

CANADA / JUDGMENT

Reference re Goods and Services Tax

[1992] 2 SCR 445

COURT

Supreme Court of Canada

DECIDED

25 June 1992

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Reference re Goods and Services Tax

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Date

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Report

[1992] 2 SCR 445

Case number

22635, 22664

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Stevenson, William; Iacobucci, Frank

On appeal from

Alberta

Subjects

Action

Agency

Appeal

Constitutional law

Notes

SCC Case Information: 22635, 22664

Decision Content

Reference re Goods and Services Tax, [1992] 2 S.C.R. 445

IN THE MATTER OF Section 27 of the

Judicature Act, R.S.A. 1980, c. J-1

AND IN THE MATTER OF a Reference by the

Lieutenant-Governor in Council to the

Court of Appeal of Alberta for hearing

and consideration of the questions set out

in Order-in-Council O.C. 538/90 in respect

of Bill C-62, an Act proposed by the House

of Commons of Canada to amend the Excise Tax Act ,

the Criminal Code , the Customs Act , the Customs

Tariff, the Excise Act , the Income Tax Act,

the Statistics Act, and the Tax Court of

Canada Act

between

The Attorney General of Canada Appellant

v.

The Attorney General for Alberta Respondent

and

The Attorney General for Ontario,

the Attorney General of British Columbia,

the Attorney General for Saskatchewan and

the Canadian Federation of Independent

Business Interveners

and between

The Attorney General for Alberta Appellant

v.

The Attorney General of Canada Respondent

and

The Attorney General for Ontario,

the Attorney General of British Columbia,

the Attorney General for Saskatchewan and

the Canadian Federation of Independent

Business Interveners

Indexed as: Reference re Goods and Services Tax

File Nos.: 22635, 22664.

1992: February 24, 25; 1992: June 25.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson* and Iacobucci JJ.

on appeal from the court of appeal for alberta

Constitutional law -- Distribution of legislative powers -- Taxation -- Goods and Services Tax -- Whether GST Act ultra vires Parliament in whole or in part -- Whether suppliers under GST Act entitled to recover expenses incurred in collection and remittance of GST from consolidated revenue fund -- Constitution Act, 1867, ss. 91(3) , 92(13) , 103 -- Excise Tax Act, R.S.C., 1985, c. E-15 , Part IX.

Constitutional law -- Intergovernmental immunity from taxation -- Appropriation of provincial funds -- Provinces obliged under GST Act to collect and remit GST on taxable supplies when they act as suppliers -- Whether obligation to collect and remit GST amounts to taxation of provinces' property or appropriation of provincial funds for federal purposes -- Constitution Act, 1867, ss. 91(3) , 125 , 126 -- Excise Tax Act, R.S.C., 1985, c. E-15 , Part IX.

Agency -- Obligations of principal -- Remuneration of agent -- Vendors of taxable supplies appointed agents of Crown in right of Canada under GST Act for purposes of collecting and remitting GST -- Whether vendors entitled to recover expenses incurred in collection and remittance of GST -- Excise Tax Act, R.S.C., 1985, c. E-15, ss. 122 , 123 , 221 , 240 , 346 .

Appeal -- Reference -- Abstract question -- Whether Court should decline to answer question.

Practice -- Interveners -- New issues -- Reference -- New issues raised by intervener falling outside scope of reference -- Whether Court should consider intervener's arguments.

The Lieutenant Governor in Council of Alberta referred to the Court of Appeal of that province several questions challenging the constitutionality of the federal Goods and Services Tax ("GST"), which was enacted by Part IX of the Excise Tax Act ("GST Act"). The GST, a value-added tax, is designed to be a tax on consumption. It is imposed on any supply other than an exempt supply. A taxable supply attracts the tax each time it is sold. To the extent that the purchaser of a taxable supply uses that good or service in the production of other taxable supplies, it is entitled to an "input tax credit" and can recover the tax it has paid from the government. A number of subordinate entities created by the provincial governments, such as municipalities, universities, public colleges, public hospitals, schools and school authorities, are entitled to claim input tax credits to the extent that their purchases are used in making taxable supplies, and they are eligible for a special rebate of a portion of the tax paid on other purchases. The provinces are not liable to pay tax on their purchases. Under the GST Act, every vendor of a taxable supply, including a province, is appointed an agent of the Crown in right of Canada for the purposes of the collection and remittance of the GST.

The questions referred to the Court of Appeal read as follows:

1. Having regard to the Constitution Acts, 1867 to 1982 or otherwise, is the GST Act ultra vires the Parliament of Canada in whole or in part and, if so, in what particular or particulars and to what extent?

2. Does the system of collection under the GST Act

(a) at any stage prior to the supply of taxable supplies to consumers or to suppliers of exempt supplies,

(b) prior to the collection by a supplier from a recipient, or

(c) otherwise

constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the Constitution Act, 1867, or of another provincial power under that Act, so that the GST Act in its application of the system of collection or any part of it is ultra vires the Parliament of Canada?

3. Having regard to s. 103 of the Constitution Act, 1867 and the common law, are suppliers entitled to charge and to collect from the Consolidated Revenue Fund of Canada all costs, charges and expenses incidental to collecting and paying a remittance under the GST Act?

4. Having regard to s. 125 of the Constitution Act, 1867,

(a) is the imposition of obligations under the GST Act on the Government of Alberta as a supplier to collect and pay a remittance on a taxable supply that is Alberta property ultra vires the Parliament of Canada,

(b) does the imposition of a remittance under the GST Act on a recipient from the Government of Alberta of a taxable supply that is Alberta property or that generates revenue to the Government of Alberta constitute taxation of Alberta property that is ultra vires the Parliament of Canada, and

(c) does the imposition of a remittance that is computed under s. 154 of the GST Act on the basis of consideration for a taxable supply that includes an amount of provincial tax constitute taxation of Alberta property that is ultra vires the Parliament of Canada?

5. Having regard to s. 126 of the Constitution Act, 1867, is the requirement under the GST Act that the Government of Alberta use part of the Government of Alberta's revenue

(a) to collect a remittance or cause a remittance to be collected, or

(b) to pay a remittance prior to the receipt of the remittance from the recipient of a taxable supply ultra vires the Parliament of Canada?

6. Having regard to ss. 125 and 126 of the Constitution Act, 1867,

(a) is the purchase of taxable supplies by provincial authorities, or any of them, in the course of their exercising a delegated constitutional power of the Government of Alberta exempt from tax under the GST Act,

(b) is the purchase of taxable supplies by provincial authorities, or any of them, designated as agents of the Government of Alberta, in the course of their exercising a delegated constitutional power of the Government of Alberta, exempt from tax under the GST Act,

(c) is the acquisition of taxable supplies by the Crown Purchase Agency referred to in section 2(k) of the Appendix exempt from tax under the GST Act, and

(d) is the acquisition or use by provincial authorities, or any of them, in the course of their exercising a delegated constitutional power of the Government of Alberta, of taxable supplies that are provided by the Crown Purchase Agency to the provincial authorities exempt from tax under the GST Act?

The opinion of the Court of Appeal was unanimous, except on question 4. The answer to question 1 was no, though the provisions referred to in question 5(a) and (b) are not binding on the province. The answer to question 2 was no. The answer to question 3 was yes, but with four limiting qualifications. The answer to question 4 was yes, with qualifications that differed between the majority and the minority. The answer to question 5 was yes, to the extent that the GST Act purported to impose collection and remittance obligations upon the province. The Court of Appeal declined to answer question 6.

The Attorney General of Canada appealed from the judgment of the Court of Appeal with respect to the answers to questions 1, 3, 4 and 5. The Attorney General for Alberta appealed with respect to the answers to questions 1, 2, 3, 4 and 6. In this Court, as in the Court of Appeal, the Attorney General for Ontario sought to raise a new ground for attacking the constitutionality of the GST Act, arguing that the Act had never been properly passed through Parliament because the

"closure" and "guillotine" rules invoked by the federal government in the passage of the GST Act were themselves ultra vires.

Held: The appeal of the Attorney General of Canada is allowed and the appeal of the Attorney General for Alberta is dismissed. Questions 1 to 5 were answered in the negative. The Court declined to answer question 6.

Per Lamer C.J. and Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The GST Act as a whole is a valid exercise of the federal taxation power under s. 91(3) of the Constitution Act, 1867 . The GST Act is properly characterized as being in relation to a mode or system of taxation. Its sole purpose is to raise revenue for the federal government, and the effects produced by the Act on matters within provincial jurisdiction over property and civil rights are incidental to this purpose. The means chosen to raise revenue is a tax on value added throughout the chain of production, with input tax credits granted in respect of taxable supplies used in the production of other taxable supplies. To sever the system of input tax credits from the revenue-raising portions of the Act would fundamentally change the character of the tax, from a value-added tax to a federal retail sales tax, and would carve out an exception to the text of s. 91(3) which the words "any Mode or System of Taxation" cannot reasonably bear. The means chosen is sufficiently well integrated into the scheme of the GST Act as a whole that the intrusion upon provincial jurisdiction is justified.

The registered suppliers under the GST Act do not have a right, under s. 103 of the Constitution Act, 1867 , to be reimbursed from the consolidated revenue fund of Canada for all expenses and charges incurred in collecting the GST . Section 103 is an appropriations provision, permitting the Government of Canada to make disbursements from the consolidated revenue fund for the purposes of raising revenue without the necessity of annual Parliamentary votes. Its purpose is to immunize the revenue-collecting machinery of the federal government from the uncertainties of annual appropriations by Parliament. It was never intended to create a legally enforceable right in third parties to receive compensation for revenue-raising duties imposed on them by Parliament. Even if s. 103 were to confer authority on the federal government to compensate such third parties, it would not create a correlative power in those third parties to enforce these payments. The decision to spend appropriated funds remains within the discretion of the government.

