. In that case the Privy Council said, "The matter depends upon the effect of the legislation not its purpose."[11] This kind of blinkered approach turns attention from what the courts

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8 1st Edition, Sydney, 1964.

9 B. Laskin - Book - op. cit. at p. 91.

10 [1929] A.C. 260.

11 ibid p. 268. The dictum was later approved by Cartwright J. in A-G Can. v. Readers' Digest Assoc.(Canada) Ltd. [1961] S.C.R. 755 at 793.

are in fact doing and constitutes too narrow a view of the effect of both the cases dealing with purpose and those dealing with effect, i.e: it is analytical in an area where pragmatism is required.[12]

Nevertheless if one debunks the formulae on the basis of lack of predictability it is not sufficient to simply state that it masks an evaluative judgment. One must go further and provide some basis for predicting the outcome of that evaluative judgment. Stated in another manner--- whilst it is true that the verbal formulae are merely what Julius Stone would call a category of indeterminate reference,[13] and only mask the evaluative judgment of nexus if predictability is going to be the aim the grounds which led the court to come to the particular decision must be discovered.

These grounds or factors then are the vital element in the prediction of constitutional questions as it is on them that the court will rely in making its evaluative judgment as to whether a statute has a sufficiently close nexus to the head of power under which it is being justified.

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12 See supra.

13 J. Stone - 'Legal System and Lawyers' Reasonings', 1964, Sydney, p. 235 et seq.

These factors will be dependent on the individual power or powers under consideration and will be drawn mainly from the range of facts before the court. It is the function of the constitutional lawyer to select and evaluate the relevant factors which may include such things as the purpose, content and effect of the legislation in question. These factors will of necessity be largely subjective to the particular statute under consideration and it is to this statute subjectivity that Lord Maugham was referring in A-G Alberta v. A-G Canada[14] when he said, "Ultra vires must be determined in each case as it arises for no general test applicable to all cases can be safely laid down."[15] The courts then in deciding whether particular legislation is ultra vires its enacting legislature are making an evaluative judgment. This judgment is whether or not the particular statute has a sufficiently close nexus with the head of power under which it is being justified. In making this judgment the courts will rely on certain factors and once the decision has been arrived at it will be cloaked with the verbal formulae in order to preserve the facade of an

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14 [1939] A.C. 117.

15 ibid at p. 129.

a priori logical deduction from previous decisions.[16]

Overlaying the selection of factors is the system of stare decisis. This is germaine to the process of selection on two levels; firstly the binding force of constitutional precedent and secondly the range of facts before the courts. As to the former the earlier decisions if on similar points and binding will themselves constitute a factor of the highest importance and in so far as they contain evidence of the factors that guided those earlier courts they will guide the choice of factors in the instant case.[17]

The range of facts before the court is important because it is largely from these facts that the choice of factors will be made.[18]

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16 This is not to imply a criticism of the common law system---the advantage of such system is precisely that it gives an appearance of immutability and certainty whilst in reality being highly volative and subject to social, ethical and political pressures. See Stone - book - op.cit. pages 237 to 241.

17 Too much should not be made of this second proposition because of the statute subjectivity to which reference has previously been made.

18 This is the justification for the 'Brandeis Brief'.

The main rules relating to constitutional precedent are clear. Thus the Privy Council did not regard itself as absolutely bound by its own decisions but would seldom as a matter of practice depart from them on constitutional matters.[19] The decisions of the Privy Council on appeal from Canada were binding on all Canadian courts including the Supreme Court of Canada until 1954.[20] The Supreme Court of Canada regarded itself as bound by its own decisions other than in exceptional circumstances,[21] and its decisions were naturally conclusive on all other Canadian courts. The position in relation to the binding force today of pre 1954 decisions of the Privy Council on the Supreme Court of Canada and the extent to which that court is, since 1954 bound by its own decisions are both more doubtful. In Reference re the Farm Products Marketing Act[22] Rand J. held that "the powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee."

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19 A-G Ont. v. Canada Temperance Federation. op. cit.

20 Reference re Sect. 16 of the Special War Revenue Act [1942] S.C.R. 429.

21 A-G Can. v. Western Higbie [1945] S.C.R. 385 at 403.

22 [1957] S.C.R. 196 at 212.

This indicates that the Supreme Court will place itself in the same position as the Privy Council in relation to decisions of that body on appeal from Canada before 1954. This approach agrees with that of Rinfret C.J. in In Re Storgoff.[23] At the time that that case was heard only criminal appeals to the Privy Council had been abolished and the Chief Justice was therefore dealing with only such appeals when he held "the Supreme Court of Canada is now the court of last resort in criminal matters, and although, of course, former decisions of the Privy Council, or decisions of the House of Lords in criminal causes or matters, are entitled to greatest weight it can no longer be said as was affirmed by Viscount Dunedin delivering the judgment of their Lordships in Robbins v. National Trust Co. Limited that the House of Lords, being the supreme tribunal to settle English law ..... the Colonial Court, which is bound by English law, is bound to follow it."[24]

If this approach is adopted the Supreme Court of Canada will not be bound by its own decisions or those of the Privy Council on appeal from Canada given prior to 1954 but it will seldom depart therefrom. The adoption of such

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23 [1945] S.C.R. 526.

24 ibid p. 538.

a position whilst in accord with the general crumbling of the citadel of strict stare decisis[25] is still at variance in degree with the view prevailing in the U.S.A. There, the Supreme Court has often asserted that it will not hesitate to overrule a prior constitutional decision which it considers to be wrongly decided State Board of Insurance v. Todd Shipyards Corp.[26] The rationale of this approach is that stare decisis in an absolute form is inapplicable because it is structured on the ability of the legislature to correct faults in the law by statute which in a federal system is difficult if not impossible.[27] Whilst this rationale has great persuasive effect against an absolute system of stare decisis it does not greatly affect a modified approach such as that of the Privy Council and it is suggested that the more cautious policy be adopted if only for the reason that people will have acted on the prior decision. This is the pervading rule in Australia where the High Court has said it will only reverse its earlier decisions

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25 Vide the High Court of Australia in Parker v. The Queen (1962-3) 111 C.L.R. 610 at 632-3 and the House of Lords in Practice Note [1966] 1 W.L.R. 1234.

26 (1962) 370 U.S. 451.

27 See per Brandeis J. in Burnet v. Coronado Oil & Gas Co. (1932) 285 U.S. 393 at 405 cited in Laskin - book - op. cit. at p. 192.

on a showing that the case in point is 'manifestly wrong'.[28]

Regardless however of whether or not the approach of the United States is adopted the existence of prior decisions on similar matters is still of major importance being both a factor itself and a guide as to the factors which other courts have found relevant in dealing with a similar case.

In considering the range of facts before the court it must be borne in mind that there are two types of such facts in any litigation---ordinary facts and legislative facts. Ordinary facts are facts peculiar to the particular parties and arise where one party asserts and the other denies certain things. Legislative facts are general facts not peculiar to the immediate parties.[29] Constitutional facts are a specific type of legislative fact. They are facts 'described as information which the court should have in

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28 per Higgins J. in Gray v. Dalgety Ltd. (1916) 21 C.L.R. 551. Whilst this power has been exercised e.g: in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920) 28 C.L.R. 129 and the Tramways Case (No.1) (1914) 18 C.L.R. 54 there have been repeated warnings about attacking decisions lightly e.g: Dixon J. in Cox v. Journeaux (1934-5) 52 C.L.R. 282; Australian Agricultural Co. v. Federated Engine drivers' & Firemans' Assoc. of A'asia (1913) 17 C.L.R. 274; Metal Trades Employers' Case (1936) 54 C.L.R. 387. Moreover the High Court has on occasions refused to overrule earlier constitutional decisions given only one or two years previously, e.g. Cain v. Malone (1942) 66 C.L.R. 10.

29 This distinction is that of P.H. Lane in Article "Facts and Constitutional Law" (1963) 37 A.L.J. 108 to 119.

order to properly judge of the validity of the statute in question, or facts the existence of which is necessary in law to provide a constitutional basis for legislation'.[30]

A court acquires all facts either by judicial notice or by evidence tendered. It has often been stated[31] that judicial notice can be taken of facts that are so generally known as to give rise to the presumption that all persons are aware of them. Cross[32] has justly pointed out that this is only part of the doctrine, albeit the major part, as the idea of judicial notice also includes 'facts' which are capable of immediate accurate demonstration by resort to readily assessable sources of indisputable accuracy.[33] Furthermore in this second part of the doctrine it is possible to give testimony that will assist the court. Thus in McQuaker v. Goddard[34] the question was whether camels were mansuetae naturae and the court at first instance

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30 Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1 at 222 et seq. cited in Lane - Art. op. cit. p.108.

31 e.g: in Holland v. Jones (1917) 23 C.L.R. 149 at 153.

32 R. Cross - Book - 'Evidence' 2nd Edit. London, 1963 pages 136-139.

33 Morgan - 'Some Problems of Proof Under the Anglo American System of Litigation' page 61 cited by Cross op.cit. page 133.

34 [1940] 1 K.B. 687.

heard witnesses and consulted textbooks. The basis for the hearing of the witnesses was stated by Clauson L.J. when the case was taken to the Court of Appeal thus:- "Sworn testimony can be heard before judicial notice is taken of a fact and in such cases the witnesses are not strictu sensu giving evidence but assisting the judge in forming his view as to what the ordinary course of nature in this regard in fact is, a matter of which he is supposed to have complete knowledge."[35] Judicial notice is the foundation for the 'Brandeis Brief' in the U.S.A. for as was said in Muller v. Oregon[36] "we, (the U.S. Supreme Court) take judicial notice of all matters of general knowledge." Hence if the courts in Canada evince an intention to refuse admission to evidence dealing with facts of a social, ethical or political variety it may be that judicial notice will be able to be used either in briefs or by the use of sworn testimony. Nevertheless the general attitude of Canadian courts to judicial notice can be seen from Saumur v. A-G Que.[37] where the Supreme Court deprived the successful

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35 ibid p.700.

