Tests for Validity of Legislation under the British North America Act: A Reply to Professor Laskin

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I have read Professor Bora Laskin's interesting article in the University of Toronto Law Journal[1] commenting with his characteristic vehemence on my article on "Tests for Validity of Legislation under the British North America Act".[2] Although he really deals directly with questions that were discussed only obliquely by me, our articles demonstrate fundamental differences in the views that may be held on certain aspects of the interpretation and application of the British North America Act. The discussion affords an opportunity to bring into bold relief most of the major questions that seem to arise. To bring out clearly the issues between Professor Laskin and myself on questions dealt with only indirectly by me, may I briefly review the conclusions I reached in my previous article and expand the statement of my views on these specific questions?

I pointed out at the outset that the B. N. A. Act confers legislative power "in relation to . . . Matters . . . coming within . . . Classes of Subjects". In determining the validity of any law enacted by Parliament or the legislatures, two questions must therefore be answered: (1) What is the "matter" which the law is enacted "in relation to"? and (2) What "class of subjects" does the matter "come within"?[3] My discussion was specifically restricted

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[1] Tests for the Validity of Legislation: What's the "Matter"? (1955), 11 U. of Toronto L. J. 114.

[2] (1954), 32 Can. Bar Rev. 813. For authorities illustrating the propositions put forward in this article I refer to those cited in my earlier article. In general they are omitted here to avoid repetition.

[3] In concentrating on the first question in my previous article I did not properly express the second question. I then phrased it, "Into what 'class of subject' does this 'matter' fall?" The language has been changed to correspond precisely with the language of the B.N.A. Act by using the term "come within".

to a consideration of the two components of the first question: What is the nature of a "matter"? and, What is the test to be applied to determine whether a law is "in relation to" a particular "matter"?

The conclusions I came to after an attempted analysis of the method of determining these questions followed by the courts were as follows. The courts test the "matter" that a law is enacted "in relation to" by the law's "effect" and its "purpose". My analysis was directed at ascertaining what the courts mean first by "effect" and second by "purpose" and what is the significance of each of these words. With respect to "effect", I started with the proposition that the basic effect of all law is to control and regulate the conduct or interests of persons in their relations individually with each other or with groups of, or all other persons. I suggested that the salient feature that the courts have looked at in deciding the "effect" of a particular law for purposes of testing its validity is the particular relations that the law, in its practical operation, regulates or controls. I stressed that the word "practical" as referring to the way in which the statute, however worded or operative legally, takes effect in controlling and regulating every-day conduct and human relations. With respect to "purpose", I suggested that the courts have had regard for the motive that impelled Parliament to enact the law—in general language, the policy that Parliament was attempting to carry out by the control and regulation enacted by the law. In the result, the "matter" that a statute is "in relation to" is a composite thing having two characteristics: from one point of view it signifies the particular human relations controlled and regulated by the law in a practical way, and from another point of view it signifies the particular policy purpose or motive for the control or regulation of those relations. Both these characteristics of a particular law, that is, the relations controlled or regulated by it and the policy motive of Parliament in enacting it, are to be ascertained as questions of fact to determine the "matter" that it is "in relation to".

Strictly speaking, having indicated what I consider the courts have decided as to the nature of a "matter" and the meaning of the term "in relation to", I had concluded my discussion of the components of the first question. Professor Laskin very properly points out, however, that to be of any utility a discussion of tests for determining the validity of legislation cannot omit at least adverting to the second main question, namely: What "class of subjects"

in the B. N. A. Act does the matter "come within"?[4] Determination of the first question—What is the "matter" which the law is enacted "in relation to"?—is only half the process. My purpose in confining my discussion to this half of the process was to make a start on analyzing the ideas underlying it in the hope that, if a correct analysis could be made of the components of this first question, this analysis might assist in clarifying the second question and permit an analysis to be made of the ideas underlying it. I made no attempt to discuss the second question in detail, deliberately leaving it for further discussion. Professor Laskin in making detailed criticisms, which are indicated later, of the barrenness of the first step of the inquiry standing by itself, has therefore anticipated me.

I indicated in general terms, however, that, having determined the matter in relation to which the law is enacted, we must then determine the enumerated head of section 91 or 92 with which the matter is connected or arises out of. In referring to the connection between the "matter" that a law is "in relation to" and the "classes of subjects" enumerated in section 91 and section 92, I consciously made two unstated assumptions and suggested that the questions involved were questions of fact. I suggested that these were questions of fact for two reasons: first, for convenience of discussion at that stage and, secondly, to provoke further discussion, being aware of the school of thought to which Professor Laskin belongs and that so unphilosophic an approach would be somewhat start-

[4] Professor Laskin is quite justified in his criticism that in discussing the first question I was driven to some consideration of the second question. I must also confess that this led to some confusion and that part of the discussion more properly relates to "classes of subjects" than to "matters". I do not apologize for publication of an article in which such a confusion occurs. Confusion of terminology on the questions discussed is almost unlimited. In my case it arose through an attempt to dissect too precisely inter-related questions into separate questions. The purpose of my article, however, as stated at the outset, was merely to explore these questions, using an approach I had not previously seen adopted, with the object of provoking discussion. As Professor Laskin says, these questions are the "pivotal" questions in determining tests for validity of legislation, and some speculative thinking is needed to clarify them. The courts cannot be expected to speculate in reaching decisions on actual cases. If any article, even though confused or incorrect in some respects, serves the purpose of provoking discussion that leads ultimately to a clearer understanding of the problems, it will have accomplished a useful object. Articles on this topic should not, at this stage, be regarded as more than working papers.

The confusion of terminology that consists in using "matters" as synonymous with "classes of subjects" is also apparent in many of the decisions. Other terms, such as "enumerated heads" and "heads" in sections 91 and 92, are also used that add to the confusion. A return to rigid use of the terms "matters" and "enumerated classes of subjects" in their proper contexts would clarify much of the discussion and avoid difficulties.

ling. I can best illustrate my assumptions and what I mean by questions of fact by considering the nature of the second main question—What "class of subjects" does the matter of a law "come within"? To understand the meaning of this question its components must be analyzed in the same way as those of the first question. It is obvious that, to determine the "class of subjects" which a particular "matter" may be said to "come within", the first inquiry must be: What is the nature of a "class of subjects"? The second inquiry then is: What is meant by the term "coming within" a class of subjects?

The first assumption I made was that a "class of subjects" is in the nature of a group of "matters" and may in effect be dealt with as a "class of matters". The basis of this assumption, and its justification as a conclusion that I now put forward, is that, if the courts in determining the "matter" that a law is enacted "in relation to" for the purpose of determining the "class of subjects" that the matter "comes within", test the law by determining the field of relations with which it deals and the purpose or policy for which it deals with them, then these in turn must also be the significant characteristics of a "class of subjects". The salient characteristics of "classes of subjects" must be similar to those of the "matters" dealt with by particular laws. They must have dual characteristics similar to those of "matters", in that each is to be interpreted as describing a specified field of human conduct or interests or relations that may be regulated or controlled by law in a practical way and as specifying a policy discretion or choice of purposes for which those relations may be regulated related to a particular idea indicated by the "class of subjects". If the "matter" of a particular law—the relations dealt with by it and the policy purpose for which they are dealt with—fall within the field of relations and the policy discretion that a "class of subjects" is interpreted to embrace, then the "matter" may be said to "come within" that "class of subjects".

The second assumption I made was that the fields of human relations and the policy discretion entrusted to Parliament for legislative purposes, comprised in each "class of subjects", are known and clearly understood. On this assumption, if the field of relations that a law controls and the particular purpose or motive for enacting it are determined, the only question remaining in the process of deciding its validity is to fit them into the known and understood fields of relations and the policy discretions comprising the "classes of subjects" established by the B. N. A. Act.

On these assumptions I stated that the question whether a law is valid turns therefore on the determination of questions of fact and that the courts were correct in their statements that in determining validity they are not concerned with the wisdom or folly of particular legislation, but merely whether it is within the power conferred.

If my conclusions on the interpretation that has been adopted by the courts of the meaning and nature of "matters" and "classes of subjects" is correct, and if the scope of each "class of subjects" can be said to have been fully interpreted so that they are all known and understood, then I believe it is broadly correct to say that determination of validity involves only questions of fact and the courts need not at this stage be troubled with questions of policy. I concede at once, however, that the meaning to be ascribed to the expression "classes of subjects" and the scope of each of them, and the meaning to be given the expression "matters", are questions of interpretation for the courts involving considerations of policy in the same way as other questions of interpretation and that my assumption, made for convenience in discussing the nature of "matters" and the meaning of "in relation to", that the nature and scope of each "class of subjects" are known and understood, is incorrect.

From the foregoing it will be seen that I approached tests for validity backwards. I started with an analysis of the nature of "matters" and the meaning of "in relation to", although it now seems that the simple and forthright way would be to start with the meaning of "classes of subjects". I have now used the meanings arrived at for the expressions "matters" and "in relation to", however, to ascribe a meaning to the expression "classes of subjects" and to indicate what is meant by saying that matters "come within" a class of subjects. It will clarify my conclusions and the issues raised by Professor Laskin's article if I set out the result in a positive way.

