Actual Questions of Vires, or Why Quebec's 'Vaccination Tax' is Unconstitutional[1]

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The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental or spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

— John Stuart Mill
On Liberty

[1] This paper was started in advance to the withdrawal of the proposed tax. A noted limitation throughout is that there was no formal draft of the tax to review. Without the form of the tax questions of pith and substance are speculative.

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ABSTRACT

A dearth of appreciation for questions of constitutional legislative competence began on April 17th, 1982, when the *Charter of Rights and Freedoms* came into force. Since that time, I contend, the practice of constitutional law and the focus of its jurisprudence has suffered a near total coup d'état by the *Charter* and its dozen or so most often cited provisions. It seems now that in a constitutional complaint—aside from a reference question—the approach seems almost invariably to be how a government action or law may impact the *Charter* rights of an individual or group. While the import of the *Charter* is evident the starting point of a constitutional challenge when the question is one of sheer legislative competence is the creature of a different part of the Constitution. In this article I seek to do four things. First, I seek to do a perfunctory and non-exhaustive discussion of the presence of certain political and human rights enshrined in the Canadian Constitution other than the *Charter*. Second, I propose a concept I refer to as "actual question[s] of *vires*" to aid in constitutional review which is distinct from the pith and substance test that deals with general questions of *vires*. Third, I apply the actual question of *vires* concept to demonstrate how Quebec's proposed tax on persons nonvaccinated for Covid-19 was *ultra vires* the province's legislative competence under section 92(2) of *Constitution Act, 1867* as having an invalid purpose and also not for the raising of a revenue. In the fourth part of the paper, I outline how the tax may also run afoul under a general question of *vires* analysis by considering some likely hypothetical hurdles regardless of the wording or form of the tax. I describe how a tax must be definable by some method of quantification to commodities or services in order to determine if it is a direct or indirect tax. That as there is no such thing as citizenship in a province it is hard to define a human being as geographically locatable within a province. And that taxing a human for the non-presence of a biological characteristic would likely breach the federal citizenship or criminal law powers or otherwise be in conflict with the *Canada Health Act* (Canada).

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PART I: THE COMPOSITION OF THE CONSTITUTION OF CANADA AND NON-*CHARTER* RIGHTS

This first part serves to give a brief description of the largely underappreciated history and composition of Canada's disjointed constitution. In doing this I seek to dispel some misconceptions about *Charter* jurisprudence and also demonstrate that legislative competence was always balanced against implied or extant human and political rights even before the advent of the *Charter*. The reader should leave this part with the consideration that in the following parts a concern for human rights can buttress arguments for or against legislative competence without reference to *Charter* jurisprudence.

1.1 - THE COMPOSITION AND PURPOSE OF THE CANADIAN CONSTITUTION

In my conversations with like and unalike minded persons it seems to me that few people, practitioners and academics included, seem to know that the Constitution of Canada consists of more than the *Charter*.[2] While the *Charter* represents one important piece of the Constitution it is just one of several and its main counterpart carries a constitutional significance that does not now get the recognition it deserves. While practitioners and academics will often recognize that the *Constitution Act, 1867* exists, there is little appreciation of that document and many a lawyer and academic alike treat it as akin to something like the registration documents of a corporation that establish the initial officers, share classes and capacities. But the *Constitution Act, 1867*, is a true and earlier peer to the *Charter* with a primary purpose to constitute (go figure) the executive, legislative, and judicial powers of the federal and provincial realms and to divide those powers of governance between them. The power of taxation is one such power divided, assigned, and limited, and I will get to that in Part III. However, it is an observation that when someone becomes concerned about a harm that will befall them because of an enactment or pending enactment the discussion jumps to which *Charter* right can be pleaded as being infringed and no one stops to ask "Wait, can this legislature/executive/parliament even enact, enforce, or promulgate this *at all*?". From a practical standpoint and something I am presuming, this may be due to the fact that since the advent of the *Charter* no one sees private persons or companies arguing from the *Constitution Act, 1867* as they once did, and so the *Charter* has perhaps taken on a job as being the "private" constitutional law fit for corporations and citizens.[3] Before getting into what I call an "actual question of *vires*" I feel the need to reiterate the point and purpose of the *Constitution Act, 1867*.

The *Constitution Act, 1867* (the "*1867 Act*"), formally known as the *British North America Act*, came into force in 1867 and ushered in Canada. The *1867 Act* was so pivotal that for 115 years the Dominion of

[2] *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras 55-56 [*Re Secession*].
The Supreme Court of Canada notes that the principle of federalism is enshrined in the *Constitution Act, 1867*, but there has been a potential to devalue federalism in light of the *Charter* which is incorrect and at least as regards the 1867 Act and the division of powers: "[the *Constitution Act, 1867* is] certainly of equal importance".

[3] Companies and natural persons since the *Charter* sometimes argue a division of powers case but it seems quite rare now. Take for example *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*].

Canada (the official name for Canada ending in 1982)[4] was governed primarily by the *1867 Act* and other Imperial statutes from London. It is in the *1867 Act* that "[the] sole claim" is found from which both the federal and provincial sovereignties may exercise their assigned lawful authority.[5] The takeaway from this is straightforward, an executive or legislative body may only enact or enforce a law for which the *1867 Act* has granted them competent jurisdiction. The *1867 Act* assigns subjects of competence exhaustively such that no subject known now or in the future is deemed to be unassigned to at least either the federal parliament or the provincial legislatures[6] or in some cases between them both.[7] The Privy Council made it clear that Canada was unlike the U.S.A. or its more closely related cousin Australia. That estimable body of law lords found that all the legislative subjects were exhaustively assigned and the residual power of future subjects was for the Parliament of Canada and not the provincial legislatures.[8] Unlike the *1867 Act* the *Charter* does not assign or grant any authority but is instead (emphasis added) "intended to constrain governmental action inconsistent with those rights and freedoms; it is not itself an authorization for government action."[9] It is vital to keep in mind that the advent of the *Charter* has not enlarged or assigned any new powers to parliament or the provincial legislators and should only be seen as a limitation on government action rather than an empowerment.[10] The *Charter* is a restraint not a side door grant to assume new powers, however this is not the goal of this discussion.