As well, the vendors of taxable supplies, as agents of the government for the collection and remittance of the GST , are not entitled to recover at common law the expenses incurred in the course of the agency. Firstly, the presumption that compensation is to be paid where property is taken under a statutory scheme, unless this is expressly excluded by the terms of the statute, has no application in the case of the GST collection regime since no property of the supplier is "taken" by the imposition of the GST collection and remittance obligations. Secondly, Parliament has the right to legislate to impose duties relating to the collection of taxes without reimbursing those upon whom the duties are imposed. In any case, the GST Act does contemplate a limited right of reimbursement in the form of the transitional credit for small businesses. Since Parliament did direct its attention to the question of compensation by providing partial

compensation in certain cases, common law rights which might have operated but for the statute cannot be relied upon. Thirdly, there is no question of any contractual relationship between the vendors of taxable supplies and the Government of Canada. In the absence of a contract, the common law duty of principals to pay remuneration for services rendered has no application to vendors of taxable supplies. Fourthly, while the principal has a duty to indemnify an agent for tortious liability to third parties incurred in good faith in the course of the agency, compliance with a statutorily imposed duty would constitute a defence in the unlikely event that such claims of liability were to arise. Finally, the suggestion that registered suppliers have a restitutionary claim against the federal government for the costs and expenses of collecting the GST is without merit.

The GST Act does not violate s. 125 of the Constitution Act, 1867 . The province's obligation under the GST Act to collect and remit the GST from purchasers of taxable supplies when the province acts as supplier does not amount to taxation of the property of the province. The GST only becomes payable by virtue of transactions in which some property interest has left the supplier and become vested in the purchaser. It is clearly the purchaser, not the supplier, which is liable to pay the tax. The possibility that the application of the GST on property sold by the provinces may reduce provincial revenues does not render the GST a "taxation" of provincial property. Nor does the calculation of the GST as a fraction of a price a portion of which is provincial tax amount to the federal taxation of provincial tax. Rather, the price paid for a taxable supply, including a component that is provincial tax, is the measure chosen by Parliament by which the liability of the purchaser to pay the GST is calculated.

The GST Act does not violate s. 126 of the Constitution Act, 1867 . The obligation imposed by the Act upon provinces to collect and remit the GST when they act as suppliers does not amount to the appropriation of provincial funds for federal purposes by Parliament. The obligation is clearly not the same as an obligation to pay out a sum of money to the federal government from the provincial consolidated revenue fund. Parliament has simply imposed certain administrative burdens upon suppliers that are necessarily incidental to a valid federal scheme of "taxation" within the meaning of s. 91(3) of the Constitution Act, 1867 . It is only in so far as the province operates as a commercial entity that it becomes subject to these burdens.

Question 6 should not be answered. This question is highly abstract and cannot precisely or usefully be answered in its present form.

The arguments of the Attorney General for Ontario should not be considered. The issues sought to be raised by the intervener, which relate to the regularity of the adoption of the GST Act , fall outside the intended scope of the Reference.

Per La Forest and L'Heureux-Dubé JJ.: The GST Act is intra vires Parliament. The Act falls squarely within s. 91(3) of the Constitution Act, 1867 . The GST, a value-added tax, is intended to raise money. It is in pith and substance a mode or system of taxation, so one need not enquire any further about whether it might be justified as necessarily incidental to the legislative scheme. The fact that it may affect activities within provincial regulatory competence is immaterial. It

flows from this that the collection provisions of the GST Act , which are simply part and parcel of the mode or system of taxation adopted by Parliament, are also intra vires. There is no indication that they were enacted for any other purpose than to collect the tax, and colourability is not lightly to be imputed. To sever the provisions of the Act that do not result in raising revenues from those that do would result in a completely different system of taxation. It would fetter Parliament's discretion to raise money by any mode or system of taxation. That the collection provisions may have an impact on property and civil rights is of no moment. There is no hermetic division between the federal legislative domain and that covered by property and civil rights. Some spillover is inevitable.

Section 103 of the Constitution Act, 1867 merely provides for the appropriation of monies from the consolidated revenue fund of Canada and does not impose an independent legal obligation on Canada to compensate collecting agents. Rather, it refers to costs, charges and expenses the Government of Canada is obliged to pay by statute or contract independently of s. 103 . Whatever duty might reside in the Crown at common law to pay suppliers for collecting the tax, by providing in the GST Act for a one-time transitional credit for small businesses to assist them in offsetting their initial compliance costs, Parliament has given a clear indication that it did not intend to provide further compensation for the purpose.

For the reasons given by Lamer C.J., the GST Act does not violate s. 125 of the Constitution Act, 1867 . The GST is not, in pith and substance, a tax imposed on provincial property. It is a tax imposed against the purchaser of goods or services and simply collected by the province in common with other suppliers of goods or services. The province is in no different position from an employer obliged to withhold income under the Income Tax Act.

Under s. 126 of the Constitution Act, 1867 , a province has the exclusive power to appropriate money from its consolidated revenue for provincial purposes. The federal government cannot impose on a province the cost of carrying out a federal activity in the province. It does not follow, however, that an administrative duty reasonably placed by Parliament on a province in the course of enacting a scheme falling squarely within a federal power will be invalid because the performance of that duty will in consequence require some expenditure by the province. In creating a tax system, which falls in pith and substance within s. 91(3) of the Constitution Act, 1867 , Parliament may incidentally require the provinces to assume such a burden. Otherwise, the broad taxing power there granted would be frustrated.

Question 6 should not be answered. Parliament has seen fit not to impose duties and taxes of the kind addressed in that question. The Court would ill serve the nation if it attempted to respond to a question raising such fundamental issues in the abstract.

For the reasons given by Lamer C.J., the arguments of the Attorney General for Ontario should not be considered.

Cases Cited

By Lamer C.J.

Applied: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; distinguished: *Reference re The Employment and Social Insurance Act*, [1936] S.C.R. 427; *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101; *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004; *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9; *Attorney-General for Quebec v. Nipissing Central Railway Co.*, [1926] A.C. 715; *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569; referred to: *The Queen v. Waterous Engine Works Co.* (1893), 3 Que. Q.B. 222; *Pettikus v. Becker*, [1980] 2 S.C.R. 834; *Zaidan Group Ltd. v. London (City)*, [1991] 3 S.C.R. 593, aff'g (1990), 71 O.R. (2d) 65 (C.A.); *Phillips v. City of Sault Ste. Marie*, [1954] S.C.R. 404; *Reference re Troops in Cape Breton*, [1930] S.C.R. 554; *Valin v. Langlois* (1879), 3 S.C.R. 1; *Reference re Education System in Montreal*, [1926] S.C.R. 246; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200; *Reference re Angliers Railway Crossing*, [1937] S.C.R. 451; *Reference re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54.

By La Forest J.

Distinguished: *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355; referred to: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Zaidan Group Ltd. v. London (City)*, [1991] 3 S.C.R. 593; *Reference re Troops in Cape Breton*, [1930] S.C.R. 554; *Valin v. Langlois* (1879), 3 S.C.R. 1; *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569; *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 91(3) , 92(13) , 102 , 103 , 104 , 105 , 106 , 125 , 126 .

Excise Tax Act, R.S.C., 1985, c. E-15 [am. 1990, c. 45, s. 12], ss. 122 , 123 , 154 , 221 , 222 , 240 , 313(1) , 346 .

Income Tax Act, S.C. 1970-71-72, c. 63, ss. 153, 227(4).

Judicature Act, R.S.A. 1980, c. J-1, s. 27.

Authors Cited

Fridman, G. H. L. *The Law of Agency*, 5th ed. London: Butterworths, 1983.

APPEAL from a judgment of the Alberta Court of Appeal (1991), 82 Alta. L.R. (2d) 289, 117 A.R. 321, 84 D.L.R. (4th) 577, [1992] 1 W.W.R. 1, in the matter of a reference concerning the federal Goods and Services Tax. The appeal of the Attorney General of Canada is allowed and the appeal of the Attorney General for Alberta is dismissed.

T. B. Smith, Q.C., James M. Mabbutt, Q.C., and James N. Shaw, for the appellant/respondent.

James C. MacPherson, Peter J. McIntyre and Gina A. Ross, for the respondent/appellant.

Janet E. Minor, Peter Landmann and John Terry, for the intervener the Attorney General for Ontario.

Hunter W. Gordon, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, for the intervener the Attorney General for Saskatchewan.

F. J. C. Newbould, Q.C., and Freya Kristjanson, for the intervener the Canadian Federation of Independent Business.

//Lamer C.J.//

The judgment of Lamer C.J. and Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. was delivered by

Lamer C.J. --

1. The Facts

These appeals involve a challenge to the constitutionality of the federal Goods and Services Tax. The legislation enacting the Goods and Services Tax (hereinafter referred to as the "GST Act ") was passed by Parliament in December, 1990, by Part IX of the Excise Tax Act, R.S.C., 1985, c. E-15 . It received Royal Assent on December 17, 1990 (S.C. 1990, c. 45, s. 12). The Goods and Services Tax ("GST") is calculated at the rate of seven percent and this rate applies to most sales of taxable supplies, which include most goods and services. Provincial governments are not liable to pay tax on their purchases. However, a number of subordinate entities created by the provincial governments such as municipalities, universities, public colleges, public hospitals, schools and school authorities, for convenience referred to as the "MUSH sector", are liable to pay the tax.

The GST is designed to be a tax on consumption. To this end, the GST Act contemplates three classes of goods and services. Taxable supplies attract the tax of seven percent each time they are sold. To the extent that the purchaser of a taxable supply uses that good or service in the production of other taxable supplies, it is entitled to an "input tax credit" and can recover the tax it has paid from the government. The MUSH sector is entitled to claim input tax credits to the extent that its purchases are used in making taxable supplies, and it is eligible for a special rebate of a portion of the tax paid on other purchases.