The B. N. A. Act confers legislative authority to enact laws "in relation to . . . Matters . . . coming within . . . Classes of Subjects". Stated positively, I put forward as the interpretation of these terms adopted by the courts the views set out in the following paragraphs. In so doing I attempt to set out expressly the assumptions underlying but not developed in my earlier article, with their proper qualifications.

The "classes of subjects" in the enumerations in sections 91 and 92 of the B. N. A. Act are expressed in language describing

persons, things, activities or concepts. As descriptions of legislative authority the language is elliptical, or abbreviated, and omits a full statement of what is intended. The courts have by interpretation expanded these descriptions of legislative authority to give them their full meaning. In so doing the courts have interpreted the abbreviated language in the description of the "classes of subjects" as describing two things arising from or connected with the persons, things, activities or concepts specified in them.

First, each "class of subjects" is interpreted as a description of a field of human relations or conduct in the world of practical affairs that may be regulated or controlled by laws to be made under the authority of that class of subject. This field of human relations is that which is associated in the real world with the special or individual quality of the persons, things, activities or concepts specified in the language describing the class of subject.

Secondly, each "class of subjects" is interpreted as a description of an area of practical governmental policy-discretion—the discretion to enact laws for the carrying out of governmental policies or purposes in the regulation or control of relations or conduct in the field that the class of subject is interpreted to describe. This discretion is a completely unfettered freedom of choice in enacting laws for the carrying out of any purpose or policy associated with the special character of the persons, things, activities or concepts specified in the "class of subjects".

A class of subjects is therefore a specified field of human relations or conduct that may be regulated or controlled by law from a specified point of view. Objective limits and subjective requirements are described by each "class of subjects" as they are to be interpreted. I suggest that this interpretation of the nature of "classes of subjects" is the one that has now been adopted and must be treated as being settled by the courts. The interpretation is implicit in their decisions and appears to have been adopted because the courts interpret their rôle to be to carry out the original scheme of distribution of powers intended by the framers of the B. N. A. Act, which established external limits defining the authorities to legislate conferred by it, that is to say, limits external to the courts' own views, and did not contemplate that the courts would merely give effect to their own policy views.

Adopting this view of the general nature of "classes of subjects", I suggest that the scope of a particular "class of subjects" enumerated in section 91 or section 92 is ascertained by determining the particular field of relations and the particular policy

discretion that are connected with or arise from the special characteristics of the persons, things, activities or concept referred to in the language specifying the "class of subjects". These are determined by the courts as a matter of interpretation in accordance with recognized canons of construction, again with the object of ascertaining and carrying out the scheme of distribution of powers intended to be embodied in the B. N. A. Act. This question of interpretation arises with respect to each particular "class of subjects" as a part of the whole scheme.

If the meaning I suggest the courts have ascribed to "classes of subjects" is adopted, then I suggest that the meanings to be ascribed to the remaining terms in the expression "in relation to . . . Matters . . . coming within . . . Classes of Subjects" appear to be reasonably clear.

A law is in relation to a matter that "comes within" a "class of subjects" if the relations dealt with by the law fall within the wider field of relations embraced by that class of subjects and the motive of Parliament in enacting the law is primarily to carry out a specific policy falling within the wider area of policy discretion designated by it. To determine the "matter" that a law is "in relation to" requires therefore an answer to two questions of fact: What relations or conduct are controlled or regulated by the law in a practical way? and, What is the real purpose of Parliament in undertaking the control or regulation? I suggest that the courts have now settled that together these are the tests as to the "matter" that the law is "in relation to" for the purpose of determining the "class of subjects" it "comes within". It is of course not germane, in dealing with a particular law, to determine these two questions in the abstract or in a vacuum; they must be determined having regard, ultimately, to matching the answers to them with the existing classification of fields of relations and policy discretions embraced by the "classes of subjects" enumerated in sections 91 and 92. Further, the relations dealt with and the policy motive of Parliament are determined as questions of practical fact and substance and do not depend on the form of the law. Where the language and legal operation of the law show clearly the practical relations dealt with and the real policy motive of Parliament, then of course the determination of the "matter" it is "in relation to" is free from difficulty. The actual practical "effect" and real "purpose" of the law are always the governing considerations, however, and closer examination is necessary where it seems that these may differ from those which might *prima facie* appear from

the form in which the law is expressed. They are always ascertained as facts in determining the "matter" that the law is "in relation to" for the purpose of determining the "class of subjects" it "comes within".

In the result I suggest that the courts have now settled the interpretation of the terms "classes of subjects" and "matters" and have given meanings to them that put external limitations on them, that is, external to the pure policy judgment of the courts. The determination of the "matter" the law is "in relation to" is a pure question of fact to be decided, according to the decisions, by looking at the practical effect of the law and the purpose of Parliament in enacting it. The determination of the "class of subjects" within which the matter comes, once the scope of each relevant class of subjects has been interpreted, seems also to be one that can be treated as a question of fact, or at most a question of mixed fact and law.[5]

Finally, I should also refer to comments in my earlier article on certain statements that have been made by the courts. I referred, among others, to the statement that there may be "overlapping legislation", to the so-called "double aspect" rule, the "ancillary" or "incidental" doctrine[6] and the statement that a law may "affect"

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[5] The interpretation that has been adopted is more difficult to express in explicit language in the abstract than it would seem to be to apply it in a concrete case. If the ideas expressed in the text are clearly grasped, I suggest that some of the cases which at first appear difficult to understand become greatly simplified, for example: *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580; *A.-G. for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328; *In Re Insurance Act of Canada*, [1932] A.C. 41; *A.-G. for Alberta* v. *A.-G. for Canada* (*Bank Taxation*), [1939] A.C. 117; *Saskatchewan Farm Security Reference*, [1949] A.C. 110.

[6] In my discussion on the "ancillary" or "necessarily incidental" doctrine I should have pointed out a distinction that must be drawn. It appears that these terms are used in two quite different senses:

(1) There is the doctrine of the "necessarily incidental" or "ancillary" provision in a particular statute. This doctrine applies where the main provisions of a statute are clearly "in relation to" a "matter" coming within a "class of subjects" but one subsidiary provision of the statute is attacked as not being in relation to such a matter. In such a case, although the provision considered by itself would be beyond the authority conferred by that class of subjects, yet it will be authorized and valid if it is only an incident of the main and valid scheme of the act, being required to give effect to it, and not an independent enactment or "law". The provision is "necessarily incidental to effective legislation" on the authorized matter.

(2) There is the "ancillary" doctrine, referring to the authority to legislate under one "class of subjects" to deal with a matter that objectively might also fall in another class of subjects. In such a case the fields of conduct or relations within the two classes of subjects overlap. The relations dealt with by a particular law may fall in the fields of relations specified by both classes of subjects although, of course, the policy points of view from which they may be dealt with are different. It appears that the over-

but not be "in relation to" matters. The so-called "double aspect rule" is stated as follows: "Subjects that in one aspect and for one purpose fall in sect. 92, may in another aspect and for another purpose fall within sect. 91". I suggest that all these statements, like the double aspect rule, are merely descriptive statements or observations rather than rules of law. They are expressed merely as observations and in fact they seem merely to be a recognition of existing situations rather than to operate as rules of law. They flow from the fact that the same human relations may fall in the fields of relations embraced in several different classes of subjects. In such a case, as stated in the "double aspect" rule, legislation may be enacted under the authority of one "class of subjects" to deal with relations in the field embraced by that "class of subjects" for a policy purpose within the policy discretion conferred by it, and other legislation may be enacted under the authority of a second "class of subjects" to deal with the same relations, because they also fall in the field of relations embraced by that second "class of subjects", but the legislation does so for a policy purpose within the different policy discretion conferred by the second class of subjects. This is an example of a "double aspect" situation. Moreover, the laws may overlap in that case. The "matters" that these two laws are "in relation to" would however be different because, although they may deal in whole or in part with the same relations, they do so for different purposes. The classes of subjects therefore overlap objectively, in the sense that the fields of relations may overlap but they do not do so when the subjective requirements are taken into account. The explanations given in full in my earlier article were not correct in their emphasis on the fact that "matters" may have overlapping fields of relations. This is true, but the real significance relates to the overlapping fields of relations embraced by different "classes of subjects", since these are the heads under which legislative authority is conferred.[7]

lapping portion of the two fields is sometimes described as "ancillary" to the essential non-overlapping portions of each field.

Both usages of these expressions arise with respect to classes of subjects that overlap from the objective point of view. The first usage, however, refers to a specific provision in a particular law that deals with relations in the overlapping area. The second is used to describe the overlapping areas themselves, as "ancillary" fields.