The 'Constitution of Canada' is not a single document nor a set of amendments, like that of the USA, nor is it made up solely of an obvious and discrete set of documents. In addition to the *Charter* and the *1867 Act*, other documents form express components of the constitution of this country such as those documents that brought the provinces into being, [11] others still have been read in,[12] or adopted by historical precedent and reference.[13] Yet further documents have risen to the level of being quasi-constitutional in nature.[14] To aid in the interpretation of the language and purpose of these documents there are various constitutional principles and conventions that give interpretative and philosophical depth to the constitution and can be found in the judicial precedents that aid in our constitutional

[4] One can contend the name has not changed comparing the *Canada Act 1982* (UK) with what is said in the preamble of the *British North America Act 1867* (UK).
[5] *Re Secession*, Supra note 2 at para 72.
[6] *The Bank of Toronto v Lambe (Quebec)*, [1887] UKPC 29 (9 July 1887) at page 11: "Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies. . ."
[7] Healthcare is a divided subject, one example is *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at paras 67-68.
[8] *The Initiative (Re)*, 1919 CanLII 426 (UK JCPC) at page 23.
[9] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at page 261.
[10] Side note, in the process of repatriating the Constitution and enacting the *Charter* some changes were made to the *1867 Act* but the *Charter* itself made no changes to the *1867 Act* nor brings in any new powers.
[11] *Constitution Act*, 1982, s. 61, Schedule to the Constitution Act, 1982.
[12] *Reference re Supreme Court Act, ss 5 and 6*, [2014] 1 S.C.R. 433 at paras 19,73-74,104-106 *n.b.* parts of the *Supreme Court Act* (Can) were constitutionally entrenched.
[13] *St. Catharines Milling and Lumber Co. v. R., 1887* 13 SCR 577 at pages 633-644; *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313 at pages 402-413 [*Calder*]. *n.b.* the *Royal Proclamation of 1763* has been found to be to some degree constitutionally entrenched, however in *Calder* a more fulsome entrenchment was prevented by a 3-3 split rendering the decision in the negative. However, the *Royal Proclamation of 1763* is now entrenched by reference as found in *Constitution Act, 1982*, s. 25.
[14] See for instance the *Official Languages Act* (Can) as noted in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773 at para 23; or provincial human rights legislation and codes as noted in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 at para 27.

interpretation.[15] For example, the *Statute of Westminster 1930* (UK) no, this is not *that* Statute of Westminster but an earlier one, forms a part of the Constitution of Canada and clarifies the rights of new provinces to their natural resource ownership. Rather perplexingly however, the statute did not amend the *1867 Act* so someone reading only the *1867 Act* may think only Ontario, Quebec, New Brunswick, and Nova Scotia, were to keep ownership of their lands and resources, but this is incorrect.[16] Welcome to the wonderful world of the Canadian Constitution.

For 115 years the constitutional jurisprudence in Canada was dominated by the interpretation, mainly, of the *1867 Act*. This was aided and supplemented by other imperial statutes such as the multiple *Westminster* statutes.[17] These 115 years had the early 19th and 20th century court during the growing pains of federalism versus centralism, these also were the years of the Judicial Committee of the Privy Council, a discrete imperial court of appeal staffed by judicial members of the House of Lords and often referred to in decisions as "the Board". From Confederation to the FLQ crisis the *1867 Act* governed all. Notably the *1867 Act* holds the first vestiges of constitutional human and civil rights for citizens and persons of Canada which are largely restated in the *Charter* and often erroneously, in my observation, considered legal products of the *Charter*. The presence of constitutionally entrenched rights in the *1867 Act* is important as unlike the *Charter* the *1867 Act* has no comparable section 1 limitation to its provisions and the *Charter* plays no part in the interpretation of the act.[18] There is no section 1 analysis, no section 7 analysis, no *Oakes test*, no section 15 discrimination balancing that must be wrestled with when the question is one of the *1867 Act*. One can see how where a right is anchored in the *1867 Act* the government may have a harder time infringing upon it than it does under the *Charter*. And now to non-*Charter* rights.

1.2 - NON-*CHARTER* CONSTITUTIONALLY ENSHRINED RIGHTS

Examples of non-*Charter* constitutionally entrenched rights are largely based on the interpretation of the preamble and certain sections of the *1867 Act* itself and how that act established and froze the powers of the colonies-turned-provinces and set the powers of the novel federal parliament. The preamble to the *1867 Act* is a specific part of our constitutional law, it is not mere recital, it has been "adopted" into our law.[19] The preamble was relied upon in *Re Alberta Statutes* (a case I will cover in Part III) where it was found by the Supreme Court of Canada (upheld by the Privy Council)[20] that the very purpose of the *1867 Act* would be jeopardized if citizens could not freely conduct public discussion of affairs or criticize policies and administrations; for impugning on such a freedom of critique would be repugnant to the preamble of "a constitution similar in principle to that of the United Kingdom".[21] While in *Re Alberta Statutes* free speech and press was framed more as a political right this framing I submit is more akin to the language of a human right and was subject only to such restraints as criminally acceptable such as criminal threats and libel. The rights were constitutionally entrenched as of clear necessity for the efficacy

[15] *Re Secession*, Supra note 2 at paras 32, 52-54.
[16] *Statute of Westminster*, (UK) 1930, 22 Geo. V, c. 4.
[17] *An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930*, 1931 c. 4 (UK).
[18] *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 at para 48.
[19] *The Initiative (Re)*, *Supra* note 8, at page 24.
[20] *Alberta (Attorney General) v. Canada (Attorney General)*, 1938 CanLII 251 (UK JCPC) [*Ref Alberta Statutes JCPC*].
[21] *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] S.C.R. 100 at pages 134, 137 [*Re Alberta Statutes*].

of a Westminster style government and constitution. Other entrenched human rights can also be found emanating from the *1867 Act*.

In *Saumur v. City of Quebec* (*"Saumur"*) the majority of the Supreme Court of Canada arrived at different conclusions as to how freedom of religion is entrenched by operation, at least in part, of the *1867 Act*, yet in the end each judge of the majority reaches a conclusion that such freedoms are entrenched.[22] *Saumur* dealt with a challenge to a municipal by-law created by Quebec City that required persons who distributed written materials on the public highways to request and be approved and issued a permit from the chief of police. Laurier Saumur was a Jehovah's witness who challenged the permit requirement primarily on the grounds of religious or personal expression. While a requirement to get a permit from the police to express one's beliefs *should* clearly run afoul of section 2 of the *Charter*,[23] in the 1950s the *Charter* was decades away. Of the nine judges five found that by the *1867 Act* itself or by its constitutional operation, the impugned bylaw was *ultra* at least to the extent it trammeled on a constitutionally entrenched right to religion. The degree to which the *1867 Act* began to form the basis for a set of non-political human rights can be illustrated in the variety of approaches taken by the justices in *Saumur:*

1) Justice Kerwin found that a pre-confederation statute of the united Canada colony known as the *Freedom of Worship Act* was incorporated by operation of section 129 of the *1867 Act* which brought into force after confederation all such laws that were in force as at the confederation and as such that incorporation thereby limited the bylaw so not to apply to protected religious expression.[24]
2) Justice Rand found that actions of speech, religion, the inviolability of the person, and self-expression are "original freedoms" and "the primary conditions of [a person's] community life within a legal order."[25] Justice Rand connects these protections to the preamble of the *1867 Act* "with a constitution similar in principle to that of the United Kingdom"[26] and a level of protection was also inferred by the denominational schools protections that can be found in section 93 of the *1867 Act*.[27]
3) Justice Kellock writes a voluminous and historically exhaustive opinion well worth reading and he finds the exercise of religion entrenched in such places as the *Quebec Act of 1774*,[28] as seemingly implied in section 93 of the *1867 Act*,[29] in the "similar in principle" preamble invocation,[30] and in the prior mentioned *Freedom of Worship Act*,[31] among a few other possible places. and
4) Justices Estey and Locke appear to concur by and large for the same reasons of Justices Kerwin, Kellock, and Rand, adding that the province would likely be incompetent to repeal the *Freedom of Worship Act*, and this would mean the province is permanently foreclosed of jurisdiction.[32]

[22] [1953] 2 S.C.R. 299 [*Saumur*].
[23] I say "should" as the Covid-19 Pandemic has greatly tested the strength, perception, and sincerity of our constitutional protections.
[24] *Saumur* at pages 322-323.
[25] *Ibid* at page 330.
[26] *Ibid* at page 331.
[27] *Ibid* at page 331.
[28] *Ibid* at page 343.
[29] *Ibid* at pages 350-351.
[30] *Ibid* at page 354.
[31] *Ibid* at page 352.
[32] *Ibid* at pages 363, 373.