By definition, to the extent that taxable supplies are not used by the purchaser to produce other taxable supplies, they are consumed by the purchaser. To this extent, the purchaser cannot recapture the tax already paid through the input tax credit mechanism. Hence, the GST is collected and refunded down through each stage of the production process to the ultimate consumption of a taxable supply, at which stage the tax paid is not recoverable by the purchaser.

Exempt supplies and zero-rated supplies do not attract any tax from the ultimate consumer. However, in respect of exempt supplies, the vendor, while paying the GST on purchases, is not entitled to an input tax credit. In consequence, in the case of exempt supplies GST is paid to the

federal government at the penultimate stage in the production chain rather than by the ultimate consumer. In principle, zero-rated supplies attract the GST in the same way as any other taxable supply as they move through the production chain to the ultimate consumer. However, the consumer pays a tax set at "0 %", and suppliers are entitled to the input tax credit, so that no net revenue is raised for the federal government at any stage in the production chain by the production and sale of these goods.

By Order-in-Council dated October 11, 1990, the Lieutenant-Governor in Council of Alberta referred several questions relating to the validity and effect of the GST Act to the Court of Appeal for Alberta, pursuant to s. 27 of the Judicature Act, R.S.A. 1980, c. J-1. These questions are reproduced below:

1. Having regard to the Constitution Acts, 1867 to 1982 or otherwise, is the GST Act ultra vires the Parliament of Canada in whole or in part and, if so, in what particular or particulars and to what extent?

2. Does the system of collection under the GST Act

(a) at any stage prior to the supply of taxable supplies to consumers or to suppliers of exempt supplies,

(b) prior to the collection by a supplier from a recipient, or

(c) otherwise

constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the Constitution Act, 1867, or of another provincial power under that Act, so that the GST Act in its application of the system of collection or any part of it is ultra vires the Parliament of Canada?

3. Having regard to s. 103 of the Constitution Act, 1867 and the common law, are suppliers entitled to charge and to collect from the Consolidated Revenue Fund of Canada all costs, charges and expenses incidental to collecting and paying a remittance under the GST Act?

4. Having regard to s. 125 of the Constitution Act, 1867,

(a) is the imposition of obligations under the GST Act on the Government of Alberta as a supplier to collect and pay a remittance on a taxable supply that is Alberta property ultra vires the Parliament of Canada,

(b) does the imposition of a remittance under the GST Act on a recipient from the Government of Alberta of a taxable supply that is Alberta property or that generates revenue to the Government of Alberta constitute taxation of Alberta property that is ultra vires the Parliament of Canada, and

(c) does the imposition of a remittance that is computed under s. 154 of the GST Act on the basis of consideration for a taxable supply that includes an amount of provincial tax constitute taxation of Alberta property that is ultra vires the Parliament of Canada?

5. Having regard to s. 126 of the Constitution Act, 1867, is the requirement under the GST Act that the Government of Alberta use part of the Government of Alberta's revenue

(a) to collect a remittance or cause a remittance to be collected, or

(b) to pay a remittance prior to the receipt of the remittance from the recipient of a taxable supply ultra vires the Parliament of Canada?

6. Having regard to ss. 125 and 126 of the Constitution Act, 1867,

(a) is the purchase of taxable supplies by provincial authorities, or any of them, in the course of their exercising a delegated constitutional power of the Government of Alberta exempt from tax under the GST Act,

(b) is the purchase of taxable supplies by provincial authorities, or any of them, designated as agents of the Government of Alberta, in the course of their exercising a delegated constitutional power of the Government of Alberta, exempt from tax under the GST Act,

(c) is the acquisition of taxable supplies by the Crown Purchase Agency referred to in section 2(k) of the Appendix exempt from tax under the GST Act, and

(d) is the acquisition or use by provincial authorities, or any of them, in the course of their exercising a delegated constitutional power of the Government of Alberta, of taxable supplies that are provided by the Crown Purchase Agency to the provincial authorities exempt from tax under the GST Act?

These same six constitutional questions were stated by the Chief Justice on November 14, 1991 and form the background of these appeals.

The opinion of the Court of Appeal for Alberta was unanimous, except for Côté J.A., who was in dissent on question 4: (1991), 82 Alta. L.R. (2d) 289, 117 A.R. 321, 84 D.L.R. (4th) 577, [1992] 1 W.W.R. 1. The answer to question 1 was no, though the provisions referred to in question 5(a) and (b) are not binding on the province. The answer to question 2 was no.

The answer to question 3 was yes, but with four limiting qualifications: reimbursement was available provided that (a) the charges are not salary wages or remuneration for time and effort, (b) they are incurred in the course of the supplier's activities as an agent for the federal government in collecting the tax, (c) they are reasonably attributable to Canada's interest in the tax, and (d) they are incurred reasonably and without negligence or known illegality.

The answer to question 4 was yes, with qualifications that differed between the majority and Côté J.A. in dissent. The answer to question 5 was yes, to the extent that the GST Act purported to impose collection and remittance obligations upon the province. The Court of Appeal declined to answer question 6.

The Attorney General of Canada appealed from the judgment of the Court of Appeal with respect to that court's answers to questions 1, 3, 4 and 5 of the Reference. The Attorney General of Alberta also appealed, with respect to the answers to questions 1, 2, 3, 4 and 6. By an order of this Court the two appeals were consolidated and set down for hearing on February 24 and 25, 1992.

2. Judgment of the Court of Appeal for Alberta (1991), 84 D.L.R. (4th) 577

(1) Majority (Laycraft C.J.A., Kerans, Hetherington, Stratton J.J.A., Côté J.A. dissenting in part)

The majority of the Court of Appeal concluded that the system of collection created by the GST Act was not ultra vires the Parliament of Canada. To sever those provisions of the GST Act that did not result in the raising of money -- the input tax system and the scheme in respect of zero-rated supplies -- from those that did, would result in a completely different system of taxation from that contemplated by Parliament. The tax, instead of being a value-added tax, would become a retail sales tax.

The Court of Appeal concluded that nothing in s. 91(3) of the Constitution Act, 1867, restricted Parliament in its choice of any system of taxation, and concluded that those provisions that did not have the effect of raising money were necessarily incidental to the scheme of the GST as a whole.

The Court of Appeal further concluded that various provisions of the GST Act -- notably the agency and trust provisions, and the imposition upon suppliers of detailed accounting requirements -- did encroach significantly upon matters traditionally subject to provincial jurisdiction over property and civil rights in the province under s. 92(13) of the Constitution Act, 1867. Relying on the judgment of this Court in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, the Court of Appeal concluded that "a strict test" was required to determine whether the challenged provisions were sufficiently integrated with the overall scheme of the legislation to be justified. However, the court noted that the object of the GST Act was the imposition of a value-added tax on consumers of taxable supplies and suppliers of exempt supplies, and found that the government achieved this object by requiring a supplier to pay the tax at the time of purchase and then allowing recovery, through the input tax scheme, of that portion of the payment that is attributable to the production and sale of other taxable supplies. In the opinion of the Court of Appeal, these provisions of the GST Act were essential if the legislation was to achieve its object, and their inclusion in the scheme was therefore justified. Consequently, the test of necessary incidence was passed.

In respect of the third question, the Court of Appeal stated that there exists a general common law presumption against the taking of property without payment of compensation. However, it concluded that it was not necessary to resort to this general doctrine, since ss. 221(1) and 222(1) of the GST Act unilaterally designate vendors of taxable supplies agents of the Crown in right of Canada for the collection of the GST, and trustees of the Crown in respect of the funds collected. Consequently, the more specific common law duties of principals to reimburse agents for expenses incurred in the course of their agency were directly applicable. The court concluded that the obligations of the principal or person requesting services fell into two distinct categories:

compensation for time and effort expended in the course of the agency, and indemnification against expense or liability incurred to third parties. The court concluded that, in the absence of a contract, a principal is under no duty to reimburse an agent for time and effort expended in the course of the agency. On this basis, the court concluded, at p. 589, that:

To suggest that here Canada is impliedly contracting to pay GST suppliers for their time and effort would be to invent both an intent and an appearance. Canada is not so promising, and no reasonable person could think that Canada really is. None of the parties to this reference suggest that there is any such contract, express or implied. Yet (as noted), that is the common-law test for remuneration. The standard textbooks on restitution do not appear to offer any basis to compel payment for such services either.

Therefore, we conclude that, apart from s. 103 of the Constitution Act, 1867, Canada need not pay suppliers for their time and trouble.

On the other hand, the Court of Appeal concluded that a principal did have a common law duty to indemnify the agent for special expenses and liability incurred to third parties in the course of the agency. While there was no question that valid legislation could extinguish this duty, the court concluded that there were no provisions in the GST Act which purported to do this. The great bulk of GST transactions and remittances would involve no such expense or liability, and therefore would not bring into play the duty for Canada to reimburse vendors of taxable supplies. However, in situations where such liability was incurred, it would be just that Canada, the principal, reimburse its fair share of that expense or liability to its agents. Therefore, and to this extent only, the court concluded that the obligation to reimburse or indemnify did exist.

In view of its conclusions with respect to the common law duty to reimburse, the Court of Appeal found it unnecessary to decide whether s. 103 of the Constitution Act, 1867 imposes a duty of reimbursement independently of the common law. However, where the common law duty of reimbursement does operate, the court concluded that s. 103 makes fulfilment of this duty a first charge upon the consolidated revenue fund of Canada. In the court's opinion, the words "first charge" contained in s. 103 were inconsistent with the idea that such payments were optional.

The Court of Appeal was of the view that s. 125 of the Constitution Act, 1867, offered a province immunity from a tax imposed on its property by Canada, and that Canada enjoyed the same immunity in respect of taxation by the provinces. This dual immunity constituted one of the "warning markers" essential to the working of a federal system of government. The court considered that the purpose of s. 125 was to head off the temptation for a government to exact revenue, not from the people directly, but from another level of government. Similarly, the purpose of s. 126 of the Constitution Act, 1867, was to prohibit the appropriation of the funds of one level of government by another, a logical corollary of interjurisdictional immunity from taxation of government property.