[7] Mr. F. P. Varcoe, C.M.G., Q.C., takes the view in his recent book, Legislative Power in Canada (1954) pp. 23 and 37, that the essential test of the "pith and substance" of a statute is its purpose. He refers to the "legal or direct effect" of the statute as being a factor to be considered however (p. 42) and suggests that "purpose" is of determining significance where the legal effect does not establish the real purpose of the law.

I suggest that the difference between Mr. Varcoe's views and mine is largely verbal. The purely "legal" effect of all laws is the same—they cre-

This outline will, I believe, bring out the ground that is common and the points in issue between Professor Laskin's views and my suggestions. Professor Laskin makes many categorical statements of detail throughout his article with which I find myself in complete disagreement. There is little value in picayune criticism when there are major questions for discussion and I propose to confine my remarks to two main issues that appear to emerge from the following extracts from his article:

> (1) It is, or should be, fairly obvious, that when the validity of legislation is challenged, resort must be had to the terms of the enactment and consideration ought to be given to its operation and to the purpose of the enacting legislature. This is not an exercise for its own sake, as Mr. Mundell's article frequently suggests, but is compelled by reason of the scheme of distribution of legislative power—an artificial and not a preordained scheme — in the British North America Act. Neither the term 'matters' nor the phrase 'in relation to' can have any significance apart from their place in the context of the classes of subjects set out in sections 91 and 92. Mr. Mundell does not purport to deal with the question —he expressly says so —Into what class of subject does a matter fall? Yet throughout his article he is driven from time to time to relate his discussion to this very question. In my view, there is little point to the discussion apart from the inquiry posed by the question.
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> (2) The second statement quoted [from Mr. Mundell's article] poses the question whether any serious student of constitutional law can long entertain the delusion that constitutional adjudication is 'pure' law, divorced from social or economic or political (in the highest sense) views. It is true that the Privy Council has often said that it is not concerned with the wisdom or policy of particular legislation, but surely this has meant nothing more than a token bow to the legislature.
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> (3) Legislative and judicial treatment of grain-marketing problems also show how choice of policy or method of regulation finds reflection in differing conceptions of legislative power. *The King* v. *Eastern Terminal Elevator Company* was in part a foredoomed decision because of previous Privy Council decisions on the scope and content both of the federal general power and of the trade and commerce power. Why, on any social and economic appraisal of the grain trade, it was beyond federal power to provide directly for orderly marketing is explicable only on the basis of a crabbed conception of federal legislative authority. Certainly, if the grain trade was beyond national regulation, all trades or businesses (other than those specifically referred to

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ate, vary or abrogate legal rights, duties, powers, liabilities or liberties. The test of effect applied by the courts refers to the practical effect of the law as a method of controlling human conduct. If Mr. Varcoe means by "legal" or "direct" effect the apparent practical effect of the law, as I imagine he does, then there appears to be little substantial difference between our views, since the true effect and real purpose will generally coincide and, as suggested in my previous article, each is evidence of the other. Moreover "purpose" is the deciding test for legislation dealing with relations in overlapping fields; *e.g.*, "Criminial Law".

in section 91 of the British North America Act) must equally be beyond such regulation. Such a conclusion necessarily depended on a view of the trade and commerce power (or, more properly, on a view of federal power in the light of provincial power) that would ignore any economic unity in the marketing features of any trade or business and regard such marketing as always involving a local provincial aspect and a separate extra provincial or export aspect.

(4) Enough, I believe, has been said to point up the emptiness of Mr. Mundell's statement that 'the only question is: Did Parliament have power to enact the legislation?' . . . . The probing, under Mr. Mundell's test ('Did Parliament have power to enact the legislation?') is assisted by determining as 'two questions of fact' both what he refers to as the objective aspect of a 'matter' and the motive of Parliament. Are these things questions of fact? No one can say with any confidence that these 'facts' are self-revealing. For myself, I do not see how the inquiry (regardless of the material that is brought to bear on it) can be said to yield facts. What it must yield are legal conclusions that are merely professional judgments.

(5) Whether the decisions are or are not in accordance with a formula of inquiry is surely not the explanation of their substance. What is important is why the decisions turned out to be what they are. Does it help understanding of constitutional issues to be told that every decision involves a finding as to what is the objective 'matter' of the legislation and what is the subjective side? Unless we know what goes into these findings and how they are arrived at, we are merely scratching the surface of constitutional law. Demonstration that judicial decisions answered a certain formula of inquiry does not mean that the holdings followed inevitably. Completely different holdings could equally answer the formula. My quarrel with Mr. Mundell's third statement is on the fundamental point that, by and large, our leading constitutional cases could just as well have been decided the other way.

(6) The pivotal factor in constitutional adjudication is the elaboration of the content of the heads of legislative power conferred by the British North America Act. It is the judicial view of this problem that governs the real inquiry into the validity of some particular piece of legislation. It sets the limits within which the inquiry will proceed. For a court to say that certain legislation is in relation to 'criminal law' or in relation to 'interest' or in relation to 'property and civil rights in the province' means very little except as it either articulates or presupposes certain views on the scope of those heads of power within which the characterization of the legislation takes place.

(7) The time has surely come in the history of our constitutional law to recognize the conscious role that courts and judges have played in shaping federal and provincial power and thereby controlling governmental policies. . . . We may as well deny the existence of the court as to deny that judicial decisions are the products of social and economic and political considerations for which the words of the British North America Act are merely the vehicles of communication. The constitution is as open as the minds of those called upon to interpret it; it is as closed as their minds are closed. The 'matters' which are expressed in

> the British North America Act represent the capacities for legislative action that each of the classes of subjects offers. It is left to the courts to announce what these capacities are as they measure challenged legislation. As the capacities are limited or extended, so will the range of valid legislation be narrow or broad. If our measure be purpose and motive (or object, or pith and substance, or true nature and character — to use some of the formulas of the cases) it is yet necessary to relate the result to a head of power. The process of interpretation is hence an interlocking one, in which the British North America Act and the challenged legislation react on one another and fix each other's meaning. I do not propose to elaborate in this article what are or what should be the methods and materials of decision. It is well known that for the most part canons of statutory interpretation have dominated our constitutional law, lightened now and then by resort to external considerations and external materials. The products of this approach have themselves played an important part in perpetuating it as they became available as precedents and dulled any desires for fresh appraisal. Whatever be the traditional or self-imposed limitations on judicial freelancing, there arise now and then cases for decision in which there are few if any familiar landmarks, and the course must be set by the light of the particular judge's mind. How we are guided will profoundly influence how we are governed.[8]

The first main issue that I believe emerges between Professor Laskin's views and mine arises from the attitude that appears to underlie the comments made by him in the extracts numbered (1), (2), (5) and (6). With the statements made I am in partial agreement. It must be apparent from what I have already said that I fully share Professor Laskin's views that ascertainment of the "matter" that legislation is "in relation to" is not an exercise in itself. I certainly never intended to suggest that it is. I expressly pointed out in my earlier article that there were two main questions and that I was proposing to deal with only one. Determination of the first question is but one step that must be followed by others. There is therefore no real issue between Professor Laskin and myself on this point.

Professor Laskin does not appear to disagree with the need for some understanding of the nature of "matters" and "classes of subjects" for the purpose of applying the B. N. A. Act. In the extract number (6) he states that there must be some "elaboration of the content of the heads of legislative power" and some "characterization" of legislation. The question is, How is this to be done?

It is here that the first issue of a general nature between Professor Laskin and myself appears. I detect in Professor Laskin's

[8] (1955), 11 U. of Toronto L. J. at pp. 114, 117, 119, 122, 124, 125 and 127.

article, evidenced by the extracts I have quoted, an impatience with any attempt to analyze the meaning of the various terms used in the B. N. A. Act, or the nature of the subjects dealt with, or the underlying ideas, as being of any assistance in determining the validity of legislation. We must, he says, relieve ourselves of the delusion that "constitutional adjudication is 'pure' law, divorced from social or economic or political (in the highest sense) views". His own solution for testing validity, which I will discuss later, and which raises the second main issue between us, is a sort of "hop, skip and jump" or personal "hunch" method. Denuded of all its resounding language about social, economic or political considerations, Professor Laskin's theory seems to come down to this, that the courts should determine whether a law is within the authority of Parliament or the legislatures on the basis of what in their view is a good thing. He apparently sees no value in any attempt to differentiate the various questions of interpretation or otherwise that arise in the process of determining validity or in any attempt at analysis of the underlying ideas or methods of inquiry.

If I am doing Professor Laskin an injustice, I am afraid it is because this attitude appears to underlie the vehemence of his criticism of my attempt to analyze the nature of the elements in the first question that must be dealt with in determining validity. I admit at once that merely setting out the questions to be asked with the ideas underlying them will not answer them. Nobody now puts forward the suggestion, or at least I certainly would not do so, that analytical jurisprudence is more than a handmaiden to clear thinking. Analysis *is* an aid to clear thinking, however, and a refusal to analyze a problem is a refusal to attempt to think clearly about it. Surely we should, for clarity of thought alone, endeavour to carry our analyses as far as possible and, if we can clearly define the questions, it will help in arriving at correct answers to them.