36 (1908) U.S. 412. Cited by Laskin, op.cit. p.187.

37 [1953] 2 S.C.R. 299.

appellant of costs because his attorney had swamped the Court's proverbial boat with facts.

The second method whereby the courts can acquire facts is by the adducing of evidence strictu sensu. There has not been much attention paid, in Canada, to the use of evidence as a method of bringing constitutional facts before the courts except in relation to 'extrinsic aids'.[38] Yet it is submitted that this method is to be preferred to the use of judicial notice for as Professor Lane has aptly observed "in truth there is no reason in law or logic why the court should not acquire relevant constitutional facts from evidence as much as from judicial notice; when such facts are propounded in court by one party subjected to criticism by the other party then 'found' by the court the decision rests on a surer foundation than what is built upon the flat-earthism

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38 'extrinsic aids' or 'extrinsic materials' are used loosely. The following four uses are common:'

1) the legislative history of a particular impugned statute.
2) all the facts that it is logically possible to bring forward in connection with the interpretation of such a statute other than its own words.
3) the legislative history of the particular section of the B.N.A. Act being considered.
4) all the facts that it is logically possible to bring forward in connection with the interpretation of the particular section of the B.N.A. Act being considered other than its own words. As the basic constitutional judgment is evaluative of the particular statute it is here proposed to use the second meaning.

of so called notorious facts which are incontestable."[39] Nevertheless it may well be that there are certain areas where judicial notice is available but where it is impossible to tender evidence. Thus in Cairns Construction Ltd. v. Govt. of Saskatchewan[40] Culliton J.A. of the Saskatchewan Court of Appeal stated "The Courts have only departed from this general rule (of extrinsic evidence not being admissible) in considering, in particular cases matters of history, law and practice; circumstances leading to the passage of the Act and facts of which the Court could and should take judicial notice.[41] I can find no cases since the definition of a direct tax was adopted by the Privy Council, in which the evidence or opinions of political economists were considered by the court."[42]

Whichever method is used there are two major hurdles to the introduction of constitutional facts before a Canadian court. The first of these is the general rule in relation to extrinsic aids and the second is the concept of

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39 P.H. Lane - Art. - op.cit.p.110. - note however that the learned author assumes that there can be no sworn testimony and cross examination under judicial notice which is contrary to McQuaker v. Goddard op.cit.

40(1959) 16 D.L.R. (2d) 465.

41 italics mine - author.

42 ibid pp. 491-2.

relevancy coupled with the nature of judicial review itself. In considering the use of extrinsic materials in Canadian constitutional interpretation care must be taken to distinguish the position of the use of such materials in relation to legislation impugned under the Act. When this distinction is kept firmly in mind it can be seen that the admissibility of extrinsic materials in the former case is not conclusive as to the latter. Hence even if V.C. MacDonald is right[43] in concluding that the general rule is against the use of such materials to assist in the construction of the B.N.A. Act it by no means follows that such use is excluded in relation to an impugned statute.

As a matter of history the general trend in English statutory interpretation has been to exclude the legislative history of Acts of Parliament from the courts.[44] The traditional explanation for this view has always been that parliament is a corporate entity and the speeches of

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43 V.C. MacDonald - Article - "Constitutional Interpretation and Extrinsic Evidence" (1939) 17 Can. Bar. Rev. 77 at 81.

44 Vide Alderson B. in In Re Gorham 5 Ex. 667; Barbat v. Allen 7 Ex. 616 per Pollock C.B.; Julius v. Oxford 49 L.J.Q.B. 578; South-Eastern Railway Co. v. Railway Commissioners 50 L.J.Q.B. 203. - all cited by Taschereau C.J. in Gosselin v. R. 33 S.C.R. 255. By 'Legislative History' is meant the actual history of the measure through the legislature, e.g. debates; it is not meant to include previous Acts dealing with the same subject matter which have always been admissible.

individuals should therefore have little weight in deciding what was its collective aim. Thus Lord Maugham L.C. in A-G for Alberta v. A-G for Canada[45] said "It must be remembered that the object or purpose of the Act, in so far as it does not plainly appear from its terms and its probable effect, is that of an incorporeal entity namely, the Legislature, and, generally speaking, the speeches of individuals would have little evidentiary weight."[46]

This rule has been firmly applied in Canadian constitutional law in respect of speeches by members of parliament. Thus in Utah Co. of the Americas and Texada Mines Limited v. A-G B.C.[47] the trial judge took judicial notice of press and radio statements by Ministers of the Crown. On appeal the Supreme Court of Canada held that the trial judge had not based his decision on the unproven statements and that evidence to prove them would have been inadmissible. This principle was adopted in A-G v. Readers' Digest Association (Canada)[48] where the Supreme Court held that a speech of the Finance Minister was not admissible to show

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45 op.cit.

46 [1939] A.C. 117 at 131.

47 (1959) 19 D.L.R. (2d) 705.

48 op.cit.

that legislation was colourable. There have been conflicting views expressed as to the admissibility of Royal Commission and Committee reports. Thus in Home Oil Distributors Ltd. v. A-G B.C.[49] Davis J. stated "Generally speaking the Court has no right to interpret legislation by reference to such extraneous material as the evidence taken before and the report of a public inquiry under a Royal Commission."[50] The learned judge went on to cite with approval the judgment of Lord Wright in Assam Railways and Trading Co. v. Commissioner of Inland Revenue[51] where he held that a Royal Commission report was not admissible in evidence for the purpose of showing the intention i.e:- the purpose or object of an Act. Again in the Readers' Digest Assoc. Case[52] Cartwright J. in delivering the judgment of himself and Locke J. said "there is no decision which requires us to hold that a report of a Royal Commission made prior to the passing of a statute and relating to the subject matter with which the statute deals, but not referred to in the statute is admissible in evidence in an action

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49 [1940] S.C.R. 444.

50 ibid p.452.

51 [1935] A.C. 445.

52 op.cit.

seeking to impugn the statute. In my opinion the general rule is that if objected to it should be excluded."[53]

On the other hand Lord Denning M.R. used a report of a committee in Letang v. Cooper[54] to see what was "the mischief at which the Act was directed" i.e: "to get the facts and surrounding circumstances from the report, so as to see the background against which the legislation was enacted."[55] The learned Master of the Rolls further stated[56] that "This is always a great help in interpreting (the Act) ." Lord Halsbury made a similar approach in Eastern Photographic Materials Co. v. Comptroller General of Patents.[57] In the most recent case on the matter[58] the question before the Appellate Division of the Supreme Court of Alberta was whether certain committee reports were admissible to give the court background information as to the Communal Property Act 1955 (Alta.) the constitutional validity of which was being impugned. During a review of the authorities

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53 ibid p.791.

54 [1964] 2 All E.R. 929.

55 ibid p.933.

56 ibid. p.933.

57 [1898] A.C. 517 at 575.

58 Walter v. A-G Alta. (1967) 58 W.W.R. 385.

McDermid J.A. (with whom Smith C.J.A. and Porter J.A. agreed) said[59] "The question of the admissibility of the report of a commission was left open by the Supreme Court of Canada in A-G Can. v. Readers' Digest Assoc. (Canada) Ltd."[60] His Lordship then proceeded to refer to the reports not as direct evidence of intention but "for the purpose of ascertaining the mischief at which the Act was directed."[61] The authorities relied on in reaching this decision were the judgment of Ritchie J.[62] in the Readers' Digest Case[63] and Letang v. Cooper.[64] In the first case the following statement was made: "As the reports were introduced without objection by counsel for background information, we are .... entitled to use them .... as a source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy."[65] The other

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59 ibid p.403.

60 op.cit.

61 op.cit. p.405.

62 with whom Maitland J. agreed.

63 op.cit.

64 op.cit.

65 op.cit. p.796.

judges in the Walter Case[66] Johnson and Kane J.J.A. held that "in determining the validity of an Act .... the reports of committees which recommended changes which were made in the legislation are proper matters to be considered."[67]

It would seem therefore that on the balance of authority a Royal Commission or committee report will be admissible not as direct evidence of intention but as background information. In a unitary state where there are few curbs on parliamentary power there is no necessity to look at the purpose of an Act for its interpretation although such purpose may be of assistance. The historical choice then of English law to preclude certain forms of evidence of such purpose whilst arbitrary was nevertheless consistent with its idea of parliamentary sovereignty. In a federal state on the other hand the first question regarding an Act is whether it is within power. No doubt it would be possible to construct a division of powers based entirely on criteria extraneous to purpose but this was not done in Canada. The result is then that it is essential that evidence of purpose be admitted to aid in constitutional adjudication in Canada

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66 op.cit.

67 ibid p.393.

and one would wish for legislative history to be available to the court.[68] Davis J. in Home Oil Distributors Ltd. v. A-G B.C.[69] recognized this policy distinction in the application of the general rule of inadmissibility to federal as contrasted with unitary states when he said[70] "A rule somewhat wider than the general rule may be necessary in considering the constitutionality of legislation under a federal system where legislative authority is divided between the central and local legislative bodies." The necessity for the distinction can be seen most acutely in the case of colourable legislation. The results of a complete bar to admission would be that legislation for an ultra vires purpose could be sustained if as a matter of form it complied with the relevant section of the B.N.A. Act. This result

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68 For a judicial plea for more evidence to be led of facts that will assist the court in examining the purpose of the legislation see Porter J.A. in Walter v. A-G Alta. op.cit. at p.387 where dealing with a question of the constitutionality of a statute that surreptitiously struck at the Hutterite community he said: "We should know something of the consequences of the development of these colonies on municipal government, on telephone communication, on transportation for school purposes, on snow clearance, and all those other elements which go for better rural living,". His Lordship gave further examples and continued, "These I cite as examples of the facts that should be before us if we are to examine the true purpose of the legislation."

69 op.cit.