There are other pre-*Charter* discussions on the constitutionally entrenched nature of the freedom of religion which are discussed and summarised with some help in *Walter et al. v. Attorney General of Alberta et al* and again the mention of entrenchment by operation of the *1867 Act* and pre-confederation statutes is discussed.[33] I also note that as far back as the Norman, and even the Anglo-Saxon kings the laws of the crown promulgated political and legal rights and freedoms (usually aimed at nobles, freemen, and clergy) and were often in the form of documents called "Constitutions".[34]

Further to the above, the Supreme Court as recently as 1998 has discussed, albeit obliquely, the purpose of enshrining and entrenching certain human rights as a fundamental part and purpose of the *1867 Act*.[35] While further discussion on the entrenchment of pre-*Charter* human rights does sound like an enjoyable time for someone so… fun at parties… as myself, the purpose at this stage and for this article is to illustrate and establish how the *1867 Act* has functioned not just to assign exhaustive jurisdictional competence of all law making but has also acted to entrench, or at least protect, certain actions and beliefs as constitutionally necessary for the society and the governments of Canada to function. All these things were done before and without requiring the *Charter*. In the context of the vaccination tax question a background history showing that the *1867 Act* pursues political and expressive protections as part of its exhaustive assignment of powers aids in the interpretation of the question of the limited power of direct taxation that the provinces have and informs upon the acceptability of discriminatory government actions. Having now established that (1) the *Charter* does not alter the division of powers, (2) the *Charter* does not apply to interpreting the 1867 *Act*, and (3) that the *1867 Act* has an inherent concern of protecting necessary rights; I move now to the concept of "Actual Questions of *Vires*".

[33] [1969] S.C.R. 383, at pages 390-393.

[34] An Angevin example is the "*Constitutions of Clarendon*". But for an Anglo-Saxon example see the *Dooms of Edgar* III, 2 as found in *Sources of English Constitutional History*, Carl Stephens and Frederick George Marcham, 1972, Harper & Row, Publishers, Inc. (herein "*English Constitutional Sources*") at page 19 where King Edgar sets terms for the appeal of judgments to the King. Or see the Dooms of King Athelstan wherein the concept of sanctuary in a church for an accused is codified (http://www.sourcebooks.fordham.edu/source/560-975dooms.asp) Or see *English Constitutional Sources* at pages 37 and 38 where William the Conqueror forbids capital punishment for crimes; or *English Constitutional Sources* at pages 77-79. And lastly see King Henry II the most important pre-*Magna Carta* king in our legal history who set indelibly (among many other things) the idea of *habeus corpus*, such that those in the king's own personal possessions including his princes were not beyond the law, and the idea of arrest warrants.

[35] *Re Secession*, Supra note 2 at paras 79-81.

PART II: ACTUAL QUESTIONS OF VIRES

2.1 - DEFINING AN AQV

In this paper I suggest a concept I call an "actual question of *vires*" and from this point on I shall call it an "AQV". An AQV is a question on whether an enactment or action taken *could ever* be taken, not whether the particular action taken is invalid for some other reason like *Charter* repugnance, or operation of some other law or principle. An AQV may be explained by comparing and contrasting between a law which is struck down on the grounds that the making party is not the one assigned to make it; from a law which is struck down not because the making party has not been assigned the power to make it but because the making party has, in making that law, caused the content of that law to go beyond its assignment of jurisdiction. This latter example we can call a "general question of *vires*" and similarly from this point on I shall call those a "GQV". A breach of the limitations and protections of the *Charter* would be an example of a GQV. Where a law-making body makes a law that goes beyond that making body's lawful assignment such that it is repugnant to the *Charter* it is a GQV. In an AQV the making party is trying to make a law it simply cannot make, not in part but at all; while in a GQV the making party is doing something they can do, at least in part, but for which what they are doing is being done beyond the limits of their assignment of authority under the *1867 Act* or is going beyond the *Charter*'s outer limits. Both result in a consequence that the impugned law is *ultra vires*. I liken the difference to a situation where someone seeks to build a specific type of structure on a particular field. In the case of an AQV the maker has built a structure they were not permitted to build in any way, but further they may also have built on a field they were not entitled to build on in any way. In the GQV case the maker is specifically empowered to build a type of structure *and* empowered to build that type of structure on the part of the field it has built the structure on, *but* the maker has *really* built a structure that is beyond the boundaries of that part of the field or constructed the structure in a way that incorporates a type of structural form they are not empowered to construct. In an AQV whether the maker can build *any* structure at all, whether the maker can build on that field *at all*, or whether the maker can build *that* type of structure on *that* field are joint and several examples of whether the very thing the maker is attempting to do can *ever* be done by that maker. Put simply an AQV is the most primary entertainment of whether a thing can simply be done, while a GQV concerns whether the thing done has been done correctly and within the proper limits assigned to that body.

2.2 - ANALOGICAL DIFFERENCES BETWEEN AN AQV AND A GQV

I should describe the differences between the field and the structure, and I am going to use an analogy of someone who is seeking a municipal building permit for the construction of a structure on their property as an *aide-de-camp*.

Now, picture someone who wishes to build a structure and seeks a building permit from their local municipality. For our purposes the building permit functions as the *1867 Act*. The permit establishes who (the permit holder) may build what kind of structure (our AQV structure) and where (our AQV field). Now I feel it is easier to describe a GQV example first and then move to the AQV example by contrasting it with the GQV example.