The inevitable result of an attitude such as that which appears to underlie Professor Laskin's comments is most detrimental. The almost superstitious fear with which any attempt at statutory analysis is apparently regarded leads to a flight to vague language —a form of polysyllabic gobbledy-gookery—that obscures such understanding of the problems as we might have. Surely it is not beyond the wit of man to be able to investigate and express the various questions that must be decided in determining the validity of legislation under the B. N. A. Act and the basis for their decision. Whether my suggestions are correct or not, it would seem that

some attempt should be made. As an example of the diffuse language that a refusal to attempt any analysis produces, may I refer to the sixth extract quoted from his article. To state that the pivotal factor is "the elaboration of the content of the heads of legislative power", or that for a court to say that certain legislation is in relation to a particular matter "means very little except as it either articulates or presupposes certain views on the scope of those heads of power within which the characterization of the legislation takes place", seems at best an obscure restatement of the various problems without aiding their solution. Professor Laskin is quite right when he says earlier that we must know what goes into the findings in constitutional cases and how they are arrived at. I do not see, however, how we can learn these things without some analysis. My suggestions are attempts to answer these very questions.

Surely it is not to adopt a "pure law" approach to say, as the courts have, that to ascertain the "matter" a law is "in relation to", as one of several steps in determining validity, we must have regard to the effect and purpose of the law and then try to understand what is meant by these expressions. By "effect" I emphasized that the courts mean the effect of a law in its practical operation in the every-day world and not its purely legal form or operation. By "purpose" the courts have meant the actual governmental policy that Parliament is trying to carry out. That these are matters of fact and substance, not purely legal concepts, was the major point I attempted to make in my previous article. They surely are not matters of pure law, but are matters of a most practical kind, whether or not you dignify them by referring to social, economic or political considerations or merely say: What in fact does the law do and why? On the contrary, far from pure law, this is the only realistic basis upon which the nature of a statute can be assessed as part of the legal mechanism of controlling practical human conduct and affairs. It is not a matter of "pure law" either to try to give a meaning to the expression "classes of subjects" in accordance with the practical governmental scheme intended by the framers of the B.N.A. Act, in so far as this is ascertainable, or in doing this to conclude that certain external standards based on practical affairs were intended as the basis upon which judgment is to be exercised to carry out the scheme. Again I emphasize that these standards establish divisions of human conduct and governmental policies that exist apart from the legal system as fields of and motives for practical governmental action. An effort to determine

what standards have actually been adopted cannot be said to be to adopt a "pure law" approach.

This brings me to the second main issue between Professor Laskin's and my views. I wish to be scrupulously fair to him on this issue, as he was to me, and to try to avoid putting words in his mouth. Moreover, I have now expanded the exposition of my views beyond those he commented on. Nothing in his article leads me to hope, however, that my expanded views would be any more acceptable to him than those already expressed.

The main issue between us is that we have entirely different views of the rôle of the courts in the interpretation and application of the B.N.A. Act. I suggest that Professor Laskin's views do not accord with the course that has been followed by the courts (which I think Professor Laskin would admit) and moreover that he has not justified his criticisms of this course.

Our two views may be contrasted as follows.

Professor Laskin states that it must now be recognized that the courts and judges play a conscious rôle in shaping federal and provincial power and governmental policies. He also states that constitutional adjudication cannot be "divorced from social or economic or political (in the highest sense) views". He expressly states that he does not elaborate in his article on what should be the methods and materials of decision, but he obviously disapproves of ordinary canons of construction and concludes with the statement that "there arise now and then cases for decision in which . . . the course must be set by the light of the particular judge's mind".

If I understand Professor Laskin correctly, he is putting forward the fundamental proposition that the proper theory of interpretation and application of the B.N.A. Act is that the courts should, in accordance with their own views on the best policy, having regard to social, economic and political considerations, without differentiating any steps in the process, consciously determine whether Parliament or the legislatures of the provinces should be held to be authorized to enact a particular law. Apparently, whether the decision accords with what the courts themselves might conclude was the scheme intended by the B.N.A. Act, or even, it might also seem, its language, is not to be the deciding factor, although presumably these would be materials for consideration. It would seem to follow that, if the decision is to be a pure policy decision based on social, economic or political considerations, any extrinsic material or information relevant to the de-

cision of the case as a policy matter would be admissible for consideration by the courts in determining what is best and not merely what was intended.

My suggestion, as already indicated, is that the rôle that has been adopted by the courts, and their proper rôle, is based on the view that legislative power is distributed between Parliament and the legislatures according to external standards, that is, standards for judgment external to the unfettered policy views of the courts as to what in their own opinion might be desirable. These external standards are specified fields of conduct or interests or relations that may be regulated by law for specified policy purposes. In determining the scope of particular fields and policy discretions, the courts have tried to carry out the scheme of distribution of legislative authority expressed or implicit in the B. N. A. Act, ascertained according to settled canons of construction. Once that interpretive function is completed, determination of the validity of a particular law is a practical question of determining the field of relations dealt with and the policy purpose of the law. As to extrinsic material, on the interpretive phase of the process, the courts look only at such material as is permissible under ordinary rules of construction. To ascertain the practical effect and purpose of a law in order to determine validity, they will look at any evidence relevant on these issues as questions of fact.

Professor Laskin appears to base his proposition on the following supporting considerations that I have tried to extract from the portions of his article quoted. He says that the policy views of the judges should be recognized as governing their decisions, which I interpret to mean that it must be recognized that the courts legislate. He says that it cannot be said that there are any questions of fact in determining the validity of a law, but only questions of professional judgment. He says that the decision in a large number of cases could and probably should have been different. He says that as a matter of fact the courts have reached their decisions in constitutional cases on the basis of social, economic and political considerations and any denial by them that they have done so is either lip service or the product of delusion. Finally, he appears to consider that many of the decisions are perversely incorrect, being based on a "crabbed conception of federal legislative authority". I hope I have fairly paraphrased Professor Laskin's statements. I should add that this is not the order in which they appear in his article but has been adopted for convenience of discussion.

I am not quite clear from Professor Laskin's proposition or

his supporting statements whether he takes the view that the courts cannot escape from exercising an unfettered discretion on a social, economic or political policy basis in constitutional adjudication or merely that it is desirable that the courts should adopt this method of determination rather than any other. Be that as it may, I suggest that Professor Laskin's supporting statements do not carry him the length of what I understand to be his fundamental proposition.

As to the consideration mentioned by Professor Laskin that I have put first, that the courts must be recognized as legislating, I admit at once that, in interpreting a statute or in interpreting the B.N.A. Act, the courts perform a legislative function when they give an obscure or ambiguous or vague provision a precise meaning in relation to a particular question. Moreover, there is no doubt that in performing a legislative function they are in effect arriving at a policy decision. These admissions, however, do not carry us the length of Professor Laskin's proposition as I understand him. Legislative authority is not necessarily unfettered or absolute. Legislative authority may be limited, or its exercise may be regulated or controlled, in a large number of different ways. I suggest that the rôle of a court in exercising its legislative power in interpretation of a statute is to endeavour to arrive at the meaning of the statutory provision that accords with the intention of its framers so far as that can be ascertained. The court's function is subsidiary—to carry out the policy as expressed in the provisions or implicit in the scheme of the enactment. It endeavours to determine what the legislators intended or would have intended if the application of an obscure, ambiguous or vague provision to a particular question before the court had been drawn to their attention. In performing this function under the B.N.A. Act the courts have considered that they were not intended to exercise a free policy judgment, but were to act in accordance with certain external standards, which I have already explained and which preclude them from a free policy decision. Professor Laskin's view is apparently that the courts should be prepared to go so far as to arrive at their decisions in accordance with whatever appears to them would be sound social or economic or political sense if the question were a new question of policy up for initial consideration.

The extent of the use that may be made of extrinsic evidence as an aid to interpretation depends upon which view of the interpretive process is adopted. If the interpretive process is viewed as

permitting a free policy decision, any extrinsic evidence on the wisdom or soundness of the ultimate decision to be taken from a social, economic or political point of view would be relevant. If, however, the interpretive process is considered as merely an attempt to carry out the policy of the legislators, then the only material that is relevant or of assistance is material tending to show the intended policy. The ordinary rules of interpretation are founded on the belief that experience has demonstrated that substantially the only reliable material for this purpose is the language of the statute, its scheme and any related legislation. Social and economic and political considerations are not totally excluded, however, for they form the background of common knowledge against which the intentions of the framers of the B.N.A. Act are to be ascertained.[9]

I suggest therefore that it does not follow merely from a recognition of the fact that the courts consciously legislate in interpreting a statute or the B.N.A. Act that we must go the length of Professor Laskin's proposition, as I understand it, that the courts should exercise a relatively unfettered discretion. Recognition of the fact that the courts exercise a legislative function in the interpretation of written law does not mean that they exercise a free policy decision. There may be a standard or basis in relation to which they exercise their legislative or policy judgment.

