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LASKIN'S FOUR CLASSES OF LIBERTY

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This article explores the relationship between the late Chief Justice Laskin's philosophy of liberty as expressed in a 1959 Canadian Bar Review article and his subsequent decisions on the Bench in cases involving civil liberties and federal power. It will be seen that his views about the appropriate role of the State in such matters remained constant throughout his career. The state was to intrude as little as possible where political and legal liberties were concerned, giving individual freedom a wide scope consistent with societal values of superordinate importance. However, it bore a positive burden to intervene actively to secure economic and egalitarian liberty. The article will show, it is hoped, that Chief Justice Laskin was ahead of his time with respect to political and legal liberties: his dissents did not carry the day when he wrote them, but they spoke to the future under the Charter of Rights and Freedoms. It is also to be hoped that his decisions on federal power will be followed to create a Canadian union whose economic and social programs are as vigorous in one part of the country as another.

Dans cet article, l'auteur compare le concept de liberté de l'ancien juge en chef Laskin tel qu'il apparaît dans l'article qu'il écrivait en 1959 dans la Revue du Barreau canadien avec celui qui ressort des jugements qu'il rendit plus tard dans les affaires concernant les libertés civiles et le pouvoir fédéral. On verra ainsi que sa conception du rôle de l'état, tout en respectant les valeurs d'importance primordiale de la société, devait, selon lui, intervenir le moins possible dans les questions de liberté politique et juridique pour que le particulier puisse exercer sa liberté aussi pleinement que possible. Il incombait cependant à l'état d'intervenir quand il s'agissait de sauvegarder la liberté économique et égalitaire. L'auteur espère montrer dans cet article le rôle de précurseur que joua l'ancien juge dans le domaine des libertés politiques et juridiques: son opinion quand il était dans la minorité ne prévalut pas en son temps mais elle annonçait l'avenir et la Charte des droits et libertés. L'auteur espère aussi que les jugements

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concernant le pouvoir fédéral serviront à créer une union canadienne dont les programmes économiques et sociaux seront appliqués avec autant de force dans toutes les régions du pays.

Introduction

This article explores the relationship between Chief Justice Laskin's philosophy of political, legal, economic and egalitarian liberty as expressed in a 1959 article¹ and his Supreme Court judgements in constitutional cases where these issues were raised.² The Chief Justice insisted upon a minimal role for the state where political liberties or legal liberties were concerned,³ and gave far wider latitude to the state, both at the federal and provincial levels, to secure economic and egalitarian liberty by providing access to economic or social programs.⁴

It should be noted that I have limited my discussion of economic and egalitarian liberty in this article to cases involving federal power. That is not because provincial laws are unimportant: on the contrary, they are

¹ Bora Laskin, *An Inquiry into the Diefenbaker Bill of Rights* (1959), 37 Can. Bar Rev. 77; hereinafter referred to as the "1959 article".

² See, generally, K. Swinton, *Bora Laskin and Federalism* (1985), 35 U.T.L.J. 353; R.J. Sharpe, *Bora Laskin and Civil Liberties* (1985), 35 U.T.L.J. 632. These articles appeared in a special "Laskin" issue of the *University of Toronto Law Journal*.

³ As to his judgments on political liberties see Part I, *infra*, p. 230. As to his vigorous dissents on issues relating to civil liberties, see Part I, *infra*, pp. . In his academic work he was strongly critical of the Supreme Court of Canada's holding in *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651, (1963), 41 D.L.R. (2d) 485, that the federal Lord's Day Act, R.S.C. 1970, c.L-13, was not violative of the freedom of religion guarantee in the Canadian Bill of Rights, R.S.C. 1970, App. III: see Bora Laskin, *Freedom of Religion and the Lord's Day Act—The Canadian Bill of Rights and the Sunday Bowling Case* (1964), 42 Can. Bar Rev. 147. That view has now been vindicated under the Charter of Rights and Freedoms, Constitution Act, 1982, (hereafter in this article the Charter) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321, where, fittingly, Laskin's comment is cited and his (and others) criticisms of *Robertson* are described by Dickson J. as "telling": see at pp. 333 (S.C.R.), 351 (D.L.R.). As to legal liberties, see Part III, *infra*, p. .

⁴ These include matters like unemployment insurance, state hospitalization insurance and medicare, public education, and so on.

Laskin's judgments indicate a quick readiness to yield the field of economic endeavour to Parliament and, to a lesser extent, the provincial legislatures to promulgate collectivist regulatory schemes: *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, (1976), 68 D.L.R. (3d) 452; *Labatt Breweries of Canada Limited v. The Attorney-General of Canada*, [1980] 1 S.C.R. 914, (1979), 110 D.L.R. (3d) 594; *MacDonald et al. v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, (1976), 66 D.L.R. (3d) 1; *Caloil Inc. v. Attorney-General of Canada*, [1971] S.C.R. 543, (1971), 20 D.L.R. (3d) 472; *Reference re Agricultural Products Marketing Act and Two Other Acts*, [1978] 2 S.C.R. 1198, (1978), 84 D.L.R. (3d) 257.

Laskin's concern for effective government action in the economic sphere did not manifest itself exclusively in division of powers cases. Sometimes it emerged in cases

critical. Provincial labour laws permit workers to organize. Occupational health and safety laws establish and enforce safety standards in the workplace. These are central features of economic liberty. Provincial human rights codes guarantee equal opportunities in employment and accommodation without regard to prohibited grounds of discrimination. Provincial programs respecting the provision of public housing, education, hospitalization and medicare equalize access to essential services. These all help to secure egalitarian liberty. However such laws no longer raise significant division of powers issues.⁵

The real constitutional issue, and one which has been a continuing problem since Confederation, is the extent of federal power to establish large and expensive social and economic programs across the country. Laskin made a continued call throughout his career for a strong central government.⁶ I shall argue that this is because, in his view, only Parliament had the financial resources and national reach to make universal programs work. I shall accordingly deal with cases involving provincial power only to the extent that they affect federal jurisdiction.⁷

about the respective roles of courts and administrative tribunals. Thus his judgment for a unanimous Supreme Court of Canada in *Seneca College v. Bhaduria*, [1981] 2 S.C.R. 181, (1981), 124 D.L.R. (3d) 193, can be seen as the follow-up to his call in the 1959 article for positive state intervention to secure equal employment opportunities. His remarks in *Badhauria* that a common law tort of discrimination, if one existed, had been "overtaken" by provincial human rights legislation evidences a faith in the ability of state regulatory boards, be they labour relations boards or human rights tribunals, to achieve employment goals.

Laskin's view of egalitarian liberty, the fourth classification outlined in his 1959 article, is closely allied with his view of economic liberty. He saw the legislatures rather than the courts as the primary caretaker and expositor of those classes of liberty. As contrasted with political and legal liberties, Laskin's philosophy permitted, and sometimes even required, state intervention to secure egalitarian liberties: see Part III, *infra*, p. 245.

⁵ Except perhaps, the extent to which provincial regulatory legislation applies to federal undertakings.

⁶ See, for example, the following articles from his academic days: *Peace, Order and Good Government Re-Examined* (1947), 25 Can. Bar Rev. 1054; *The Supreme Court of Canada: A Final Court of and for Canadians* (1951), 29 Can. Bar Rev. 1038; *Comment—Revival of the Trade and Commerce Power—Intraprovincial Grain Transactions Not Excluded from Control Scheme under Canadian Wheat Board Act* (1959), 37 Can. Bar Rev. 630; *Comment—Constitutional Law—Peace, Order and Good Government—Labour Relations in Uranium Mines—Functional Considerations in Determining Limits of Legislative Power* (1957), 35 Can. Bar Rev. 101. For his decisions on the Bench, see Part III, *infra*, p. 245.

⁷ For example, as will be discussed in Part III of this article, *infra*, cases in which Laskin C.J.C. participated like *Reference re Agricultural Products Marketing Act and Two Other Acts*, *supra*, footnote 3 and *Central Canada Potash Co. Limited v. The Government of Saskatchewan*, [1979] 1 S.C.R. 42, (1978), 88 D.L.R. (3d) 609 arguably have a substantial impact on federal power to regulate production in their statements about the scope of provincial power. The same may be said about *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, (1977), 80 D.L.R. (3d) 449 insofar as federal power to fix prices is concerned. With other cases, given the

One further preliminary point is in order. Although Laskin raised the issues of non-discrimination and social welfare benefits together in the egalitarian class of liberty, in fact the issue of non-discrimination cuts across all four classes of substantive liberty. It is a call for basic human dignity and respect; a right to be free of irrational, stigmatizing or simply unnecessary governmental judgments based upon one's personal characteristics. One cannot participate freely in the political process, be assured of freedom from arbitrary arrest or imprisonment, or share in society's economic and social advantages unless one is treated by government with respect and dignity. Non-discrimination is thus a separate value which precedes Laskin's four classes of liberty. This is emphasized today by section 15 of the Charter of Rights and Freedoms. Although it is related to the other Charter guarantees, as for example where Sunday closing laws raise both equality and freedom of religion issues, it is textually and analytically separate from those guarantees. Accordingly, while Laskin's anti-discrimination judgments⁸ are beyond the scope of this article as I have conceived it, the principle which they represent underlies all that follows.

I. *Political Liberties: A Theory of State Exclusion*

Laskin described the political liberties as follows in his 1959 article:⁹

History and tradition have hallowed what may be termed political civil liberty which is associated with the operation of our parliamentary institutions and which makes

operation of the "double aspect" and paramountcy doctrines, a holding for or against provincial power may have little or no impact on federal power. For example, it is clear that the fact that the Supreme Court of Canada upheld provincial power to regulate the construction and operation of a power line in Alberta which, when completed, would be connected to a British Columbia line, did not foreclose federal power to regulate the same thing in its interprovincial aspect. It is simply that federal power was not engaged in that case: see *Fulton v. Energy Resources Conservation Board*, [1981] 1 S.C.R. 153, (1981), 118 D.L.R. (3d) 577.

Similarly the holding in favour of provincial power in *Attorney-General (Quebec) v. Kellogg's Co.*, [1978] 2 S.C.R. 211, (1978), 83 D.L.R. (3d) 314 does not mean that Parliament could not regulate the content of advertising in the broadcast medium, subject of course to the Charter. On the subject of federal jurisdiction over broadcasting, see *Capital Cities Communications Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141, (1977), 81 D.L.R. (3d) 609 and *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191, (1977), 83 D.L.R. (3d) 178. By the same token, holdings which would have sustained provincial laws over agricultural farm products marketing (*Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689, (1971), 19 D.L.R. (3d) 169; *Burns Foods Ltd. v. Attorney-General of Manitoba*, [1975] 1 S.C.R. 494, (1973), 40 D.L.R. (3d) 731), taxation of goods moving in provincial airspace (*The Queen in Right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303, (1980), 111 D.L.R. (3d) 513) or contaminant in extra-provincial waters being carried into the province (*Interprovincial Co-Ops v. The Queen in Right of Manitoba*, [1976] 1 S.C.R. 477, (1975), 53 D.L.R. (3d) 321) would not have denied federal jurisdiction, if exercised, over the same subject matter.

⁸ See his forceful judgments in cases like *Attorney-General of Canada v. Lavell*, [1974] S.C.R. 1349, (1973), 38 D.L.R. (3d) 481.

⁹ *Loc. cit.*, footnote 1, at p. 80.

parliamentary democracy possible and tolerable. The substance of this kind of liberty is freedom of association. . . freedom of the press (or of the use of other media for dissemination of news and opinion) and freedom of conscience and of religion. Crucial as any of these may be to the preservation of the nature of our polity, they are not absolutes. As will be shown below, freedom of association and of assembly have been qualified by propriety (and in the result, legality) of purpose and by a duty to keep the peace. Freedom of speech does not on a level of public order and law cover incitement to crime or seditious utterances; and, on a private level, it is limited by the law of defamation. This is equally true with freedom of the press which, moreover, cannot be invoked to support publications that are in contempt of court. Freedom of religion and of conscience will not, in the views of the courts of the common-law countries, justify human sacrifice or polygamy or the practice of medicine without proper certification or refusal to obey compulsory school attendance laws.

The Charter now entrenches the political liberties, shifting decisions about their parameters from the legislatures to the courts. However, the core of these liberties remains, as Laskin said, state exclusion from the citizen's affairs.¹⁰

As much as anyone else, Laskin presaged the Charter in the political liberties area. Furthermore, he had to swim against the judicial tide to do it. Whereas Rand J. in *Saumur v. City of Quebec*,¹¹ *Switzman v. Elbling*,¹² *Henry Birks & Sons (Montreal) Ltd. v. City of Montreal*¹³ and other cases sat on what is arguably the most civil libertarian Supreme Court in Canadian history, Chief Justice Laskin sat on one where the majorities in a number of cases involving equality rights or political and legal liberties were quite conservative.¹⁴

¹⁰ I do not wish to be understood as saying that the Charter goes no further than to entrench the pre-existing common law. Dickson J. for a unanimous Supreme Court of Canada in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, [1984] 6 W.W.R. 577 specifically rejected that assertion. While Dickson J. was speaking about unreasonable search and seizure, this principle undoubtedly extends to the other Charter guarantees as well. Even the common law, whether codified or not, must pass Charter muster.

The central core of political liberty with which Laskin was concerned is anchored in the democratic principle that an individual is free to do that which is not prohibited by law and, further, that one of the things which the law should not prevent him from doing is speaking out.

¹¹ [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641.

¹² [1957] S.C.R. 285, (1957), 7 D.L.R. (2d) 337.

¹³ [1955] S.C.R. 799, [1955] 5 D.L.R. 321.