70 ibid p.453.

the Canadian courts have vehemently and steadfastly denied.[71] Thus Lord Maugham L.C. in A-G Alta. v. A-G Can.[72] asserted "It is not competent either for the Dominion or a province under the guise, or the pretence, or in the form of an exercise of its powers to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other: A-G Ont. v. Reciprocal Insurers[73]; In Re The Insurance Act of Canada[74] Here again, matters of which the Court would take judicial notice must be borne in mind, and other evidence in a case that calls for it."[75] Another example of the same judicial attitude is the joint judgment of Taschereau, Rinfret and Crockett J.J. in Lower Mainland Dairy Products Board v. Turner's Dairy Limited[76] wherein it was said "In certain cases in order to avoid confusion extraneous evidence is required to facilitate the analysis of legislative enactments and thus disclose their aims which

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71 Vide Lord Atkin in Ladore v. Bennett [1939] A.C. 468 at 482 and the decision of the P.C. in P.A.T.A. v. A-G Can. [1931] A.C. 310.

72 op.cit.

73 [1924] A.C. 328.

74 [1932] A.C. 41.

75 italics mine - author. op.cit. pp.130-131.

76 [1941] S.C.R. 573.

otherwise would remain obscure or even completely concealed. The true purposes and effect of legislation, when revealed to the courts are indeed very precious elements which must be considered in order to discover its real substance. If it were held that such evidence may not be allowed and that only the form of an Act may be considered, then colourable devices could be used by legislative bodies to deal with matters beyond their powers."[77]

On policy the rule is at variance with purposive constitutional interpretation in Canada. It would be convenient to suggest that it should be abandoned in the Constitutional arena but the weight of recent authority especially the Readers' Digest Case[78] precludes this. It is therefore incumbent on the constitutional lawyer to investigate exactly what is the ambit of the general rule. The types of evidence that have so far been excluded

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77 ibid p.583 - This rule was applied in Anthony v. A-G Alta. [1943] S.C.R. 320 and see also the judgment of Rinfret C.J. in Reference re Validity of Wartime Leasehold Regulations [1950] S.C.R. 124 in which he held "no doubt anybody attacking Parliament's legislation as colourable would have to introduce evidence of certain facts to support the contention, for it can hardly be expected that the Order of Reference would contain material of a nature to induce the Court to conclude as to the colourability of the legislation." (page 127)

78 op.cit.

are press statements by members of parliament[79] and speeches in parliament by Ministers of the Crown.[80] Against this there have been numerous references to associated statutes especially where a legislative scheme is involved. In Reference re Alberta Statutes[81] is an example of this.[82] As a matter of principle it is therefore submitted that the exclusion of extrinsic evidence should, in constitutional questions, be limited to those spheres where it has already been applied and that every effort should be pursued to whittle away and ultimately abolish those.[83]

Even if the hurdle of the non use of extrinsic material is overcome there is an equally difficult barrier to the wholesale admission of constitutional facts, viz:- the concept of relevancy coupled with the nature of judicial review. When a court is dealing with a question of constitutional power it inquires whether the statute in issue

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79 Texada Mines Case op.cit.

80 Readers' Digest Assoc. Case op.cit.

81 op.cit.

82 See also Laskin - Book - op.cit. p. 160 and the cases therein cited.

83 The U.S. Supreme Court has admitted both speeches and reports of committees on constitutional issues vide Wright v. Vinton Branch of Mountain Trust Bank of Roanoke (1937) 300 U.S. 440 per Brandeis J. and generally Laskin op.cit. page 171.

attains an end 'in relation to' a specified power[84] as contrasted with merely 'affecting' that power. Hence facts will be relevant if they assist in resolving that enquiry, i.e:- evidence could be introduced to show that a statute although outwardly within the power was in fact outside it.[85] Lest it be thought that such an expansive approach is tantamount to heresy in Canada, it should be pointed out[86] that the Australian High Court which is probably more 'legalistic' than its Canadian counterpart[87] has admitted evidence to show both that a federal statute whilst purporting to deal with a subject outside the federal powers was intra vires and that a federal statute whilst purporting to be within federal powers was ultra vires those powers.[88]

Hence the concept of relevancy by itself is far from

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84 Gold Seal Ltd. v. Dominion Express Co. op.cit. and Munro v. National Capital Commission op.cit.

85 This is 'colourable legislation' - see cases cited previously and Lord Greene in A-G B.C. v. Esquimalt & Nanaimo Railway [1950] A.C. 87 at 114.

86 As P.H. Lane has done in Art. op.cit. p. 113.

87 Vide Sir Owen Dixon's address on being sworn in as Chief Justice (1952) 85 C.L.R. XI at XIV and S.A. De Smith - Book Review (1957) 20 M.L.R. 681 at 682.

88 P.H. Lane op.cit p.115 and R. v. Burgess Exp. Henry (1936) 55 C.L.R. 608 at 629 and O'Sullivan v. Noarlunga Meat Ltd. (1954) 92 C.L.R. 565 at 596.

being a restriction. The restrictive element is introduced when it is coupled to the scope of judicial review. Lane[89] has indicated that there is no written basis in the B.N.A. Act for constitutional review by the judiciary. Whilst this may be so the fact remains that the courts have asserted such a doctrine which assertion has been sanctified by practice. The scope of judicial review is limited. It has no application to whether the legislature has chosen the best method of achieving its aims. It is only concerned with whether the actual method chosen is within the legislature's power. Hence in theory constitutional facts are relevant if they go to the latter proposition but are irrelevant if they go to the former. These two rules are however not as clear cut as would at first sight appear. Thus if it is claimed that a particular statute is within a power of its enacting legislature, facts which show that the effect of the statute is to carry out something within that power or to attain an end 'in relation to' the power are relevant whereas the identical facts are irrelevant if they are only sought to be admitted to show that the legislature could otherwise have achieved its object and

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89 P.H. Lane - Article - 'Judicial Review or Judgment by the High Court' 5 Syd. L.R. 203 at 203.

therefore that the legislation is colourable.[90] In Australia these two sometimes conflicting principles have been crystalised into a rule that where the question of purpose or effect of legislation is in issue as tending to show that the statute was within power evidence will be admitted to show that some expert opinion was prepared to say that the means chosen by the federal parliament would have a within power effect.[91] That is, if a situation arose where on the balance of expert opinion the effect of a federal statute would be X, and X was beyond federal power, the statute would still be upheld if there was some expert opinion that the means chosen by the legislature would have Y effect and Y was within its power. It seems likely that Canadian courts would adopt a similar solution at least in so far as the reconciliation is based on a weak presumption of the validity of federal statutes.[92] Accordingly it is submitted that the scope for tendering evidence of constitutional facts in Canada is wider than has previously been acknowledged.

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90 This analysis is based on P.H. Lane - Article - 'Facts and Constitutional Law' op.cit.

91 Lane ibid p.119.

92 For such weak presumption in Canada see Valin v. Langlois 5 App.Cas. 115 at 118.

When it is realized that the determination of the validity of legislation under S.91 and S.92 is an evaluative judgment the scope of the double aspect doctrine can be better appreciated. Under this doctrine legislation can be intra vires the federal parliament even though similar legislation could be enacted from another aspect or for another purpose by the provincial legislatures and vice versa. The doctrine was first stated in Hodge v. The Queen[93] where the Privy Council said[94] "subjects which in one aspect and for one purpose fall within S.92 may in another aspect and for another purpose fall within S.91." Laskin[95] observes that this doctrine was derived from Chief Justice Marshall's dictum in Gibbons v. Ogden[96] where that learned judge said[97] "All experience shows that the same measure or measures scarcely distinguishable from each other may flow from distinct powers; but this does not prove that the powers themselves are identical." Now all this double aspect doctrine is really stating is that when examining a

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93 (1883) 9 App.Cas. 117.

94 ibid p.130.

95 op.cit. p.90.

96 (1824) 22 U.S. 1.

97 ibid p.90.

particular statute the courts may hold that it has a sufficient nexus with a S.91 power to be valid and that at another time a statute dealing with similar matters may be held to have a sufficient nexus with a S.92 power to be valid. This is a result of factors such as effect, nature of the whole Act and purpose. It flows from the fact that no division of powers can ever be completely watertight. Furthermore this concept of dual aspect is consistent with the general method of interpretation previously laid down. Thus a court in answering the first question as to whether the statute is prima facie within a S.92 power may decide that it has a nexus with that power sufficiently close to be so classified and then go to hold in answering the second question that it has a close nexus with a S.91 enumerated power and thus can only be enacted on a federal level. Yet when another statute on much the same matter is impugned the court may hold that its nexus is closer with S.92 than with the S.91 enumerated power and hence that it can only be valid if enacted by a provincial legislature.

Associated with the idea of an evaluative judgment is the question of severability. Where certain sections of a statute are ultra vires there are two situations that may occur. Firstly the bad sections may be so inextricably interwoven with the rest of the Act as to be incapable

of being deleted without robbing the Act of effect in which case the whole Act will be ultra vires. Secondly the bad sections may deal with only part of what is contemplated by the Act and therefore the residue will be able to stand on its own feet in which case the bad section will be ultra vires but the residue will be upheld as being within power. The criterion for determining severability was clearly laid down by Viscount Simon in A-G Alberta v. A-G Canada (Alberta Bill of Rights Act Case)[98] wherein delivering the Privy Council's advice, he said the question was whether[99] "what remained is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without the part that survives at all." Besides invoking a fiction, viz:- the legislative intent, this test of severability is an evaluative judgment itself. As it will only be applied where part of the statute has been held to be ultra vires which is itself a value judgment the test of severability is building evaluation on evaluation. Whilst this in itself is not

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98 [1947] A.C. 503.