Our person is Robert the Builder ("Bob" for short) who has been granted a building permit and that building permit allows Bob to construct a 5 meter long, 3 meter wide, 3 meter high shed, and he can only do so using wooden materials and only to build this shed on his backyard lawn. Furthermore, Bob must construct the shed such that it is to be no closer than 1 meter from any adjoining property line. We can say that Bob has been empowered to construct a 5x3x3 meter shed made out of wood, this would be our assigned structural competence under the permit (the structure). Bob has also been assigned his location (or field) in which to construct said shed and that location is the backyard of his house provided the shed is no closer than 1 meter from any adjoining property line. Bob can therefore be said to have the competence to build this type of shed and also the competence of where he can build it. Now I will give some examples of unauthorized types of shed that Bob builds:

> GQV Example 1) Bob builds a 5x3x3 meter mixed wood and aluminum shed in his backyard instead of a wooden shed, but otherwise does not build within 1 meter from the adjoining property line. In this example he has built his shed in the backyard and no closer than 1 meter from an adjoining property line, so he has built the shed in the "correct" field. But Bob has built a type of structure that the permit has not assigned him structural competence to build as it is made of materials he was not allowed to use; Bob is in the correct field but has not built with correct materials.
>
> GQV Example 2) Bob builds a perfectly beautiful rustic oak shed in millimetre precision at 5x3x3 meters, and it is again more than 1 meter from an adjoining property line. But this time it is in the middle of his front yard driveway (for some reason). Bob has built a structure he had the competence under the permit to build as it is 5x3x3 and made of wood, and Bob has built the correct type of structure. However, Bob built it in a place, or for us on a field, that he was not competent to build upon and so Bob has built a correct structure on a field he was not granted competence to build upon.
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> GQV Example 3) Bob builds a 5x3x3 meter wooden shed and properly in the backyard but it spills over to be within 1 meter of an adjoining property line. Here the structure is correct, and the field is mostly correct, but he has exceeded the bounds of his assigned field. Bob has built the shed in such a way that it is sitting on a part of the field that he has not been granted competence over, even though the structure itself is competently constructed and most of it lays in an area of the field he was competent to build upon.

To summarise, the permit has empowered Bob the builder to build a 5x3x3 wooden shed, and to do so in a very particular and limited place. What we know is that the person who is empowered is Bob, what is empowered to be constructed is the 5x3x3 wooden shed, and where it may be built, Bob's backyard, so long as it is at least or more than 1 meter from the property line, that is the field. Bob has the ability to do each of these things but may individually breach one, two, or all of them. However, to borrow from earlier language we can see that there is granted in the permit something, *at least in part*, that Bob can do, he can build a wooden shed. It cannot be doubted that the shed project itself is something that Bob may embark upon in some way, whether he does it properly is a question of GQV. In our GQV Example 1, Bob was authorised to build that type and size of shed in that place, but not with mixed materials, there is *something* he can do but he did it incorrectly in erecting that example structure. In our GQV Example 2, Bob was authorised to build the shed as he did, the structure is fine, but he was not authorised to build it on his front driveway, but again those actions were *something* he could do. And in GQV Example 3, Bob has otherwise built a nice structure, and he built it more or less in the right place, but he built it in a way that spilled out beyond his grant into a field he was not to be in, but there is no doubt that there was *something* he could do, he was able to build the shed on the rest of the location that was not encroaching

within the 1 meter property line.[36] As can be seen in the three GQV examples Bob is doing one or several things he is explicitly contemplated as being competent to do under the permit but on the whole of the project he is doing them in a way that is incorrect, but *could* be done correctly. An AQV is a situation where Bob tries to build something that is not at all contemplated as authorised.

Now for an AQV example using the exact same parameters we gave above. Bob the builder is permitted to build a 5x3x3 wooden shed in his backyard so long as it is no closer than 1 meter from any adjoining property line. As follows, and I will describe, Bob does a set of actions that illustrate an AQV:

> AQV Example 1) Bob builds a swimming pool in his backyard instead of a shed.
>
> AQV Example 2) Bob builds a 5x3x3 wooden shed on his neighbour's backyard lawn.
>
> AQV Example 3) Not Bob but Frank, Bob's cousin, builds a 5x3x3 wooden shed but on Frank's own and discrete backyard.
>
> AQV Example 4) Or even further on example 3 and depending on how limited the permit is to Bob himself, Frank builds a 5x3x3 wooden shed in Bob's backyard but in this case it would be the idea that the permit that authorizes Bob to build the shed is so strictly interpreted as to mean *only* Bob can actually do the very physical work of construction, not Frank.

In each of these instances what goes wrong is that Bob (or Frank) is doing things that cannot ever be competent of them to do under the building permit. In AQV Example 1 the pool is not a shed under any circumstances, it is not merely the wrong materials it is simply not a shed. In AQV Example 2 the neighbour's backyard is not Bob's yard and (ignoring a purchase and transfer of the yard) it cannot be under any circumstances described as Bob's property. In AQV Example 3, Frank's yard is not Bob's yard. And in AQV Example 4 Frank is not the authorised agent to do the work and cannot be, Bob and Frank are not the same person. It is the case that in each instance a thing is being done that cannot be done under any contemplation permitted by the permit. The breaches by Bob and Frank are breaches that could never be "put right" under their grant of competence from the building permit, unlike under a GQV there is *nothing* Bob nor Frank could do to make the various examples comply with the building permit. In AQV example 1 Bob has built a structure that cannot ever be authorised in anyway on a field he has competence to build upon. In AQV Example 2, Bob has built a structure he is competent to build but on a field he cannot ever be authorised to build upon. In AQV Example 3 Frank builds a shed that complies with the description of the structure in the permit, but he is not the one granted the permit and he has built the shed on a field that cannot ever be authorised by that permit. And, in AQV Example 4 the wrong person is attempting to exercise authority that could never be granted to him by the permit. In these examples one can find the spirit of an AQV, and when applied to a government it can be roughed down to this question: is the government actor doing something that they could not nor ever could be permitted to do under their empowering permit (the *1867 Act*) at all?

[36] I note that GQV Example 3 is an example where parts of a law are struck as *ultra vires*, but the rest of the enactment can remain in place because the struck parts were not necessary for the rest of the structure to remain. For Bob this would be the equivalent of picking up and moving the shed within the proper limit without reconstruction. But in GQV Example 1 the shed needs to be completely dismantled.

2.3 - DISTINGUISHING AN AQV FROM PITH AND SUBSTANCE

I note that in several ways the structure part of our structure/field AQV limbs may be identified with the pith and substance test. However, as I will describe the pith and substance test is a test suitable for GQVs and while it may be suitable to most AQV situations in that anything that fails an AQV fails a GQV, GQVs and AQVs are not interchangeable.