The majority of the Court of Appeal concluded that the collection and remittance provisions under attack did not impose a tax directly on the property of a province. However, they did purport to impose certain obligations on a province. By virtue of s. 313(1) of the GST Act, the

price for non-compliance with collection and remittance obligations was an action in the superior courts for recovery of the tax revenue "deemed" to have been collected, and, ultimately, the issuance of writs of execution against provincial property. Since the collection mechanism required the vendor of taxable supplies either to collect and remit the tax or pay the tax itself, it offended s. 125 of the Constitution Act, 1867 in its application to provincial governments, and was to that extent inoperative. Thus, while a province might voluntarily comply with the GST Act's collection and remittance provisions, it was under no legal obligation to do so. The court concluded, at p. 602, that:

[A]n attempt by Canada to oblige a province to expend valuable effort to collect the GST on taxable supplies by the province is an exaction in the nature of a tax and is caught by both s. 125 and s. 126 . As a result, the provisions in the GST Act imposing these duties do not validly operate against a province. However, we would not declare them of no force and effect, because they do, as we have elsewhere said, lawfully bind others.

The court also rejected the suggestion that the application of the GST to taxable supplies sold by the province amounted to a tax on the province's property. While the imposition of GST upon sales by the province might well depress the price that the province could charge on such transactions, the real bite of the tax was not intended to fall on the seller. Most federal taxes, including the federal income tax, have some impact upon provincial revenues, but they do not amount, for this reason alone, to impermissible indirect taxation of provincial property contrary to s. 125 , or to indirect appropriations of provincial funds contrary to s. 126 , of the Constitution Act, 1867 .

The Court of Appeal declined to answer the final question in the Reference, on the grounds that some of the Crown organizations and agents referred to in the question did not exist, and that without greater specificity of description, any answers given would be useless or even misleading. Moreover, even if it were possible to give the answers requested, exceptions would have to be made if it were decided that the establishment of these organizations was in truth a colourable attempt to interfere with a federal scheme of taxation. In the absence of any specific existing scheme to evaluate, the Court of Appeal concluded that it would not be appropriate to provide speculative answers.

(2) Côté J.A. (dissenting in part)

Côté J.A. joined in the judgment of the Court of Appeal except with respect to question 4. In his opinion, there could arise circumstances in which the imposition of the GST upon purchasers of taxable supplies from the provincial government could amount to an impermissible taxation of the province's property. Côté J.A. stated that the characterization of the tax as a tax upon the purchaser, rather than the vendor, determined very little, and that the true question was on whom the burden of the tax actually fell. There could well arise situations where the imposition of the GST upon the purchaser would simply reduce the price the vendor could charge for a taxable supply. In these cases, the true burden of the tax was borne by the vendor.

In Côté J.A.'s opinion, the value of property is measured by what that property can be sold or rented for on the market. Therefore, a tax on the income from property is capable of amounting to a tax on that property itself. Since the purpose of s. 125 was to protect the property of the province from taxation by other levels of government, the application of the GST to sales of taxable supplies by the provincial government was ultra vires to the extent that the tax burden was actually absorbed by the province as vendor. To the extent that the province could establish by evidence that it, rather than the purchaser, bore the true burden of the tax in the form of reduced revenues from the sale of its property, Côté J.A. was of the opinion that the application of the GST to sales by the province should be declared ultra vires.

3. The Interveners

Before this Court, the Attorneys General for Saskatchewan, British Columbia and Ontario, as well as the Canadian Federation of Independent Business ("CFIB"), were granted leave to intervene. The CFIB intervenes only with respect to the third constitutional question, on which it adopts the position advanced by the Attorney General for Alberta. In addition, the CFIB urged the Court to find that registered suppliers who incurred costs and expenses in complying with the GST Act have a restitutionary claim against the federal consolidated revenue fund in full reimbursement of these expenses.

The Attorney General for Saskatchewan adopts the submissions of the Attorney General for Alberta with respect to the first five constitutional questions, but urged us to decide that the Court of Appeal of Alberta was correct to decline to answer the sixth constitutional question. In addition, the Attorney General for Saskatchewan offered an argument of its own in respect of constitutional questions four and five.

The Attorney General of British Columbia intervenes with respect to both the fifth and sixth constitutional questions, arguing that questions 5(a), 5(b), 6(a), and 6(b) should be answered in the affirmative.

The Attorney General for Ontario intervened on what we consider to be a subject unrelated to the broad issues involved in these appeals. Put succinctly, counsel for the Attorney General for Ontario sought to argue that the GST Act had never been properly passed through Parliament, on the grounds that House of Commons Standing Orders 57 -- "closure" -- and 78(3) -- government imposed time limits on debate ("guillotine") -- which were invoked by the federal government in the passage of the GST Act, are themselves ultra vires.

It will not be necessary for us to deal separately with the submissions of the interveners in any detail, as our opinion with respect to their arguments will become apparent from the answers we give to the six constitutional questions in these appeals. For reasons that appear later in this judgment, we did not consider it appropriate to hear the submissions of the Attorney General for Ontario.

4. Analysis

All the parties agreed, and we accepted their submission, that the first constitutional question need not be answered separately from the others. The first question pertains to the global vires of the GST Act . In effect, it is an "umbrella" question which comprises within itself the answers to the remaining more specific questions. For this reason, we will proceed directly to consider the second constitutional question posed.

Constitutional Question 2

Section 91(3) of the Constitution Act, 1867 , provides as follows:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, --

...

3. The raising of Money by any Mode or System of Taxation.

Section 92(13) of the Constitution Act, 1867 , provides as follows:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, --

...

13. Property and Civil Rights in the Province.

The interaction between these two provisions is at the heart of the challenge to the vires of the GST Act brought by the Attorney General for Alberta.

Canada concedes, and I am of the same view, that the GST Act affects matters which fall within the provincial jurisdiction under s. 92(13) to pass legislation in relation to property and civil rights in the province. It is therefore necessary to answer two questions in order to determine whether this incursion into provincial jurisdiction is justified. First, it is necessary to decide whether the GST Act is a valid exercise of any federal head of jurisdiction under s. 91 of the Constitution Act, 1867 . Secondly, it must be decided whether the effect the GST scheme has on matters traditionally within the province's jurisdiction can be said to be necessarily incidental to the exercise of this federal power.

In my view, the answer to the first question is quite simple. The GST Act has no purpose other than to raise revenue for the federal government, and it does in fact raise revenue at the point of consumption of taxable supplies. As such, it would be hard to dispute that the Act itself is properly characterized as being in relation to a mode or system of taxation in the meaning of s. 91(3) of the Constitution Act, 1867 . While the GST Act certainly affects matters falling under provincial jurisdiction, it cannot reasonably be said to be aimed at a provincial purpose.

With respect, in my opinion, the Attorney General for Alberta's attack on the GST Act at this level is implausible. The decision of this Court in *Reference re The Employment and Social Insurance Act*, [1936] S.C.R. 427, is clearly distinguishable. In that case, the federal government sought to support legislation creating a system of unemployment insurance under a number of federal heads of power, including s. 91(3) . The Court was quite correct to reject the argument that the goal of the legislation in question was to raise revenue by a mode or system of taxation, and to find that its true purpose was to impose certain conditions on employment contracts and create a system of unemployment insurance. That is clearly not the present case.

The GST Act has significant effects upon matters within provincial jurisdiction, but it is impossible to say that the purpose of the Act is to produce these effects. The purpose of the Act is to raise revenue for the federal government, and the effects produced by the scheme on matters within provincial jurisdiction are incidental to this purpose.

It must still be decided, however, whether these incidental effects are sufficiently a part of the scheme of the GST Act that they are justifiable, despite the incursion upon provincial jurisdiction, on the "necessarily incidental" doctrine. The appropriate test has been stated by this Court on a number of occasions, but in substance what is required is a high degree of integration between a scheme enacted pursuant to a valid federal objective, and those portions of the scheme which impinge upon provincial jurisdiction. In *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, the majority of the Court (Martland, Ritchie, Dickson, Beetz, Estey and Chouinard JJ.) had this to say about the "necessarily incidental" doctrine (at pp. 1052-53):

One has to bear in mind . . . in dealing with the arrogation of property rights by federal authority in the exercise of some other right, that, whatever the terminology may be, it is only such part of the property right and such extent of the taking of that right, as may be tied inherently and of necessity to the exercise of the authority in question by the federal level of government that the Constitution will permit. [Emphasis added.]

The test is clearly a strict one. However, in *General Motors of Canada Ltd. v. City National Leasing*, supra, at p. 669, Dickson C.J. indicated that a degree of judicial moderation was appropriate, for the reason that a federal system requires both levels of government to be accorded a degree of latitude in the pursuit of valid objectives:

In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate.

Dickson C.J. continued at pp. 671-72 to set out an analytical scheme for the evaluation of federal incursions upon matters within provincial jurisdiction under the "necessarily incidental" doctrine. The first step is to decide whether the impugned scheme in fact touches matters within provincial jurisdiction. If it does not, the inquiry ends, but if it does, then it is necessary to ask whether the legislation in question is enacted pursuant to some valid federal head of power. If the legislation is not enacted pursuant to a valid purpose, then of course it must be struck down. However, if it is enacted pursuant to a valid federal purpose, then it is necessary to determine whether the impugned provisions are "sufficiently integrated with the scheme that [they] can be upheld by virtue of that relationship." If the impugned provisions are not sufficiently integrated into the scheme as a whole, then they cannot be sustained as a valid exercise of federal power. However, if the test of integration is passed, then the provisions are supportable as an exercise of federal jurisdiction notwithstanding that they affect matters falling within the jurisdiction of the provinces.

