

Can the Taxing Power Be Delegated?

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Citation Information

Hogg, Peter W. "Can the Taxing Power Be Delegated?." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 16. (2002).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol16/iss1/10>

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CAN THE TAXING POWER BE DELEGATED?

Peter W. Hogg*

I. THE POWER TO TAX

Both the Parliament of Canada and the legislatures of the provinces have the power to levy taxes. In the case of the Parliament, the power is conferred by section 91(3) of the *Constitution Act, 1867*,¹ and it extends to “any mode or system of taxation”. In the case of the Legislatures, the power is conferred by section 92(2) of the *Constitution Act, 1867*, and it is limited to “direct taxation within the province”.² For the most part these powers are not interpreted or applied any differently than other legislative powers that are distributed by the *Constitution Act, 1867*. But section 53 of the *Constitution Act, 1867* does single out the taxing and spending powers by providing that a bill imposing any tax or spending public monies “shall originate in the House of Commons”. Section 54 goes on to provide that the House of Commons shall not enact a bill for the spending of public monies unless the bill was recommended by message of the Governor General. By virtue of section 90 of the *Constitution Act, 1867*, sections 53 and 54 apply to the provinces as well as to the federal government with appropriate modifications to the language.

The special treatment of the taxing and spending powers has its origin in the conflict between the King and Parliament in England in the 17th century. Democratic governance required that the powers to tax and spend be approved by the elected House of Commons. Experience showed that, if the King was not dependent on Parliament for supply, the King would be able and willing to govern without reference to the House of Commons; in other words, the unelected King was free to govern without regard for

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¹ The *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.).

² An account of the taxing powers is to be found in Hogg, *Constitutional Law of Canada* (4th ed., 1997), ch. 30.

the wishes of the people. As we shall see, this archaic problem is not entirely without its modern counterpart.

Sections 53 and 54 of the *Constitution Act, 1867* constitute manner and form requirements for the enactment of bills to impose taxes (or spend public monies). Do they also impose substantive restrictions on the powers to tax? In particular, do they preclude Parliament or the legislatures from delegating the power to tax?

II. DELEGATION OF LEGISLATIVE POWER

The general rule of Canadian constitutional law is that Parliament and the legislatures have the power to delegate their legislative powers.³ This doctrine also had its origin in 17th century England, where the courts denied the power of the King to make new laws of his own initiative, but accepted the King's power to make laws if he acted pursuant to a delegation enacted by Parliament. Democratic governance was sufficiently preserved if the law-making of the King and his ministers was circumscribed by Parliament itself. Canadian courts accepted the same doctrine, permitting Parliament to delegate its powers to the Governor in Council, to ministers, to officials or to administrative agencies. There was initially some controversy as to whether the provincial Legislatures enjoyed the same power, but the courts held that they did, so that the Legislatures were permitted to delegate to the Lieutenant Governor in Council, to ministers, to officials, to municipalities, to school boards and to administrative agencies. In fact, extraordinarily sweeping powers were delegated by Parliament to the Governor in Council in the *War Measures Act*, under which Canada was governed during both world wars, and those powers were upheld by the courts.⁴ The provinces have also from time to time engaged in sweeping delegations of legislative power, for example, to establish marketing schemes, and these have been upheld.⁵

There are some limits on the power to delegate legislative power,⁶ but none that are relevant to the present topic. For present purposes, it may be assumed that the power to delegate legislative power is unlimited. The question is whether the power to tax is in a different category as the result of the requirement of section 53 that a bill imposing a tax must originate in the House of Commons (or provincial Legislative Assembly). A tax levied under a delegated

³ An account of the law respecting delegation is to be found in Hogg, *supra*, note 2, ch. 14.

⁴ *Re Gray* (1918), 57 S.C.R. 150.

⁵ *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708.

⁶ The important one is the prohibition on federal inter-delegation, namely, the delegation of legislative power from Parliament to the provinces and *vice versa*: see Hogg, *supra*, note 2, ch. 14.

power would not originate in the House of Commons. The policy argument against permitting delegation of the taxing power is that a delegation reduces the democratic control of taxation by permitting taxes to be imposed or increased secretly — without the normal public debate in the legislative assemblies. We shall see that this concern persists to this day.