99 ibid p.518.

objectionable it illustrates the fact that to regard the question of whether or not to sever the ultra vires parts of a statute as being based on an objective criterion is as accurate as so regarding the 'reasonable man' concept in negligence.[100]

A classic example of judicial failure to appreciate the evaluative judgment whereby a statute is said to be within either a S.91 enumeration or a S.92 power can be found in the ancillary or incidental doctrine. The best statement of this concept is the third of Lord Tomlin's propositions in the Fish Canneries Case[101] viz:- "it is within the competence of the Dominion Parliament to provide for matters, which, though otherwise within the legislative competence of the provincial legislature are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject expressly enumerated in S.91." This statement which is based on earlier pronouncements in A-G for Ontario

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100 In so far as both criteria exclude the use of other criteria they may properly be termed 'absolute'. However the opposite of 'absolute' is not 'subjective' but 'relative'. Both the test of severability and the 'reasonable man' idea are 'absolute subjective' concepts.

101 op.cit. at p.118.

v. A-G for Canada[102] and A-G Ontario v. A-G Canada,[103] received judicial approval in In Re Silver Bros.,[104] In Re Aeronautics Reference[105] and C.P.R. v. A-G B.C.[106]

It is apparent that either a statute comes within a S.91 enumerated power or it does not do so.[107] The whole idea of setting up a division of powers is for certain powers to be given to body A. and certain to body B. Of course certain powers may be given to both A and B and it is also possible for both bodies to share certain powers owing to faulty drafting but neither form of concurrency denies that for example body A has the power it merely means that body B may have it also. Hence to suggest that something is necessarily incidental to a power is in reality only saying that it is so closely connected with the power as to be regarded as part of it. On this basis the doctrine

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102 [1894] A.C. 189. (Voluntary Assignments Case)

103 (Local Prohibitions Case) op.cit.

104 op.cit.

105 op.cit.

106 op.cit

107 Looked at in another way a statute although not as a matter of logical necessity belonging within a S.91 power, is deemed either to have a sufficient nexus or not to have a sufficient nexus with that power.

of ancillary or incidental powers is redundant. Moreover it is a dangerous doctrine as can be seen from the judgment of Duff J. in Reference re Waters and Water Powers[108] where he asserted that a difference existed between powers within the S.91 enumerated articles and those ancillary or incidental to such enumerations. Thus he stated[109] "it is only the exclusive authority of the Dominion under the enumerated heads of S.91 which is accorded the primacy intended to be declared by those words. In themselves they have not the effect of giving pre-eminence to the incidental or ancillary powers which are not strictly exclusive." Now although this approach has not found favour with subsequent courts[110] it clearly indicates that dividing up the S.91 enumerated powers can lead to difference in result.

The redundancy of the ancillary doctrine was judicially noticed in A-G Can. v. Nyorak[111] where Judson J. held "legislation of this kind comes squarely under head 7 of S.91 notwithstanding the fact that it may incidentally

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108 [1929] S.C.R. 200.

109 ibid p.217.

110 Vide Lord Tomlin in the Fish Canneries Case op.cit.

111 (1962) 33 D.L.R. (2d) 373.

affect property and civil rights within the Province. It is meaningless to support this legislation as was done in the Grand Trunk Case[112] on the ground that it is necessarily incidental to legislation in relation to an enumerated class of subject in S.91." Again in Commission Du Salaire Minimum v. Bell Telephone Co. of Canada[113] the Supreme Court was faced with deciding whether minimum wages legislation of Quebec applied to federal works or undertakings in the absence of federal legislation. Martland J. in delivering the Court's judgment declined to hold that the federal power to legislate on hours of work was ancillary or incidental to its power in relation to federal undertakings and held that it was a 'vital part' of such power.

The question then is not whether a statute is on a matter so closely connected with a S.91 power to be said to be incidental or ancillary to it but simply whether it can be said to fall within the ambit of that power.[114]

If the nexus analysis of interpretation is adopted questions of paramountcy between federal and provincial

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112 [1907] A.C. 65.

113 (1967) 59 D.L.R. (2d) 145.

114 For another criticism of the ancillary doctrine see Laskin - Article - "Peace, Order and Good Government Re Examined" (1947) 25 Can. Bar Rev. 1054 at 1061.

legislation will only occur where the double aspect doctrine is applied. This is because such questions can only arise where both statutes in the absence of the other are valid and under the nexus method the only case where both statutes would be valid is where the double aspect doctrine applies.[115] It is well established that in the event of a clash between federal and provincial legislation the former shall prevail.[116] The major problem in the area is to determine when two statutes clash so that application of a paramountcy doctrine is required. The solving of this problem is not assisted by such loose phrases as "There must be a real conflict between the two Acts; that is the two enactments must come into collision."[117]

There are two methods for determining whether you have clashing legislation. The first of these is the 'cover the field' test. This test has been adopted for determining

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115 Under the double aspect doctrine a federal statute may have a sufficiently close nexus with a federal power and a provincial statute on a similar matter have an equally close nexus with a provincial power but not a sufficiently close nexus with a federal power for it to be ultra vires.

116 Tennant v. Union Bank of Canada op.cit; Local Prohibitions Case op.cit; Fish Canneries Case op.cit; C.P.R. v. A-G B.C. op.cit.

117 Local Prohibitions Case op.cit at p.366.

when there is 'inconsistency' under S.109 of the Australian Constitution. That section provides:- "When a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail and the former shall to the extent of the inconsistency be invalid." A classical statement of the 'cover the field' test is that of Isaacs J. in Clyde Engineering Co. Ltd. v. Cowburn[118]--- "If a competent legislature evinces its intention to cover the whole field that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field." Again in Ex.p. McClean[119] Sir Owen Dixon (as he later became) in applying the test points out that "inconsistency does not lie in the mere co-existence of two laws susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment completely, exhaustively or exclusively what shall be the law governing the particular conduct or matter to which its attention is directed. When a federal statute discloses such an intention it is inconsistent with it for a State to govern the same conduct or matter."[120]

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118 (1926) 37 C.L.R. 466 at 489.

119 (1930) 43 C.L.R. 472.

120 ibid p.483.

There are then three constituent parts of the 'cover the field test'---a subject matter or field---a comprehensive coverage of that field by the federal authority and a State or provincial law on a matter inside that field.[121] Hence in order to determine by the 'cover the field' test whether the two statutes clash there are three value judgments to be made: Firstly what is the relevant field,[122] secondly whether the federal legislation is or is not meant to be comprehensive and finally whether the State or provincial legislation is in the field so covered.

In Canada there has been some judicial attention paid to this test. Thus in Forbes v. A-G for Manitoba[123] the Privy Council said[124] "the doctrine of the occupied field applies only where there is a clash between Dominion and provincial legislation within an area common to both." As the doctrine of the 'occupied field' is really a test to decide whether or not there is a clash between federal and provincial legislation it is apparent that the Privy Council

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121 Lane - Book - op.cit. p.231.

122 This will largely depend on the level of abstraction at which the statute is viewed.

123 [1937] A.C. 260.

124 ibid p.274.

failed to fully appreciate the concept. Again in O'Grady v. Sparling[125] Cartwright J. in a dissenting judgment with which Locke J. concurred said[126] "Assuming .... that S.55(1) (of the Provincial legislation) has a provincial aspect and so would be valid until Parliament occupies the field in which it operates it is necessary to consider whether Parliament has done so. In my opinion Parliament has occupied the field." Previously in Reference re S.92(4) of the Vehicles Act 1957 Saskatchewan C.93[127] the same learned judge held "I am of the opinion that S.92(4)d of the Vehicles Act of Saskatchewan invades a field occupied by valid legislation of Parliament, is in direct conflict with that legislation and cannot stand."[128] In Mackay v. R.[129] the Supreme Court inclined to the view that federal parliament had occupied the field in respect of signs for federal elections but found it unnecessary to decide the point. Yet another example of judicial approval of the 'cover the field' test in Canada is the statement of

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125 [1960] S.C.R. 804.

126 ibid p.820.

127 [1958] S.C.R. 608

128 ibid p.622.

129 [1965] S.C.R. 798.

Lord Tomlin in the Fish Canneries Case.[130] "There can be a domain in which provincial and dominion legislation may overlap in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail."[131] Lord Tomlin relied on Grand Trunk Railway of Canada v. A-G Can.[132] as authority for this proposition which has subsequently been judicially approved.[133]

The 'cover the field' test then has been applied in Canada. It is not inconsistent with the double aspect doctrine as may at first sight appear. Such a suggestion stems from the idea that where you have federal and provincial legislation dealing with a similar subject matter you cannot adopt as a criterion for deciding whether the legislation clashes the subject matter or field of the paramount legislation. This idea is based on a misconception of the 'cover the field' test. It is not a test of subject matter

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130 op.cit.

131 ibid p.118.

132 op.cit.

133 In Re Aeronautics Reference op.cit; In Re Silver Bros. op.cit; C.P.R. v. A-G B.C. op.cit.

for as Wynes[134] aptly observes[135] "The test of 'covering the field' is of course only another way of expressing the principle that it is the intention of the federal legislation which is to be ascertained in every case. The federal law may, for example, contemplate the co-existence of State provisions." It is perfectly consistent to say that where both federal and provincial legislation is valid because of the double aspect doctrine that whether or not they clash will depend on the intention of the federal parliament and this is all the 'cover the field' test purports to do. It seems that this basis of intention has not been fully understood. Thus the Privy Council in the Grand Trunk Case[136] talked in terms of legislation overlapping. F.P. Varcoe[137] criticized the overlapping idea by asserting "It is not provincial and Dominion legislation that overlap. If they did, the provincial legislation would be automatically nullified. The overlapping is between classes of subjects

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134 W.A. Wynes - book - 'Legislative, Executive and Judicial Powers in Australia' 2nd Edition - Sydney - 1956.

135 ibid p.133.

136 op.cit.