¹⁴ During Laskin's tenure, a majority of the Supreme Court fashioned the "valid federal objective" test in equality cases either over his vigorous dissent (see, for example, *Lavell v. Attorney-General of Canada*, *supra*, footnote 8; *MacKay v. The Queen*, [1980] 2 S.C.R. 370, (1980), 114 D.L.R. (3d) 393), or in his absence (see *Bliss v. Attorney-General of Canada*, [1979] 1 S.C.R. 183, (1978), 92 D.L.R. (3d) 417). The effect of this course of decision was to eviscerate the Supreme Court's earlier holding in *R. v. Drybones*, [1970] S.C.R. 282, (1969), 9 D.L.R. (3d) 473 and emasculate the equality guarantee in the Canadian Bill of Rights, *supra*, footnote 3. In the political liberties area, a majority of the Supreme Court of Canada in *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, (1978), 84 D.L.R. (3d) 1, over Laskin C.J.C.'s dissent, upheld provincial

In *Nova Scotia Board of Censors v. McNeil*,¹⁵ provincial legislation empowered a provincial board to prohibit the exhibition of any film or live performance in the province. There were no statutory guidelines to regulate the exercise of the board's discretion, the board never stated whether it had any internal guidelines or, if it did, what they were, and it never gave reasons for its decisions. The board refused to allow the film, *Last Tango in Paris*, to be shown. An appeal to the Governor in Council failed, and the applicant challenged the provincial enabling legislation on the grounds that it was in relation to criminal law.

Ritchie J., speaking for a majority of the Supreme Court of Canada, upheld the Nova Scotia legislation on two alternative bases. First, he held that it was part and parcel of a scheme to regulate the business of films and theatres in the Province and accordingly was valid pursuant to section 92(13) of the Constitution Act, 1867. Second, he held that even if the legislation was directed at public morals, morality could be a separate local matter within the meaning of section 92(16).¹⁶

Although *McNeil* was a pre-Charter case, Chief Justice Laskin's dissent has the greatest significance in a Charter world. He was bound by the strictures of a division of powers Constitution, but the principles which underlie his judgment focus upon fundamental liberties. He would have struck down the provincial legislation on the grounds that it was in relation to criminal law, and therefore beyond the scope of provincial authority under the Constitution Act, 1867. However, I would argue that the real motivation for his conclusion was not the division of powers, but

authority to delegate unfettered censorship power to a board. In *Attorney-General for Canada and Dupond v. City of Montreal*, [1978] 2 S.C.R. 770, (1978), 84 D.L.R. (3d) 420, the majority of the Supreme Court overrode his dissent and dealt a harsh blow to the freedoms of expression and association both in the result of the case and in a number of its statements about their scope. With regard to liberties connected with the legal order, see the discussion in the immediately following text.

¹⁵ *Supra*, footnote 14.

¹⁶ *Ibid.*, at pp. 692 (S.C.R.), 23 (D.L.R.). Two points may be made about Ritchie J.'s division of powers holdings. First, his characterization of the law as being in relation to the regulation of a business is highly problematic. The impugned provisions had nothing to do with licensing, zoning, safety, suitability of exhibition premises, film classification or any other such object. They were censorship provisions whose exclusive object, as Laskin C.J.C. put it, was to protect the public from films and theatre which the board thought the public should not see: *ibid.*, at pp. 674 (S.C.R.), 10 (D.L.R.). As such, s. 92(13) could not ground the exercise of provincial power. Second, assuming I am correct about the first proposition, the legislation can only depend upon Ritchie J.'s alternative holding that a provincial Legislature may regulate morality as a local matter pursuant to s. 92(16). For reasons which I have argued elsewhere in Note on Provincial Power to Regulate Morality, in N. Finkelstein, *Laskin's Canadian Constitutional Law* (5th ed., 1986), p. 902, Ritchie J.'s decision about s. 92(16) has likely been overruled by *Westendorp v. The Queen*, [1983] 1 S.C.R. 43, (1983), 144 D.L.R. (3d) 259 and *Goldwax v. City of Montreal*, [1984] 2 S.C.R. 525, (1984), 16 D.L.R. (4th) 667 and can no longer be considered authoritative on the point.

rather a distaste for this kind of governmental intrusion into public discourse. His difficulty with the legislation was that the state should not be in the business of regulating public taste, not that the wrong level of government enacted the measure:¹⁷

The only inference that can be . . . drawn from the bare facts on the record is that the Board presumes to protect the general public from exposure to certain kinds of films. . . because, in the Board's allegedly unchallengeable judgement, the general public should not see them.

He was further concerned that the legislation and/or the regulations promulgated thereunder were overbroad in relation to their object, vague, and imposed prior restraints:¹⁸

There are no criteria fixed by the Statute upon which the Board is required to act, no provision distinguishing or classifying films as being fit for viewing by adults but not by children. Only Regulation 32 purports to establish criteria but they are at large, namely 'indecent or improper performance' as the Board may define; and although they are addressed to theatre owners and amusement owners they relate directly to the general public's opportunity to view films that are sought to be exhibited. All of this is by way of prior determination, by way of anticipatory control of public taste.

And he stated later in his judgment:¹⁹

What is involved, as I have already noted, is an unqualified power in the Nova Scotia Board to determine the fitness of films for public viewing on considerations that may extend beyond the moral and may include the political, the social and the religious.

All of the factors which one would consider in a freedom of expression case under section 2(b) of the Charter are telescoped into the foregoing paragraphs. First, there is the concern about the purpose of the legislation. The sense is clear that a Legislature should not purport to protect public morals or safeguard the public from exposure to films. Laskin's language reminds us of Rand, J.'s comment in *Switzman v. Elbling*²⁰ that it is not the state's function to prevent the "poisoning of men's minds".

Second, Laskin clearly raises the problem of overbreadth in his point that the statute did not fix any criteria to regulate the exercise of the board's discretion. The board could therefore regulate beyond the moral to political, social or even religious expression as well. Standards by which to regulate the exercise of the board's discretion could not even be deduced from the overall scheme of the Act because the specific harm which the legislation was meant to correct was not clear. If the perceived societal harm was that children could be exposed to unfit material, as Laskin assumed in the second quotation above, the legislation did not

¹⁷ *Ibid.*, at pp. 674 (S.C.R.), 10 (D.L.R.).

¹⁸ *Ibid.*, at pp. 675 (S.C.R.), 10-11 (D.L.R.).

¹⁹ *Ibid.*, at pp. 680 (S.C.R.), 14 (D.L.R.).

²⁰ *Supra*, footnote 12, at pp. 305 (S.C.R.), 357 (D.L.R.).

isolate that problem for redress. It simply gave the board censorship power at large.²¹

Third, while the statute was clear,²² the regulations were vague. As Laskin noted, they empowered the board to prohibit films which were "indecent or improper". What is "indecent"? What is "improper"? The Chief Justice was prescient: these words would not pass Charter muster today.²³

Finally, Laskin was concerned about prior restraints, the "anticipatory control of public taste" by the state.

Laskin's dissent in *McNeil* has been vindicated under the Charter by the Ontario Court of Appeal in *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors*²⁴ where similar regulation was struck down. The Government of Ontario withdrew its appeal to the Supreme Court of Canada in that case in December 1985 after amending its regulatory scheme.

*Attorney-General (Canada) and Dupond v. Montreal*²⁵ further illustrates the contrast between Laskin's approach to political liberties and that of the majorities on the various panels of the post-1950's Supreme Court of Canada. By a by-law, the City of Montreal provided that its Executive Committee could, by ordinance, prohibit "any or all assemblies, parades or gatherings [that might lead to] tumult or disturbance". It thus authorized the imposition of content-based restrictions on the right of assembly. An ordinance was passed pursuant to the by-law which banned all demonstrations on the public domain for thirty days.²⁶ The impugned by-law was thus a vehicle for censorship, empowering municipal authorities to

²¹ I should add that the greatest problem with the *McNeil* legislation, as opposed to the regulation passed pursuant to it, was overbreadth rather than vagueness. The legislation was not vague at all: the board had unfettered power to censor. It went beyond that in the *Reference re Alberta Statutes*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, where the proposed legislation gave the provincial government a right of reply, not a power to suppress. The *McNeil* legislation did not distinguish on any objective grounds between permissible and impermissible expression: the sole criterion was Board clearance.

²² The board undoubtedly had absolute discretion.

²³ The Federal Court of Appeal in *Re Luscher and Deputy Minister, Revenue Canada* (1985), 17 D.L.R. (4th) 503 (F.C.A.), has now struck down a similarly worded customs tariff prohibiting the importation of literature and pictorial depictions "of an immoral or indecent character" pursuant to s. 2(b) of the Charter. Hugessen J. said, at p. 150, that the legislation was "so vague as to be unreasonable".

²⁴ (1984), 5 D.L.R. (4th) 766, 45 O.R. (2d) 80 (Ont. C.A.), aff'g (1983), 147 D.L.R. (3d) 58, 41 O.R. (2d) 583 (Ont. Div. Ct.).

²⁵ *Supra*, footnote 14.

²⁶ *Dupond* should be considered with *Saumur v. City of Quebec*, *supra*, footnote 11, where a municipal by-law prohibited the distribution of pamphlets, handbills or other literature on the streets of Quebec City without the written permission of the Chief of Police. A member of the Jehovah's Witnesses challenged its validity. While the Supreme

screen messages and exclude certain of them from the public domain. Beetz J., speaking for a majority of the Supreme Court of Canada, upheld the by-law. His characterization of it is of interest:²⁷

... Freedoms of speech, of assembly and association, of the press and of religion are distinct and independent of the faculty of holding assemblies, parades, gatherings, demonstrations or processions on the public domain. . . Demonstrations are not a form of speech but of collective action. They are of the nature of a display of force rather than of that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse.

One may usefully contrast the majority's opinion with Laskin's dissent. Again, as in *McNeil*, he used section 91 (27) of the Constitution Act, 1867 as the basis for his judgment that the provincial regulation was unconstitutional. However, the following passage illustrates that his real concern was for political liberty:²⁸

Here, persons who might seek to associate or gather for innocent purposes are to be barred, not because of any problem as to whether certain public areas should be open at certain times or on certain days or occasions—all of which go to their ordinary regulation—but because of a desire to forestall the violent or the likely violent. This is the invocation of a doctrine which should alarm free citizens even if it were invoked and applied under the authority of the Parliament of Canada. . .

The Chief Justice's difficulty was thus not the usual one in division of powers cases that the wrong level of government enacted the measure. On the contrary, he specifically stated that the by-law should "alarm free citizens" even if it were enacted by Parliament. It is clear that political liberty, not the division of powers, was paramount in his mind.

Harrison v. Carswell,²⁹ a non-constitutional case, is also germane to this discussion. A shopping centre tenant's employee was picketing her employer's premises. She was not obstructing shoppers or creating a disturbance, and an action by her employer (the tenant) to prohibit her from picketing would likely have failed. She was convicted of trespassing on the shopping centre owner's property contrary to the provincial Petty Trespasses Act.³⁰ Dickson J., speaking for a majority of the Supreme Court of Canada, felt constrained both by precedent and the terms of the statute to uphold the convictions.³¹

Court of Canada was badly divided on the *ratio decidendi* of the case, the characterization of the by-law did not pose a real difficulty. Five judges characterized it as being in relation to religion, and two others easily admitted its adverse impact upon freedom of the press and religion (*i.e.* Kerwin, Rand, Kellock, Estey and Locke JJ. characterized it as being in relation to speech or religion, while Rinfret C.J.C. and Taschereau J. admitted its effect on religion). The Supreme Court of Canada struck down the by-law.

²⁷ *Supra*, footnote 14, at pp. 797 (S.C.C.), 439 (D.L.R.).

²⁸ *Ibid.*, at pp. 780 (S.C.R.), 427 (D.L.R.).

²⁹ [1976] 2 S.C.R. 200, (1975), 62 D.L.R. (3d) 68.

³⁰ R.S.M. 1970, c.P-50.

³¹ Beetz J. relied upon *R. v. Peters* (1971), 17 D.L.R. (3d) 128 (S.C.C.). While he appreciated the public interest in allowing union members to bring economic pressure to

Laskin C.J.C., in dissent, assumed a judicially activist stance, claiming a balancing role for the courts "without yielding place to the Legislature".³² He assessed the respective weights of the interests asserted, enunciated the policy choices which had to be made throughout, and indicated his reasons for choosing one policy over the other. After balancing the respective interests of the landlord in his property and the striking employee in her right to express herself and bring economic pressure to bear he resolved the issue in favour of the employee.

In the course of his reasons, Laskin C.J.C. insisted on the importance of social facts in civil liberties adjudication. He was quite willing to reconsider age-old legal principles in light of new social and economic settings. Furthermore, he was willing to look at the American experience, notwithstanding the different constitutional arrangements in the United States, on the basis that the American economic and social setting is similar to that in Canada. Such an approach was novel in 1976 when *Harrison* was decided, at least on an explicit level—indeed the majority rejected it—but it is clearly required today under the Charter.

II. *Liberties Connected with the Legal Order*

I now turn from the political liberties to those connected with the legal order. Laskin described them this way in his 1959 article:³³

Closely associated with political liberty, if not in truth particular projections thereof, are liberties connected with the legal order. Among these are freedom from arbitrary arrest, or arbitrary search and seizure of person, premises and papers; and protection of impartial adjudication, involving notice and hearing, an independent judiciary and access to counsel; and protection against compulsory self-crimination. It is well to note that while these values emerged in the political struggles that helped fashion our basic criminal procedure, they have in recent years been adapted in part as a means of curial control of administrative adjudication.