Next Professor Laskin disagrees with my suggestion that there are questions of fact to be decided in determining the validity of legislation because, he says, questions of validity are matters of professional judgment. No doubt his rejection of my suggestion is in great part based on his failure to differentiate the steps in the process of determining validity.[10] His objection seems, however, to go deeper. He appears to be of the opinion that any question requiring judgment for its determination necessarily raises a question of policy at large.

I suggest that Professor Laskin's comments in this respect are

[9] Moreover, the "class of subjects" to be interpreted may confer authority to legislate to carry out some social or economic concept, for example, "unemployment insurance". The very question at issue may be the scope of an economic, social or political concept.

[10] The mere analysis of the several steps in interpretation and application of the B.N.A. Act that I have suggested does not exclude adoption of Professor Laskin's fundamental views on the rôle of the courts. The separation of the process into several stages merely brings into sharper focus and serves to pin-point the stage in the process of interpretation and application at which the courts would exercise their policy judgment. They could do so by discarding the external limits they have adopted or by exercising greater freedom in interpreting the scope of the particular "classes of subjects", or both.

based on a misconception. Every question determined by an individual or by a court involves the exercise of judgment and only some of them raise questions of policy of greater or less magnitude.

The simplest question of bare fact, for example whether *A* hit *B* in the eye with his fist, can be decided only by the exercise of judgment. Supposing an eye witness testifies that in broad daylight he saw *A* hit *B* in the eye with his fist and heard the sound of the blow. The court exercises judgment when it decides that the testimony may be accepted. It accepts the truth of the evidence because, in its experience, in the ordinary case a credible person with eyesight and hearing similar to those of the witness could in broad daylight see the act he testifies to and could hear the sound. Courts continually exercise judgment as to whether acts or events have occurred on the basis that the evidence is sufficient to establish that in the ordinary course of events they must have occurred.

The kind of judgment exercised in determining the questions in constitutional cases that I have called questions of fact is of a similar kind. The effect of a statute is determined having regard to the normal course of events in the light of evidence. The policy purpose of Parliament is inferred from what Parliament has done and from such other materials as are trustworthy.

Further, even on questions of interpretation of the scope of the various "classes of subjects", where judgment is admittedly exercised on a different basis, the judgment is not necessarily exercised at large. Judgment must be exercised according to some standards. These standards may be wide or narrow. Professor Laskin suggests that the standard should be the opinion of the court as to what is a sound social, economic or political conclusion. I suggest that the standard is the intention of the framers of the B. N. A. Act as closely as their intention can be ascertained, and that the judgment should be exercised to achieve this as nearly as possible. The mere fact that judgment is exercised does not carry us to the length of Professor Laskin's proposition that the judgment must or should be exercised to reach what in the court's opinion is the best thing in the particular case.[11]

[11] I have the same difficulty adopting the conclusions suggested by Professor W. R. Lederman in his stimulating essay, Classification of Laws and the British North America Act (Legal Essays in Honour of Arthur Moxon, 1953, p. 183). Professor Lederman develops the idea that sections 91 and 92 of the B.N.A. Act are classifications of laws. He states that we must look at the "total meaning" of a rule of law to classify it in the appropriate way. He develops as his main point "that a rule of law for the purposes of distribution of legislative powers is to be classified by that feature of its meaning which is judged the most important one in that respect". He suggests that we might as well abandon the use of such

The third consideration Professor Laskin appears to put forward to support his proposition that constitutional adjudication must or should be a policy judgment based on social, economic or political considerations, is his statement that by and large our fundamental constitutional cases could have been decided quite as easily the other way. I am not sure what Professor Laskin proves by this. If I have correctly interpreted his fundamental proposition, then, in accordance with it, his statement is obviously correct. Different courts might have taken different views of the best social, economic or political course. Whether they should have or not depends upon whether we agree with the soundness of their decision viewed as a free policy decision. On the other hand, if you

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expressions as "pith and substance" and "true nature and character", since they are all merely relative terms, and substitute the word "important". He then goes on: "the thesis so stated points to the heart of the problem of interpretation i.e. whence come the criteria of relative importance necessary for such a decision? In this inquiry the judges are beyond the aid of logic, because logic merely displays the many possible classifications, it does not assist in a choice between them. If we assume that the purpose of the constitution is to promote the well-being of the people, then some of the necessary criteria will start to emerge. When a particular rule has features of meaning relevant to both federal and provincial classes of laws, then the question must be asked, Is it better for the people that the thing be done on a national level or on a provincial level? In other words is the feature of the challenged law which falls within the federal class more important to the well-being of the country than that which falls within the provincial class of laws. Such considerations as the relative value of uniformity and regional diversity, the relative merits of local versus central administration and the justice of minority claims, would have to be weighed. . . ." Professor Lederman then continues by saying: "In the making of these very difficult relative-value decisions, all that can rightly be required of judges is straight thinking, industry, good faith and a capacity to discount their own prejudices". (Pp. 197-198)

The difficulties I experience are twofold. First, I suggest that this is not the course that the courts have followed and, as a practitioner, it affords me little guidance in giving opinions or in presentation of cases to the courts. Secondly, Professor Lederman does not seem to me to justify his apparent view that sections 91 and 92, as interpreted by the courts in the way I suggest they have been interpreted, do not lay down more precise criteria for classification, designed to accomplish the desirable end he indicates, which criteria should guide the discretion of the courts without the need of adopting the unfettered approach suggested by him.

Before going over to the Olympian approach he advocates, I suggest we should attempt to analyze the course the courts have followed as a preliminary to the conclusion that they have been in error or that a new method is advisable. As indicated in the text of this article, I concede that the courts make value-judgments, but I suggest that the courts have found a sensible standard of values in the B.N.A. Act that furnishes tests as to how "features" of a law are to be determined to be federal or provincial. The courts have already considerably refined the problem from the crude state in which Professor Lederman leaves it.

I suggest that an inquiry as to the "effect" and "purpose" of a law is really a more precise and practical way of stating Professor Lederman's test of the "total meaning" of the law. If we know what the law does and

agree with my suggestion that the courts have adopted certain external standards of judgment, and that these standards are a proper basis for decision, then whether the decisions could or should have been different depends upon whether we agree with the application of the standards in the particular case. We cannot determine this without ascertaining what the standards are and analysing the reasoning of the court. Professor Laskin makes no attempt to do this. In the result it seems to me that his statement is merely a suggestion that, in his view, the courts have arrived at incorrect decisions tested by his own standards. He is pulling himself up by his own bootstraps by assuming his conclusion.

This brings me to Professor Laskin's apparent view that as a matter of fact the courts have reached their decisions in consti-

why, surely we have its total meaning. These tests also afford some basis for judging what is relevant for consideration.

Next, I agree that Professor Lederman is correct in suggesting that "more important features" may be a better way of expressing such things as "pith and substance" and "true nature and character", but I should say that this change in terminology really does not, beyond leading to clearer thinking, contribute to the solution of the problems. It recognizes that laws do not have only one "effect" or one "purpose" and that out of the many effects and purposes it is necessary to pick the governing ones. Analyzing the test of "importance" into the separate factors of "effect" and "purpose" is, however, an aid in refining the problem of determining the relative importance of federal and provincial features.

Finally, I suggest that Professor Lederman's test appears to be directed mainly at determining what "matters" fall within the residuary power of section 91. We still have the problem of determining what falls in the enumerated heads in sections 91 and 92. The general test he puts forward does not really furnish much guidance on the dividing line between "classes of subjects", such as "Banking" and "Property and Civil Rights in the Province". The external limits that are implicit in the decisions of the courts do lay down a sound basis for determining the limits of the authority of Parliament or the legislatures under the various enumerated classes of subjects. When we come to the question of the residuary power of Parliament under the opening words of section 91, I suggest that the courts have laid down a test that is more practical than that suggested by Professor Lederman. Surely interpreting the residuary power as limited to matters of "inherent national concern" is a more practical way of stating the test that he proposes to distinguish matters falling into the residuary power from matters of merely local nature arising in each province. It affords a test in relation to which judgment can be exercised as to whether or not a matter should be dealt with by Parliament. For example, it is apparent that a war affects the country as a whole and rises above matters of merely local interest. Another example that might be furnished is the state that exists when there is an inflation of the currency. Inflation by its very nature is a condition that affects an economic unit as a whole, and would seem to be almost a textbook example of something that is "inherently" of national concern. Legislation to meet an inflation, for example price controls, would therefore be authorized by Parliament. On the other hand, the control of prices in a company town to prevent exploitation of the workers in that town would be a purely local matter to be dealt with by the provincial legislature. Here we have some guidance in the expressed test laid down by the courts that to fall within the residuary power of section 91 the matter must be one that is of "inherent national concern".

tutional cases on the basis of policy considerations and any denial that they have done so is either lip service or the product of delusion.