In *General Motors of Canada Ltd. v. City National Leasing*, supra, Dickson C.J. was considering the extent of permissible federal incursion upon provincial matters in relation to the federal power over trade and commerce. However, in my view, nothing limits his analysis to the trade and commerce power. Applying this analysis to the GST Act, it is clear -- indeed it is conceded -- that the Act intrudes on provincial powers. However, the GST Act was enacted pursuant to a valid federal objective -- the raising of revenue for the federal government pursuant to s. 91(3) of the Constitution Act, 1867. On the question of integration, I am of the opinion that Canada is correct to say that to sever the revenue raising portions of the GST Act from those portions which do not raise revenue would be to change the character of the tax fundamentally, from a value-added tax to a federal retail sales tax. The objective of the Act is to raise revenue for the federal government, and the means chosen is a tax on value added throughout the chain of production, with input tax credits granted in respect of taxable supplies that are redirected to production instead of consumed. The means chosen are highly integrated into the scheme of the GST Act as a whole, and, indeed, to sever the system of input tax credits from the rest of the Act would be to carve out an exception to the text of s. 91(3) of the Constitution Act, 1867 which the words "any Mode or System of Taxation" cannot reasonably bear.

I conclude that the GST Act is enacted pursuant to a federal head of power under s. 91 of the Constitution Act, 1867, and that while the scheme it establishes does intrude upon matters traditionally falling under the provincial power over property and civil rights, the scheme is sufficiently well integrated into the GST Act as a whole that the intrusion upon provincial jurisdiction is justified. The second constitutional question therefore must be answered in the negative.

Constitutional Question 3

According to the Attorney General for Alberta, registered suppliers under the GST Act have the right to be reimbursed from the consolidated revenue fund of Canada for all expenses and charges incurred in collecting the GST . This argument is based on s. 103 of the Constitution Act, 1867 , and on the common law of agency.

Section 103 of the Constitution Act, 1867 reads as follows:

103. The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

By virtue of ss. 123, 221 and 240 of the GST Act , every vendor of a taxable supply is unilaterally appointed an agent of the Crown in right of Canada for the purposes of the collection and remittance of the GST . By virtue of s. 122 the provinces are also bound to collect and remit the GST when they sell taxable supplies.

The Attorney General for Alberta's position is that s. 103 of the Constitution Act, 1867 has the effect of giving all vendors of taxable supplies a right to be reimbursed out of the consolidated revenue fund of Canada for expenses they incur in collecting and remitting the GST . At the outset, I must say that if this submission is correct, it produces a startling result. The federal government would be obliged to reimburse any expenses incurred by statutory agents of the Government of Canada in the collection of taxes. I see no reason why this obligation would be limited to expenses incurred in the collection of the GST . Under ss. 153 and 227(4) of the Income Tax Act, S.C. 1970-71-72, c. 63, for instance, employers are under a duty to withhold and remit income tax in respect of their employees. It has not hitherto been suspected that all such persons have a right -- indeed, a constitutional right which cannot be modified or extinguished by statute -- to be reimbursed for their time, effort and expenses out of the consolidated revenue fund of Canada.

In my opinion, Canada is correct to submit that s. 103 is appropriately construed as an appropriations provision, permitting the Government of Canada to make disbursements from the consolidated revenue fund for the purposes of raising revenue without the necessity of annual Parliamentary votes. Indeed, this construction is quite consistent with the overall scheme in which s. 103 is embedded. Section 102 of the Constitution Act, 1867 creates the consolidated revenue fund of Canada. Section 104 creates a charge on that fund for the payment of interest on the public debts of the old provinces of Canada, Nova Scotia and New Brunswick. Section 105 creates a charge on the consolidated revenue fund for the payment of the salary of the Governor General of Canada. Finally, s. 106 provides for appropriations by Parliament from the consolidated revenue fund for other public purposes.

It is clear to me that the scheme of ss. 102 through 106 was intended to insure that the federal government could carry on at least certain aspects of the business of government without the necessity of annual appropriations by Parliament. It was intended, for instance, that the salary of the Governor General should not be at the mercy of annual votes in the House of Commons. Similarly, it was recognized that if annual votes were required for the payment of interest on the public debt it would rapidly have become impossible for the government to raise funds through borrowing. Equally, it was recognized that without the authority to expend funds for the collection of taxes, the entire operations of the government could be brought to a standstill.

Clearly, therefore, the purpose of s. 103 was to immunize the revenue-collecting machinery of the federal government from the uncertainties of annual appropriations by Parliament. It was never intended to create a legally enforceable right in third parties to receive compensation for revenue-raising duties imposed on them by Parliament. Even if one were to suggest, *arguendo*, that s. 103 confers authority on the federal government to compensate such third parties, it would be a non sequitur to say that this created a correlative power in those third parties to enforce these payments. In *The Queen v. Waterous Engine Works Co.* (1893), 3 Que. Q.B. 222, Wurtele J. stated the principle that appropriations from the consolidated revenue fund are permissive, in the sense that they authorize, but do not compel, the executive to make the authorized expenditures. The decision to spend appropriated funds remains within the discretion of the government. I am therefore of the opinion that the third constitutional question cannot be answered in the affirmative on the basis of s. 103 of the Constitution Act, 1867.

The Attorney General for Alberta, however, makes the alternative argument that vendors of taxable supplies are entitled to recover the expenses incurred in collection and remission of the GST at common law. This common law right of recovery was urged upon us on two distinct bases. First, it was submitted that the decision of this Court in *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101, reaffirms the principle that where property is taken under a statutory scheme there is a presumption that compensation is to be paid unless this is expressly excluded by the terms of the statute. This line of argument can be dealt with quite briefly. In my view, the presumption of "no taking without compensation" has no application in the case of the GST collection regime. Alberta's suggestion that in collecting and remitting the GST the vendor of a taxable supply has had his property "taken" is difficult to understand. It is the purchaser, not the supplier, who is obliged to pay the GST. The supplier is simply the agent of the Crown in right of Canada for the purposes of collection. Even in those cases where the vendor is obliged to absorb the GST in order to maintain sales, the resulting reduction in revenue cannot reasonably be characterized as a "taking" of the supplier's property by the federal government. Were such reasoning to prevail, virtually any governmental policy which resulted directly or indirectly in the reduction of a supplier's revenue could be characterized as a "taking" of property which would give rise to a right to compensation. In truth, since no property of the supplier is "taken" by the imposition of the GST collection and remittance obligations, a right to compensation cannot be supported on this basis.

Alternatively, the Attorney General for Alberta submits that since suppliers are designated agents of the government for the collection of the GST, the common law duties of principals with respect to agents are triggered. These duties are said to include the duty of the principal to reimburse agents for all costs and liabilities incurred in the course of the agency. In my opinion, with respect, this argument constitutes a considerable exaggeration of the common law duty of principals to agents. According to Fridman in *The Law of Agency* (5th ed. 1983), at p. 164:

The most important duty of the principal is to remunerate the agent for services rendered. The obligation to pay such remuneration -- the agent's "commission" -- exists only where it has been created by an express or implied contract between principal and agent. . . . It is a question of construction in each case whether it was the intention of the parties that the agent shall work gratuitously or whether an agreement to pay remuneration was expressly made, or can be implied into the relationship. [Emphasis added.]

The duty to remunerate the agent for costs incurred in the course of the agency does not, therefore, arise automatically. It only arises in cases in which the principal and the agent contract, expressly or by implication, for such remuneration to be paid.

Clearly there is no question of a contract between the Government of Canada and the vendors of taxable supplies for the government to remunerate the vendors for costs incurred in collecting the GST. The obligation to collect and remit the GST is imposed unilaterally by ss. 221 (agency) and 222 (trust) of the GST Act. The government has turned its mind to the question of remuneration and has expressly provided for a limited right of reimbursement in the form of the transitional credit for small businesses, as I point out below. The matter having been expressly considered in the legislation and no further compensation having been provided for, no contractual duty of reimbursement can be said to arise either expressly or by implication. It is not necessary in the context of these appeals to decide whether there could ever arise a case in which governments would be under a duty to reimburse agents unilaterally created by statute for the costs incurred in the course of their agency.

Outside of contract a common law right to recover remuneration does not exist. On the other hand, a right of indemnification for tortious liability operates in favour of agents who inadvertently cause tortious injury to others in the course of their agency. This right of indemnity does not, contrary to the submission of the Attorney General for Alberta, arise on the facts assumed on this Reference. It is difficult to see how a vendor of taxable supplies could cause tortious injury to third parties by complying with its obligations under the GST Act. Indeed, compliance with a statutorily imposed duty would constitute a defence in the unlikely event that such claims of liability were to arise. The common law right of agents to indemnity, therefore, cannot provide support for the right claimed by Alberta on behalf of registered suppliers under the GST Act.

The CFIB also relies upon the common law as a basis for the recovery of expenses incurred in connection with the collection and remittance of the GST by registered suppliers, but by a different path of reasoning altogether. According to the CFIB, registered suppliers have a restitutionary claim against the federal government for the costs and expenses of collecting the GST. In my opinion this novel suggestion is without merit.

In the decision of this Court in *Pettikus v. Becker*, [1980] 2 S.C.R. 834, Dickson J., as he then was, stated that three basic conditions were to be fulfilled before restitutionary recovery would be permitted: these are (1) an enrichment, (2) a corresponding deprivation, and (3) a lack of any juridical reason for the enrichment. Under the GST Act the expenses involved in collecting and remitting the GST are borne by registered suppliers. This certainly constitutes a burden to these suppliers and a benefit to the federal government. However, this is precisely the burden contemplated by the statute. Hence, a juridical reason for the retention of the benefit by the federal government exists unless the statute itself is *ultra vires*. This, however, is the subject of constitutional questions 1 and 2.