The most basic liberty connected with the legal order is freedom from arbitrary arrest and detention. This immediately invites reference to *habeas corpus*. *Habeas corpus* no longer raises federalism issues,³⁴ and

bear on their employers on one hand, and the value of property rights (which he termed a "fundamental freedom") on the other, he refused to take explicitly a position on the relative values of these competing interests. By refusing to do so, of course, he effectively preferred property rights to picketing. However, his judgment was couched in terms of deference to legislative choice.

³² *Supra*, footnote 29, at pp. 202 (S.C.R.), 69 (D.L.R.).

³³ *Loc. cit.*, footnote 1, at p. 81.

³⁴ It was settled in *Re Storgoff*, [1945] S.C.R. 526, [1945] 3 D.L.R. 673, that the writs are associated with the detention proceeding in which they are invoked, and hence fall to be regulated by that legislature which has jurisdiction to regulate the substantive proceedings. Thus in criminal proceedings it is for Parliament to determine the scope of the writ or whether it will be available at all, subject of course to s. 9 of the Charter, and to control the jurisdiction of the judge or court to whom the application is made: see *Re Goldhar*, [1958] S.C.R. 692, (1958), 16 D.L.R. (2d) 509.

the essential nature of the writ has been maintained from its beginnings.³⁵ However, perhaps strangely at our stage of development, questions still sometimes arise about whether courts are entitled to examine the reasons for executive decisions to detain people which underlie the formal detention orders.

In *Mitchell v. The Queen*,³⁶ the accused's parole was suspended one week before his sentence was due to expire, and a warrant of committal was issued and executed three days later. He remained in custody following his scheduled release date. His parole was revoked and he was re-committed to prison without any credit for his time served on parole. The Parole Board refused to give any reasons for its actions. As Laskin C.J.C. said in dissent, the "uncontested facts on which the application was based tend to shock from their mere narration".³⁷ Mitchell sought *habeas corpus* with *certiorari* in aid in provincial superior court pursuant to the Parole Act³⁸ and section 2(c) of the Canadian Bill of Rights.³⁹

Ritchie J., speaking for the majority of the Supreme Court of Canada, upheld the Parole Board's position on the basis of precedents and old administrative law notions about the right/privilege and administrative/quasi-judicial decision dichotomies. He never examined the fundamental issue of why as a policy matter the executive should be able to detain a person in a case like this without giving any reasons.⁴⁰

³⁵ The protection against arbitrary detention or imprisonment through *habeas corpus* and the action for civil damages, while allegedly founded on article 39 of the Magna Carta, is actually of more recent origin. The Crown's prerogative to commit people to gaol arbitrarily was ended by a series of events which included an unsuccessful challenge to the prerogative in *Darnel's Case* (1627), 3 State Trials 1, the Petition of Right, 1628, the abolition of the Star Chamber in 1641, the Habeas Corpus Act, 1679 which went some way to making *habeas corpus* effective, the Bill of Rights, 1688 which restricted excessive bail, and finally the Habeas Corpus Act, 1816. While there have been some statutory modifications to *habeas corpus* in Canada, as for example the grant of a right of appeal, the essential nature of the writ remains unchanged. It permits a challenge to the legality of a detention and empowers a judge to inquire into the truth of the facts stated in the gaoler's return. See generally Laskin, *loc. cit.*, footnote 1, at p. 90 *et seq*; W.S. Holdsworth, *History of English Law*, Vol. 6 (1924), Ch. VI.

³⁶ [1976] 2 S.C.R. 570, (1975), 61 D.L.R. (3d) 77.

³⁷ *Ibid.*, at pp. 575 (S.C.R.), 80 (D.L.R.).

³⁸ R.S.C. 1970, c.P-2.

³⁹ *Supra*, footnote 3.

⁴⁰ Ritchie J. relied upon *Ex parte McCaud*, [1965] 1 C.C.C. 168 (S.C.C.) and *Howarth v. National Parole Board*, [1976] 1 S.C.R. 453, (1974), 50 D.L.R. (3d) 349, as establishing that "the procedures leading up to revocation of parole are administrative in nature and that even if the Court of Queen's Bench had jurisdiction to grant such a writ, it would not lie to effect them": *supra*, footnote 36, at pp. 590 (S.C.R.), 91 (D.L.R.). He went on to note that parole is a "privilege" rather than a "right", and from that concluded that "the Parole Board is a statutory body clothed with an unfettered discretion in the administration of the Parole Act . . .": *ibid.*, at pp. 593 (S.C.R.), 93 (D.L.R.).

Chief Justice Laskin's dissent is of a different order. It bypassed the technical administrative law distinctions and cut to the heart of the matter:⁴¹

The plain fact is that the Board claims a tyrannical authority that I believe is without precedent among administrative agencies empowered to deal with a person's liberty. It claims an unfettered power to deal with an inmate, almost as if he were a mere puppet on a string. What standards the statute indicates are, on the Board's contentions, for it to apply according to its appreciation and without accountability to the Courts. Its word must be taken that it is acting fairly, without it being obliged to give the slightest indication of why it was moved to suspend or revoke parole.

Once he put human flesh on the issue and focused upon the enormity of the board's assertion, Laskin had little trouble disposing with the technical arguments. The board argued that Mitchell could not invoke *certiorari* in aid of his application for *habeas corpus* in provincial superior court because the Federal Court had exclusive jurisdiction pursuant to the Federal Court Act⁴² to issue *certiorari* against a federal agency. As such, even if the detention order was improperly issued, the superior court could not get behind it to grant *habeas corpus*. Laskin dismissed this as "scholasticism" and held that the affirmation of the right to *habeas corpus* in section 2(c)(iii) of the Canadian Bill of Rights embraced *certiorari* in aid where necessary.

Laskin's dissent in *Mitchell* is now good law following the Supreme Court of Canada's decision in *R. v. Miller*.⁴³ Le Dain J., speaking for a unanimous court, said that the issue of coupling *certiorari* in aid with *habeas corpus* must be approached "from the same point of departure as was adopted by Laskin C.J."⁴⁴ In particular, Le Dain J. recognized that *certiorari* in aid is often crucial to the effectiveness of *habeas corpus*.⁴⁵ He specifically relied upon the constitutional guarantee of the right to *habeas corpus* in section 10(c) of the Charter as additional support for his, and therefore Laskin's, position.⁴⁶

Related to the question of freedom from arbitrary arrest and detention is the necessity for impartial adjudication: the former cannot be protected unless the latter is firmly established. Furthermore, to preserve

Ritchie J. further asserted that, because decisions of parole boards are administrative in nature, *certiorari* would not lie to quash them. In other words, *habeas corpus* would not lie even if no valid reasons for detention existed because technically one could not set aside the custodial order by *certiorari* in aid.

⁴¹ *Supra*, footnote 36, at pp. 577 (S.C.R.), 81 (D.L.R.).

⁴² R.S.C. 1970, 2nd Supp., c.10.

⁴³ [1985] 2 S.C.R. 613.

⁴⁴ *Ibid.*, at p. 624.

⁴⁵ *Ibid.*, at p. 625. For example, *habeas corpus* alone is an empty remedy where the record before the tribunal is not before the reviewing court, and the court is therefore not in a position to decide whether the executive has exceeded its jurisdiction.

⁴⁶ *Ibid.*

the integrity of the system and to ensure public confidence, the adjudicator must be impartial in appearance as well as in fact.

In *MacKay v. The Queen*,⁴⁷ the accused, a member of the Canadian Armed Forces, was convicted of Narcotic Control Act⁴⁸ violations by a Standing Court Martial established pursuant to the National Defence Act.⁴⁹ The charges were laid by the accused's commanding officer, the Court Martial was ordered by a senior commander, a lieutenant-colonel was appointed from an approved list as the presiding officer, and both the prosecutor and the presiding officer were part of the Office of the Judge Advocate-General. The accused was therefore in the hands of his military superior in respect of the charge, the prosecution and the tribunal which was judging him. He argued that his right to be tried before an impartial tribunal pursuant to section 2(f) of the Canadian Bill of Rights⁵⁰ was denied.

Ritchie J., writing for the majority, rejected the argument based on section 2(f) on the grounds that the presiding officer's "career in the army must have made him familiar with what service life entails [and] would, with all respect to those who hold a different view, appear to me to be a more suitable candidate for president of a court martial than a barrister or a judge who has spent his working life in the practice of non-military law".⁵¹ McIntyre J.'s minority concurrence addressed the issues more fully, but came to the same conclusion that the procedure did not violate section 2(f) of the Bill of Rights on the facts of the particular case.⁵²

⁴⁷ *Supra*, footnote 14.

⁴⁸ R.S.C. 1970, c.N-1.

⁴⁹ R.S.C. 1970, c.N-4.

⁵⁰ *Supra*, footnote 3.

⁵¹ *Supra*, footnote 47, at pp. 395 (S.C.R.), 414 (D.L.R.). With respect, there are three problems with this reasoning. First, the issue is not whether a military person would make a better president of a court martial than a non-military person. It is whether a court martial is the appropriate forum in the first place. Second, because this involved a charge of breaching the ordinary criminal law, familiarity with service life is irrelevant. Third, I would suggest that contrary to what Ritchie J. said, the practice of non-military law is an asset, not a liability, where the charge relates to alleged violations of the ordinary criminal law. The real issue is why a system which (i) intermingles prosecutorial and adjudicative functions, (ii) in the same office, (iii) in the same hierarchy as the accused, (iv) to deal with breaches of ordinary criminal law as opposed to services offences is valid when measured against s. 2(f) of the Canadian Bill of Rights *supra*, footnote 3. The closest Ritchie J. comes to this point is to say that the "necessity of recognizing that a separate code of law administered within the services is an essential ingredient of service life has been appreciated since the earliest days, and in my view the administration of the *National Defence Act* must be considered in light of the history and development of that code": *ibid.*, at pp. 398 (S.C.R.), 416 (D.L.R.). The difficulty is that there is no indication of why such a separate code of law is "essential" with offences having nothing to do with military discipline.

⁵² First, to respond to the argument that a military officer is the representative of the

Chief Justice Laskin in dissent held that the provisions of the National Defence Act were rendered inoperative by section 2(f) of the Bill of Rights. While he conceded that courts martial could try cases of alleged breaches of military discipline, presumably for the reasons given by Ritchie and McIntyre JJ. regarding military experience and expertise, the same could not be said for ordinary criminal offences like narcotics violations. The nub of the Chief Justice's reasoning is contained in the following passage:⁵³

In my opinion, it is fundamental that when a person, any person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, he or she is entitled to be tried before a court of justice, separate from the prosecution and free from any suspicion of influence of or dependency on others. There is nothing in such a case, where the person charged is in the armed forces, that calls for any special knowledge or special skill of a superior officer, as would be the case if a strictly service or discipline offence, relating to military activity, was involved. It follows that there has been a breach of section 2(f) of the *Canadian Bill of Rights* in that the accused, charged with a criminal offence, was entitled to be tried by an independent and impartial tribunal.

class in the hierarchy from which he comes, McIntyre J. said that civilian judges are equally the products of their background. Civilian judges are no better qualified to adjust their attitudes than military judges to meet the duty of impartiality.

The weakness in this argument is that it fails to take account of the institutional differences between military and non-military judges. The former are part of a highly structured hierarchy. Military judges would not pass any of the institutional tests of judicial independence recently set out by the Supreme Court of Canada in *Valente v. The Queen*, [1985] 2 S.C.R. 673, (1985), 24 D.L.R. (4th) 161. Contrary to civilian judges, who are insulated from the executive by a number of statutory and, in the case of superior, district or county court judges, constitutional instruments, military judges are dependent upon their superiors for financial security, tenure and promotions.

Second, McIntyre J. argued that, since officers serving abroad must perform judicial duties in the absence of Canadian civilian legal processes, domestic officers should be able to fulfill the same function because the "character of the officer for independence and impartiality will surely not vary because he is serving overseas". The difficulty with this argument is that it contains the implicit assumption that officers serving overseas *are* impartial and independent. The fact is that the justification for overseas officers assuming judicial functions is not that they are independent. The institutional impediments to independence such as lack of financial security and tenure and dependence on superiors for promotion remain. Instead it is that there are no Canadian civilian facilities abroad.

The foregoing having been said, McIntyre J.'s disagreement with Laskin C.J.C. is not on the point that ordinary criminal matters which are not service offences should be tried in civilian court. The two are in agreement on the point, although the basis of McIntyre J.'s conclusion on the point is the equality guarantee in the Canadian Bill of Rights, *supra*, footnote 3, rather than s. 2(f). The difference between them is that Laskin C.J.C. asserts that the offence is not related to military activity (*supra*, footnote 47, at pp. 380 (S.C.R.), 402 (D.L.R.)) whereas McIntyre J. says that it is (*ibid.*, at pp. 411 (S.C.R.), 426-427 (D.L.R.)).

⁵³ *Supra*, footnote 47, at pp. 380 (S.C.R.), 402 (D.L.R.).

It is worth adding that it was central to our system, even before *Hunter v. Southam Inc.*⁵⁴ and *Valente v. The Queen*⁵⁵ constitutionalized it, that investigative, prosecutorial and adjudicative functions should not be intermingled in penal cases and, further, that adjudicators must both be and be seen to be independent. Where charges involve a breach of military discipline and as such require military expertise, different considerations may apply. However, surely the mere fact that an accused is a member of the armed forces is not enough to justify a departure from the principles of natural justice without a very hard look at the nature of the offence. It is useful to note that McIntyre J.'s disagreement with Laskin C.J.C. was with the characterization of the offence as a service offence, not on the principle that military personnel should be tried in civilian courts for non-service offences. It is to be hoped that Ritchie J.'s decision, which in my view paid undue deference to the courts martial system, will be reconsidered when the issue arises again.