The pith and substance test is the current test used by the courts in division of powers disputes and can be simplified as "what is this law *really* about?". The pith and substance test has been described as looking toward an impugned law's primary characteristic and has a handful of other just as helpful descriptions. The pith and substance test consists of two separate but often conflated limbs,[37] (1) establishing the character of the impugned law, and (2) classifying that impugned law as to its express or implied head of power under the *1867 Act*.[38] To describe and make distinct the structure from the field I propose the following scenario, but in the form of a province making an enactment so that we are talking in an analogy to the law. At the end of this example the application of the pith and substance test and its difference with an AQV should be apparent:

> British Columbia, like all provinces, has assigned to it a broad competence under section 92(13) over "property and civil rights in the province."[39] under that head of power we can conclude positively that the field is limited to those things that are or have found themselves in the province; and we can conclude in the negative that "property and civil rights in the province" does not include everything, for example the legislating for criminal wrongs, being that a criminal wrong is a blanket prohibition of unlawful activity, and is not a property nor a civil right.[40] Now say British Columbia[41] decides that it will institute a licensing scheme for all persons and corporations that calculate sale prices by weight. In this scheme, and for some entertainingly French Revolutionary like reason,[42] the legislature of British Columbia has it out for anything weighed in pounds and ounces and requires anyone seeking to calculate sale according to these imperial weights to possess a license from a newly established Commissioner for Proper Bulk Sale. The act further states that those not holding an imperial license cannot sell a product with a total calculated weight equal to a whole pound or multiples of pounds. There are no punishments to the natural person if one does so, so as not to risk constituting a criminal wrong, but perhaps the revocation of one's business license is possible. The act sets no licensure requirement for the use of metric

[37] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 118.
[38] This test can be found in countless cases, for the sake of an easy and quick look up you can see one such example here: *Re Employment Insurance Act*, [2005] 2 S.C.R. at para 8.
[39] *Constitution Act*, 1867, s. 92(13).
[40] For more on this see the late Peter Hogg: *Constitutional Law of Canada*, 5th Ed, Peter W. Hogg, on section 92(13); Lord Blackstone, *Commentaries on the Laws of England (Of Public Wrongs)*, Vol IV: "The distinction of public wrongs. from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; wrongs, or crime and misdemeanors, are breach and violation of the public rights and duties, due to the whole community, considered as community, in its aggregate capacity."
[41] I am picking on this province right now.
[42] During the French Revolution one of the revolutionary governments got so passionate about metric everything that at one point during the revolution they made or proposed the day consist of 10 hours of 100 minutes each instead of 24 hours made of 60 minutes each. This concept of decimal time was not a French invention as types of this had been used in places such as China in the past, however the drive to make all things metric is the reference.

> weights nor forbids the possession of imperial weights but merely limits itself to the prohibition of imperial weights in the process and conduct of selling goods in the province.

In our above example the province would appear to be regulating the civil right of buying and selling and the regulation of businesses within the province,[43] however what the legislative structure is truly about is the regulation of weights or measures which is an exclusive domain of parliament under section 91(17) of the *1867 Act*.[44] Facially such an idea is absurd and unimpactful to the average person, but the structure of our sample law is so constructed as to present itself as relating to property and civil rights in the province but in actuality is to eliminate imperial weights as an acceptable form of measurement and in so doing the Province has erected a structure which is one that regulates what weights and measures are acceptable and applicable. In our above example British Columbia is purporting to build on the field of property and civil rights under section 92(13) of the *1867 Act*, and there is little doubt that they are building their structure within the limits of that field as it is limited to the regulatory purpose of business, but the structure that was erected, the law itself, is one that regulates weights and measures which is a federal responsibility under section 91(17) of the *1867 Act*. In this way the building of an invalid structure on a valid field is caught by the pith and substance test quite well. When applying the pith and substance test one could characterise the law as one "relating to a business's use of imperial weights and measures in a sale".[45] Moving to the second limb, classification, the pith and substance test would probably classify the law as really being one under section 91(17) and not 92(13) and thus be *ultra vires* the competence of the province. I feel there is little doubt to the question that British Columbia could pass valid laws affecting weights and measures under the property and civil rights heads in other circumstances, one example could be employee safety in regulating commercial elevators, presumably the characterisation would in that circumstance be "a law relating to the rights and protection of employees in businesses and on commercial properties" and the classification would fit under perhaps section 91(13) where it is viewed as protecting the civil rights of employees to be safe from workplace harm or to sue employers for such harm. However, where the pith and substance test does not overlap with the AQV perspective is when a making body is not impermissibly colouring the structure so it appears to be under a head that belongs to a different making body but where the making party cannot touch the subject at all, no matter the heads of power it possesses or its attempts at colourability.

The concept of an AQV is based on the idea that there are certain subjects under the *1867 Act* for which the "field" or the "structure" is exclusively within the assigned competence of either Parliament and its executive to enforce, or the provincial legislatures and their executives. Where either the federal or provincial bodies seek to build a structure they are not authorized to build, or to build an authorized structure on a field they are unauthorized to build upon the question is "can this body even do this *at all*?" and not "Can this body do this in this way?". Conversely, a question of GQV is whether one or the other making body has gone too far or failed to follow direction, and a question of whether someone has gone too far presumes that there is an ability to at least go some amount of distance. Therefore, an AQV is whether the impugned party *actually* has been assigned the right to *even try* to build the structure it is building *and/or* whether that body is empowered to build that structure where it has. An AQV is not concerned about whether a body in building a structure on a field has gone too far beyond its grant or

[43] The regulation of businesses in the province has been held variously to be under section 92(13), 92(9), and 92(15) of the *1867 Act*.
[44] *Constitution Act*, 1867, s. 91(17).
[45] I am not saying that our sample law could not be characterised less charitably, but we must give the benefit of charity for explanatory purposes here.

done the construction incorrectly because no amount of construction is permitted. Where the pith and substance test focusses on the intent and purpose of the law to divine its empowering field and decide whether it has been built "to spec", where an AQV is triggered, it's analysis is done without any regard to the intent or legislative purpose of the enacting body. This means that where the subject is one of double aspect, paramountcy, interjurisdictional immunity, or ancillary effect, such a question is one of a GQV rather than an AQV. An AQV polices what is left to the true and clear exclusion of either the federal or provincial realms. An AQV could potentially be described as a last relic of the "watertight compartments" theory of division of powers interpretation that is not yet disposed or disposable under court interpretation of the *1867 Act*. The question is one of simple capacity of a body to even attempt the action, not whether the attempt made the grade.

2.4 - THE AQV TEST

At this point I have only conclusively identified one area of the *1867 Act* that I believe is clearly an AQV, that is the provinces' taxation power under section 92(2). I have also hinted, but without concluding, that section 92(16) may also be one such power subject to an AQV test as parts of the language apply internal limitations to that head of power. It may also be the case with further development that the AQV test is unique to the provinces due to Parliament's POGG and residual power grants, I am as of yet unsure on this too. Gauging from the provincial taxation power alone I suggest that an AQV test can be applied in both general and specific situations. It is general situation when the investigation is triggered any time someone asks, "can this body do this at all". It is a specific situation where the thing being done can only be done under a single head of power for which that very head of power sets the conditions for accomplishing that thing. For the taxation power as we will see in Part III, it is a specific situation as the provincial taxation power under section 92(2) has its own inbuilt test that applies regardless of whether there is a conflict with Parliament. An AQV test may be described as follows:

1) Is the general competence of the making body to do the impugned action *at all* being challenged?
2) Is the making body's claimed competence located within a single head of power, or can it be cobbled together from multiple heads?
3) If the making body's claimed competence is located only within a single head of power does that single head of power contain specific limits on the making body's competence? And
4) Applying this specific head of power's limits, has the making body adhered to that single head of power's limits?