The CFIB's argument thus involves it in the following dilemma: If the GST Act is *ultra vires*, then registered suppliers cannot be compelled to collect the tax, and it is not necessary to consider the extent of any restitutionary claim this group might have against the federal government. If, on the other hand, the GST Act is *intra vires*, then the statute itself constitutes a valid juristic reason for the retention of the benefit the federal government receives by being able to rely upon registered suppliers to collect the tax at their own expense. In neither case is the outcome urged upon us by the CFIB supportable.

It follows from all this that any right to remuneration for the time and trouble involved in collecting the GST would have to flow from the statute itself, which plainly lacks any such general provisions. I note, however, that the GST Act is not entirely silent on the issue of compensation for the costs of compliance. Section 346 of the statute provides a one-time transitional credit for small businesses to assist them in offsetting their initial compliance costs. In my opinion, this is a strong indication that Parliament did direct its attention to the question of compensation for compliance costs by enacting a provision providing partial compensation in certain cases. Even if the Attorney General for Alberta were correct to suggest that a more generous right to compensation exists at common law, in my view Parliament decided to substitute for that right its own view of the socially appropriate level of compensation for compliance costs. As this Court recently decided in *Zaidan Group Ltd. v. London (City)*, [1991] 3 S.C.R. 593, *aff'g* (1990), 71 O.R. (3d) 65 (C.A.), where a statute establishes a scheme providing for compensation, common law rights which might have operated but for the statute cannot be relied upon.

In my opinion, the right to compensation contended for by Alberta is supported neither by s. 103 of the Constitution Act, 1867, nor by the common law, nor by the operation of the GST Act itself. The third constitutional question must therefore be answered in the negative.

Constitutional Question 4

Section 125 of the Constitution Act, 1867 provides as follows:

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

In *Reference re Exported Natural Gas Tax*, supra, at p. 1081, the majority of this Court concluded that s. 91(3) of the Constitution Act, 1867 must be subordinated to s. 125. Section 125, therefore, is an exception to the general taxation power of the federal Parliament under s. 91(3). The Attorney General for Alberta argues that the imposition upon the province of the obligation to collect and remit the GST when the province acts as a supplier runs afoul of this constitutional injunction and is therefore ultra vires Parliament.

Canada does not contend that a province is liable to pay the GST as a purchaser of taxable supplies. Instead, it claims simply that the province is under an obligation to collect and remit the GST from purchasers of taxable supplies when the province acts as supplier. The Attorney General for Alberta's position is that this amounts to taxation of the property of the province.

In *Reference re Exported Natural Gas Tax*, supra, the majority of this Court said, at p. 1078, that

Section 125 provides, in broad terms, that no lands or property of the federal or provincial Crown shall be "liable to taxation". The purpose of this immunity, as we have seen, is to prevent one level of government from appropriating to its own use the property of the other, or the fruits of that property. This immunity would be illusory if it applied only to taxes "on property" but not to a tax on the Crown in respect of a transaction affecting its property or on the transaction itself. The immunity would be illusory since, by the simple device of framing a tax as "in personam" rather than "in rem" one level of government could with impunity tax away the fruits of property owned by the other. The fundamental constitutional protection framed by s. 125 cannot depend on subtle nuances of form.

By analogy to this reasoning, the Attorney General for Alberta submits that the imposition of the GST on taxable supplies made by the province as vendor amounts to taxation of the "fruits" of provincial property. It is said that if provincial property is exempt from taxation, then it cannot be taxed indirectly by characterizing the subject matter of the tax as a "transaction" involving that property. The imposition of the GST on property sold by the province, it is argued, runs contrary to the protection of s. 125 of the Constitution Act, 1867 and therefore is ultra vires Parliament.

In my opinion, with respect, the Attorney General for Alberta's analogy cannot withstand scrutiny. In *Reference re Exported Natural Gas Tax*, this Court was considering federal legislation which purported to impose a tax upon the receipt by distributors of natural gas that was the property of the province of Alberta. By the operation of a deeming provision, where natural gas was exported, the exporter was treated as a "distributor" of the natural gas exported and was deemed to have "received" it at the time it was exported. In consequence, the province became liable to pay a tax upon natural gas that remained the property of Alberta at the moment of its export.

The GST, in contrast, does not apply to exports. It applies to the domestic provision of taxable supplies, and it is the purchaser, rather than the supplier, which is liable to pay the tax. Indeed, the tax only becomes payable by virtue of transactions in which some property interest has left the supplier and become vested in the purchaser. Clearly, therefore, it is the purchaser, not the vendor, which is taxed.

Nor can it plausibly be said that the imposition of the GST on sales of provincial property amounts to a tax on the fruits of provincial property in that, due to their liability to pay the GST, purchasers will purchase less of such property, resulting in lost sales and diminished revenues to the province. The fact that a federal tax renders provincial property less commercially attractive than it would be if the tax did not apply does not render that tax a tax upon provincial property. In *Phillips v. City of Sault Ste. Marie*, [1954] S.C.R. 404, this Court considered the case of a municipal tax levied on tenants of land owned by the Crown in right of Canada. The tax was assessed on the basis of the value of the premises occupied as assessed by the city. This Court found that the tax was not levied upon the land, but upon the occupants; the value of the land was simply the measure by which the liability of the occupants to pay the tax was to be assessed. Consequently, the tax did not violate s. 125 of the Constitution Act, 1867, notwithstanding that, de facto, its collection might lower the returns that the Crown in right of Canada could realize from rental of the land.

Clearly, a practical consequence of the collection and remittance responsibilities imposed by the GST Act may result in a cost to the province, but neither the true aim and purpose of the scheme nor its incidental effects runs contrary to the spirit of s. 125. As the majority of this Court clearly stated in *Reference re Exported Natural Gas Tax*, supra, at pp. 1053-54, in order to violate s. 125 the impugned measure must in pith and substance constitute taxation. The possibility that the GST may have the effect of reducing provincial revenues from the sale of provincial property does not render the GST a "taxation" of provincial property. Nor does the calculation of the GST as a fraction of a price a portion of which is provincial tax amount to the federal taxation of provincial tax. Rather, the price paid for a taxable supply, including a component that is provincial tax, is the measure chosen by Parliament by which the liability of the purchaser to pay the GST is calculated.

Since the obligation of a province to collect and remit the GST when it acts as supplier does not amount to a taxation of the province's property, s. 125 of the Constitution Act, 1867 has no application in these situations. Consequently, the fourth constitutional question must be answered in the negative.

Constitutional Question 5

Section 126 of the Constitution Act, 1867 provides:

126. Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

The Attorneys General for Alberta and Canada agree that s. 126 has the effect of immunizing the consolidated revenue funds of the provinces from appropriation, except by their provincial legislatures. The Attorney General for Alberta, however, contends that the obligation imposed by the GST Act upon provinces to collect and remit the GST in respect of taxable supplies made by the province amounts to the appropriation of provincial funds for federal purposes by the federal Parliament. In support of this position, the Attorney General for Alberta relies on the decisions of this Court in *Reference re Troops in Cape Breton*, [1930] S.C.R. 554, and *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9. In my opinion, neither of these decisions supports the proposition that the Attorney General for Alberta seeks to advance.

In *Reference re Troops in Cape Breton*, the question was whether the province of Nova Scotia was liable to reimburse the federal government for the expense of sending troops to quell a local disturbance in Cape Breton at the request of the Attorney General of the province. The Militia Act, R.S.C. 1906, c. 41, as amended by S.C. 1924, c. 57, purported to impose such an obligation upon the government of a province whose Attorney General had called in federal troops to assist the civil power in the province. The majority of this Court decided that Parliament lacked jurisdiction to impose this obligation. Appropriations from the consolidated revenue fund of the province belong exclusively to the legislature of the province.

Similarly, in *Peel*, this Court was required to rule upon the constitutionality of s. 20(2) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3, which purported to authorize judicial orders directing the expenditure of money by municipalities for the custody and support of delinquent children. Relying upon *Reference re Troops in Cape Breton*, Martland J. decided that Parliament had no jurisdiction to compel municipalities, which are creatures of the provincial legislatures, to expend money. Interestingly, however, Martland J. did suggest, at p. 22, that s. 20(2) could have been *intra vires* Parliament if it had been shown to be necessarily incidental to the operation of valid federal legislation in relation to criminal law. However, as the section pertained to the continuing support of delinquent children after criminal proceedings had terminated, it could not be justified as criminal law in the meaning of s. 91(27) of the Constitution Act, 1867 :

The effect of s. 20(2) is to alter the role of municipal institutions, not necessarily limited to financial matters but also with respect to their duty toward persons found within their boundaries. This is an indirect amendment to provincial legislation respecting municipalities. It could not be justified in the absence of a direct link with federal legislative power under s. 91(27) . There is no direct link between the municipality "to which the child belongs" and the issue of the child's criminality. The obligation sought to be imposed on the municipality arises only after the criminal proceedings have been completed and sentence has been imposed. [Emphasis added.]

I have already concluded that there does exist a "direct link" between the obligations placed on suppliers by the GST Act and the federal power over taxation under s. 91(3) of the Constitution Act, 1867 . On the above reasoning, therefore, even if the GST Act imposed an obligation to pay out a sum of money for federal purposes this might be justified.

The GST Act , however, does not go nearly this far. The obligation to collect and remit the GST is clearly not the same as an obligation to pay out a sum of money to the federal government from the provincial consolidated revenue fund. To this extent, Reference re Troops in Cape Breton and Peel are beside the point. Parliament has simply imposed certain administrative burdens upon suppliers that are necessarily incidental to a valid federal scheme of taxation within the meaning of that term as it is used in s. 91(3) of the Constitution Act, 1867 .