III. DELEGATION OF THE POWER TO TAX

There have been three cases in which the Supreme Court of Canada has considered the question whether the taxing power could be delegated. Each case has yielded a different (and inconsistent) answer. The first case is *Reference re Agricultural Products Marketing Act*.⁷ In that case, a constitutional attack was mounted against the levies on farmers that were imposed by marketing boards. The boards were created under authority granted in a federal statute, and the statute empowered the boards to impose levies. The argument was that the levies were taxes which could not be imposed by a delegated body. The Court held that the levies were not taxes (they were administrative or regulatory charges), so there was no need to resolve the issue. But Pigeon J. for the majority of the Court in an *obiter dictum* answered the question anyway. He acknowledged that section 53 of the *Constitution Act, 1867* appeared to be a bar to the delegation of the taxing power. But he pointed out that section 53 could be amended by the federal Parliament alone,⁸ and he said that any delegation by Parliament of the power to impose taxes should be regarded as an implicit amendment of section 53. Therefore, the taxing power can be delegated. This reasoning is open to criticism. So long as section 53 has not in fact been amended, it surely ought to be obeyed. The fact that section 53 can be amended ought not to justify its being disregarded, which is what the theory of implied amendment allows.

The second case in which the Supreme Court of Canada has considered whether the taxing power could be delegated is *Eurig Estate (Re)*.⁹ In that case, the Supreme Court of Canada struck down a probate fee imposed by the prov-

⁷ [1978] 2 S.C.R. 1198.

⁸ At that time, the power of amendment was in s. 91(1) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) (hereinafter *Constitution Act, 1867*). That provision has been repealed and replaced by s. 44 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (hereinafter *Constitution Act, 1982*), which would also authorize the amendment by Parliament alone of s. 53 or s. 54.

⁹ [1998] 2 S.C.R. 565. On the issue of the effect of s. 53, the majority opinion of Major J. was disagreed with by both the concurring opinion of Binnie J. (who struck down the tax on administrative-law grounds) and the dissenting opinion of Bastarache J. (who would have upheld the tax).

ince of Ontario on the estates of deceased persons. The probate fee was levied by the Lieutenant Governor in Council, acting under a statutory power to impose “fees” in court proceedings. The Court unanimously held that the probate fee had as its main purpose the raising of revenue (as opposed to defraying expenses) and was therefore a tax. The Court by a majority then held that the tax was invalid for failure to comply with section 53 of the *Constitution Act, 1867*. Justice Major speaking for the majority, held that section 53 “ensures parliamentary control over and accountability for taxation” by “requiring any bill that imposes a tax to originate with the legislature”, and prohibiting “any other body other than the directly elected legislature from imposing a tax on its own accord”.¹⁰ Moreover, section 53 “is a constitutional imperative that is enforceable by the courts”.¹¹ What of the *obiter dictum* in the *Agricultural Products Marketing* case that any inconsistent legislation should be upheld as an indirect or implicit amendment of section 53? Justice Major said that the dictum should no longer be followed. It was true that section 45 of the *Constitution Act, 1982* empowered a provincial Legislature to amend the constitution of the province, and it was also true that the requirement of section 53 was a provision that could be amended under that power, but section 45 should be interpreted as requiring that any such amendment be direct or express, not merely indirect or implied.¹² The probate fee, being a tax that had not been imposed by the legislature itself, was therefore invalid.¹³

Eurig Estate (Re) did not have to decide the question whether the taxing power could be delegated. The Ontario legislature had enacted a statute delegating the Lieutenant Governor in Council the power to levy “fees” in court proceedings, but it had not delegated the power to levy a tax. “Therefore”, said Major J., “whether it could constitutionally do so does not need to be addressed.”¹⁴ However, in an earlier passage, Major J. implied that the answer was no, because he said:

¹⁰ *Id.*, paras. 30 and 32. Justice Bastarache, dissenting, took the view that s. 53 was addressed only to the relationships between an upper and lower house; since no province had a bicameral legislature anymore, s. 53 had become redundant in its application to the provinces (para. 54). Justice Binnie, concurring in the result, took a similar view that s. 53 was applicable only to “legislative procedure”, and if a taxing measure never took the form of a “bill” s. 53 had no work to do (para. 60).

¹¹ *Id.*, para. 34.

¹² *Id.*, para. 35.