137 F.P. Varcoe - book - 'The Constitution of Canada', Toronto - 1965.

or heads of legislative power."[138] With all due respect to the learned author this statement shows a failure to comprehend the basic concept of the 'cover the field' test. Whilst it is true that it is the vagueness in classes of subjects that causes overlapping, it is nevertheless the legislation that overlaps. One is not considering in constitutional questions in this area whether S.92(16) and S.91(27) for example, overlap each other[139] but whether a statute valid under federal power and a statute valid under provincial power are able to stand together. In this sphere there are two distinct questions: Firstly whether the provincial statute comes within a S.92 power and assuming that it does whether it also comes within S.91. If it does come within S.91 no question of paramountcy can arise as the federal parliament has exclusive power to deal with S.91 matters. If it does not so fall within S.91 and a federal statute purports to deal with the same act or thing

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138 ibid p.43.

139 As a side comment it should be noticed that the structure of the B.N.A. Act is to deny concurrency of power and hence ex hypothesi the various heads of SS.92 and 91 cannot overlap. When paramountcy questions arise it is because the lack of complete separation has enabled statutes to fall within the power of both legislatures under the double aspect doctrine.

or person then the second question is posed viz:- whether the two statutes clash with the consequence that if they do the federal legislation will prevail. Unfortunately the Canadian courts have shown a tendency to confuse the question of validity with the question of whether the legislation clashes.

Thus in A-G for Ontario v. Barfried Enterprises Limited[140] Martland J. said[141] "In these circumstances there is a direct conflict between the two statutes and .... the legislation of the Canadian parliament validly enacted must prevail," however he then continued, "In my opinion therefore the legislation in question is ultra vires the Ontario legislature."

The second major test for deciding whether or not the two statutes meet, conflict or clash is the 'Double Obedience Test'. Under this theory two statutes do not conflict unless it is impossible to comply with both at the same time. This view was taken by Judson J. in delivering the majority judgment in O'Grady v. Sparling[142] thus---"There is no conflict ..... Both provisions can live together and

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140 [1963] S.C.R. 570.

141 ibid p.583.

142 op.cit. p.811.

operate concurrently." Again in Smith v. The Queen[143] Martland J. held, "it may happen that some acts might be punishable under both provisions and it is in this sense that these provisions overlap. However even in such cases there is no conflict in the sense that compliance with one law involves breach of the other. It would appear therefore that they can operate concurrently."

This test was adopted in Fawcett v. A-G for Ontario[144] and had previously been suggested by Roach J.A. in R. v. Pee Kay Smallwares Limited.[145] Laskin is on the cases undoubtedly correct when he talks in terms of the modern trend being towards the complementary approach and it is also valid to point out as he does[146] that under the

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143 [1960] S.C.R. 776 at 800.

144 ibid p.583.

145 [1947] O.R. 1019.

146 B. Laskin - op.cit throughout parts 3 & 4 of Chapter III and especially at page 140 the learned author treats the terms 'paramountcy' and 'complementarity' as being opposite to one another and thus talks of a 'recession from paramountcy' to express the idea of double obedience replacing the cover the field test. This use of the term 'paramountcy' ignores the fact that there is no dispute that where valid federal and provincial legislation clash the former will prevail. The area of difficulty is in determining when the statutes do clash. Strictu sensu there is no retreat from 'paramountcy' only a change from one test of whether legislation clashes to another. To be fair however it is true that under the double obedience test there will be fewer cases of conflict than where the cover the field test is applied and to that extent Laskin is correct in regarding the adoption of the test as marking a recession in the amount of use of the paramountcy doctrine.

complementary theory or double obedience test there will be cases of double sanction because of the discrepancy between the penalties of the two Acts. However it may be that in such cases use would be made of the idea expressed in the Fawcett Case[147] that there will be considered to be a conflict where the results of applying the two statutes would be different. If so the 'double obedience' test would be modified into an 'identical result' test which would, as Laskin observes,[148] be difficult to reconcile with O'Grady v. Sparling.[149]

As both tests then have the weight of judicial authority behind them the question is immediately posed as to which one should be adopted. It is suggested that as a matter of the predictability of the validity of the statutes the 'double obedience test' should be applied. There are three reasons for this; firstly the more recent authorities such as O'Grady v. Sparling; Fawcett's Case; Barfried's Case; and Smith v. The Queen[150] are in favour of the idea of dual

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147 op.cit.

148 op.cit. p.142.

149 op.cit. - it would also be contrary to the Barfried Case principle discussed earlier.

150 all op.cit.

obedience. Secondly where a judge finds that a provincial statute has a closer nexus with a S.92 power than with an overriding S.91 power he has made an evaluative judgment in favour of the validity of the Provincial Act and he is unlikely to retreat from that assessment to say that although the Act is valid it has no effect because of a conflict with federal legislation under the head of power that he has just considered not to override the provincial power. Indeed most of the cases cited by Varcoe[151] in respect of the overlapping doctrine really turn on the question of whether the provincial Act was rendered ultra vires by an overriding S.91 enumerated power. Finally as pointed out previously the 'cover the field' test involves three evaluative judgments viz:- what is the field, is the federal legislation intended to be exhaustive of that field and has the provincial legislation entered on that field. On the other hand the 'double obedience test' involves usually none and in the Barfried situation only one such judgment. As the original

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151 Varcoe op.cit. pp. 59 to 66 e.g.- Johanneson v. West St. Paul [1952] 1 S.C.R. 292; C.P.R. v. Parish of Notre Dame de Bonsecours [1899] A.C. 367; Madden v. Nelson & Fort Shepperd Railway [1899] A.C. 625; Toronto v. Bell Telephone Co. [1905] A.C. 52; A-G for Ontario v. Winner [1954] A.C. 542; John Deere Plow Co. v. Wharton [1915] A.C. 330; Great West Saddlery Co. v. The King [1921] 2 A.C. 91, and A-G for Manitoba v. A-G for Canada op.cit.

aim of the tests is to provide a solution to the evaluation question (i.e. do the statutes clash?) it is scarcely logical to substitute three evaluations for one.[152]

On the other hand it would be naive to suggest that the double obedience test does not have problems in application. Three major difficulties loom besides that of the infliction of the double penalty mentioned earlier. Thus there is the case of the permissive federal law and a prohibitory provincial law. Both statutes can be obeyed but it seems to do violence to the idea of a paramount federal law for as a practical matter it will be the provincial enactment that will be obeyed. Secondly there is the case of a federal law permitting an act to be done subject to certain requisites and a provincial law prohibiting it completely. The third situation is where the federal law permits an act to be done subject to certain requisites and a provincial law permits

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152 The doctrine of 'cover the field' is particularly suitable for Australia with its large area of concurrent powers of the Commonwealth and the States but even so the 'double obedience test' has not been entirely abandoned. The test is usually applied before the 'cover the field' test i.e:- if the statutes are incapable of double obedience there is 'inconsistency' while if they are so capable they may still be inconsistent if the 'cover the field' test is not satisfied; vide Swift Australian Co. Pty. Ltd. v. Boyd Parkinson (1962) 108 C.L.R. 189 at 207, and Collins v. Charles Marshall Pty. Ltd. (1955) 92 C.L.R. 529 at 547 cited by Lane - book - op.cit. p.238.

the same act subject to some other requisites.[153]

The realisation that the evaluative judgment of nexus provides the answers to the questions posed in the method of interpretation, permits the doctrines of interpretation and especially those of severability and paramountcy to be viewed in their true role. When this evaluative judgment is recognised it only remains to select the factors that are likely to guide the court's actions in order for some degree of predictability to be attained in the quagmire of constitutional interpretation.

These factors will be largely dependent on the particular heads of matters in S.91 and S.92 that are being considered. It is proposed therefore to use the criminal law power as an example and to consider some of the factors that guide the courts in the interpretation of that power.

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153 In Australia all three of these examples have been held to be cases of inconsistency vide P.H. Lane - book - op.cit. and the cases cited therein at pages 229 and 230. The answer to the first situation in Canada would appear to be that there is no conflict vide A-G Ontario v. Barfried Enterprises Limited op.cit.

III. FACTORS IN INTERPRETING THE CRIMINAL LAW POWER

The so called 'criminal law power' is contained in S.91(27) of the B.N.A. Act which provides that "the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the Classes of Subjects next hereinafter enumerated; that is to say .....(27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." Now the very existence of such a class of matters presupposes something distinctive about the criminal law, i.e: there is some area of activity that by its very nature falls within the criminal law. However under classical common law theory this is simply not factually accurate. "Crimes" have been defined as "acts or defaults which tended to the prejudice of the community and were forbidden by law on pain of punishment inflicted at the suit of the Crown."[1] It has thus been truly said that it would be possible to end crime immediately merely be enacting that every act or default which is now punishable at the suit of the Crown should no longer be so. It is readily apparent that on this theory it would be possible for the Dominion parliament to acquire

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1 per P.G. Osborn 'A Concise Law Dictionary' 4th Edition 1954 p.108.

enormous jurisdiction simply by tacking a penalty at the suit of the Crown onto a specific action or default thereby constituting such action or default, a crime and the Act one dealing with criminal law.

It was no doubt the recognition of this lack of intrinsic limits to the power that prompted Viscount Haldane to lay down his confined view of the scope of 'criminal law' in the Board of Commerce Case[2] where he referred to S.92(27) as "enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence." Such a view derived support from the existence of S.92(15)[3] which provides, "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say:-----(15) The Imposition of Punishment by Fine, Penalty or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section."

Nevertheless the learned law lord was laying down an idea essentially foreign to English jurisprudence where often

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2 [1922] A.C. 191.

3 of the B.N.A. Act.

the same action is both a tort and a crime e.g:- the stealing of another person's goods or the physical striking of another person. This was pointed out by Lord Atkin in P.A.T.A. v. A-G for Canada[4] thus:- "Criminal Law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality---unless the moral code necessarily disapproves of all acts prohibited by the State, in which case the argument moves in a circle." On the authority of this case together with A-G for Ontario v. Hamilton Street Railway;[5] A-G for British Columbia v. A-G for Canada;[6] and Lord's Day Alliance v. A-G for British Columbia[7] the Haldane confined concept of criminal law is now to be regarded as rejected.