A 'no' on limb one will mean the impugned action is suited to a GQV ending the AQV inquiry. A 'no' on limb two will also mean the impugned action is suited to a GQV as the making body has multiple heads to justify the action, having such the question is suitable to the characterisation and classification of a GQV to determine which ones, ending the AQV process. A 'no' on limb three means that the head of power being analysed gives no conditions of application and so the law will only be *ultra vires* to the extent it trenches upon the other making body's jurisdictional competence, suitable for a GQV, this ends the AQV process. A 'yes' on limb four means the making body has complied with the limits of the head of power they are acting under, but a 'no' under limb four means the making body has failed to act under the limits of that head of power, it does not matter what or if the other making body's jurisdiction is

affected, the *1867 Act* has not approved that impugned action. Therefore, under an AQV inquiry a making body's action will be *ultra vires* when the limbs are answered as such: (1) yes, (2) yes, (3) yes, (4) no.

The lion's share of the test is taken up by the latter two numbers and that is why it can often be summarised, more or less, as "Can this body do *this* at all".

2.5 - REMEDIAL NOTE ON QUESTIONS OF TRUE VIRES

A remedial note, to make sure I do not confuse administrative law practitioners with a similar sounding phrase I need to clarify by what I mean by "actual *vires*" compared with the similar sounding administrative term of "a question of true *vires*".[46] Prior to the 2019 landmark decision of *Vavilov* the field of administrative law— specifically judicial review—had a term called "questions of true *vires*". A question of "true *vires*" was previously summarised by the Supreme Court of Canada as "[a question of true vires] is confined to instances where the decision maker must determine whether it has the authority to enter into the inquiry before it."[47] This term has become deprecated and is likely discarded in light of *Vavilov*.[48] A question of true *vires* was concerned with whether an administrative decision maker had the jurisdiction under their empowering statute to engage in the inquiry before them rather than whether the legislator who made the empowering statute was assigned that power under the *1867 Act*. This question was often at play on whether the standard of review in the proceeding was correctness or reasonableness. There is some similarity between "a true question of *vires*" with my "actual question of *vires*" in that at the heart of both there is a question of whether the very activity can be done at all. The "question of true *vires*" concerns the actions of a delegated tribunal body, while one of "actual *vires"* is focussed beyond that and applies to the actions of the legislative or executive body operating expressly as assigned by the *1867 Act*. A delegated body has no inherent jurisdiction while a legislative body may possess some amount of inherent unspoken authority. I should also note that *Vavilov* has maintained questions of jurisdiction between two administrative bodies, general questions of law of central importance, and constitutional questions as questions still to be considered under the standard of correctness and are related to the idea of the assignment of powers under the *1867 Act* for which I view the remarks in *Vavilov* as a buoy to the concept of AQVs.[49]

[46] I should have come up with a better acronym.
[47] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* [2018] 2 S.C.R. 230 at para 31.
[48] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras 65-69.
[49] *Ibid*, at para 17.

PART III: PROVINCIAL TAXATION AND APPLYING THE AQV TEST

3.1 - PROVINCIAL TAXATION AND WHY THE QUEBEC VACCINATION TAX IS AN ACTUAL QUESTION OF VIRES

The legislature of Quebec appeared to be enacting a tax that only applies to persons whose individual biological status did not meet or reflect a definition set by the province and for which if that person takes steps to meet that definition—presumably by getting a qualifying vaccination—the liability of that tax is thereafter removed from that person. We will likely never know for sure whether the planned "contribution" was to be a tax or whether it would have been called a fine or a fee. [50] Whether the contribution was to be a tax or whether it was to be a fine affects this evaluation. Were the tax to be just that, a tax, the question would be an AQV; were the tax to be a fine, fee, or penalty, then the question may still be an AQV depending on how it was implemented but would more likely be a GQV. I discuss as part of Part III that if the contribution was instead formulated as a fine, it would run up against the *Canada Health Act* and the contribution would be unconstitutional by way of conflict with that federal act under the paramountcy doctrine or as an impermissible colouring that trenches upon federal heads of power under section 91. That said, it is necessary to describe the taxation powers in Canada and what a tax is versus a fine and versus a fee. In describing the taxation power available to the province one will see as with our building permit example that only a very specific type of structure and field is allowed to the provinces, thus making the provincial taxing power an AQV.

The *1867 Act* assigns a taxation power to both Parliament and the provincial legislatures, but they are not equivalent assignments. A broad and open-ended grant of taxation power without limitation is given to Parliament under section 91(3) which states "The raising of Money by any Mode or System of Taxation." This plenary wording was recognized by the Supreme Court of Canada in *Re: Inflation Act*.[51] In contrast, the provinces are given a distinctly limited taxation provision under section 92(2) which states "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.".[52] The provincial taxation power is limited to being a "direct tax", and "to the raising of a Revenue for Provincial Purposes". As mentioned, the federal power is plenary and complete, it covers all matters of taxation that do or could exist, and it can be said that the federal power covers the entire conceptual field of taxation. Remembering back to our Bob the Builder examples the *1867 Act* allows the Federal Parliament to build on any part of the property, front yard, back yard, Frank's yard… and within 1 meter of an adjoining property line. So, presuming no colourable or unacceptable purposes are present,[53] the federal parliament

[50] Different publications variously use the term "tax" but in some interviews the Quebec Premier uses "health contribution", this is not a semantic nor meritless difference as whether the levy is a "tax" or a "contribution" and what distinction those have can make the difference between whether there is a valid regulatory regime for provincial regulation or whether it is a tax, a fee, or a fine. See an example of this word usage: Francois Legault speaking in English saying "health contribution" https://youtu.be/6iGAeITCZ3A (the Montreal Gazette).
[51] *Constitution Act*, 1867, s. 91(3); *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 at page 391 [*Re: Anti-Inflation*].
[52] *Ibid* s 92(2).
[53] See an example of a colourable intrusion by the federal government into provincial jurisdiction over property and civil rights under the guise of taxation in: *Reference re legislative jurisdiction of Parliament of Canada to enact the Employment and Social Insurance Act (1935, c. 48)*, [1936] S.C.R. 427; and *Reference Re Validity of Section 5(a) of*

can pass a law to tax any item or service that a province can and certainly on those things that the provinces cannot. On the other hand, a provincial legislature's taxation power is highly constrained and contains only such part of the field of taxation that is direct and that is for the purpose of the raising of provincial revenue. Like with the Bob the Builder examples, we could say that the provincial legislature unlike the federal parliament is limited to, perhaps, the backyard of Bob alone, and a 5x3x3 meter wooden shed. The federal parliament can legislate a tax for the purpose of raising revenue,[54] like the limited provincial power, and it can also do so by means of direct taxation,[55] just like the more limited provincial head of power. And yet further, the federal parliament can legislate a tax to encourage moral conduct or discourage "societally damaging" behaviours,[56] for the regulation of trade and commerce in conjunction with section 91(2),[57] debt purposes,[58] naturalization purposes,[59] and more, it can legislate a tax that is direct or indirect. Put simply, the federal taxation power consists of the entire field of that thing one could call a tax. The wording of "any Mode or System of Taxation" and the lack of limits on a tax being direct or indirect gives an unlimited boundary on the structure and field open to Parliament; while in contrast the words "direct taxation" and "for provincial purposes" and "for the raising of a revenue" limit the structure and field available to the provincial legislatures.