He reviews a considerable number of cases to support his contention that the courts have based their decisions on social, economic or political considerations and on their own views of the wisdom of the legislation. Space does not permit a review of all these cases. May I however deal with the first decision he relies on to support his statement, the decision in the *Alberta Bank Taxation* case.[12] Professor Laskin states that:

> The Privy Council made short shrift of the argument, based on the *Lambe Case*, that the courts should not be concerned with the wisdom of legislation. Lord Maugham gave an answer in one sentence: 'Their Lordships do not agree that this argument should prevail in a case where the taxation in a practical business sense is prohibitive'. Does not this involve a conclusion based on the economic impact of the tax?[13]

I suggest that an analysis of this case does not support Professor Laskin's interpretation of it. Moreover, I suggest his statements demonstrate a mixture of ideas. He appears to be of opinion that if the courts take into account the economic impact of a tax, that is, as I understand it, the amount of tax payable and by whom, and so on, they must necessarily have decided on the basis of their view of the wisdom of the legislation. I suggest that there is a *non sequitur* in this reasoning.

In the *Alberta Bank Taxation* case the question was whether legislation imposing a tax on banks was legislation "in relation to" a "matter" that could be said to "come within" the "class of subjects" in section 91 entitled "Banking". It appears to be reasonably clear that no question of interpretation of the scope of "Banking" as a "class of subjects" was involved, since it must be admitted by all that legislation directly prohibiting persons from carrying on banking in the province of Alberta clearly would be legislation in relation to a matter coming within "Banking". The only question was whether the legislation then before the court was of this character. The courts examined the operation of the legislation as a question of fact and found that, although the statute was in form only a taxing act, as in the *Lambe* case, the amount of the tax was in fact prohibitive of banking. They also found that it was intended to be so and that its object was the termination of banking in Alberta. They therefore held that the legislation was in relation to a matter coming within the class of subject, "Bank-

[12] [1939] A. C. 117.

[13] *Op. cit.*, footnote 1, at p. 118.

ing", quite as much as if it had in terms directly prohibited banking.

That this is a correct interpretation of the judgment appears from the following extracts from it. After setting out at some length the necessity of looking at the effect and purpose of legislation to determine its validity, and stating the general principles of interpretation and application, Lord Maugham continues:

> If these principles are borne in mind, it appears to their Lordships, as it appeared to the Supreme Court, that the specific question that arises in relation to the Bill No. 1 presents no serious difficulty. In the first place, it is plain that the taxation is aimed simply at banks. . . .
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> Next, if the effect of the Bill is examined on the footing that it becomes operative in the Province, some remarkable facts emerge. . . . Their Lordships do not disagree with the Chief Justice and Davis J. that the facts are sufficient 'to show that such a rate of taxation must be prohibitive in fact and must be known to the Alberta Legislature to be prohibitive, . . .
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> It was rightly contended on behalf of the appellant that the Supreme Court and the Board have no concern with the wisdom of the Legislature whose Bill is attacked; and it was urged that it would be a dangerous precedent to allow the views of members of the Court as to the serious consequences of excessive taxation on banks to lead to a conclusion that the Bill is ultra vires. Their Lordships do not agree that this argument should prevail in a case where the taxation in a practical business sense is prohibitive. If, however, any doubt could be entertained on the question of fact, there is in this case a further point which seems to their Lordships to be decisive. . . .
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> . . . Their Lordships agree with the opinion expressed by Kerwin J. (concurred in by Crocket J.) that there is no escape from the conclusion that, instead of being in any true sense taxation in order to the raising of a revenue for Provincial purposes, the Bill No. 1 is merely 'part of a legislative plan to prevent the operation within the Province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada'. This is a sufficient ground for holding that the Bill is ultra vires.[14]

I suggest that any fair reading of this judgment shows two things. First, the Privy Council, far from basing its decision on the wisdom or folly of the legislation, expressly states that it was "rightly contended" that they are not concerned with this, and in fact did not concern themselves with it. It would seem therefore that the mere fact that the tax might be excessive and therefore unwise would have been no ground for holding it invalid. They reject the argument, however, that they cannot look to the consequences of excessive taxation where "the taxation in a practical business sense is prohibitive". The relevant consideration was not merely that

[14] [1939] A. C. at pp. 131-133.

the tax was excessively heavy but that it prevented banking. Secondly, these extracts illustrate one of the major propositions I have been developing, that the courts determine the validity of legislation having regard to the real effect in a practical way and the real purpose of the legislation. These are determined as actual questions of fact. Parenthetically, I suggest that the course adopted supports in turn the inference I have put forward as to the interpretation of the nature of "classes of subjects", because these facts were ascertained to find out within which "class of subject" the matter of the law came.[15]

This analysis of the first authority upon which Professor Laskin relies for his assertion that the courts have expressly admitted that they decide cases on the basis of their views as to the wisdom of the legislation or of the interpretation of the B.N.A. Act to be adopted, from a social, economic or political point of view (which I understand his quotation from Lord Maugham is intended to prove), demonstrates that Professor Laskin misunderstands the

[15] Both Professor Laskin and I appear to have been confused in our discussion of the extent to which the wisdom or folly of a particular law is significant in determining its validity. The courts are clearly correct in their statements that the wisdom or folly of the particular law is quite irrelevant. The legislative authority conferred by sections 91 and 92 has been held to be exhaustive (subject to the one limitation that laws may not be enacted under these sections conflicting with other provisions of the B.N.A. Act) and it follows that all potential laws, whether wise or foolish, can be enacted by either Parliament or the legislatures, or both in co-operation. It further follows that, even if the courts should consider that a law is completely foolish, nevertheless they must determine whether Parliament or the legislatures can enact the law. The wisdom or folly of particular legislation is the responsibility of Parliament and the legislatures within their power to make laws.

The significant question is the extent to which the courts may give effect to their own views as to the wise interpretation to be given to the B.N.A. Act in determining whether Parliament or the legislatures are authorized to enact laws in relation to a particular matter. This is the issue between Professor Laskin and myself. I suggest that the courts exercise their discretion in relation to certain standards external to their own policy views. Professor Laskin suggests that they should exercise an unfettered discretion guided by the light of their own wisdom. It may be that the result of any particular case would not differ whichever approach is adopted. I am compelled to admit that in some borderline instances the courts find little guidance from the language of the act and must go on their general judgment as to the intended scheme. It is important, however, for us to understand which is the correct approach. Certainly it is important for any advocate who is charged with the presentation of a constitutional question to the courts. He must know what may properly be considered and what may not be considered. Again, although it may be suggested that the differences in the approaches proposed by Professor Laskin and myself are merely a matter of emphasis, since obviously the courts will not arrive at a result they consider to be completely foolish on the quite proper canon of interpretation that the B.N.A. Act was not intended to produce absurd results, nevertheless, as a practical matter in establishing the proper rôle of the courts, determination of the correct approach is important.

decision and has been guilty of relying on a portion of the judgment out of context. His misunderstanding, I suggest, applies equally to his analysis of the other cases referred to in his article as indicating that the courts have either expressly or implicitly followed such a course. The decisions do not in fact support his assertion that the courts have decided the cases in the light of either their own views as to the wisdom or folly of a law or of permitting Parliament or the legislatures to enact a particular law. I submit that these cases have been decided in accordance with the method of interpretation and application I have suggested and that the courts have conscientiously attempted to give effect to the intended scheme of the B.N.A. Act as expressed in it. For illustrative quotations from the authorities, may I refer to my earlier article.

This brings me to Professor Laskin's final criticism of the decisions in a number of matters which he asserts are founded on a "crabbed conception of federal legislative authority". It is not sufficient for Professor Laskin to assert that these decisions are incorrect or unsound because he disagrees with the result, tested in accordance with the method of interpretation that he proposes and his own views on the wise thing to do. Surely he must analyze the method of interpretation and application that was in fact adopted and indicate where the error lies either in the method or in the way in which the method was applied. It hardly seems fair to accuse the courts of having a "crabbed" conception of federal legislative authority without at least analyzing the conception and indicating wherein it errs. I suggest that there is a great deal to be said in favour of the interpretation and application of the B.N.A. Act that has been adopted in the cases with which Professor Laskin disagrees.

In the first place, the method of interpretation and application I suggest has been adopted is based on the premise that the courts are not original policy makers in constitutional law any more than in the interpretation of other legislation. They have construed their function to be the subsidiary one of carrying out the scheme that was intended in so far as they can ascertain it. This is the proper rôle for the courts to adopt. It seems almost axiomatic that, with respect to the interpretation of written law, the function of the courts when they make policy judgments is subordinate to that of the framers of the law who formulated the original policy. Such a view of the rôle of the courts removes them to a large extent from the controversial sphere of politics, which is desirable in order to maintain the integrity of the legal system as a whole.

Further, the consequences of the interpretation that has been adopted are not, I suggest, as fatal to good government as Professor Laskin suggests and may in fact be justified on his own tests of general social, economic and political considerations.

The main weight of Professor Laskin's complaints about the interpretation of the B.N.A. Act adopted in the decisions he refers to is directed at the interpretation that has been adopted in cases considering insurance legislation, marketing legislation and labour legislation. I should like for a moment to examine in a broad way the interpretation that I understand was adopted by the courts in these cases.