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4 op.cit. at p.324.

5 [1903] A.C. 324.

6 Reference re S.498A of the Criminal Code Case [1937] A.C. 368.

7 [1959] S.C.R. 497.

With the rejection of this concept the only limit on the criminal law power was the necessity for a penalty at the instigation of the State for disobedience. However the courts have expressly denied that the mere imposition of a penalty for failure to comply with a statutory enactment renders that enactment criminal law either from the federal position[8] or from that of the Provinces.[9]

Hence the courts have been faced with making an evaluative judgment as to whether an impugned statute has a sufficient nexus to a head of power which head of power has no intrinsic limits or definitional criteria. It is this lack of ostensible limits that makes the criminal law power so useful as an example of a factorial approach to constitutional interpretation for it effectively denies to the court a close reliance on a priori deductive reasoning. This is not to say that the interpretation of the criminal law power is in fact more evaluative than the interpretation of other parts of sections 91 and 92 but only that it is more readily apparent in the case of criminal law that the courts are being evaluative or selective and not deductive.

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8 Toronto Electric Commissioners v. Snider op.cit. see also A-G Ont. v. Reciprocal Insurers Ltd. op.cit.

9 O'Grady v. Sparling op.cit.

The broad general categories which act as the factors that will lead the court to a particular decision on a question involving S.91(27) are the construction of the impugned Act, its overall purpose and its direct and immediate effect. By construction of the statute is meant the imposition of penalties, the number of sections without such sanctions and the manner of expression of the statute. Whilst it is true that the mere fact that an Act imposes penalties does not make it fall within S.91(27) either from a federal or a provincial aspect, no federal statute that did not have some form of immediate sanction would fall inside the subsection's ambit. Conversely a provincial Act containing no penalties will not be held ultra vires as being on criminal law. As a corollary to this the number of clauses or sections with sanctions attached thereto will be an inducement to categorisation. Thus the more clauses with sanctions there are, the more likely the statute is to be held to be criminal law. Furthermore the manner of expression of the statute is a guide. Where the Act exhibits the idea of prohibiting a certain action it is more likely to be held to be criminal law than otherwise.

This factor is however very weak at its best as there are numerous examples of provincial legislation that ex facie are criminal statutes and several instances of

'regulation' by means of an absolute prohibition subject to exceptions that have been upheld as within S.91(27).[10]

The distinction between direct and immediate effect and overall purpose is one between the results of an action and the aims thereof. Lord Summer in the Provincial Sale of Shares Case[11] declared that in determining the nature and character of legislation one examines the effect thereof and not its purpose. These words were adopted by Estey J. in his dissenting judgment in Johnson v. A-G for Alberta[12] where he held that the Alberta Slot Machine Act, 1942 was valid and by Cartwright J. in A-G for Canada v. Readers' Digest Assoc.(Canada) Ltd.[13] Such an attitude represents a failure to appreciate the true nature of the decision being given. It is not a priori but is evaluative. There is not one single true nature and character of the legislation as the question of true nature and character is a value judgment and hence there can be many different opinions each one of which could lead to a different result in terms of whether

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10 See e.g:- Re Race Tracks and Betting (1921)49 O.L.R. 387 and O'Grady v. Sparling op.cit.

11 A-G for Manitoba v. A-G for Canada [1929] A.C. 260 at 268.

12 [1954] S.C.R. 127 at p.142.

13 op.cit. p.793.

the legislation falls under S.91 or S.92.[14] Once this is grasped it becomes absurd to deny to the court the use of any aid to arriving at an informed opinion as to whether the statute has a sufficient nexus to its head of power. Accordingly if purpose of the statute is a help in reaching such an opinion it should be utilised. Moreover the Privy Council and Canadian courts have always looked to statutory purpose and it has been a decisive factor in numerous cases. For example in A-G for Alberta v. A-G for Canada[15] Lord Maugham L.C. in delivering the advice of the Privy Council said[16] "The next step in a case of difficulty will be to examine the effect of the legislation ..... A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question." Again in Lymburn v. Mayland[17] the Privy Council in upholding the Alberta Security Frauds Prevention Act (1930) was of the opinion:[18] "There is no reason to doubt that the

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14 Restated - the decision is not as between right and wrong but between one opinion and another.

15 Alberta Bank Taxation Case op.cit.

16 ibid p.130.

17 [1932] A.C. 318.

18 ibid p.324.

MAIN OBJECT[19] sought to be secured in this part of the Act is ..... ." Similarly Lord Macnaghten in A-G Manitoba v. Manitoba Licence Holder's Association[20] declared[21] "In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil rather than the regulation of property and civil rights." Yet another example is the dictum of Locke J. in Johnson v. A-G Alberta[22] - "in essence the Act was directed against gambling ..... In 1935 when the Slot Machine Act was re-enacted its purpose was made even more abundantly clear ....." and Cartwright J. in the same case stated "the conclusion appears to me to be inescapable that the main object of the Act is ....."[23] These statements selected at random show that the courts have been concerned with purpose and have not applied Lord Sumner's dictum.

Furthermore there are two additional reasons why purpose is a matter that should guide the court's decision. In the first place one of the cardinal rules of statutory

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19 italics mine - author.

20 [1902] A.C. 73.

21 ibid p.79.

22 op.cit. p.153.

23 ibid p.164.

interpretation is the Mischief Rule. Indeed as Professor Friedmann has pointed out[24] "The mischief rule expresses both the oldest[25] and the most modern approach to statutory interpretation." Now the mischief rule requires that one should ascertain what was the mischief or evil or wrong that parliament was attempting to remedy in order to interpret the Act i.e:- it requires the ascertaining of the object or aim or purpose of the legislation. Thus Lord Sumner's approach runs contrary to this general method of interpretation.

Secondly there is the case of 'colourable legislation'. It is clear that legislation that is in form within power but which is in actual violation of constitutional limits will not be upheld but will be declared ultra vires as being a mere sham, a pretence, a colourable device.[26] Thus the legislature cannot do indirectly what it is precluded from doing directly.[27] All this concept expresses is the idea

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24 W. Friedmann - Article - 'Statute Law and Its Interpretation' (1948) 26 Can. Bar Rev. 1277 at 1279.

25 It is derived from Heydon's Case in 1584.

26 vide Lord Atkin in Ladore v. Bennett [1939] A.C. 468 at 482.

27 vide Madden v. Nelson & Fort Shepperd Railway op.cit. p.627-8.

that an ultra vires purpose cannot be achieved surreptitiously. Hence it is clear that this line of authority is also contrary to Lord Sumner's proposition.

If it is recognized that purpose or object of the Act in question is a factor guiding the courts in their evaluative judgment and that evidence is able to be introduced in respect of such object or purpose,[28] the next step is to ascertain what is the type of object or purpose that will tend to make the courts lean towards deciding the evaluative question in a particular way. Rand J. in the Margarine Case[29] talked[30] of "some evil or injurious or undesirable effect upon the public against which the law is directed" and again in Johnson v. A-G for Alberta[31] of a "public or community evil". In Russell v. The Queen[32] the reference was to laws "designed for the promotion of public order, safety or morals" while Cartwright J. in Johnson v. A-G for Alberta[33] spoke of "the interests of public morality".

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28 See supra Section II & generally P.H. Lane 'Facts and Constitutional Law' op.cit.

29 op.cit.

30 ibid p.49.

31 op.cit. p.137.

32 op.cit. p.839

33 op.cit. p.164.

There are numerous further examples that could be given.[34] The actual community interests supported in these cases were:- control of gambling by forbidding slot machines,[35] adulteration of dairy products,[36] adulteration of meat products.[37]

It is clear from these cases that the relevant purpose is the safeguarding of public morality, the ensuring of public safety or the preventing of a community evil. In applying the purpose of a statute as a factor in the determination of its constitutional validity it is important to keep the entity that passed the Act firmly in mind as the strength of purpose varies according to whether it is a federal or provincial Act that is being considered.

It is well established that a federal Act the purpose of which is not to safeguard public morals, ensure public safety or prevent a community evil will be held to be outside S.91(27). Thus in the Margarine Case[38] the absence of a benefit to public health proved fatal. Again the

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34 e.g:- Trueman J.A. in R. v. Perfection Creameries Ltd. [1939] 2 W.W.R. 139 - 'public evil' and Macdonald J.A. in Standard Sausage Co. v. Lee [1933] 4 D.L.R. 501 -'public injury'.

35 Johnson's Case op.cit.

36 R. v. Perfection Creameries Ltd. op.cit.

37 Standard Sausage Co. v. Lee op.cit.

38 op.cit.

courts could not find an appropriate object in Snider's Case[39] or in the Reciprocal Insurer's Case[40] and the legislation was struck down. Purpose has also been used to uphold federal legislation. Thus in R. v. Perfection Creameries Ltd.[41] and Standard Sausage Co. v. Lee[42] the legislation was upheld as being aimed at the protection of public health by preventing the adulteration of food. The purpose factor is thus strong when used in relation to federal legislation either negatively or positively.

From a provincial standpoint purpose is considerably weaker as a determining factor. There have been decisions striking down provincial legislation with a 'criminal law' purpose. Thus for example in A-G for Ontario v. Koynok,[43] legislation for preventing the publication of obscene matter was held to be ultra vires the province.[44] On the other hand the courts

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39 op.cit.

40 op.cit.

41 op.cit.

42 op.cit.

43 [1941] 1 D.L.R. 548.