The Attorney General of Canada argues that there is nothing impermissible in valid federal legislation imposing administrative burdens upon provincial governments, provided that these are necessarily incidental to the operation of a valid federal scheme of taxation. In *Attorney-General for Quebec v. Nipissing Central Railway Co.*, [1926] A.C. 715 (P.C.), for instance, it was decided that federal legislation in relation to railways could authorize the compulsory taking of provincial Crown lands to the extent necessary for the building of railway lines. In *Valin v. Langlois* (1879), 3 S.C.R. 1, this Court upheld the Dominion Controverted Elections Act, 1874, which conferred upon provincial superior courts the jurisdiction, and imposed the duty, of trying controverted elections of members of the House of Commons.

The case of *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, also relied on by Canada, is less helpful. In that case, the issue was whether the Motor Vehicle Transport Act, S.C. 1953-54, c. 59, which permitted the respondent Board, an entity created by the Ontario legislature, to issue and review licenses for the interprovincial transport of goods, was ultra vires as an impermissible delegation of Parliament's legislative powers to a provincial body. Cartwright J., for the majority, found that there was no delegation, but, rather, simply the adoption by Parliament of the legislation of another body, as it might from time to time exist, as its own. The decision in *Coughlin* is not clearly relevant to the question we are faced with here, as Parliament did not purport to compel Ontario to establish a Highway Transport Board to administer the federal statute, nor did Cartwright J. suggest that it could have done so.

In any case, in my opinion it is not necessary for us to analyze the limits of the federal power to impose administrative obligations on the provinces, pursuant to a valid federal scheme of taxation, in order to answer the fifth constitutional question. The most that can be said of the collection and remittance obligations created by the GST Act is that they impose certain administrative burdens on commercial entities operating in the province. It is only in so far as the province operates as a commercial entity that it becomes subject to these burdens. This is not the same thing as an appropriation of money from the provincial consolidated revenue fund, without the consent of the provincial legislature, for federal purposes. Indeed, from the point of view of policy, it is far from clear that it would be desirable to adopt an interpretation of the GST Act which would give special advantages to provinces when they act as commercial entities. Section 126 of the Constitution Act, 1867 does not come into play. For this reason I conclude that

the fifth constitutional question must be answered in the negative.

Constitutional Question 6

The Alberta Court of Appeal declined to answer the final constitutional question. In my view, it was correct so to decide, and, for the reasons given by the Court of Appeal, I am of the view that this Court ought not to answer it either. The sixth constitutional question is highly abstract, in that it does not refer to specific provincial institutions, and, indeed, refers to some hypothetical provincial institutions which apparently do not exist. Without greater specificity and detail, answers given by this Court could be quite misleading. Worse yet, they could be invoked to justify provincial attempts to frustrate the operation of the GST by the disingenuous manipulation of institutional forms.

In my view, the Attorney General of Canada is quite correct to argue that in the absence of a legislative scheme the pith and substance of which can be ascertained, this Court is placed in the impossible position where it cannot distinguish between valid schemes of provincial legislation, and colourable attempts to circumvent a valid federal scheme of taxation enacted under s. 91(3) .

Where this Court is faced with a hypothetical question which cannot be answered with any assurance of correctness, the appropriate course of action is for us to decline to answer the question. In *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704, we said (at p. 708):

This Court is entitled to exercise its judgment on whether it should answer referred questions if it concludes that they do not exhibit sufficient precision to permit cogent answers. This is irrespective of the fact that the reference power is couched in broad terms

It is clear that we are entitled to decline to answer a question referred to us on a reference if the question is such that the answer given would not be precise or useful: see also, *Reference re Education System in Montreal*, [1926] S.C.R. 246, *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, *Reference re Angliers Railway Crossing*, [1937] S.C.R. 451, *Reference re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54. The sixth constitutional question in this Reference cannot usefully be answered in its present form, and we therefore respectfully decline to answer it.

5. Arguments of the Attorney General for Ontario

The Attorney General for Ontario was granted leave to intervene in these proceedings and filed a factum. After reviewing these materials and hearing the submissions of counsel on the point, we decided that we would not hear the submissions of the counsel for the Attorney General for Ontario.

Briefly, it was the position of the Attorney General for Ontario that the GST Act had been passed through Parliament by an invalid procedure and was therefore void in its entirety. The Attorney General for Ontario pressed this argument as an intervener before the Alberta Court of Appeal, which, in its judgment, declined to deal with these submissions on the merits. In my view, the Court of Appeal was quite correct in this decision.

The Attorney General for Ontario has sought to raise an entirely different ground for attacking the vires of the GST Act, and one which was not addressed by the principal parties in these appeals. To address the issues raised by the Attorney General for Ontario would require this Court to embark on a lengthy analysis of issues not raised by any of the other parties and not related to the substance of these appeals.

We are all of the opinion that the issues sought to be raised by the Attorney General of Ontario fall outside the intended scope of the Reference. In *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, this Court declined to address a similar argument sought to be raised by an intervener on this very ground. I would adopt the reasoning of Pigeon J. in this respect where he said at p. 1290:

It does not appear to me that the appellants' attack based upon the alleged absence of a message from the Governor General recommending its enactment, comes within the scope of the question submitted. Nothing in the order of reference or in the material submitted therewith, raises any issue with respect to the regularity of the adoption of the Act, as opposed to its intrinsic validity depending on Parliament's legislative authority. On a reference the Court has to give answers on the basis of the questions submitted exclusively (*Re: Quebec Magistrates' Court*, [1965] S.C.R. 722), intervening parties are not permitted to raise other issues and to bring up other facts as they might in ordinary litigation. I would therefore decline to consider this ground of attack.

With all due respect, therefore, the arguments sought to be raised by the Attorney General for Ontario are not helpful. Intervener status is granted when this Court feels that the intervener may be of assistance to the Court in resolving the principal issues before us. Intervener status is not granted to allow the intervener to raise an entirely new set of issues which are not addressed by the principal parties. This principle is even stronger in reference cases, where the scope of the appeal is governed by specific questions posed by the Lieutenant-Governor or the Governor General in Council.

We therefore will not address the merits of the arguments sought to be raised by counsel for the Attorney General for Ontario. They are not helpful to us in the disposition of these appeals.

6. Conclusion

In the result, the appeal of the Attorney General of Canada is allowed and the appeal of the Attorney General for Alberta is dismissed. The constitutional questions are answered as follows:

1. Having regard to the Constitution Acts, 1867 to 1982 or otherwise, is the GST Act ultra vires the Parliament of Canada in whole or in part and, if so, in what particular or particulars and to what extent?

Answer: No.

2. Does the system of collection under the GST Act

(a) at any stage prior to the supply of taxable supplies to consumers or to suppliers of exempt supplies,

(b) prior to the collection by a supplier from a recipient, or

(c) otherwise

constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the Constitution Act, 1867, or of another provincial power under that Act, so that the GST Act in its application of the system of collection or any part of it is ultra vires the Parliament of Canada?

Answer: No.

3. Having regard to s. 103 of the Constitution Act, 1867 and the common law, are suppliers entitled to charge and to collect from the Consolidated Revenue Fund of Canada all costs, charges and expenses incidental to collecting and paying a remittance under the GST Act?

Answer: No.

4. Having regard to s. 125 of the Constitution Act, 1867,

(a) is the imposition of obligations under the GST Act on the Government of Alberta as a supplier to collect and pay a remittance on a taxable supply that is Alberta property ultra vires the Parliament of Canada,

(b) does the imposition of a remittance under the GST Act on a recipient from the Government of Alberta of a taxable supply that is Alberta property or that generates revenue to the Government of Alberta constitute taxation of Alberta property that is ultra vires the Parliament of Canada, and

(c) does the imposition of a remittance that is computed under s. 154 of the GST Act on the basis of consideration for a taxable supply that includes an amount of provincial tax constitute taxation of Alberta property that is ultra vires the Parliament of Canada?

Answer: No.

5. Having regard to s. 126 of the Constitution Act, 1867, is the requirement under the GST Act that the Government of Alberta use part of the Government of Alberta's revenue

(a) to collect a remittance or cause a remittance to be collected, or

(b) to pay a remittance prior to the receipt of the remittance from the recipient of a taxable supply

ultra vires the Parliament of Canada?

Answer: No.

6. Having regard to ss. 125 and 126 of the Constitution Act, 1867 ,

(a) is the purchase of taxable supplies by provincial authorities, or any of them, in the course of their exercising a delegated constitutional power of the Government of Alberta exempt from tax under the GST Act ,

(b) is the purchase of taxable supplies by provincial authorities, or any of them, designated as agents of the Government of Alberta, in the course of their exercising a delegated constitutional power of the Government of Alberta, exempt from tax under the GST Act ,

(c) is the acquisition of taxable supplies by the Crown Purchase Agency referred to in section 2(k) of the Appendix exempt from tax under the GST Act , and

(d) is the acquisition or use by provincial authorities, or any of them, in the course of their exercising a delegated constitutional power of the Government of Alberta, of taxable supplies that are provided by the Crown Purchase Agency to the provincial authorities exempt from tax under the GST Act ?

Answer: This question should not be answered.

//La Forest J.//

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

La Forest J. -- These appeals raise the constitutional validity of the federal Goods and Services Tax ("GST") passed by Parliament as Part IX of the Excise Tax Act, R.S.C., 1985, c. E-15 . The case began by a reference by the Lieutenant-Governor in Council of Alberta to the Court of Appeal of that province of six questions regarding the validity and effect of the tax. The nature of the tax and the history of the litigation are set forth in the reasons of the Chief Justice, and I need not repeat them. I agree with his proposed disposition and his answers to the referred questions, but our views diverge on several matters. For that reason, I have thought it best to write short reasons of my own. The questions and my answers and reasons therefor follow:

1. Having regard to the Constitution Acts, 1867 to 1982 or otherwise, is the GST Act ultra vires the Parliament of Canada in whole or in part and, if so, in what particular or particulars and to what extent?