The authority to legislate on these subjects requires consideration of three provisions in sections 91 and 92:

(a) the "exclusive" authority of Parliament to legislate in relation to "The Regulation of Trade and Commerce";

(b) the "exclusive" authority of the legislatures of the provinces to legislate in relation to "Property and Civil Rights in the Province"; and

(c) the authority of Parliament "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".

The authority of Parliament under the first class of subjects, "The Regulation of Trade and Commerce", is exclusive in the sense that any matter falling within it does not fall, by reason of the closing words of section 91, in the classes of subjects in section 92. The authority of the legislatures of the provinces with respect to "Property and Civil Rights in the Province" does not therefore include anything coming within "The Regulation of Trade and Commerce", but is exclusive in the sense that anything coming within this class of subjects does not fall to Parliament under the opening words of section 91. By its terms the power there expressed extends only to matters "not coming within the Classes of Subjects . . . assigned exclusively to the Legislatures . . .".

The general interpretation of the scope of these "classes of subjects" appears to be as follows. "The Regulation of Trade and Commerce" in section 91 is restricted to the regulation of interprovincial or international trade and commerce, that is, relations or conduct arising out of inter-provincial or international transactions, and possibly the regulation of relations arising from general aspects of trade and commerce, although so far nothing

of this character of any significance has been recognized. "Property and Civil Rights in the Province" as a class of subjects is not restricted merely to the regulation and control of relations between individuals connected with property or status. All relations between individuals in their conduct to each other within the province for purposes of regulation from a provincial point of view fall within this "class of subjects" unless withdrawn expressly by a "class of subjects" enumerated in section 91.[16] The authority of Parliament under the opening words of section 91, which in terms is restricted to "matters not coming within the Classes of Subjects . . . assigned . . . to the Legislatures", is interpreted as authorizing Parliament to make laws to control or regulate relations arising only from matters not dealt with in section 92 at all or from matters that are "inherently" of national concern from a national point of view.[17]

The decisions to which Professor Laskin refers relate almost entirely to the control and regulation by legislation of relations connected with contracts or transactions or labour negotiations participated in by persons engaged in businesses or trades. These businesses or trades may be carried on by persons wholly within one province or on a large scale by the same person throughout several provinces. The transactions or activities in the businesses or trades are in general entered into wholly within each province. In general, transactions engaged in wholly in a province, whether as matters of contract or negotiation or otherwise, do not fall in "The Regulation of Trade and Commerce" but come within "Property and Civil Rights in the Province". Moreover, even though the fact that the same transactions may occur in several different provinces or may be entered into by the same person in several different provinces does not bring them within "The Regulation of Trade and Commerce" or the residuary power, if each transaction is entirely intra-provincial. There is nothing of inherently national concern in accumulating wholly intra-provincial matters. It follows from the foregoing that insurance contracts, intra-provincial marketing transactions and local labour negotiations are subject to provincial regulation.

I suggest that the foregoing interpretation gives effect to the intended scheme of the B.N.A. Act and to the scheme that is politically and socially acceptable today. This can be tested by con-

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[16] *Citizens Insurance Company* v. *Parsons* (1881), 7 App. Cas. 96; *First Insurance Reference*, [1916] 1 A.C. 588.

[17] *Canada Temperance Act Reference*, [1946] A.C. 193.

sidering the other courses that could have been followed. The only two other interpretations of the scope of the classes of subjects referred to that could have been adopted would appear to have been as follows.

In the first place "Property and Civil Rights in the Province" could have been interpreted as restricted (as was originally argued) to civil rights arising strictly in relation to property or status. Apart from the fact that the dividing line would have been an extremely difficult one to draw, and that the argument appears to misconceive the nature of a "class of subjects",[18] such an interpretation would have had the effect of placing a very large part of the subjects dealt with by the Civil Code of Quebec within the authority of Parliament and outside the authority of the legislature of the province of Quebec. These subjects would in such an interpretation have come within "The Regulation of Trade and Commerce" or within the residuary power as being omitted from section 92.

Secondly, even accepting the wider interpretation that has been given to "Property and Civil Rights in the Province", it would have been possible to say that Parliament has authority to legislate to deal with relations arising in local as well as general trade and commerce, or out of some common situation existing simultaneously in several different provinces, for the purposes of legislation of general application through the country. It could have been said that for these purposes these relations had a trade and

[18] If I am correct that each "class of subjects" is to be taken as describing a field of practical human conduct or relations that may be regulated by law from a specified policy point of view, then "Property and Civil Rights in the Province" should not be treated or considered as a segregation of certain legal rights or concepts considered from a technical legal point of view. For example, as indicated in the text, it has been argued that all "contracts" fall in "Property and Civil Rights in the Province". A contract is, however, a technical legal concept. For reasons given in my earlier article, classes of subjects must not be interpreted as referring only to fields of law or legal concepts. They refer to the practical fields of relations that give rise to the fields of law or legal concepts. The latter are merely devices forming a part of the legal mechanism for regulating those relations. Consequently "contracts" as such do not fall in "Property and Civil Rights in the Province". The correct method of expressing it is that human relations giving rise to agreements between persons having effect in law as contracts fall in the class of subjects "Property and Civil Rights in the Province", except those that come within such fields of relations (which may also give rise to contracts) as fall in section 91. To determine whether Parliament or the legislatures have the authority to regulate particular contracts recognized by the law depends on the field of relations in connection with which these contracts occur—whether objectively they come within a class of subject in section 91 as well as within "Property and Civil Rights in the Province"—and the purpose for which they are being regulated. For an example see *Grand Trunk Railway* v. *Attorney-General of Canada* (*Contracting Out Case*), [1907] A.C. 65.

commerce aspect or a national aspect. The practical result of this interpretation in overbearing provincial legislative authority would probably have been the same as if "Property and Civil Rights in the Province" had been given the narrow interpretation. If the mere fact that certain human relations are common in several provinces were a sufficient foundation to authorize Parliament to legislate, then the control and regulation of virtually all relations between individuals and all conduct would be within the authority of Parliament, for example, the relations of landlord and tenant.

I doubt if it can be said with confidence that the framers of the B.N.A. Act would have agreed to either of these interpretations if the effect on the civil law of Quebec had been specifically drawn to their attention. The maintenance of the integrity of Quebec law was probably of as great significance in 1867 as it is now. Moreover, I doubt if either of these interpretations would be politically or socially acceptable now to residents in other provinces if the question of interpretation were arising as an initial question. At the present time, any attempt to argue for an extended interpretation of Parliament's authority is almost invariably contested by one or more provinces in addition to Quebec. It is, therefore, certainly arguable that the interpretation adopted in the decisions to which Professor Laskin objects gives effect to the language of the B.N.A. Act conferring certain "exclusive" authority on the legislatures and gives effect to a scheme in accordance with that language which accords with the scheme that the framers of the B.N.A. Act would have accepted if the details of its operation that have since come to light had been completely before them. By and large, it would seem that this interpretation is also in accordance with current social and political requirements.[19]

[19] It may well be a fallacy to detect "trends" in the decisions of the courts interpreting the B.N.A. Act. It is commonly said that during the period from 1916 to 1937 the decisions of the Privy Council were directed at narrowing the legislative authority of Parliament. It is also said that during the period since 1937 the decisions have taken a more "liberal" view of Parliament's authority and have narrowed provincial authority. I suggest that one explanation of the so-called trends is that, during the first period, the legislation that was being tested in the major cases was federal legislation and that during this period Parliament was endeavouring to extend its authority as widely as possible. The successive series of decisions holding federal legislation invalid have the appearance of a trend. On the other hand, in the major cases since 1937 in which legislation has been held invalid, the legislation in question was provincial legislation. There are exceptions of course. The result, however, was that in the first period Parliament and, in the second, the legislatures were held in a series of cases to be attempting to legislate beyond their powers. The successive decisions give the appearance of a "trend" although in both periods they appear to be consistent with each other.

There is no doubt that some inconvenience and loss of efficiency result from this interpretation. It would be more convenient, for example, to have one legislative enactment and one administration dealing with labour relations. This is even more true of marketing schemes. With the extension of international arrangements, it may well be, however, that at some future date a federal marketing scheme forming an integral part of an international transaction might be treated as "inherently" of national concern. In the meantime, practical devices exist to permit inter-provincial or international marketing schemes but leave freedom for local divergencies. Basically this is the purpose of a federal system, and there is nothing wrong with such a conception of federalism. It is adopted to provide for a strong national government in national matters and for local government in other matters to meet local divergencies. Professor Laskin's seeming assumption that anything that can functionally be dealt with conveniently as a unit should come within federal authority is really an argument against federalism. It is an argument that the B.N.A. Act should be interpreted to establish a unitary state. This view is scarcely reconcilable with the language of the B.N.A. Act or, I suggest, the intentions of at least many of the framers. Finally, as a hard political fact, it is not generally acceptable today.