Chief Justice Laskin was equally vigilant about ensuring that every person had an opportunity to make a full answer and defence. This can be seen in his refusal to associate himself with the majority view in *Duke v. The Queen*⁵⁶ that "the failure of the Crown to provide evidence to an accused person does not deprive the accused of a fair trial unless, by law, it is required to do so." His judgments in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*⁵⁷ and *Martineau v. Matsqui Institution Disciplinary Board*,⁵⁸ although removed from the criminal trial context on their facts, stand for the proposition that the procedure must be fair where a person's rights, privileges or liberty are at stake. Applying this to the content of a criminal trial, I suggest that Laskin would not have been content with the proposition that the Crown's obligation to disclose depends upon the presence or absence of a particular legal requirement to do so. His approach in *Mitchell*⁵⁹ suggests that he would have gone beyond the technical rules about disclosure to ask whether in substance the person had a fair opportunity to make a full answer and defence.

On reverse onus clauses, it appears from his judgments in *R. v. Appleby*⁶⁰ and *R. v. Shelley*⁶¹ that Chief Justice Laskin viewed the pre-

⁵⁴ *Supra*, footnote 16.

⁵⁵ *Supra*, footnote 52.

⁵⁶ [1972] S.C.R. 917, (1972), 28 D.L.R. (3d) 129.

⁵⁷ [1979] 1 S.C.R. 311, (1978), 88 D.L.R. (3d) 671.

⁵⁸ [1980] 1 S.C.R. 602, (1979), 106 D.L.R. (3d) 385.

⁵⁹ *Supra*, footnote 36.

⁶⁰ [1972] S.C.R. 303, (1971), 21 D.L.R. (3d) 325.

⁶¹ [1981] 2 S.C.R. 196, (1981), 123 D.L.R. (3d) 748.

sumption of innocence in the Bill of Rights as a species of the right to make full answer and defence. In *Appleby*, he looked at whether a "rational connection exists between the fact to be deemed and the fact required to be proved."⁶² In *Shelley*, he modified the test to see whether there was any "rational or necessary connection"⁶³ between the fact to be deemed and the fact to be proved.⁶⁴ The difficulty is that both of these formulations merely address the question of whether the accused is in a position to rebut the reverse onus. They do not say why a reverse onus should be permitted in the first place given the clear policy in the Bill of Rights that an accused is presumed to be innocent until proven guilty.

It is clear, following the Supreme Court of Canada's decision in *R. v. Oakes*,⁶⁵ that a reverse onus is not justifiable under the Charter merely because an accused is in a position to discharge it. The presumption of innocence requires the Crown to prove each element of the offence. The presumption involves a right to be silent, not merely a right to defend. The question today is therefore whether a statute which puts the onus on the accused to disprove an element of the offence is reasonable, prescribed by law and demonstrably justified in a free and democratic society pursuant to section 1 of the Charter.

Chief Justice Laskin was similarly tentative in the related matter of freedom from self-incrimination. In *Curr v. The Queen*,⁶⁶ the accused argued that the statutory compulsion pursuant to the Criminal Code⁶⁷ to provide a breath sample violated, *inter alia*, his right to due process and freedom from self-incrimination contrary to sections 1(a) and 2(e) of the Canadian Bill of Rights.⁶⁸ Chief Justice Laskin rejected this contention. In the course of his reasons, he took a far more deferential posture about the role of the courts than he did in cases like *Harrison v. Carswell*,⁶⁹ a political liberties case, or even in legal liberties cases like *Mitchell*⁷⁰ and *MacKay*.⁷¹ Whereas in those cases Laskin had refused to yield ground to

⁶² *Supra*, footnote 60, at pp. 317 (S.C.R.), 337 (D.L.R.).

⁶³ *Supra*, footnote 61, at pp. 202 (S.C.R.), 752 (D.L.R.). (Emphasis added).

⁶⁴ In *Appleby*, Chief Justice Laskin upheld the reverse onus because the accused was in a position to know why he climbed behind the wheel of the car and was accordingly in a position to rebut the presumption that he intended to drive. In *Shelley*, he struck down the reverse onus because the mere fact that an accused was in possession of foreign goods did not mean that he was in a position to vouch for the legality of their importation. To require him to do so was tantamount to directing a conviction.

⁶⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103, (1986), 26 D.L.R. (4th) 200.

⁶⁶ [1972] S.C.R. 889, (1972), 26 D.L.R. (3d) 603.

⁶⁷ R.S.C. 1970, c.C-34.

⁶⁸ *Supra*, footnote 3.

⁶⁹ *Supra*, footnote 29.

⁷⁰ *Supra*, footnote 36.

⁷¹ *Supra*, footnote 14.

the legislature, in *Curr* his activism in the other cases was replaced by a reminder that the Bill of Rights was a statutory instrument rather than a constitutional one. As such, "compelling" reasons had to be advanced to justify resort to the Bill, and even then the reasons must "relate to objective and manageable standards" by which a court should be guided. This requirement that the accused bear the burden of showing why a provision was unjustified, and that he do by demonstrating "compelling" rather than merely "rational" reasons, is a strict requirement indeed. Again, as in the reverse onus cases, section 1 of the Charter has changed the law to put the burden of justification on the state.

Laskin's activism flowered again in the right to counsel cases, where his concern was always to ensure that the right could be vindicated in a real sense. The mere fact that the right to counsel was theoretically available was not enough if it depended upon the fortitude of an accused in insisting upon it⁷² or in knowing enough to ask for it.⁷³

In *Brownridge v. The Queen*,⁷⁴ the accused refused to submit to a breathalysér without counsel and was convicted of failing to provide a breath sample without reasonable excuse. Laskin, concurring in the result that the conviction be quashed, said:⁷⁵

The right to retain and instruct counsel without delay can only have meaning to an arrested or detained person if it is taken as raising a correlative obligation upon the police authorities to facilitate contact with counsel.

Laskin's remedy for the police officer's refusal to allow the accused to consult counsel was to vitiate the conviction. On the other hand, Ritchie J. for the majority used the Bill simply as an aid to statutory interpretation: the denial of counsel constituted a reasonable excuse to take the breathalyser, so there was no offence committed in the first place.

The problem with Ritchie J.'s approach is that where creative statutory interpretation is not available to temper the rigours of a restrictive law, the Bill is spent. It provides no effective remedy to force the authorities to vindicate the right to counsel. This was brought into sharp focus by the next case, *Hogan v. The Queen*.⁷⁶ In *Hogan*, the accused was denied access to counsel and, lacking Brownridge's fortitude, submitted to the breathalyser. He was convicted of driving with a blood alcohol level in excess of .08 contrary to section 236 of the Criminal Code. Ritchie J. for

⁷² *Brownridge v. The Queen*, [1972] S.C.R. 926, (1972), 28 D.L.R. (3d) 1; *Hogan v. The Queen*, [1975] 2 S.C.R. 574, (1974), 48 D.L.R. (3d) 427.

⁷³ See, for example, *Jumagat v. The Queen*, [1977] 1 S.C.R. 486, (1976), 68 D.L.R. (3d) 639, where the accused did not know enough to ask for privacy in his solicitor-client communications.

⁷⁴ *Supra*, footnote 72.

⁷⁵ *Ibid.*, at pp. 952-953 (S.C.R.), 20 (D.L.R.).

⁷⁶ *Supra*, footnote 72.

the majority held that, although the accused could have refused to take the test, once he took it the Bill of Rights was spent. There was nothing in the Bill to negate the offence as there had been in *Brownridge*.

Laskin's dissent followed his concurrence in *Brownridge* that the Bill of Rights was more than a tool for statutory interpretation. Indeed, he specifically refused to put a "gloss" on the Criminal Code and instead excluded the evidence obtained following the breach of section 2(c) of the Bill of Rights.⁷⁷

The question that arises, therefore, is whether the vindication of this right should depend only on the fortitude or resoluteness of an accused so as to give rise to a *Brownridge* situation, or whether there is not also an available sanction of a ruling of inadmissibility where the police authorities are able to overcome an accused's resistance to a breathalyzer test without prior access to counsel. Nothing short of this would give reasonable assurance of respect of an individual's right to counsel by police authorities whose duty to enforce the law goes hand in hand with a duty to obey it.

In the last case in this series, *Jumaga v. The Queen*,⁷⁸ the police remained in the room while the accused spoke on the telephone with his counsel. The accused did not object or request more privacy. On the evidence, the police could have maintained observation from an adjoining room. After the call, the accused refused to provide a breath sample and was convicted of failure to comply.

The majority of the Supreme Court of Canada put the onus on the accused, as it had in *Hogan*, to assert his rights. As Pigeon J. said, the accused "made no request for any greater degree of privacy that was afforded to him, such as it may have been", and the accused therefore could not have been "'deprived' of that which he did not ask for".^{78a}

Laskin in dissent took a different view both of the scope of the right to counsel and of the obligations of the police to advise the accused:⁷⁹

Once an accused has requested that he be permitted to consult counsel, that should carry with it, to the knowledge of the police, a right to have the consultation in private, so far as circumstances permit. The right to counsel is diluted if it can only be secured by adding request to request. I would not put the police in an adversary position on this question: they are better placed than the ordinary person (who has been detained or arrested and is in police custody) to recognize what the right to

⁷⁷ *Ibid.*, at pp. 589 (S.C.R.), 437 (D.L.R.). It should be noted that Laskin did not demand that there be a causal connection between the breach of the right and the evidence obtained, as there would be, for example, where an illegal search yielded incriminating evidence. Ritchie J. was probably technically correct here in saying that there was no causal connection between the denial of the right to counsel and the obtaining of the evidence, although even that is arguable. For example, as happened in *Jumaga v. The Queen*, *supra*, footnote 73, the accused might have refused to give a breath sample after consulting counsel.

⁷⁸ *Ibid.*

^{78a} *Ibid.*, at pp. 496, 497 (S.C.R.), 647, 648 (D.L.R.).

⁷⁹ *Ibid.*, at pp. 495 (S.C.R.), 645 (D.L.R.).

counsel imports, and they should be alert to protect that right as an important element in the administration of justice through law, for which they are as much accountable as any others involved in the judicial process.

This dissent in *Jumaga* has been followed under section 10(b) of the Charter by the Nova Scotia Court of Appeal in *Le Page v. The Queen*.⁸⁰

Jumaga, *Hogan* and *Brownridge* indicate a clear difference between the majorities led by Pigeon and Ritchie JJ. and the minorities led by Laskin C.J.C. The majorities were of the view that there is no correlative duty on the authorities to facilitate access to counsel where the accused, through ignorance or timidity, does not insist. As to remedy, the majorities would not exclude evidence or set aside a conviction. Laskin took a more expansive view. He was concerned that practical mechanisms be built into the Bill of Rights guarantees to ensure that they worked at the ground level. He recognized that if a person could be intimidated or did not know what to ask for, the Bill of Rights guarantees would be hollow indeed.

III. Federal Power and the Economic and Egalitarian Liberties

Returning once again to his 1959 article, Laskin described "economic liberty" in the following terms:⁸¹

Individual rights in an economic sense symbolized freedom from state regulation or intervention in economic affairs. Such a call to liberty is no longer as impressive as it once was, but it is of some interest to note that the trade unionist who was once the victim of the assertion of economic liberty is now relying on a particular version of it to defend free collective bargaining and his freedom to engage in strikes and in picketing. Public controls, in the general social interest, administered through government departments or through more or less independent statutory tribunals, have made heavy inroads upon economic individualism. In an era of great social and economic change, it has become quite clear that economic liberty, however defined, must be more relative in its operation than either the political or the legal liberties referred to above.

In the same paragraph of the same article he described "egalitarian liberty".⁸²

A more recent call to liberty, or at least one that has more recently had some response, is liberty in a human rights or egalitarian sense. Involving, as this has, positive state intervention to secure such things as equality of employment opportunity or of access to public places without discrimination on account of colour or religion or ethnic or national origin or ancestry, it is, in a sense, the antithesis of the economic individualism that deprecated state interference in business or social relations. It would be idle to attempt an exhaustive list of the claims or interests for which protection is or might be sought under the head of human (or, perhaps, social) rights. Unemployment insurance, state provision for hospitalization and medical care, and opportunity for free education compatible with ability, are some of the

⁸⁰ (1986), 44 M.V.R. 167 (N.S.A.D.).

⁸¹ *Loc. cit.*, footnote 1, at p. 81.

⁸² *Ibid.*, at pp. 81-82.

better known and partly realized objectives in this class of liberty. To a considerable extent, the Universal Declaration of Human Rights embraces the kind of interests which are comprehended within my fourth class of civil liberty. As a class of social welfare benefits they appear to me to be no less relative than liberty in its economic sense and hence stand on a less exalted plane than do political or legal liberty.

Laskin was less forthright about the factors at work in his judgments dealing with the division of powers to regulate the economy or social programs than he was when dealing with cases about political or legal liberty. As we have seen in the latter two situations, he essentially approached each of these liberties on their own terms. In the former cases, his judgments contain more division of powers language and less about the policy reasons which underlie his conclusions. However, I would argue that, while his decisions are couched in federalism terms and are decided by reference to the division of powers in sections 91 and 92 of the Constitution Act, 1867, they in fact represent a functional view that economic and egalitarian liberties as they are enunciated in the foregoing excerpts from the 1959 article are best preserved by a strong central government.