I would answer this question "no". Section 91(3) of the Constitution Act, 1867 empowers Parliament to make laws for "[t]he raising of Money by any Mode or System of Taxation". There can be no question that the GST is intended to raise money and that a value-added tax, which is what the GST is, is a mode or system of taxation. The GST thus falls squarely within s. 91(3) . It is in pith and substance a mode or system of taxation, so one need not enquire any further about whether it might be justified as necessarily incidental to the legislative scheme. The fact that it

may affect activities within provincial regulatory competence is of no moment. This basic proposition was recently restated in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, where, speaking for the Court, I stated, at p. 62:

. . . if the Guidelines Order is found to be legislation that is in pith and substance in relation to matters within Parliament's exclusive jurisdiction, that is the end of the matter. It would be immaterial that it also affects matters of property and civil rights

See also *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286. I might add that it is hard to imagine a tax that would not affect property and civil rights.

Nor does the case of *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355 (Employment Insurance Reference), have any relevance. In that case, the Privy Council held that the statutory scheme there in question was in pith and substance an unemployment insurance scheme, a matter then falling exclusively within provincial legislative competence. Here the pith and substance of the Act is simply to impose a tax to raise money.

2.Does the system of collection under the GST Act

(a)at any stage prior to the supply of taxable supplies to consumers or to suppliers of exempt supplies,

(b) prior to the collection by a supplier from a recipient, or

(c) otherwise

constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the Constitution Act, 1867 , or of another provincial power under that Act , so that the GST Act in its application of the system of collection or any part of it is ultra vires the Parliament of Canada?

I would answer this question "no". The answer flows largely from what I have said about question 1. The collection provisions of the GST are simply part and parcel of the mode or system of taxation adopted by Parliament. There is no indication that these provisions were enacted for any other purpose than to collect the tax, and colourability is not lightly to be imputed. As Laskin C.J. stated in *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 390:

The Parliament of Canada is authorized to raise money "by any mode or system of taxation", and it would be an unusual case where this power, so apparently limitless, could be challenged as colourably used and thus make it appropriate for the Court to consider extrinsic material to show colourability.

I agree with the Court of Appeal that severing the provisions of the Act that do not result in raising revenues from those that do, would result in a completely different system of taxation. It would transform the tax from a value- added tax to a retail sales tax. It would fetter Parliament's discretion to raise money "by any mode or system of taxation".

That these provisions may, as I earlier noted, have an impact on property and civil rights is of no moment. As I stated in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 145, there is no hermetic division between the federal legislative domain and that covered by property and civil rights. Some spillover is inevitable.

3. Having regard to s. 103 of the Constitution Act, 1867 and the common law, are suppliers entitled to charge and to collect from the Consolidated Revenue Fund of Canada all costs, charges and expenses incidental to collecting and paying a remittance under the GST Act?

I would answer this question "no". Section 103 reads:

103. The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

As counsel for the Attorney General of Canada argued, s. 103 merely provides for the appropriation of monies from the consolidated revenue fund of Canada. It does not impose an independent legal obligation on Canada to compensate collecting agents. Rather, it refers to costs, charges and expenses the Government of Canada is obliged to pay by statute or contract independently of s. 103.

I need not go into the common law position. Whatever duty might reside in the Crown at common law to pay suppliers for collecting the tax, by providing (s. 346 of the Act) for a one-time transitional credit for small businesses to assist them in offsetting their initial compliance costs, Parliament, in my view, has given a clear indication that it did not intend to provide further compensation for the purpose. For a similar situation, see *Zaidan Group Ltd. v. London (City)*, [1991] 3 S.C.R. 593.

4. Having regard to s. 125 of the Constitution Act, 1867,

(a) is the imposition of obligations under the GST Act on the Government of Alberta as a supplier to collect and pay a remittance on a taxable supply that is Alberta property ultra vires the Parliament of Canada,

(b) does the imposition of a remittance under the GST Act on a recipient from the Government of Alberta of a taxable supply that is Alberta property or that generates revenue to the Government of Alberta constitute taxation of Alberta property that is ultra vires the Parliament of Canada, and

(c) does the imposition of a remittance that is computed under s. 154 of the GST Act on the basis of consideration for a taxable supply that includes an amount of provincial tax constitute taxation of Alberta property that is ultra vires the Parliament of Canada?

I would answer this question "no" for the reasons given by the Chief Justice. The majority in the circumstances in *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, interpreted the tax there as in pith and substance one imposed on provincial property, indeed the public domain,

which at Confederation was intended, as the majority underlined, to provide the primary source of revenue for the provinces, a constitutional principle s. 125 was designed to protect. Here the tax is in pith and substance one imposed against the purchaser of goods or services and simply collected by the province in common with other suppliers of goods or services. The province is in no different position from an employer obliged to withhold income under the Income Tax Act, S.C. 1970-71-72, c. 63, ss. 153 and 227(4).

5. Having regard to s. 126 of the Constitution Act, 1867, is the requirement under the GST Act that the Government of Alberta use part of the Government of Alberta's revenue

(a) to collect a remittance or cause a remittance to be collected, or

(b) to pay a remittance prior to the receipt of the remittance from the recipient of a taxable supply ultra vires the Parliament of Canada?

There can be no doubt that the province by virtue of s. 126 has the exclusive power to appropriate money from its consolidated revenue for provincial purposes, just as by s. 102 the federal Parliament has exclusive power of appropriation from the federal consolidated revenue fund. And the very structure of the Constitution, which creates two sovereign levels of government with their own fiscal organization flies against the idea that one level of government can appropriate monies from the other's consolidated revenue fund. That was decided in *Reference re Troops in Cape Breton*, [1930] S.C.R. 554, where this Court held invalid an attempt by the federal government to impose on a province the cost of carrying out a federal activity in the province.

It by no means follows, however, that an administrative duty reasonably placed by Parliament on a province in the course of enacting a scheme falling squarely within a federal power will be invalid because the performance of that duty will in consequence require some expenditure by the province. In creating a tax system, which falls in pith and substance within s. 91(3) of the Constitution Act, 1867, Parliament may incidentally require the provinces to assume such a burden. Otherwise, the broad taxing power there granted would be frustrated. It must be remembered that this power, subject to s. 125, is a paramount power, which must be given room for its effective exercise.

The present situation, as counsel for the Attorney General of Canada noted, is somewhat similar to that in *Valin v. Langlois* (1879), 3 S.C.R. 1, where Parliament conferred a duty upon provincial superior courts in a federal matter. It also has some affinity to cases like *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, where Parliament conferred upon provincial boards the duty to administer laws which it had incorporated by reference, although it may not be irrelevant that schemes of this kind result from federal-provincial cooperation.

Nor do I see anything in *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9, that assists the province here. The provision there impugned directed a municipality to which a delinquent child belonged to contribute to the child's support. The provision was held not to fall within the criminal power nor to be truly necessary for its effective exercise. Rather, it fell within provincial

power to regulate municipal institutions. In such a case, it would be surprising if Parliament could impose such financial duty on the province. In the present case, there is not only a link with federal legislative power, as Martland J. seems to suggest (at p. 22) might have been acceptable; the tax and the collecting mechanism, we saw, fall squarely within the ambit of the relevant legislative power, s. 91(3) .

6. Having regard to ss. 125 and 126 of the Constitution Act, 1867 ,

(a) is the purchase of taxable supplies by provincial authorities, or any of them, in the course of their exercising a delegated constitutional power of the Government of Alberta exempt from tax under the GST Act ,

(b) is the purchase of taxable supplies by provincial authorities, or any of them, designated as agents of the Government of Alberta, in the course of their exercising a delegated constitutional power of the Government of Alberta, exempt from tax under the GST Act ,

(c) is the acquisition of taxable supplies by the Crown Purchase Agency referred to in section 2(k) of the Appendix exempt from tax under the GST Act , and

(d) is the acquisition or use by provincial authorities, or any of them, in the course of their exercising a delegated constitutional power of the Government of Alberta, of taxable supplies that are provided by the Crown Purchase Agency to the provincial authorities exempt from tax under the GST Act ?

I agree with the Chief Justice that this question should not be answered. Let me simply add a few words to what he says about the importance of the issues we are being asked to answer in the abstract. The argument of counsel for Alberta seems at times to suggest that any federal tax imposed against the province would be ultra vires by virtue of ss. 125 and 126 . I would not be prepared to go that far. If that result had been intended, it is not easy to understand why the prohibition in s. 125 was limited to property taxes. And if s. 126 was intended to prevent such taxation, then one wonders why it was thought necessary to enact s. 125 .

I am not unmindful, however, of the fact that the power to tax involves the power to destroy and that, accordingly, the fiscal independence of the provinces and the protection of their sources of revenue must be maintained. A complete prohibition of federal taxation against the provinces (apart from being anything but obvious from the constitutional text) might, however, frustrate the development of legitimate fiscal initiatives as well as deprive Parliament of the power to prevent serious economic imbalances in the conduct of many activities both within and outside the province arising out of the tax owing to differences in the extent that the provinces engaged in such activities. These are daunting questions to which the Court may need to respond if and when they arise. If they do, it would be better for the Court to be in a position to undertake the task uninhibited by statements made in the absence of appropriate contexts. These questions do not arise here. Parliament has seen fit not to impose duties and taxes of the kind addressed in question 6. I think the Court would ill serve the nation if it attempted to respond to questions raising such fundamental issues in the abstract.

I also agree with the Chief Justice's reasons concerning the arguments of the Attorney General for Ontario.

Accordingly, I would dispose of these appeals and answer the constitutional questions in the manner proposed by the Chief Justice.

Appeal of the Attorney General of Canada allowed. Appeal of the Attorney General for Alberta dismissed.

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Solicitors for the respondent/appellant: Burnet Duckworth & Palmer, Calgary.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: The Deputy Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: The Deputy Attorney General of Saskatchewan, Regina.

Solicitors for the intervener the Canadian Federation of Independent Business: Borden & Elliot, Toronto.

* Stevenson J. took no part in the judgment.

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