44 In Johnson v. A-G Alberta, op.cit., three of seven Judges of the Supreme Court of Canada (Kerwin, Taschereau and Estey JJ.) held provincial legislation inhibiting gambling by prohibiting slot machines ultra vires. Rand J. held the legislation merely inoperative, but there are indications in his judgment that he might have been prepared to find it ultra vires the province.

have tended to lean in favour of provincial legislation that prima facie was passed for an inappropriate purpose where it has been dealing with an activity that in the absence of the imposition of penalties would fall within the provincial ambit. In these cases the courts have characterised the legislation as being for the purpose of governing or regulating the activity and not as being for the protection of public morality or the ensuring of public safety or the preventing of a community evil. Thus in P.E.I. v. Egan[45] a provincial statute provided for the suspension of a motor driver's licence where the holder drove a vehicle whilst intoxicated. After three offences the licencee was prohibited from holding such a licence. The Supreme Court of Canada held that the Province had the power to prescribe the conditions and manner of use of the highway and this included a licensing system. It then upheld the legislation holding that its purpose and effect was to regulate and govern the conditions under which licences were granted, suspended or forfeited. Again in O'Grady v. Sparling[46] a Manitoba Act providing for driving without due care and attention to be an offence was upheld as being legislation for the purpose

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45 [1941] S.C.R. 396.

46 op.cit.

or object of the regulation and control of traffic on the highways. Similarly in Reference re S.92(4) of the Vehicles Act 1957 Saskatchewan[47] a provincial statute requiring a person to submit to having a sample of his breath taken if he was suspected of driving under the influence of alcohol was upheld as being for the purpose of administering the highways. Probably the locus classicus of this kind of approach is Millar v. The Queen.[48] In that case a licence was granted to Millar to carry on a dance hall. The licence was subject to a condition that the holder should not permit gambling on the premises and was issued pursuant to a municipal by law. Gambling was conducted on Millar's premises without his knowledge and he was prosecuted for breaking the by law. On appeal it was argued that the by law was ultra vires as it was dealing with criminal law. The Manitoba Court of Appeal held that the by law was intra vires. In the course of his judgment Beaubien J.A. stated:[49] "The test (of whether the Act is in relation to criminal law) to be applied it seems to me is clearly indicated in R. v.

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47 [1958] S.C.R. 608.

48 [1954] 1 D.L.R. 148.

49 ibid at pages 161 & 162.

Watson.[50] Street J., whose dissenting judgment was upheld on appeal said:[51] "Is it an Act constituting a new crime for the purpose of punishing that crime in the interest of public morality? Or is it an Act for the regulation of the dealings and rights of cheese makers and their patrons with punishments imposed for the benefit of the former? If it is found to come under the former head, I think it is bad as dealing with criminal law; if under the latter I think it is good as an exercise of the right conferred on the Province by the 92nd section of the British North America Act." In the case of Jones v. Vancouver[52] a section of a by law of the city provided that "no keeper of a billiard and pool room shall permit or allow any person to play or have part in any game in any billiard, pool or bagatelle table ..... upon the result of which there is any wager or take ....." was by a unanimous judgment of the British Columbia Court of Appeal held intra vires of the powers of the city to enact. Macdonald C.J.A. held that "the prohibiton of betting (contained in the section) was clearly aimed at regulation and therefore intra vires of the council". Galliher J.A.

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50 (1890) 17 O.A.R. 221.

51 17 O.A.R. 58 at 64.

52 (1920) 51 D.L.R. 320.

expressed the same view and McPhillips J.A. held that the by-law was in the subject matter of "regulating and governing". "In my view the sole object of the by-law is to regulate and govern the mode of operation of a licensed dance hall, namely, a particular trade or business carried on in the City of Winnipeg. It is not legislation in relation to criminal law and that being so it is within the competence of the city council in the sphere of 'Municipal Institutions in the Province', 'Property & Civil Rights in the Province' and 'Generally all matters of a merely local or private Nature in the Province' S-SS (8),(13) and (16) of S.92 of the B.N.A. Act."

Whilst there are cases which are difficult to reconcile with this judicial tendency as they have struck down legislation that could have been regarded as being for a regulatory or governing purpose they have usually been decided on the basis that the purpose of the statutes was to augment the criminal code.[53]

All these cases whilst revealing the inadequacies and indeterminacies of the 'purpose factor' do not negate

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53 Vide St. Leonard v. Fournier (1956) 115 Can. C.C. 366 and Hurrell v. Montreal [1963] Que.P.R. 89 where the legislation was held ultra vires because its effect was to supplement the Code.

its use.[54] In fact they support it for it is apparent that had the court in P.E.I. v. Egan;[55] O'Grady v. Sparling;[56] Reference Re S.92(4) of the Vehicles Act;[57] Millar v. The Queen;[58] R. v. Watson[59] or Jones v. Vancouver[60] found that the purpose of the Act was the protection of public morals, the ensuring of public safety or the preventing of a community evil it would have held the Act before it to be unconstitutional.[61]

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54 Thus in A-G Ont. v. Koynok op.cit. it was stated at p.551 "Although the Provinces have the power to impose punishment by fine, penalty or imprisonment for enforcing any law of the Province under S.92 that section does not include public morality. Parliament alone can define crime and enumerate the acts which are to be prohibited and punished in the interests of public morality." See also Re Race Tracks & Betting (1921) 49 O.L.R. 339 per Middleton J. and R. v. Hayduk [1938] O.R. 653.

55 op.cit.

56 op.cit.

57 op.cit.

58 op.cit.

59 op.cit.

60 op.cit.

61 See also Lieberman v. The Queen [1963] S.C.R. 643 where a municipal by law closing down bowling alleys on Sundays was held not to be criminal law as it was not directed to preventing the profanation of the Sabbath and hence was not aimed at the protection of public morals. - Also R. v. Nat Bell Liquors Ltd. [1922] 2 A.C. 128. On the constitutional problems involved in 'Sunday' legislation generally see K.M. Lysyk - Article "Constitutional Aspects of Sunday Observance Law: Lieberman v. The Queen" (1964) U.B.C.L.Rev.59.

The major defect in applying purpose of the legislation as a factor is its indeterminacy. Is the purpose to be ascertained subjective or objective? The courts in applying the Mischief Rule have always attempted to find some objective purpose (viz:- the intention of parliament) and have therefore excluded extrinsic evidence such as parliamentary speeches as going only to a subjective purpose. It is suggested that in constitutional interpretation the purpose being sought should be subjective, i.e: the actual intention of the legislature in passing this particular Act. The adoption of a subjective approach does not mean the disregarding of effect as a guide to purpose as in most cases at least parliament will have been able to foresee the effects of its actions and accordingly can be taken to have wished those effects to have occurred. It has earlier been pointed out that in the context of judicial review where a purposive power is being interpreted evidence would be admissible to show what the most likely effects of the legislation would be as an indication of parliamentary purpose or object. To this extent then the separate factors of purpose and effect are linked. When it is realized that the evidentiary veil is not inscrutable and that evidence can be adduced that will tend to show a definite object or purpose in passing the legislation, purpose will assume a more stable

position and be less dependent on the values of the particular judges involved. It is submitted therefore, firstly, that although purpose or object is vague and indeterminate its existence and nature is capable of being ascertained much more accurately than at present and secondly that it is useful today and a fortiori in the future as a factor, though not a conclusive factor in guiding the court's decision as to nexus.

Turning to the direct and immediate effect as a factor in determining the court's decision. Where the Act in question is dealing with an action that has previously been the subject of criminal sanctions the courts will be likely to find that it is dealing with criminal law even where the legislation is legalising rather than proscribing. The converse however does not so apply so that an act previously untouched by the criminal law may be dealt with by it.[62] The scope of the criminal law power can be viewed as resting in three areas. The first of these could be designated as central core prohibitions, the second as the central core abolitions and the third as the dynamic or developing sphere. By central core prohibitions is meant those things that have traditionally

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62 See P.A.T.A. v. A-G Can. op.cit. and Toronto Railway v. The King [1917] A.C. 630.

been regarded as criminal law in the common law world (e.g: murder, burglary and robbery) and especially the actions proscribed in Canada in the past. By central core abolitions is meant the relaxing of the prohibitions of actions contained in the central core prohibitions and by the dynamic or developing sphere is meant the creation of new offences. Such a classification is itself dynamic as matters contained in the dynamic or developing sphere gradually fall into the central core prohibitions and if they are then modified or relaxed they come inside the central core abolitions.

The penumbra area of doubt[63] is then, the only area where the scope of S.91(27) is in question in relation to federal statutes though because of the double aspect doctrine all three areas are opened up when the validity of provincial legislation is in issue.

In the federal sphere it is well established that the relationship between the immediate effect of the Act and its

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63 For the idea of umbra and penumbra from which this classification is drawn see H.L.A. Hart - Article - 'Positivism and the Separation of Law and Morals' 71 Harv.L.R. 593 and the rebuttal thereof by L. Fuller - Article - 'Positivism and Fidelity to Law' 71 Harv.L.R. 630.

purpose cannot be too tenuous.[64] Thus if an Act has a sufficient purpose for the court to lean towards its validity this tendency will be overcome if the direct effect is something quite different with only a tenuous connection with the purpose. Such a doctrine flies in the face of the maxim of judicial review that it is for the legislature to choose the means of carrying out a grant of power and the courts should not "inquire whether more or less drastic means could have been chosen by the legislature or whether the theories inspiring the ..... measure ..... are sound or whether the measures taken by parliament are regarded by those subjected to them as effective in practice or whether some other means or method might have been chosen by the legislature in carrying out its object."[65]

However as Professor Lane has pointed out[66] the court does inquire in a question of power "whether the means

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64 e.g:- In Re Board of Commerce Act [1922] 1 A.C. 191; Oil Chemical and Atomic Workers International Union Local 16-601 v. Imperial Oil Ltd. [1963] S.C.R. 584. Conversely it is also clear that had the court not decided in Robertson and Rosetanni v. The Queen [1963] S.C.R. 651 that the effect controlled the purpose the Act would have been held to be ultra vires.

65 P.H. Lane - Article - 'Facts in Constitutional Law' op.cit. p.109.

66 ibid p. 112.

chosen by the legislature are appropriate (in the sense of having an inherent tendency) to a relevant end or subject matter fairly within power," and facts are admissible as evidence of this. Thus in In Re Board of Commerce Act and the Combines & Fair Prices Act 1919[67] it was attempted to justify the Act under both the residuary federal power and under the trade and commerce power. The Privy Council held that the method chosen was so gross an infraction of S.92(13) that the matter was in 'pith and substance' not within S.91(2). In this area it is of little importance what the courts say they are doing and in reality they do look at method or means in making their evaluative judgment.