In the Laskin view of it, as indicated by the quoted extracts, economic liberty was and is a subordinate and highly circumscribed value. Put another way, he felt that the *laissez-faire* economic philosophy, with its concomitant view of the illegitimacy of government intervention in the marketplace, was not and should not be a guiding principle for the judiciary. Unlike his views with regard to political and legal liberty, he thought that the legislatures and Parliament had a responsibility to intervene in citizens' affairs by establishing universal economic and social programs. In fact, courts today are highly deferential to these kinds of legislative initiatives. The difficulty is that we still carry around a good deal of constitutional baggage from the era when activist Canadian and American⁸³ courts, mistrustful of government and imbued with a *laissez-*

⁸³ The same judicial stance was adopted in the United States where the so-called "substantive due process" or "liberty of contract" era reigned from around 1870 through to the New Deal cases in the 1930s. It began with *dicta* in the *Slaughter-house Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873) and *Savings and Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655, 22 L.Ed. 455 (1874), to the effect that there were definable spheres of governmental and private power. It followed from that that while government regulation of economic activity was not *per se* invalid, it was circumscribed by its sphere of inherently limited authority. The state could not regulate so as to redistribute wealth in a way which would benefit some citizens at the expense of others. The line of *dicta* culminated in *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897), where the United States Supreme Court struck down a Louisiana statute prohibiting unlicensed companies from writing marine insurance contracts in the state. The court struck down the statute as infringing upon the liberty to contract for insurance contrary to the due process clause of the Fourteenth Amendment.

The substantive due process era reached its high watermark with *Lochner v. New York*, 198 U.S. 45 (1905), where the United States Supreme Court struck down a maximum hours of work law for bakers on the basis of liberty of contract. It came to an end in

faire economic philosophy, used the division of powers as a tool to strike down both federal and provincial or state schemes. A thumbnail sketch of the development of the Canadian scene is in order here to show the backdrop against which Laskin wrote his judgments.

In the first part of the century, collectivist federal legislation did not survive judicial division of powers scrutiny. The period between the two World Wars saw a great diminution in Parliament's powers in favour of a somewhat theoretical provincial autonomy. This diminution did not always mean an expansion of provincial powers in practical terms. First, the provinces often did not have the resources to implement collectivist schemes of sufficient magnitude to combat the Depression; and second, provincial legislation could not reach across provincial borders where necessary to make competition, agricultural products marketing, or other regulatory schemes work. The practical result was sometimes that even Parliament and the Legislatures acting in concert could not enact badly needed legislation.⁸⁴

1937 due to a confluence of factors. Because of the Depression, public opinion was demanding legislation to deal with a crisis of catastrophic proportions. As Professor Tribe describes it in his treatise, *American Constitutional Law* (1978), pp. 448-449, when the U.S. Supreme Court invalidated a state minimum wage law in 1936, *Morehead, Warden v. New York ex. rel. Tipaldo*, 298 U.S. 587 (1936), it was reported that 79% of all commenting newspapers criticized the decision. Political pressures mounted as well. Franklin D. Roosevelt was elected to the U.S. presidency on the promise of a New Deal. He embarked on a program of collectivist legislation which heavily involved the federal government in private economic affairs. This legislation enjoyed great popular support, but came into obvious conflict with the liberty of contract line of cases which had developed since *Allgeyer* in 1897. President Roosevelt's famous court-packing plan further increased the intense external pressures on the court. Finally, in the famous "switch in time saved the nine" case, the Supreme Court reversed its earlier course of decision and upheld minimum wage legislation in 1937 in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). After that the floodgates opened for the approval of New Deal legislation.

⁸⁴ See, for example, *Attorney-General for British Columbia v. Attorney-General for Canada (Re Natural Products Marketing Act)*, [1937] A.C. 377, [1937] 1 D.L.R. 691 (P.C.). Admittedly other factors besides a judicial philosophy of *laissez-faire* economics were at work in the period. Professor Mallory describes the diminution of federal power between the World Wars as a confluence of economic and political factors: see J.R. Mallory, *Social Credit and the Federal Power in Canada* (1954; reprinted 1976), Ch. 4, pp. 40-42. At Confederation, the regions were willing to subordinate their local goals to national ones like building railroads and developing national industries. By the end of World War I, Canada was an industrialized capitalist society far different from the one facing the Fathers of Confederation in 1867. The focus had moved away from the development of national economic interests to the nourishment of local ones. The Rowell-Sirois Report describes the effect of this regionalism. See Donald Smiley (ed.), *The Rowell Report* (1978), p. 140:

In the endeavour to meet their growing obligations or to take full advantage of rising economic opportunities, provincial demands of various kinds were made on the Dominion, and the Federal Government, unable to deflect these demands by a

Canada operated virtually as a unitary state during the Second World War. This had important ramifications for the postwar centralization which followed. First, the public developed a perception of Parliament as very powerful in relation to the provinces, and therefore expected it to take the lead in formulating social and economic policies. Second, a great bureaucracy grew up which gave the central government the administrative capability to effect those policies. At the same time, Keynesian economic thought was wholeheartedly adopted by federal policy-makers. Canada's

vigorous policy of its own, made important concessions to the provinces. The rise of regionalism gave an altered direction to Dominion-provincial relations.

However, the inability of Parliament to formulate a vigorous policy was due at least in part to the work of the Privy Council.

It is true that the courts in the 1920s and 30s upheld "facilitative" legislation designed to enable a free market to function, but this is consistent with *laissez-faire*. For example, trademarks legislation, which makes possible product differentiation in similar goods, was upheld by the Privy Council in *Attorney-General for Ontario v. Attorney-General for Canada* (Reference re Dominion Trade and Industry Commission Act, 1935), [1937] A.C. 405, [1937] 1 D.L.R. 702 (P.C.). Similarly a federal incorporation law, which permitted the limitation of liability and accordingly facilitated the raising of capital, was upheld in *John Deere Plow Company, Ltd. v. Wharton*, [1915] A.C. 330, (1914) 18 D.L.R. 353.

On the other hand, collectivist legislation which restricted the operation of the free market was struck down by the courts no matter which level of government enacted it. The Privy Council struck down federal competition codes in *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, *sub. nom. Attorney-General of Canada v. Attorney-General of Alberta* (1921), 60 D.L.R. 513, notwithstanding that the provinces acting alone, or even in concert, could not enact them. When Parliament attempted to rationalize labour relations, its scheme was declared unconstitutional in *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5 (P.C.). With agricultural products marketing, the British Columbia government tried to fashion a price support system for provincially produced tree fruits. The Supreme Court of Canada held in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, [1931] 2 D.L.R. 193 that it was *ultra vires* as an invasion of the federal trade and commerce power. When Parliament tried to fill the gap, the Privy Council struck down the federal legislation in *Attorney-General for British Columbia v. Attorney-General for Canada*, *supra*, even though it was part of a joint federal-provincial co-operative effort. The New Deal cases decided by the Privy Council were: *Attorney-General for British Columbia v. Attorney-General for Canada* (Natural Products Marketing Act), *supra*; *Attorney-General for Canada v. Attorney-General for Ontario* (Labour Conventions), [1937] A.C. 326, [1937] 1 D.L.R. 673; *Attorney-General for Canada v. Attorney-General for Ontario* (Unemployment Insurance), [1937] A.C. 355, [1937] 1 D.L.R. 684; *Attorney-General for Ontario v. Attorney-General for Canada* (Dominion Trade and Industry Act), *supra*, footnote 84; *Attorney-General for British Columbia v. Attorney-General for Canada* (Price Spreads), [1937] A.C. 368, [1937] 1 D.L.R. 688; *Attorney-General for British Columbia v. Attorney-General for Canada* (Farmers' Creditors Arrangements), [1937] A.C. 391, [1937] 1 D.L.R. 695. These decisions are the subject of a symposium in (1937), 15 Can. Bar Rev. 393-507. See also W.H. McConnell, The Judicial Review of Prime Minister Bennett's 'New Deal' (1968), 6 Osgoode Hall L.J. 39; W.H. McConnell, Some Comparisons of the Roosevelt and Bennett 'New Deals' (1971), 9 Osgoode Hall L.J. 221.

prewar decentralized structure, particularly in its public finance system, had made it very difficult to cope with the Depression. The solution adopted was to centralize enormous fiscal power in Parliament, giving it the fiscal and monetary levers to manage the economy. In addition, Parliament used its spending power to promote its social goals.⁸⁵ This enabled Parliament to formulate national policy indirectly through the use of conditional grants without encountering its previous constitutional problems in the courts.

The system began to break down in the 1950s and 60s for a number of reasons.⁸⁶ First, fiscal and monetary tools were too blunt as instruments of economic management. They could not accommodate local needs, and were not sufficiently sensitive to be fine-tuned to particular sectors of the economy. More specialized policies were necessary, but the Parliament lacked the constitutional power to implement them as a result of the Privy Council's earlier work.⁸⁷ Second, Parliament's use of the spending power to accomplish its social policy ends met with provincial resistance. These factors combined to reintroduce a more decentralized form of federalism to the Canadian scene.

Today regulatory schemes are an important part of our national life. However the *stare decisis* of the earlier period has stunted the growth of the major federal powers.

Laskin was a persistent advocate of effective governmental action to formulate economic and social policies. I have divided the analysis into three headings: (A) Federal Spending; (B) Federal Power to Enact National Regulatory Schemes; and (C) Trade.

A. Federal Spending

Parliament has substantial financial and human resources, given its plenary taxing power and national constituency. However, as a result of the judicial decisions which circumscribed its major regulatory powers,⁸⁸ it lacks the authority to establish unilaterally the broad range of public welfare schemes which are currently in place in Canada. Parliament's major role has been its assertion of a plenary spending power, unrestricted by the division of powers and the authority to make conditional grants. In this way, Parliament has been able to shape provincial regulatory schemes by attaching strings, or conditions, to its willingness to provide funds for

⁸⁵ See Garth Stevenson, *Unfulfilled Union* (1979), p. 138; D. Smiley, *The Federal Dimension of Canadian Economic Nationalism* (1974), 1 Dal. L.J. 551; J.R. Mallory, *op. cit.*, footnote 84, pp. 123-124.

⁸⁶ The rise and fall of this "fiscal federalism" is documented in Smiley, *ibid.*; Stevenson, *ibid.*

⁸⁷ See footnote 84, *supra*.

⁸⁸ *Ibid.*

those programs. It has done so with respect to health, welfare, public education, universities and a host of other programs.

It should be noted that, at the time of this writing, Prime Minister Mulroney's Meech Lake Accords with the ten provincial Premiers have not been formally drafted in constitutional amendment form. I therefore do not know what the final language will say, either generally or specifically, with respect to the federal spending power. To date, Parliament has been able to impose conditional grants—an exercise of the spending over which, although not written in the Constitution or judicially tested in any serious way, has been extensively used in practice since World War II—to create a host of major national social programs. It is to be hoped that the final amendments as drafted do not gut this federal power.

Laskin was not called upon in his judicial career to assess squarely the scope of the federal spending power. However, there is a clear indication in his judgment in *Reference re Agricultural Products Marketing Act and Two Other Acts*⁸⁹ that he did not consider it to be limited by the division of powers. The issue was raised in his discussion of whether Parliament could buy and sell in local markets as part of a price-fixing scheme even though its regulatory power was limited to extra-provincial trade. Laskin C.J.C. said:⁹⁰

The appellants objected that [the federal statute] which empowers an agency to purchase and dispose of any regulated farm product is not confined to interprovincial or export trade, but, in my opinion, statutory power to purchase and dispose of products does not raise a constitutional question save as it may be an element in regulatory authority which is itself impeachable. . . . A federal agency may lawfully be authorized to purchase in any market and to dispose of its products as an ordinary trader.

One could, of course, argue that this passage is limited to the question of the ability of government in a federal system to deal in the market as an ordinary trader. However I would argue that there is no difference in principle between Parliament's spending money in an area of provincial regulatory jurisdiction for the purpose of supporting the price of eggs, as in the *Ontario Egg Reference*, and spending money in other areas within provincial regulatory authority. I am buttressed in that conclusion by the fact that Pigeon J. in the same case felt it necessary to say that there was no difference between Parliament's acting as an "ordinary trader" and its intervening in any other way:⁹¹

In my view federal intrusion into local trade is just as unconstitutional when done by buying and selling, as when done through any other method. . . . Of course, this does not preclude operations by federal agencies acting for proper federal purposes.

⁸⁹ *Supra*, footnote 4.

⁹⁰ *Ibid.*, at pp. 1266 (S.C.R.), 305 (D.L.R.).

⁹¹ *Ibid.*, at pp. 1293 (S.C.R.), 323 (D.L.R.).

Pigeon J.'s concern was obviously that a wide federal spending power provides a strong federal presence in fields of provincial jurisdiction. For example, the federal condition in the Canada Health Act⁹² which denies funds to provinces which allow doctors to extra-bill greatly affected Ontario's recent decision to ban the practice. The difficulty with Pigeon J.'s hard line, particularly when it is left at an abstract level, is that it has serious consequences for a myriad of social programs. First, some provinces cannot afford to provide an acceptable level of health, education, welfare, job training, housing or other service to its residents. Federal money is necessary. There is already considerable pressure on Parliament to cut its spending even under the current conditional grant system. Parliament would have a strong incentive to reduce its provincial grants if it could no longer take a policy position through the imposition of conditions. This is one of the serious dangers of the Meech Lake Accords. It would be ironic indeed if Prime Minister Mulroney's "nation-building" became a formula for institutionalizing regional disparities. Second, apart from the question of affordability, even provinces with the financial means might lack the political will to raise the money necessary for these programs.