¹³ The province immediately enacted the *Estate Administration Tax Act, 1998*, S.O. 1998, c. 34, to impose a tax at the same rates and on the same base as the probate fee, and made the legislation retroactive to 1950, when the probate fee had first been imposed by the Lieutenant Governor in Council.

¹⁴ [1998] 2 S.C.R. 565, para. 36; see also para. 39.

my interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over *the details and mechanism of taxation* in statutory delegates such as the Lieutenant Governor in Council.¹⁵

With respect, the facts of the *Eurig* case demonstrated quite dramatically that it should not be possible for the taxing power (apart from details and mechanism) to be delegated. Once a taxing power has been delegated, the resulting taxes do in practice escape the democratic accountability that occurs when a bill is introduced in the legislative assembly. This was demonstrated quite clearly by the history of Ontario's probate fee. It had been increased tenfold since 1950 when the power was vested in the Lieutenant Governor in Council, and the last increase, which was a tripling of the rate in 1992, was quietly imposed by order in council after the government of the province publicly announced that there would be no further increases in taxation!¹⁶

The third case in which the Supreme Court of Canada has considered the question of whether the taxing power can be delegated is *O.E.C.T.A. v. Ontario (Attorney General)*.¹⁷ In that case, the question was whether the power to fix the rate of Ontario's property tax for education could be delegated. The property tax was imposed by statute, but the statute stipulated that the rate was to be fixed by the Minister of Finance. The Supreme Court of Canada held that the power to fix the rate was an essential element of the power to tax so that a delegation of the power to tax had indeed occurred. And the Court went on to hold that, while only the legislature could create a new tax, the imposition of the tax could be delegated so long as the delegation was contained in a statute in language that was "express and unambiguous". The "democratic principle" was preserved by the fact that "the legislation expressly delegating the imposition of the tax must be approved by the legislature."¹⁸ In this case, the Minister's power to set the rate of the property tax was contained in the *Education Act* in express and unambiguous language. The delegation was therefore valid.

The *Ontario English Catholic Teachers* case cannot easily be interpreted as a case in which only the "details and mechanism" of taxation were delegated. The phrase "details and mechanism" was never referred to, and the literal reading of the Court's opinion is that even an essential element of the power to tax can be delegated without offending section 53 of the *Constitution Act, 1867*. It seems therefore that, after the twists and turns of *Agricultural Products Market-*

¹⁵ *Id.*, para. 30 (emphasis added).

¹⁶ None of these increases had anything to do with inflation, because the rate was an *ad valorem* one, consisting of a percentage of the value of the estate, which would of course automatically rise with inflation.

¹⁷ [2001] 1 S.C.R. 470. Justice Iacobucci wrote the opinion of the Court.

¹⁸ *Id.*, para. 74.

ing and *Eurig*, the Court has finally provided an answer to the question whether the taxation power can be delegated. The answer, however, is the wrong one. While it is clearly established (and obviously necessary) that other legislative powers be subject to delegation, the taxing power is distinctive. It is distinctive for the legal reason that section 53 singles it out for the requirement that any bill must originate in the House of Commons. Admittedly, that is not the clearest possible declaration that delegation is prohibited, but a prohibition on delegation is, it is submitted, implicit in section 53. It must be remembered that the taxing power is the one upon which the rest of governance depends. As the King and Parliament both recognized in the 17th century, nothing important can be done without resources, and it is control of the taxing power that provides the resources. Moreover, no other power has as direct and immediate an effect on citizens as the taxing power, and (for that reason) nothing government does is as unpopular as the imposition and collection of taxes.¹⁹ There is a huge incentive for governments to offload this power to a delegate, who can raise taxes quietly without any irritating fuss in the Parliament or Legislature, and who can shoulder the blame when the media do get wind of the action. The action of the government of Ontario in 1992 in tripling probate fees by order in council *after having publicly promised to stop raising taxes* perfectly illustrates the mischief of delegation in the case of the taxing power. The Court should have interpreted section 53 as prohibiting the delegation of this primary instrument of democratic governance.

¹⁹ I take this to be a proposition for which no authority is needed, but consider the Goods and Services Tax, which continues to be unpopular despite the fact that it has been in force for more than a decade, that the (Progressive Conservative) government that introduced it has been defeated, and the current federal (Liberal) government's only sin is its failure to repeal it!

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