While taxes often feel punitive to many of us and are sometimes described in a way as if they represent a fees-for-services system (I am thinking of the "I pay your salary/I pay my taxes" lines) a tax is different than a fine, a fee, a levy, or a license. A fine is punitive, it is a punishment for the breach of a regulatory scheme or criminal prohibition, it is a form of conceptual *wergild* for breaking a "thou shall not". Fees, levies, and licenses, are limited to regulatory schemes and must have their root in being necessary to funding, administering, or affraying the costs associated with administering the regulatory regime.[60] The important thing about fees, levies, and licenses, is that a regulatory regime is not a criminal law, one must opt into a regulatory regime one may not be opted into one without a choice.[61] For taxes and criminal laws one is opted in whether they like it or not. All are presumed to have to pay tax unless given an exception after the fact, and all are subject to the same criminal prohibitions… ideally, there is no "rules for thee but not for me".[62] But the province can charge you fees or licensing requirements for driving a car because a person does not have to drive a car or get a license, they can opt out by not participating. I would suggest that because picture bearing government issued identification is necessary this may be the reason one can get an alternate identification card in every jurisdiction in Canada and can fill out a form to get that identification for free lest the province be establishing a tax on identity. But I digress, in summary a tax can be limited to a regulatory setting, but it need not be, a tax can trigger on the general

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Tre Dairy Industry Act, Canadian Federation of Agriculture v. Attorney-General of Quebec et al. Margarine Case, 1950 CanLII 342 (UK JCPC).

[54] *McLeod, Surviving Executor of Curry Estate v. Minister of Customs and Excise / McLeod v. Minister of Customs and Excise / In re Income War Tax Act, 1917*, [1926] S.C.R. 457.

[55] Supra note 37, at para 401.

[56] *RJR-MacDonald*, Supra note 3 at para 38; *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804 at para 63.

[57] *British Columbia (Attorney-General) v. Canada (Attorney-General*), 1923 CanLII 426 (UK JCPC).

[58] *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 at page 473.

[59] As noted in the "Chinese Head Tax" history and as discussed in passing *in Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at para 75.

[60] See for example the entire discussion in *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 SCR 929.

[61] For example, see *Rio Hotel Ltd. V. New Brunswick (Liquor licensing Board)*, [1987] 2 SCR 59 at para 42 [Rio Hotel].

[62] Editorial note: Purported covid-19 regulations contrasted with the perplexing health based criminal exemptions for recreational drug use of addicted persons seems to put this principle into question.

occurrence of a thing, be it a sale of goods, the cycling of a solar year, or on the export of goods. In contrast, a fee, levy, or license, is limited to being for and within the regulatory regime for which it is appurtenant to.

What the *1867 Act* makes clear is that a province is constrained both in field and structure as the residual legislative powers are granted to Parliament not the provinces. The provincial field of taxation is limited to that part of the entire field of taxation for the raising of funds for the provincial revenue. The structure permitted to the province in levying for the provincial revenue is limited to being in the structural form of direct taxation. While normally the pith and substance test may evaluate the purpose and thrust of an impugned law to establish what head of power that law actually falls under, the provincial power of taxation is singular, limited, defined, and definite, and so the pith and substance test serves no meaningful nor additional purpose. A province has no other head of power but section 92(2) if it wishes to impose a non-regulatory regime tax. A province can only make a tax under the taxation power and for the purposes and in the ways listed in that power (direct, for provincial purposes, and for the raising of a revenue). Provincial grants of power under section 92, unlike the federal grants under section 91, often include, albeit using positive terms to delineate the limits, the definition and limit of the specific head of power. Another example is seen in section 92(16) by use of the term "merely local" demonstrating a direct limit on that head of power when the province invokes it but I submit few powers are as hemmed in as the provincial power of taxation. Provincial taxation must be for the purpose of raising of a provincial revenue and must be done only by direct taxation. Quebec and the other provinces are limited to making taxes for the raising of a provincial revenue by direct taxation only. By section 92(2) setting the very limits of structure and field we know that a tax is an AQV as the sole power of that action is located and delineated within that head of power. To the extent that the abandoned Quebec tax was to be a tax then our question regarding the vaccination tax is:

Could the *1867 Act* section 92(2) *ever* empower Quebec (or any province):

As I will detail in Part III, the answer is No.

To the extent that the abandoned Quebec tax was to be a fee, fine, or license, the question would be a GQV under the pith and substance test, and appear (among a number of other possible variations depending on its structure) I have diagrammed it as follows:

Is *this* Act of the Province of Quebec, characterised and classified, *ultra vires* the Province of Quebec (or any province):[63]

Characterisation	Classification	Conflict	Exception
A law that fines/fees/levies or licenses persons located in Quebec for the use or potential use of Quebec's public health system	Is such a law one the province is competent to make under one or more of sections: • 92(2) – taxation; • 92(7) – establishment and maintenance of hospitals etc…;	And is this law one that is otherwise not: 1) A colourable trenching on exclusive federal jurisdiction;	And if in conflict, is the conflict merely incidental to an otherwise competent provincial

[63] I note that only column one (characterisation) and column two (classification) form formal parts of the pith and substance test. Columns three (conflict) and four (exception) are additional considerations dependent on each case's factual scenario.

	• 92(13) – property and civil rights; • 92(15) – the imposition of punishment by fine, penalty, or imprisonment; or • 92(16) – Generally are matters merely and local or private in nature to the province	2) Affected by interjurisdictional immunity; 3) Affected by the double aspect doctrine; or 4) Put in abeyance by operation of federal paramountcy.	head of power?

As I will touch upon in Part IV, the GQV answer *may* also be a 'no', however without the formal text of the withdrawn non-vaccination tax it is speculative and hypothetical.

3.2 – SETTING THE STAGE OF THE PROPOSED QUEBEC VACCINATION TAX

I trust I have now established how the discussion of the Quebec Tax is an AQV to be approached as a black and white question of legislative competence. As a tax there is no question here of federal overlap, so we need not invoke arguments of paramountcy even if they did apply, there is no federal tax on nonvaccinated persons.[64] Taxation is not some question of vague double aspect as both the federal parliament and the provincial legislatures have their boundaries clearly established, the former with essentially none and the latter with iron curtain levels of limitation. And there is no question of interjurisdictional immunity. Further, while there may be a question suitable for the pith and substance test, and I will discuss such, as to whether the substance of the tax is actually masquerading as a federal section 91 power, for provincial taxing purposes this pith and substance question is ancillary and it is not necessary to decide which head of power the province is using, as it may only use one, section 92(2) if it is imposing a tax. The pith and substance test is used to inquire about whether a law masquerading under one head power is actually really the product of another validly or invalidly enumerated head of power, for provincial taxation this is not up for debate for while the federal parliament can pair its taxation power with other of its heads of power for purposes of criminal, debt, or other reasons, the province may not. The province may only levy a tax for the purposes of the raising of provincial revenue. Whether a tax is really an exercise of section 91 federal powers is a GQV. Whether the province can make a tax that is not for purposes of raising provincial revenue and/or is not direct is an AQV. The proposed Quebec tax therefore is challengeable first as an AQV and second as a GQV. For the reasons that follow in this part the expected tax fails the AQV test.