In my view, the passages from his 1959 article set out at the beginning of this Part,⁹³ taken together with his comments in the *Ontario Egg Reference*, indicate that Laskin's position on federal spending was not primarily based upon federal-provincial concerns. Rather, it was based upon a view that Parliament, with its financial resources and national reach, should play a central role in the delivery of social programs. It is true that federal money makes for a federal presence in areas of provincial legislative competence. However, it is equally true that without Parliament's intervention, residents of some provinces would be without what are today regarded as basic necessities in Canadian life. Canadians take for granted universal public education and medicare. As the American example indicates, it was not inevitable that we have such programs. Canada's public programs were the result of a conscious choice, made possible by a political will in the central government paired with a presumption that federal spending to achieve Parliament's objectives was valid.

B. Federal Power to enact National Regulatory Schemes

In the economic realm, as indicated in the 1959 article, Laskin viewed economic liberty as a circumscribed value. Put another way, he saw a legitimate role for the state in fashioning collectivist regulatory schemes. I would argue that his decisions on the scope of federal regulatory power over the economy were an attempt to give Parliament a strong role in creating such schemes on a national basis.

⁹² S.C. 1984, c.6, as am.

⁹³ *Supra*, p. 245.

As is well known, *Citizens Insurance Company of Canada v. Parsons*⁹⁴ left open the possibility that Parliament could enact legislation for the "general regulation of trade affecting the whole dominion". However, apart from relatively minor matters such as incorporation of companies with federal objects⁹⁵ or a law of trademarks,⁹⁶ the second branch of *Parsons* has been a weak support for federal power.⁹⁷ This appears to be changing and, if so, Chief Justice Laskin played a critical role in its restoration as a vital head of power.

The first case of importance in this resurrection was *MacDonald et al. v. Vapor Canada Ltd.*⁹⁸ In that case, Vapor Canada Ltd. brought action against a former employee alleging that he had acted contrary to section 7(e) of the Trade Marks Act,⁹⁹ which provided:

7. No person shall. . . (e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

Laskin C.J.C.¹⁰⁰ struck down the provision as an invasion of provincial legislative authority to create private torts. Section 7(e) was simply a broad competitive clause which had nothing to do with trademarks, and therefore could not be supported by the federal trade and commerce power. If the case had stopped there, no new ground would have been broken. However, it is clear that the decision was *not* based on the proposition that Parliament could not legislate a competition policy based on *Parsons* second branch. On the contrary, the deficiency here was simply that there was no scheme of public regulation in place. Instead, enforcement was left to private action.¹⁰¹

One looks in vain for any regulatory scheme in s. 7, let alone s. 7(e). *Its enforcement is left to the chance of private redress without public monitoring by the continuing oversight of a regulatory agency* which would at least lend some colour to the alleged national or Canada-wide sweep of s. 7(e). The provision is not directed to trade, but to the ethical conduct of persons engaged in trade or in business, and, in my view, such a detached provision *cannot survive alone unconnected to a general regulatory scheme* to govern trading relations going beyond merely local concern.

⁹⁴ (1881), 7 App. Cas. 96, at p. 113 (P.C.).

⁹⁵ *John Deere Plow Company Ltd. v. Wharton*, *supra*, footnote 84.

⁹⁶ *Attorney-General for Ontario v. Attorney-General for Canada (Reference re Dominion Trade and Industry Commission Act, 1935)*, *supra*, footnote 84.

⁹⁷ A history of the difficulties with respect to federal competition legislation is set out in N. Finkelstein (1984), 62 Can. Bar. Rev. 182.

⁹⁸ *Supra*, footnote 4. For a discussion of its importance as a support for federal competition law, see Finkelstein, *loc. cit.*, footnote 97.

⁹⁹ R.S.C. 1970, c. T-10.

¹⁰⁰ Spence, Pigeon, Dickson and Beetz JJ. concurring. A separate judgment concurring in the result was written by de Grandpré, Martland and Judson JJ. concurring.

¹⁰¹ *Supra*, footnote 4, at pp. 165 (S.C.R.), 25-26 (D.L.R.). (Emphasis added).

The section was thus invalid because there was no general and continuing scheme of public supervision, *not* because the trade and commerce power could not justify competition law. The implication was clear that, at least in Laskin's view, the matter would be different if there was an over-arching regulatory scheme to monitor and enforce the federal policy. This position was picked up by Dickson J. in *Attorney-General of Canada v. Canadian National Transportation Ltd.*¹⁰² where, in his minority concurrence, he relied upon *Vapor Canada* to support federal competition legislation on the basis of the trade and commerce power. For reasons which I have argued elsewhere, I believe that this represents the state of the law in Canada today on the point.¹⁰³ Furthermore, I would argue that properly drafted federal securities legislation would now be valid based upon the principles enunciated in these two cases.¹⁰⁴

¹⁰² [1984] 1 W.W.R. 193 (S.C.C.).

¹⁰³ *Loc. cit.*, footnote 97. See also *Re BBM Bureau of Measurement and Director of Investigation and Research* (1984), 9 D.L.R. (4th) 600 (F.C.A.); *Rocois Construction Inc. v. Quebec Ready Mix Inc.* [1985] 2 F.C. 40, (1985), 25 D.L.R. (4th) 373 (*sub nom. Attorney-General of Canada v. Quebec Ready Mix Inc.*) (Fed. C.A.), leave to appeal granted (1985), 25 D.L.R. (4th) 373 n.

¹⁰⁴ The federal government has presented a discussion paper for securities law for Canada. See *Proposals for a Securities Market Law for Canada*, (Department of Consumer and Corporate Affairs, Ottawa, 1979). For a full discussion of its constitutionality, see P. Anisman and P. Hogg's report, *Constitutional Aspect of Federal Securities Legislation*, Volume 3, page 136. This paper and Anisman and Hogg's comments thereon were reviewed by Dickson J. for a majority of the Supreme Court of Canada in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, (1982), 138 D.L.R. (3d) 1. The tone of that judgment seems to invite properly drafted federal securities legislation.

Securities regulation has a strongly federal character. Canadian capital markets are national and international in scope. Very few public issues are offered purely intraprovincially. Furthermore, securities markets perform the allocation function of shifting resources from investors to industry. This affects productivity and employment, and enhances the national economy.

After *Vapor Canada*, *Canadian National Transportation* and *Multiple Access*, I would argue that properly framed legislation could be supported by the second branch of *Parsons*. The securities scheme would have to be supervised by a public regulatory authority to qualify as "regulation" in the *Parsons* sense. Furthermore, it would have to be effective yet general in character. First, Parliament could promote investor confidence through a system guaranteeing adequate standards of disclosure. To do so, Parliament could empower an overseeing board to supervise uniform, comprehensive disclosure requirements which apply to all issuers generally. Second, Parliament could regulate trading activities. Such legislation would be valid because trading is necessarily incidental to the allocation function. However, the legislation would have to be carefully framed to cover the trading markets, not particular transactions. Anisman and Hogg suggest that stock exchanges and other self-regulatory organizations be required to register with a public supervisory body. As a condition of registration, these organizations would have to conform with standards governing such activities as trading, supervision of issuers, and listing.

The standards would have the constitutionally mandated degree of generality, and yet would effectively ensure an adequate amount of investor protection. For further commentary, see Finkelstein, *op. cit.*, footnote 16, pp. 713-714.

Viewed in this way, *Vapor Canada* represents the antithesis of economic individualism. It encourages the creation of federal regulatory bodies, and in fact goes so far as to condition the validity of federal regulation on the existence of an overseeing body. A public presence rather than a private redress is required. This is directly contrary to the *laissez-faire* philosophy evidenced by the Privy Council cases.

The extent to which Laskin would allow federal regulatory power where such a public body *was* created is indicated by the next case, *Re Anti-Inflation Act*.¹⁰⁵ In that case, the impugned federal legislation was upheld by a 7:2 majority of the Supreme Court of Canada.¹⁰⁶ The purpose of the Act was to contain and reduce inflation. To achieve this end, it regulated profit margins, prices, dividends and compensation in the private and federal public sectors. A public board was established by the Act to implement the legislation.

The Act was clearly economic regulation designed to combat an economic problem of national dimensions. The legislation was of general application throughout Canada, limited as to time, did not attempt to regulate any particular trade or business, or groups thereof, and no province acting alone could do what it purported to do. It is true that a province could enact the particular provisions and apply them to the private or provincial public sectors in the province. However this would not have been effective as an inflation-fighting device. While intra-provincially produced goods would be caught, unregulated goods produced elsewhere and imported into the province would continue to feed inflation therein, thereby frustrating any provincial scheme.

Laskin C.J.C., speaking for four of the nine Judges, acknowledged the possibility of anchoring the legislation in the federal trade and commerce power.¹⁰⁷ The five remaining Judges rejected the national dimen-

¹⁰⁵ *Supra*, footnote 4.

¹⁰⁶ The court (Beetz and de Grandpré JJ. dissenting) upheld it as emergency legislation. This was the first time the emergency doctrine had been used to support federal legislation under the general power in peace time. Four of the Judges (Laskin C.J.C. and Judson, Spence and Dickson JJ.) left open the possibility that it could be supported under the "national dimensions" doctrine formulated by Lord Watson in *Attorney-General for Ontario v. Attorney-General for the Dominion (Local Prohibition)*, [1896] A.C. 348, at p. 361 ("... that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada"). Having upheld it as crisis legislation, it became unnecessary to consider the broader ground. The remaining five Judges held that only the existence of a national emergency could justify such legislation. Three (Martland, Ritchie and Pigeon JJ.) held that an emergency had been shown to exist. The two dissenters held that it had not.

The case is also important for its holdings on the admissibility of extrinsic evidence in constitutional cases. For further commentary in this regard, see P.W. Hogg, *Proof of Facts in Constitutional Cases* (1976), 26 U.T.L.J. 386.

¹⁰⁷ Laskin C.J.C. was joined by Judson, Spence and Dickson JJ.

sions doctrine, therefore implicitly rejecting the trade and commerce power as a constitutional support, and said that only an emergency could justify such legislation. The rationale for this was most clearly articulated by Beetz J., speaking for the two dissenters. He said that where a program is all-embracing, as here, the test of validity is the nature of the specific subject matter covered and its effect, not the legislation's ultimate purpose. Here many of the subjects of regulation such as labour, production and capital markets fell within provincial jurisdiction under section 92(13). Parliament was thus precluded from entering the field in this broad way regardless of its purpose.

A concern for provincial autonomy clearly underlies this reasoning. If Parliament can regulate the economy in this comprehensive way, reaching deeply into intraprovincial activities in the process, these five Judges apparently thought there could be little left of provincial jurisdiction over property and civil rights in the province. A closer look shows the flaw in this proposition.

In this case, the fact that the federal legislation touched many subjects in their anti-inflationary aspect would not have precluded valid provincial legislation with a provincial purpose. Moreover, the generality which should have anchored the regulation in the national dimensions doctrine, or in the trade and commerce power, would have preserved provincial jurisdiction. If the legislation had been more specific, the "colourability" doctrine could have been used to strike down federal encroachments into provincial spheres. For example, if the Act regulated particular trades instead of the private sector generally, it would have been harder to argue that the Act was designed for the broad purpose of combatting inflation.

By contrast, Chief Justice Laskin specifically adverted to the trade and commerce power, and it is fairly clear (although he did not specifically decide it) that he would have supported the Act on the basis of the national dimensions doctrine had the emergency doctrine not been available. His most telling statement in that regard is as follows:¹⁰⁸

Since no argument was addressed to the trade and commerce power I content myself with observing only that it provides the Parliament of Canada with a foothold in respect of 'the general regulation of trade affecting the whole dominion', to use the words of the Privy Council in *Citizens Insurance Co. v. Parsons* [(1881), 7 App. Cas. 96] at p. 113. The *Anti-Inflation Act* is not directed to any particular trade. It is directed to suppliers of commodities and services in general and to the public services of governments, and to the relationship of those suppliers and of the public services to those employed by and in them, and to their overall relationship to the public. With respect to some of such suppliers and with respect to the federal public service, federal legislative power needs no support from the existence of exceptional circumstances to justify the introduction of a policy of restraint to combat inflation.

¹⁰⁸ *Supra*, footnote 4, at pp. 426-427 (S.C.R.), 498-499 (D.L.R.).

The economic interconnection with other suppliers and with provincial public services, underlined by collective bargaining conducted by, or under the policy umbrella of trade unions with Canada-wide operations and affiliations, is a matter of public general knowledge of which the court can take judicial notice. The extrinsic material does not reveal any distinction in the operation and effect of inflation in respect of those economic areas which are ordinarily within and those ordinarily outside of effective federal regulatory control. In enacting the *Anti-Inflation Act* as a measure for the peace, order and good government of Canada, Parliament is not opening an area of legislative authority which would otherwise have no anchorage at all in the federal catalogue of legislative powers but, rather, it is proceeding from legislative power bases which entitle it to wage war on inflation through monetary and fiscal policies and entitle it to embrace within the *Anti-Inflation Act* some of the sectors covered thereby but not all. The circumstances recounted above justify it in invoking its general power to extend its embrace as it has done.

As with federal schemes to regulate competition and combat inflation, Laskin C.J.C. equally supported federal power to set national standards of composition and quality of goods. In *Labatt Breweries of Canada Limited v. Attorney General of Canada*,¹⁰⁹ the Governor in Council was empowered by sections 6 and 25(1)(c) of the Food and Drugs Act¹¹⁰ to set national standards for, *inter alia*, light beer. The regulation prohibited any person from marketing beer with more than 2.5% alcoholic content as light beer. Estey J., speaking for a majority of the Supreme Court of Canada, struck down the legislation as detailed regulation of particular industries by means of a series of codes.¹¹¹ He did not consider whether national standards regulation could be supported as "general trade regulation affecting the whole dominion" based upon *Parsons* second branch. Laskin C.J.C. characterized the matter entirely differently, viewing national standards regulations as a type which fortifies the Canadian economic union:¹¹²

I do not press any perfect analogy to the prescription of common standards for an article of food which is produced throughout the country and which is also imported from abroad, but it does appear to me that if Parliament can set up standards for required returns for statistical purposes, it should be able to fix standards that are common to all manufactures of foods, including beer, drugs, cosmetics and therapeutic devices, at least to equalize competitive advantages in the carrying on of business concerned with such products.