It seems that much of the vehemence in many current criticisms of the courts' interpretation of the B.N.A. Act, such as Professor Laskin's, is partially misconceived. Most of the major difficulties that arise under the Canadian federal system do not flow from the interpretation of the distribution of legislative powers on the subjects discussed, but rather from the lack of equilibrium between the financial resources and responsibilities of the respective governments. The courts could hardly have accomplished anything by way of interpretation beneficially to change the provisions of the act on the powers to tax. It may not be possible to make any different legal provisions in the B.N.A. Act on the taxing powers, even by amendment. Can one envisage authorizing the provincial legislatures to impose unlimited indirect taxes? One of the major advantages of a federal form of government, namely, the customs union that it creates, would be destroyed if this were done. It seems equally impossible, from the point of view of revenue alone, and leaving aside fiscal policy control, to preclude the federal government from imposing direct taxes. The likely solution to the financial difficulties would seem to be practical arrangements between the governments either for the transfer of moneys raised

by the federal government to the provinces on one basis or another, for a limited participation by the provinces in the indirect tax fields, or for mutual co-operation in the direct tax field, or a combination of these. In any event it seems clear that the courts could have done little or nothing to solve these problems by any possible interpretation open to them.

With respect to legislative power over other matters, I suggest that the interpretation adopted by the courts has established a scheme that is as defensible as any other. The B.N.A. Act as interpreted recognizes the local divergency that is permitted by a federal system and at the same time it provides the federal government with adequate powers to carry out the functions essential for a strong national government. There seems to be sufficient flexibility in the interpretation that has been adopted, which confers on Parliament authority to deal with all matters that are "inherently" of national concern, to meet all future potential requirements of the nation as a whole. Parliament has authority available whenever the nation as a whole is imperilled or concerned and this authority may become more important as Canada becomes more closely integrated as an economic unit and as international considerations become more dominant. More subjects are likely to become inherently national in concern.[20]

In the result I suggest that Professor Laskin has not justified his criticisms of the theory of interpretation that appears to be

[20] As an example of the flexibility these words provide, reference may be made to the question of the authority to enact legislation to implement treaties. In the 1937 *Labour Conventions* case it was held that Parliament did not have authority to implement international conventions dealing with minimum wages, maximum hours of labour, and so forth. The authority to make laws to carry out these conventions, it was held, was to be determined in accordance with the ordinary domestic distribution of powers, and required legislation by both Parliament and the legislatures to give effect to different provisions in the conventions. The mere fact that there were conventions was not sufficient to give Parliament overall authority. It must be borne in mind however that the conventions there under consideration were of a very unusual type. They settled no issues between Canada and any other country on matters involving their external relations. They were designed to bring about common action by several nations for the adoption of domestic standards of industrial legislation in each of their own countries. I suggest for consideration that if a treaty such as a treaty of peace, or a treaty dealing with some aspect of Canada's external relations (for example, aeronautics), comes into question, the courts would be bound to hold that Parliament may enact legislation to implement it as a matter of inherent national concern. Such a treaty involves the relations of Canada as a whole with other countries and its subject matter is inherently national. This submission was argued before the Supreme Court of Canada in *Johanneson* v. *West St. Paul*, [1952] 1 S.C.R. 292. It is not referred to in the judgments, but some of the learned judges upheld Parliament's authority to implement the non-imperial aeronautical convention there in question.

implicit in the decisions of the courts, or of the decisions themselves, by the arguments he puts forward. I cannot escape the conclusion that in his approach to the problem of interpretation of the B.N.A. Act Professor Laskin is importing into the Canadian legal system without sufficient consideration a concept of the rôle of the judiciary developed by certain legal thinkers in other countries, notably in the United States, on the assumption that it represents an absolute or universal truth holding equal value for all legal systems. No attempt is made to analyze or appraise this concept to determine its suitability for import into the Canadian legal system. I have not sufficient knowledge to attempt to discuss whether or not the American concept of the rôle of the judiciary is desirable or necessary for the legal system of the United States. I assume that it is the only sound and proper approach. The fact that the United States and Canada both have federal systems of government is not a sufficient reason, however, for Canadians to adopt the same theory. There are many fundamental distinctions between the legal systems and constitutions of the two countries.

In the first place, the differences between the legislative processes under a parliamentary system and under a congressional system necessarily have a bearing on the adoption of United States doctrine as to the rôle of the courts on the general principles to be followed in the interpretation of legislation. These necessarily affect constitutional interpretation. This matter is so thoroughly dealt with by Professor J. A. Corry in a recent article in this Review[21] that I do not propose to enlarge on it.

Again, the Canadian judicial system is a centralized system under which the Supreme Court of Canada may be the final arbiter in any legal question raised in the country. This is not true in the United States. The result in the long run is a uniformity of decision in this country that may very well be lacking in the United States. Treatment of judicial decisions as reversible may not be necessary here and should not be adopted without full consideration.

The Constitution of the United States and the British North America Act differ in a number of fundamental respects. The British North America Act does not include a bill of rights limiting the authority of Parliament nor does it include any overall restrictions on provincial legislatures of a similar character. Provisions of this kind are of the greatest significance for the process

[21] The Use of Legislative History in the Interpretation of Statutes (1954), 32 Can. Bar Rev. 624.

of interpretation to be adopted by the courts because the language of a bill of rights is necessarily of the most general kind, having varying social significance from time to time. Undoubtedly a court is faced with a very difficult problem in interpreting and applying general language of this character. Wide language embodying social concepts and standards of varying significance not only allows but requires greater play for value judgment than in almost any other aspect of interpretation. It may well lead to an entirely different theory of interpretation and an entirely different concept of the rôle of the courts from those that may be proper where no such provisions are contained in the constitution.

A second major difference between the United States Constitution and the B.N.A. Act lies in the provisions on distribution of legislative powers. The B.N.A. Act is more complicated in providing for "exclusive" classes of subjects within federal authority, "exclusive" classes of subjects within provincial authority and then a residuary clause covering "classes of subjects" not assigned "exclusively" to the provinces. I suggest for consideration that this arrangement of the distribution of powers requires, and possibly forces, the adoption of objective tests for determining the powers of Parliament and of the legislatures of a more stable character than might otherwise be required. The legislative authorities are interlocking and an interpretation adopted for the scope of one "class of subjects" affects the interpretation of others. As we have seen, the interpretation of the scope of "Property and Civil Rights in the Province" reacted on "The Regulation of Trade and Commerce" and also on the general residuary power. A different decision on the same subject matter now, favouring the federal powers, might immediately bring into controversy numerous provincial statutes, since it would necessarily carry with it a view of the powers conferred on the provinces entirely different from those prevailing at the time of their enactment.

A third difference between the United States Constitution and the B.N.A. Act is the doctrine of the "separation of powers" in the United States, which has led to the development there of different theories of legislative, executive and judicial powers and responsibilities, both legal and practical.

In the result, I suggest that the transplanting of concepts from other legal systems into Canada should take place only after the most careful examination of the propriety of doing so and of their applicability, and Professor Laskin has not demonstrated such an examination in his article. He seems to have assumed the

soundness of his approach as a foundation for his criticism without justifying the approach.

It is interesting to note, however, that apparently the United States Supreme Court in constitutional cases is coming more closely to share the view of the rôle of the courts in scanning the wisdom of legislation that has been adopted since the beginning by the Privy Council and the Supreme Court of Canada. Although the tests for the validity of legislation under the United States Constitution and the B.N.A. Act appear to differ materially, and particular aspects of these tests may not be relevant in Canada, the court has returned to the general position on constitutional cases that the question is merely one of applying the constitution. They seem to be coming perilously close to adopting as the fundamental question, "Has Congress the power to enact the legislation?", which Professor Laskin objects to so strongly for Canadian purposes. I rely for these statements on an article by Bernard Schwartz, "The Changing Rôle of the United States Supreme Court", in this Review.[22]

Possibly I may be permitted to conclude with the following extracts from Professor Schwartz' article:

> Perhaps the outstanding characteristic of the Court today is the restraint with which it exercises judicial review in dealing with acts of Congress. As stated by Mr. Justice Frankfurther: 'It is not for us to find unconstitutionality in what Congress enacted although it may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country's well-being. . . .'[23]
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> Unless there is an express constitutional prohibition of this character which is contravened, the present Court will not invalidate challenged legislation. It may be going too far to conclude from this, as one commentator did, that 'the scope of national authority has become a question of governmental policy, and has substantially ceased to be one of constitutional law'. But the attitude of the Court today with regard to its power to declare statutes unconstitutional certainly represents a drastic change from that of its predecessors. No longer can the Court be accused of exercising the functions of a super-legislature, which passes upon the desirablity of legislation according to its own notions of reasonableness. If anything, the pendulum has swung to the opposite extreme. As expressed by a member of the present Court, the determination of whether particular legislation is desirable is not for the Court. 'A century and a half of constitutional history and government admonishes this Court to leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government.'[24]

[22] (1950), 28 Can. Bar Rev. 48.
[23] *Ibid.*, at pp. 52-53.
[24] *Ibid.*, at pp. 54-55.