A classical example of the connection between the legal effect and the purpose being too strained is Mackay v. The Queen[68]

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67 op.cit.

68 [1965] S.C.R. 798. - in the interpretation of trade and commerce power S.91(2) the courts have not been prepared to uphold a statute the purpose of which was intra vires but the effect of which had too tenuous a connection with that purpose. Thus Duff J. in R. v. Eastern Terminal Elevator Co. [1925] S.C.R. 434 said at p.446, "It is undeniable that the one principal object of this Act is to protect the external trade in grain and especially in wheat.... I do not think it is fairly disputable...., that the Dominion possesses legislative powers which would enable it effectively.....to regulate this branch of external trade..... It does not follow that it is within the power of parliament to accomplish this object by assuming as this legislation does, the regulation in the provinces of particular occupations."

where it was stated that had the court been unable to hold that the Act did not include federal election signs it would have held the Provincial Act to be invalid even though its purpose was to preclude certain uses of property, a matter clearly within S.92, on the basis that the effect would have been to encroach on an area where the Dominion had exclusive power viz:- the control of federal elections. The converse to the main proposition is equally true so that where the legal effect is within but the purpose is outside power the legislation is invalid as being colourable at least from a federal point of view. Thus in the Reciprocal Insurer's Case[69] the court found that the legal effect was to make the soliciting or accepting of any insurance other than on behalf of a company registered under the Insurance Act, 1917 an indictable offence. Yet it held the legislation invalid as being for the purpose of giving compulsory force to the regulative measure of the Insurance Act. A different answer to a similar type of legislative scheme was given in Australia in the First Uniform Tax Case[70] where the High Court held each of four Acts to be intra vires and ignored the general

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69 R. v. Reciprocal Insurer's Ltd. op.cit.

70 South Australia v. The Commonwealth (1942) 65 C.L.R. 373.

purpose and scheme of the legislation which was to transfer effective control of all income taxation to the Commonwealth. In Canada the courts have taken a lenient view of provincial cunning as both O'Grady v. Sparling[71] and Re Validity of S.92(4) of the Vehicles Act[72] could with little effort be regarded as legislation for ulterior motives.[73]

In the sphere of direct effect both federal and provincial legislation can be preventive. That is both legislatures can pass statutes designed to prevent the occurrence of crime. Hence in R. v. Neil[74] a federal Act providing for preventive detention of criminal psychopaths was upheld. The provincial power was asserted by Duff J. in Bedard v. Dawson[75] in the following manner:[76] "The legislation

71 op.cit.

72 op.cit.

73 c/f. Reference Re Alberta Statutes [1938] S.C.R. 100 and Reference re S.16 of the Special War Revenue Act [1942] S.C.R. 429.

74 [1957] S.C.R. 605.

75 [1923] S.C.R. 681.

76 ibid p.684 - again Locke J. in Goodyear Tire & Rubber Co. of Canada Ltd. v. The Queen [1956] S.C.R. 303 at p.308 said "The power to legislate in relation to criminal law is not restricted in my opinion to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime."

impugned seems to be aimed at suppressing conditions calculated to favour the development of crime. This is an aspect of the subject in which the Provinces seem free to legislate. I think the legislation is not invalid." It is interesting to note that Duff J. didn't fall into the error perpetrated by Estey J. in his dissent in Johnson v. A-G for Alberta[77] where the learned judge assumed that by holding the legislation to be preventive rather than punishing he had effectively removed it from the scope of S.91(27). Thus he stated[78] "The effect of the legislation is to prevent rather than to punish. It is therefore quite different from that which is classified as criminal law under S.91(27)." Properly viewed this is an area where the double aspect doctrine is applicable for it would seem that both legislatures can legislate as to the prevention of crime from different sources of power.

The principle that the Province cannot relax or supplement punishment provided by a federal Act is oft quoted.[79] Despite the firmness with which this rule is enunciated

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77 op.cit.

78 ibid p. 143.

79 vide for example Re Morrison & Kingston [1938] O.R. 21; R. v. Stanley (1952) 104 Can.C.C. 31 and Boyce v. The Queen (1959) 22 D.L.R. (2d) 553.

the courts have not paid much in the way of obeisance to it. Thus the combined effect of Green v. Livermore[80] and Kennedy v. Tomlinson[81] is that a person charged under either a federal or a provincial Act can be committed to a mental hospital under a provincial statute. Similarly the effect of the provincial Act in O'Grady v. Sparling[82] was to supplement the criminal code as was the effect of the statutes under consideration in P.E.I. v. Egan[83] and Reference re S.92(4) of the Vehicles Act.[84] In the light of these decisions the validity of the principle can well be doubted. However it would be premature to retire the concept especially with regard to relaxation of a federally imposed penalty as in this area it seems clear that a provincial Act that purported to directly lessen the burden would be struck down.[85] Furthermore it would also appear to be good law that

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80 [1940] O.R. 381.

81 (1959) 20 D.L.R. (2d) 273.

82 op.cit.

83 op.cit.

84 op.cit.

85 Even were it to stand it would be inoperative under the paramountcy rule because it would conflict with the federal statute regardless of whether the 'double obedience' or the 'cover the field' test was applied.

if a province actually tacks on a supplementary penalty to a federal offence as distinct from creating a similar offence and prescribing a penalty for that offence the provincial enactment would be ultra vires. Subject to these exceptions the rule is of little help as an aspect of the factor of effect in determining the court's decision.

Finally there is a more limited factor than construction, purpose and effect which will assist a court in deciding the question as to nexus. This is the rule that where there are two interpretations of a statute one of which will lead to its being ultra vires and the other to its being intra vires the latter interpretation will be adopted. In any case involving a statute the first question is always whether the facts fall within the ambit of that statute and it is only when this has been decided in the affirmative that any question as to the constitutionality or otherwise of the statute can be raised. Whilst this proposition is easy to formulate in the abstract there is in practice a feedback between the two questions so that where a court finds itself in the position of wanting to hold the statute to be ultra vires by reason of its applying to a particular set of facts it will if possible support the legislation by holding that the particular facts are not covered by the

statute. Thus in Mackay v. The Queen[86] a municipal by law was passed dealing with signs. Under this by law which was enacted pursuant to a provincial statute, a prosecution was launched against Mackay in connection with a federal election sign. The Supreme Court stated that it would have found the by law to be ultra vires had it applied to federal election signs but it was unnecessary to determine the question because on its 'proper' interpretation the by law did not so apply. This factor is not confined to provincial statutes and a similar decision to Mackay's Case[87] was given in Transport Oil Co. Ltd. v. Imperial Oil Co. Limited[88] when the court was dealing with a federal statute. However this factor also is not decisive as was shown in De Ware v. R.[89] where, dealing with New Brunswick legislation with respect to slot machines, some of the majority judges held that the Act was ultra vires and others that its terms did not apply to the particular machine in the case.

By relying on these factors the facade of formulae may be cast aside. No doubt the charge may be levelled that

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86 op.cit.

87 op.cit.

88 [1935] O.R. 215.

89 [1954] S.C.R. 182.

Precedent affects the decision in two ways. Firstly it constitutes a factor itself and secondly it provides a guide as to the factors that determined the decisions of previous courts on similar matters. In so far as it constitutes a factor itself precedent establishes certain basic propositions which form the limits of the factorial approach. These limits are only as strong as the strength of the previous decisions and in the ultimate analysis will be able to be overruled. Examples of such limits are---the rule that it is within provincial power to enact a statute that provides for the suspension of motor driver licences for drunken driving and the rule that federal legislation is not criminal law merely because it imposes penalties for the commission or omission of certain acts. The evaluative nature of the process of constitutional interpretation requires a more flexible judicial attitude with regard to the admission of evidence of constitutional facts especially where a purposive power is involved. Thus the present rule against the use of some extrinsic material should be limited to those sources already excluded by judicial authority and every opportunity taken to confine its operation still further.

one has merely replaced one indeterminacy with another but a realization of the evaluative nature of the judgment being made coupled with the adducing of evidence pertinent to these factors and perhaps some judicial acknowledgment of the nature of the question cannot help but lead to a more predictable position in relation to a power which by its historical nature should never have been listed as a proper class of subject matter in a constitutional division of powers.

IV. CONCLUSION

The B.N.A. Act then, is capable of supporting a consistent method of interpretation based on making three enquiries. These enquiries are:- Is the statute in question under one of the enumerations in S.92?---Is the statute under one of the enumerations in S.91?---and Is the statute within the residuary general power?

The answers to these questions are not a priori or necessary[1] but are evaluative. Accordingly the formulae used by the courts will not provide a solution and it is essential to look at the factors that underly each decision.

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1 In the sense of there being only one 'proper' answer to be found by construing the B.N.A. Act and then seeing whether the statute comes within it. On the futility of 'proper' meaning generally see H.L.A. Hart - Article - 'Definition and Theory in Jurisprudence' (1954) 70 L.Q.R. 37.

The criminal law power provides a good illustration of the use of a factorial approach to interpretation as it has no historical limitations. In S.91(27) the prime factors beside precedent itself are the construction, effect and purpose of the impugned statute none of which is individually decisive, but do provide, when combined together, (especially with a wider admission of evidence as to purpose and effect) a more solid basis for constitutional prediction than a rigid adherence to an empty shell.

Whilst this whole approach reduces constitutional interpretation to the position of Oliver Wendell Holmes Jr. (viz:- a prediction as to what the court will do in fact), the time is surely ripe for some attention to stability of expectations in a volatile area of law.[2]

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2 O.W. Holmes Jr. 'Path of the Law' (1897) 10 H.L.R. 457 at 461.

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