The operations of Labatt Breweries and of other brewers of beer extend throughout Canada, and I would not attenuate the federal trade and commerce power any further than has already been manifested in judicial decisions by denying Parliament authority to address itself to uniform prescriptions for the manufacture of food,

¹⁰⁹ *Supra*, footnote 4.

¹¹⁰ R.S.C. 1970, c.F-27.

¹¹¹ For criticism of the majority judgment on the constitutional issue, see Finkelstein, *loc. cit.*, footnote 97, at pp. 195-196. For further comment on *Labatt*, see J.C. MacPherson, *Developments in Constitutional Law: The 1979-80 Term* (1981), 2 Sup. Ct. L.R. 49, at pp. 64-81; H. Kushner, *Dominion Stores and Labatt Breweries: Signals of a Return to the Theory of Provincial Rights* (1981), 19 Osgoode Hall L.J. 118.

¹¹² *Supra*, footnote 4, at pp. 921-922, (S.C.R.), 599 (D.L.R.).

drugs, cosmetics, therapeutic devices in the way, in the case of beer, of standards for its production and distribution according to various alcoholic strengths under labels appropriate to the governing regulations.

It should be noted that Laskin appears to have subsequently opened up the *Labatts* decision to reconsideration by his remarks for a majority of the Supreme Court of Canada in *R. v. Wetmore, Kripps Pharmacy Ltd.*¹¹³ It will be interesting to see whether the court takes up the challenge.

Taking Laskin's judgments in *Vapour Canada*, *Anti-Inflation* and *Labatts* together, and fortifying them with Dickson J.'s judgment in *Canadian National Transportation*, the following picture emerges. The Chief Justice saw a major role for Parliament in the establishment of national schemes to regulate the economy and consumer protection. If he is right, Parliament may set broad general directions over the economy in matters such as inflation, even apart from crisis situations, and may do so through comprehensive regulation which reaches deeply into all aspects of national trade and commerce. Further, Parliament can direct how that economic activity is to be carried out by establishing regulatory bodies to monitor and enforce national standards of competitive behaviour, promulgate national standards of quality to protect consumers, or, I suggest, establish national schemes to facilitate the raising of capital while at the same time protecting the investing public. This is a wide view indeed of federal regulatory power, but one which is consonant with Laskin's view of a single Canadian economic and social union.

C. Trade

The economic realities of trade are such that its component parts cannot be divided into watertight compartments. For example, manufacturing and production are local in one aspect, but in another they are the first link in the chain of national and international trade. Similarly the consummation of a contract of sale between a vendor and purchaser is a local transaction when viewed in isolation, but it is also the end point of a series of transactions which comprise the trade process.

The difficulties of divided jurisdiction are especially acute with agricultural products marketing, where a number of economic factors combine to make uniform national price support and producer equalization schemes extremely desirable.¹¹⁴ At first this proved to be very difficult

¹¹³ (1983), 49 N.R. 286, at p. 289, [1984] 1 W.W.R. 577, at p. 581 (S.C.C.). For further discussion, see Finkelstein, *loc. cit.*, footnote 97.

¹¹⁴ *First*, agriculture is one of the few sectors of the economy which approaches a state of pure competition. Because there are so many producers, individual decisions to increase or decrease crop size have no influence on commodity prices. Farmers are accordingly price-takers rather than price setters. *Second*, demand is largely inelastic in relation to supply. Sharp increases in the supply of farm products will not encourage

from a constitutional point of view. The early marketing cases took a highly abstract, legalistic approach which assumed that clean lines could be drawn to separate local and extra-provincial trade along federal-provincial lines for regulatory purposes.¹¹⁵ This strict approach was due at least in part to a judicial economic philosophy which opposed government intervention in the market place through the imposition of collectivist regulatory schemes.¹¹⁶

consumers to eat or drink more without substantial drops in price, and even then there are limits. One can only eat three meals a day. The effect of the above factors is that, paradoxically, farmers are actually worse off in good crop years than in bad ones. A sharp increase in supply in a good year will trigger a substantial drop in price with only a modest increase in consumption, so cash flows will actually decrease. On the other hand, a bad crop year generates a contraction in supply such that both prices and cash flows rise.

A collective price stabilization scheme is thus necessary to smooth out the highs and lows. In periods of excess supply, produce must be removed from the market and stored to support the price. In lean years it can be fed into the market to stabilize the price. In order to be effective, the scheme must apply to all producers on a compulsory basis, and must control all channels of supply, local or extra-provincial. If only one channel is regulated, the unrestricted one will feed excess produce into the market to frustrate the price support system.

A price stabilization scheme is not enough. A producer equalization scheme is necessary to ensure that the system is equitable. Producer returns must be the same even where a particular farmer lives in an area which is too thin to support the regulated price for that farmer's full quota. There must, accordingly, be a mechanism for pooling returns and spreading the burden of shortfalls in demand over all producers equally. Again, as with price stabilization, the equalization scheme cannot function unless all channels of supply are controlled. If, for example, farm products sold locally were outside the scheme, producers who were fortunate enough to live in unsaturated areas would be able to satisfy that market and still deliver to interprovincial markets to the full extent of their quotas. Farmers living in saturated areas would be limited to their interprovincial market quotas.

Thus the logic of price support and equalization schemes cannot stand the distinction between federal and provincial jurisdiction. For example, a province which wanted to protect its producers of a given commodity as to price and equalize their returns could only impose marketing quotas on local producers whose products were destined for local markets. Such a scheme would fail, because both local and out-of-province farmers could circumvent all provincial controls by selling their produce extra-provincially. A farmer's home province could not prevent export (*Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, *supra*, footnote 7; *Central Canada Potash v. Government of Saskatchewan*, *supra*, footnote 7), and the receiving province could not limit imports (*Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*, *supra*, footnote 7; *Burns Foods Ltd. v. Attorney-General for Manitoba*, *supra*, footnote 7). Any provincial market could therefore be flooded with commodities flowing in through inter-provincial trade. On the other hand, Parliament could not regulate products destined for local markets: *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, [1925] 3 D.L.R. 1). Unregulated local products could therefore compete with regulated interprovincial goods, thereby frustrating a federal scheme. The result of the above is that divided jurisdiction over agricultural products is unworkable.

¹¹⁵ For a full discussion of the constitutional history of agricultural products marketing in Canada, see Finkelstein, *op. cit.*, footnote 16, p. 473 *et seq.*

¹¹⁶ See footnote 84, *supra*, for a fuller discussion of this.

Thus in *R. v. Eastern Terminal Elevator Co.*,¹¹⁷ Duff J. struck down a federal grain marketing scheme, notwithstanding that the market was substantially national and international in scope, on the basis that the scheme covered produce destined for local consumption as well.¹¹⁸ A similar strict approach was applied to the provinces in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*.¹¹⁹ Subsequently the Privy Council struck down even a federal-provincial co-operative scheme in *Reference re Natural Products Marketing Act*.¹²⁰ The federal centrepiece legislation provided that a co-operative scheme could be initiated on the approval of the Governor in Council if he was satisfied that, *inter alia*, some of the produce was for export. Lord Atkin, speaking for the Privy Council, invalidated the legislation on the basis that Parliament could only regulate produce destined exclusively for non-local markets. Here the federal statute might cover transactions completed in a province which had no relation to extra-provincial trade.

The practical difficulty with the Privy Council's approach is that it assumed that produce can be meticulously sorted by local and non-local destination at the stage when effective regulation must be imposed. In fact, that is not the case. For a wheat marketing scheme to be effective, the regulation must attach when the grain arrives at the elevators and *before* the ultimate destination of each kernel is known. The effect of the Privy Council's decision was that neither level of government could regulate produce whose destination was unknown for fear that it might ultimately move in the other level of government's sphere of jurisdiction. A practical legislative hiatus therefore existed. Due to the presence of unregulated grain in the market place, even the co-operative scheme was unworkable.

*Reference re The Farm Products Marketing Act*¹²¹ and *Murphy v. Canadian Pacific Railway Company*¹²² were significant turning points in terms of judicial attitude,¹²³ but no innovation was actually necessary. In

¹¹⁷ *Supra*, footnote 114.

¹¹⁸ Though this approach is fraught with practical difficulties, we can see the federalism concern underlying it. Once one accepts a pragmatic division of jurisdiction, power tends to become much more centralized as occurred in the United States. As Chief Justice Marshall said in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824), the restrictions on federal power become political, not constitutional.

¹¹⁹ *Supra*, footnote 84.

¹²⁰ *Ibid.*

¹²¹ [1957] S.C.R. 198, (1957), 7 D.L.R. (2d) 257.

¹²² [1958] S.C.R. 626, (1958), 15 D.L.R. (2d) 145.

¹²³ The *Reference re Farm Products Marketing Act*, *supra*, footnote 121, signalled a new judicial approach. The subject of the Reference was a provincial statute which regulated only "intraprovincial transactions". Four of the Judges (Kerwin C.J.C. and Rand, Locke and Nolan JJ.) construed the phrase narrowly, and perceived a broader scope

R. v. Klassen,¹²⁴ the Manitoba Court of Appeal broke new legal ground. The issue in *Klassen* was whether the Canadian Wheat Board Act¹²⁵ could be applied to a mill operating exclusively in intra-provincial trade. The Manitoba Court of Appeal realized that price support and producer equalization schemes do not work unless the regulating authority can cover the entire market.¹²⁶ Because the grain trade was substantially non-local, the court held that Parliament could regulate even local trade to effectuate its extra-provincial regulation.

Klassen was directly contrary to the Supreme Court of Canada's earlier decision in *Eastern Terminal Elevator Co.*¹²⁷ where Duff J. described as a "lurking fallacy" the federal argument (which was in fact accepted by the Manitoba Court of Appeal) that "because in large part the grain trade is an export trade [Parliament] can regulate it locally in order to give effect to [its] policy in relation to the regulation of that part of it which is export". If *stare decisis* had been controlling, the *Klassen* scheme would have been struck down. The Supreme Court of Canada refused leave to appeal¹²⁸ in spite of the earlier precedent to the contrary.

Professor Laskin (as he then was) was a great admirer of *Klassen*, praising it highly in a 1959 Canadian Bar Review comment.¹²⁹ He approved

for federal power than had previously been recognized. Parliament could regulate transactions completed in the province if the goods in question entered the flow of extra-provincial trade. Furthermore, Parliament did not have to differentiate the products by destination. If a substantial part of the trade was interprovincial or export, Parliament could regulate incidental transactions in goods destined for local consumption. There was no actual accretion to federal power, because the Reference concerned the validity of the provincial statute. Nevertheless, the language indicated that the Supreme Court was adopting a more pragmatic approach. In *Murphy v. C.P.R.*, *supra*, footnote 122, the Supreme Court upheld the Canadian Wheat Board Act, R.S.C. 1952, c.44, as applied to an interprovincial transaction. The language again indicated that the judges were willing to take a broad view of trade, and therefore of federal jurisdiction.

¹²⁴ (1959), 20 D.L.R. (2d) 406, 29 W.W.R. 369 (Man. C.A.).

¹²⁵ *Supra*, footnote 123.

¹²⁶ The objects of the scheme were to stabilize the market and equalize producer returns. If intraprovincial transactions were outside the sweep of the Act, both objects would be frustrated. First, the market could not be stabilized. Grain is a fungible commodity. If demand is such that a certain supply level will support a particular price, that demand can be satisfied by either locally or extra-provincially produced grain. The consumer is indifferent. To the extent local grain feeds the demand, extra-provincial grain cannot without resulting in an over-supply which drives prices down. Second, if the scheme is to succeed in equalizing producer returns, it must be a matter of indifference whether a particular producer's grain is sold in one place or another. His returns should be the same in any case. If grain sold locally were outside the scheme, a producer would sell part of his grain intraprovincially and still deliver to extra-provincial channels to the full extent of his quota. This would put the unfortunate producer whose local market was satisfied at the regulated price at a disadvantage.

¹²⁷ *Supra*, footnote 114, at pp. 447 (S.C.R.), 12 (D.L.R.).

¹²⁸ [1959] S.C.R. ix.

¹²⁹ (1959), 37 Can. Bar Rev. 630.

of the pragmatic foundation of the case, concerned as it was more with workability than legal formalism. He explained it this way:¹³⁰

Klassen was caught by the Act not merely because, as a matter of words, it purported to be directed to regulation of [export and interprovincial] trade in wheat. As a mere legal formula this would not have carried the day against Klassen, especially if any regard were had to the judgment of Duff J. (as he then was) in the *Eastern Terminal Elevator* case. The dominating consideration must have been that the sweep of the Act was supported by the economic facts—trade in wheat was, for Canada, essentially a matter of export and interprovincial movement. Realistically, then, any movement of wheat into marketing channels, be they intra-provincial or not, was a movement which could reasonably be subjected to a federal control scheme for the marketing of wheat.

He went on in the following paragraph of the comment to criticize the Privy Council's farm products marketing decisions for "persistently [refusing] to relate power in relation to the regulation of trade and commerce to economic realities of the Canadian market",¹³¹ and characterized *Klassen* by paraphrasing a line from the American case of *Wickard v. Filburn*:¹³²

. . . [*Klassen*] has recognized that 'questions of the power of Parliament are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon the regulation of trade and commerce'.

Laskin took this concern with economic substance over legal formalism onto the Bench. In *Caloil Inc. v. The Attorney-General of Canada*,¹³³ a condition in a federal licence required imported oil to be sold in a particular area. Pigeon J., speaking for a majority of the Supreme Court of Canada, with Laskin concurring, upheld the condition as necessarily incidental to an extra-provincial marketing scheme intended to protect the domestic oil industry, notwithstanding that it reached down to the level of distribution for consumption. Although *Klassen* was not specifically cited, the two cases obviously rest on the same pragmatic foundation. Laskin's brief concurrence made it clear that, for him, the issue was not whether a particular subject of regulation was "local", but rather whether it formed an integral part of an overall scheme directed at extra-provincial trade. His short judgment upheld the regulation on the following basis:¹³⁴

. . . the admitted authority of Parliament to regulate importation of goods from foreign countries was validly exercised in this case in including as part of the regulatory scheme a provision restricting the area of distribution of the goods within Canada by their importer.

¹³⁰ *Ibid.*, at pp. 633-634.

¹³¹ *Ibid.*, at p. 634.

¹³² *Ibid.*, at pp. 635-636. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the U.S. Supreme Court upheld a federal regulation pursuant to the interstate commerce power which covered home-consumed wheat as part of the scheme to govern the national and international trade in wheat.

¹³³ *Supra*, footnote 4.

¹³⁴ *Ibid.*, at pp. 553 (S.C.R.), 479 (D.L.R.).

It is likely following *Klassen* and *Caloil* that a federal scheme governing a substantially extra-provincial trade would be valid today notwithstanding that it incidentally caught purely local transactions in its sweep.

However, this does not answer all of the problems. Apart from the relatively few situations, such as with wheat, where the trade is substantially non-local, the markets for most natural products are both local and extra-provincial. *Klassen* and *Caloil* would not support exclusive federal power in relation to these products, and it is clear after *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*¹³⁵ and *Burns Foods Ltd. v. Attorney-General for Manitoba*¹³⁶ that unilateral provincial action would not work either.¹³⁷

¹³⁵ *Supra*, footnote 7.

¹³⁶ *Ibid.*

¹³⁷ *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*, *supra*, footnote 7 arose as an indirect challenge to a Quebec egg marketing scheme. The Government of Manitoba wanted to challenge the Quebec scheme but could not do so directly. It thus promulgated a similar set of regulations in skeleton form, referred its validity to the Manitoba Court of Appeal, and appealed the decision to the Supreme Court.

The regulations provided that all eggs sold in Manitoba, whatever their province of origin, had to be marketed through a provincial board. The board was empowered to set quotas or prohibit importation altogether, and control such ancillary marketing activities as grading, packing and marking. The plan did not affect the production of out-of-province producers, but attached to their eggs once they arrived in Manitoba. The Reference was considered on the footing that the board did not discriminate against extra-provincial producers.

Martland J., speaking for the majority, held that the scheme was invalid because it "aimed" at the regulation of interprovincial trade. He did not even attempt to distinguish contrary precedents in *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708, [1938] 4 D.L.R. 81 (P.C.) and *Home Oil Distributors Ltd. v. Attorney-General of British Columbia*, [1940] S.C.R. 444, [1940] 2 D.L.R. 609. More importantly, he did not explain why this case "aimed" at interprovincial trade while *Carnation Company Ltd. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238, (1968), 67 D.L.R. (2d) 1, merely "affected" it. In both cases, the province of origin was different from the province of ultimate consumption. Both schemes affected the flow of trade, and were designed to protect local producers by supporting the price. Why was one *ultra vires* the provincial Legislature but the other was not? There does not appear to be any economically significant distinction between the cases. Both sets of regulations could equally have clogged interprovincial trade.

In *Burns Foods Ltd. v. Attorney-General for Manitoba*, *supra*, footnote 7, a provincial marketing scheme provided that only hogs purchased through the Producers' Board could be slaughtered in Manitoba, regardless of their province of origin. In practice, this scheme governed the marketing of both locally and extra-provincially produced hogs in the province.

Pigeon J., speaking for the majority, held that the regulation of imports was an invalid intrusion into Parliament's jurisdiction under the trade and commerce power.

In my opinion, the Supreme Court should have permitted the provincial Legislatures to protect indigenous producers in the *Manitoba Egg Reference* and *Burns Foods*. If the schemes had been upheld, the effect would not have been to deny federal competence in

Parliament and the provincial legislatures recently tried again to fashion a valid co-operative scheme. Apart from a levy provision in the federal legislation,¹³⁸ the Supreme Court of Canada in judgments written by Laskin C.J.C. and Pigeon J. upheld the federal and provincial dove-tailing legislation in *Reference re Agricultural Products Marketing Act and Two Other Acts*.¹³⁹ It was left to the provinces to enact the invalidated federal levy.

It is not necessary for the purposes of this article to review the details of the complex scheme beyond saying that it solved the long-standing problem of farm products marketing.¹⁴⁰ However, it is useful to contrast Laskin's economic approach with Pigeon J.'s federalism approach to jurisdiction over manufacturing and production, because their judgments illustrate the tension in the cases between functional economics and local autonomy. The traditional view is that production is a local matter which accordingly falls to be regulated by the provinces. This focuses on the static aspect of production.¹⁴¹ However, from an economic perspective, production is also part of the trade dynamic. Production controls can affect price in interprovincial trade just as surely as price controls can. The difficulty with this economic argument from the point of view of preserving provincial autonomy is that, when one meshes federal jurisdiction with the paramountcy doctrine, provincial laws respecting production would remain operative only at federal sufferance.

the field. *Caloil* illustrates that federal regulation of a local transaction in its interprovincial trade aspect is valid. Furthermore, it would be of paramount authority. Consequently, if discrimination or some market disequilibrium should arise, Parliament could correct it through the exercise of its exclusive authority over interprovincial and export trade.

In the absence of such federal legislation, a province should be free to protect its economy through non-discriminatory marketing legislation governing intraprovincial activities in their local aspect. However, the effect of the *Manitoba Egg Reference* and *Burns Foods* is that a province acting alone cannot protect its producers. If it cannot cover the whole market, the efficacy of the scheme is destroyed.

¹³⁸ S. 2(2)(a) of the Agricultural Products Marketing Act, R.S.C. 1970, c.A-7, purported to authorize local boards to impose levies in respect of purely intraprovincial trade. This was thought to be necessary as a result of earlier decisions declaring similar provincial legislation invalid as imposing indirect taxes. See *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*, [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639. The court here overruled the *Crystal Dairy* doctrine at the same time as it declared s. 2(2)(a) *ultra vires* Parliament. As such, it was open to the provincial Legislatures to patch the whole by enacting the provision themselves.

¹³⁹ *Supra*, footnote 4.

¹⁴⁰ For a full discussion, see Finkelstein, *op. cit.*, footnote 16, p. 473 *et seq.*

¹⁴¹ See *Carnation Company Ltd. v. Quebec Agricultural Marketing Board*, *supra*, footnote 137, where a provincial scheme to regulate the sale of raw milk to Carnation was upheld notwithstanding that Carnation's production was destined for sale outside Quebec and the regulation affected the interprovincial sales price. See also *Reference re Agricultural Products Marketing Act and Two Other Acts*, *supra*, footnote 4, at pp. 1296-1297 (S.C.R.), 324-326 (D.L.R.) (Pigeon J.).

Laskin opted for functional economics over abstract notions of federation. The second passage previously quoted from his *Klassen* comment derided the use of legal "formulae"¹⁴² and urged that courts have regard to the actual effects of each particular activity on trade and commerce. In *Reference re Agricultural Products Marketing Act*,¹⁴³ he noted:

. . . I am quite aware of the problem that exists in making a federal marketing scheme effective if the regulatory agency cannot reach back into production.

He later added:¹⁴⁴

Federal legislative authority which, when exercised, has a reactive effect on local production does not on that account become invalid if it is properly related to objects within federal competence.

Finally, and most importantly, Laskin C.J.C. said the following in relation to the provincial production quotas at issue in the case:¹⁴⁵

The issue raised by the appellants on s. 21a [of the provincial statute] is that its application necessarily involves an interference with interprovincial and export trade. No doubt, control of production by quotas cuts more deeply than control of marketing. . .

Eggs like automobiles pass in interprovincial or export trade. The question then is this: If a Province may constitutionally limit the production of eggs by a producer, without regard to the course of his trade (which may be mainly in the interprovincial or export market), may it not do the same in respect of the manufacture of automobiles or any other product? It is true that a Province cannot limit the export of goods from the Province, and any provincial marketing legislation must yield to this. How then, it may be asked, can it be allowed to accomplish this forbidden end by choking off interprovincial trade at its very source, at the point of production?

I point out, however, that what we are dealing with here is a provision of a provincial marketing statute. The primary object is to regulate marketing in intraprovincial trade. Although it would not be a valid regulation of such marketing to impose quotas on production with a view to limiting interprovincial or export trade, I am not persuaded that I should give s. 21a. . . that construction.

Thus he refused to accede to the proposition that "production" is *prima facie* a local matter which automatically engages provincial power. On the contrary, he viewed "production" as a divisible field according to the object and purpose of the regulation at issue. Parliament could regulate it provided that its legislation was directed at the control of extra-provincial trade. The provinces could regulate it in its local aspect.

Furthermore, Laskin was not willing to return to the *Eastern Terminal Elevator/Reference re Natural Products Marketing Act* requirement that the federal regulation meticulously divide goods by local and non-local destination at the production stage. As he made clear in the second

¹⁴² *Supra*, footnote 132.

¹⁴³ *Supra*, footnote 4, at pp. 1263 (S.C.R.), 303 (D.L.R.).

¹⁴⁴ *Ibid.*, at pp. 1265 (S.C.R.), 304 (D.L.R.).

¹⁴⁵ *Ibid.*, at pp. 1285-1287 (S.C.R.), 318-319 (D.L.R.).

passage quoted above, the fact that a federal scheme incidentally caught production destined for a local market was not fatal where the overall scheme was directed at a matter within the federal catalogue of powers.

Pigeon J. took a much more abstract and formalistic view, as is illustrated by the following passages from his judgment.¹⁴⁶

In my view, the control of production, whether agricultural or industrial, is *prima facie* a matter of provincial jurisdiction. . .

We are not called upon to decide in the present case whether the federal Parliament could assume control over egg farms devoted exclusively to the production of eggs for extraprovincial trade. . .

. . . "Marketing" does not include production and, therefore, provincial control of production is *prima facie* valid.

While one can understand Pigeon J.'s federalism concerns, there are nevertheless two basic difficulties with his approach. First, on a theoretical level, the Constitution Act, 1867 does not specify "production" or "marketing" in either the federal or provincial catalogues of power. The validity of the impugned legislation should depend upon whether its object and purpose is to regulate local trade if it is provincial, or non-local trade if it is federal. Merely labelling the regulation as being in relation to "production" should not be determinative of the issue in favour of provincial jurisdiction. Second, on a practical level, Pigeon J.'s approach constitutes a return to the *Eastern Terminal Elevator* requirement that Parliament cannot regulate production destined for local markets even where that prohibition effectively frustrates a national scheme for a product whose market is substantially but not totally extra-provincial.

Laskin C.J.C. was only speaking for four judges in the *Ontario Egg Reference* whereas Pigeon J. was speaking for five, but it is submitted that Laskin C.J.C. got in the last word. In *Central Canadian Potash Co. Limited v. The Government of Saskatchewan*,¹⁴⁷ he said for a unanimous Court, which included Pigeon J.:

It is, of course, true that production controls and conservation measures with respect to natural resources in a Province are, *ordinarily*, matters within provincial legislative authority. . . The situation may be different, however, where a Province establishes a marketing scheme with price fixing as its central purpose.

It is true that Laskin C.J.C. later in the *Potash* case denied that the above necessarily involved an accretion to federal power. However, given the exhaustive distribution of legislative power (with exceptions which are not relevant here), it is difficult to see how this can be so. I would argue that after *Potash* Parliament may use production controls as a feature in establishing an interprovincial and international scheme of price supports. Furthermore, I would argue that there is nothing magic about "price

¹⁴⁶ *Ibid.*, at pp. 1293-1296 (S.C.R.), 324-326 (D.L.R.).

¹⁴⁷ *Supra*, footnote 7, at pp. 74 (S.C.R.), 630-631 (D.L.R.). (Emphasis added).

fixing'', and that *Potash* stands for the broader proposition that Parliament may impose production controls in furtherance of any valid federal objective.

Conclusion

Laskin's work has influenced and will continue to influence Canadian constitutional law. Particularly in the political and legal liberties area, he was ahead of his time. His dissents did not carry the day when he wrote them, but they spoke to the future. The dissents in *McNeil*¹⁴⁸ and *Mitchell*¹⁴⁹ have become law under the Charter. I anticipate that his judgments in the other political and legal liberties cases discussed herein will also be persuasive when these issues arise again.

I would hope that his judgments dealing with the scope of federal power will also be followed. This has already happened to some extent, as where Dickson J. adopted his *Vapor Canada*¹⁵⁰ approach in *Canadian National Transportation*.¹⁵¹ However, there may be limits to how far future courts are willing to go. Where Laskin was driven by pragmatic considerations of ensuring effective redistribution and regulation, others will emphasize federalism and a concern for local autonomy. Although Canadian constitutional law will likely continue the fluctuations it has experienced since Confederation between centralism and decentralism, it is to be hoped that Laskin's work will be persuasive in helping to create a Canadian union whose economic and social programs are as vigorous in one part of the country as in another.

¹⁴⁸ *Supra*, footnote 14.

¹⁴⁹ *Supra*, footnote 36.

¹⁵⁰ *Supra*, footnote 4.

¹⁵¹ *Supra*, footnote 102.