3.3 - THE RAISING OF REVENUE AND IMPROPER PURPOSES

As I have rather repetitiously laid out, section 92(2) limits a provincial tax dramatically. There are three criteria in the provincial taxing power, first that the tax is direct,[65] second that the tax is ". . . in order to the raising of a Revenue" and third is "for Provincial Purposes.".[66] One may immediately jump to the words "for provincial purposes" and conclude that a tax will be valid if it raises any revenue, as in takes in any amount of money, for any provincial purpose found in section 92(1) to 92(16), however this is not how the highest courts of our land have interpreted this. The key words are "raising of Revenue" ***and*** "for Provincial Purposes". As I hinted earlier in Part II the case of *Re Alberta Statutes* gives an answer both to what a provincial purpose is and what is meat by the raising of revenue. The same case is therefore to be evaluated twice. On the provincial purpose limb, it is the decision of the Supreme Court of Canada, while on the raising of revenue limb it is to be the Privy Council's decision of the same case. I turn to the provincial purpose Supreme Court of Canada decision first.

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[64] On this paper's reasoning, a federal tax on nonvaccinated persons would presumably pass the AQV portion of this test and be subject to scrutiny under the pith and substance of a GQV.

[65] Whether a tax is "direct" or "indirect" has been a bone of contention well back to the Privy Council days. The Privy council declined to apply a clean definition from John Stuart Mill and instead one may describe the question as whether the tax is effectively carried on to another consumer or born by the provider. This discussion is too broad to be sandwiched into this already dense article.

[66] *1867 Act*, section 92(2).

In *Re Alberta Statutes* the province of Alberta had three enactments under constitutional reference: the *Credit of Alberta Regulation Act*, the *Accurate News and Information Act*, and importantly for our purposes the *Bank Taxation Act*. I discussed the nascent entrenchment of such things as political expression and freedom under the *1867 Act* and in doing so mentioned *Re Alberta Statutes*, it is in relation to the *Accurate News and Information Act* part of the reference that those comments were made, and it is worth a read; however, it is the *Bank Tax Act* part of the reference which is pertinent here. The three acts concerned a legislative scheme by the Social Credit party of Alberta to implement a titularly named Alberta social credit system in place of or alongside the Canadian dollar and banking system.[67] One facet of this scheme was Alberta's attempt to levy a tax on banks that operated within the province, and as a foreshadow of what is to come the purpose of the tax appeared to be to render a burden on banks for the purposes of propping up or supporting the social credit scheme. Banking and the regulation of banks is assigned to the federal parliament under section 91(15).[68] The Supreme Court of Canada ultimately found the entire set of statutes *ultra vires*, with all the justices joining the majority decision or writing concurring opinions. The question for the *Bank Taxation Act* was put rather simply by the plurality as "is it an enactment in exercise of the provincial power to raise a revenue for provincial purposes by direct taxation, or is it legislation which, in its true character, relates to Incorporation of Banks and Banking[?]"[69] The answer was that the tax impermissibly attacked banks and banking. What the Supreme Court of Canada focussed on was the purpose behind the tax. The court read the tax in the surrounding context of the social credit system legislation,[70] considered the rate of the tax,[71] and that the tax was discriminately levied on "credit institutions" rather than a general class of persons.[72] In ruling that the *Bank Taxation Act* was *ultra vires* the court summed up its opinion as (emphasis added):[73]

> . . . It is plain on the face of the Bill that the purpose of it is not to raise a revenue for provincial purposes, *and* equally plain that taxation of this character throughout Canada, if operative, would completely frustrate the purposes of the *Bank Act*.
>
> . . .
>
> The specific ground on which, in our opinion, this legislation is invalid is: It is not competent to the provinces of Canada, by the exercise of their powers of taxation, to force banks which are carrying on business under the authority of the Bank Act to discontinue business; and taxation by one province on a scale which, in a practical business sense, is manifestly prohibitive is not a valid exercise of provincial legislative authority under section 92. Such legislation, though in the form of a taxing statute, is " directed to " the frustration of the system of banking established by the Bank Act, and to the controlling of banks in the conduct of their business.
>
> The answer, therefore, to the question concerning this, Bill is that it is ultra vires.

The concurring judgments of the rest of the justices were complimentary. Justice Cannon agreed that the tax "does not seek to raise revenue for provincial purposes but, in its true character, aims ... to prevent the banks from conducting their legitimate business."[74] Justice Kerwin adds "… these provisions leaves no

[67] *Re Alberta Statutes*, Supra note 21, at pages 110-112, and 117-118.
[68] *1867 Act*, section 91(15).
[69] *Re Alberta Statutes*, Supra note 21, at page 127.
[70] *Ibid*.
[71] *Ibid* at pages 130-131.
[72] *Ibid*, at page 156.
[73] *Ibid*, at pages 130-132.
[74] *Ibid*, at page 141.

doubt in my mind that the Act is an attempt to regulate and control banks and banking…"[75] and Justice Hudson concurred and added little further. I note the majority found the tax as not being in purpose for the raising of revenue for provincial purposes and then further found it also conflicted with federal powers which demonstrates that a provincial tax can fail under section 92(2) all by itself and it need not trench upon the powers of its federal neighbor to be invalid its purpose can be invalid with or without trenching upon its legislative neighbour.

In sum, the ruling of the Supreme Court of Canada in *Re Alberta Statutes* establishes that the provincial taxing power is bound by necessarily being (1) a raising of revenue, and (2), for *valid* provincial purposes. While valid provincial purposes may often be invalid *because* they impermissibly trench upon a federal head of power under section 91, it is not only where there is such a trenching that a provincial purpose will be necessarily invalid. It will be where it is not for the purpose of raising revenue.

Two decades later in *Texada Mines Ltd. v. Attorney-General of British Columbia* ("*Texada"*)[76] the Supreme Court of Canada vacated a British Columbia iron ore taxing statute on similar grounds as *Re Alberta Statutes*, namely that the purpose of the tax was an attempt to coerce the iron resource industry to build a smelter and smelt iron within the province and the tax was not to raise revenue for provincial purposes. The court remarking "in my opinion, the true nature and purpose of the legislation is something other than the raising of revenue for provincial purposes under head 2 of s. 92."[77] The *Texada* case helps illustrate that the purpose of the tax simplicitor, even when ignoring the revenue generated, can be determinable to the tax's validity, however it also appears the very raising of the revenue itself can also be determinable of the tax's purpose. It is the Privy Council's reasons in dismissing Alberta's appeal from the Supreme Court in *Re Alberta Statutes* that we are then presented with the idea that "the raising of a revenue" and "for provincial purposes" may be joint or several such that a provincial tax can fail for not having a valid provincial purpose *or* not really being an instrument for the raising of a revenue.

Alberta's appeal from the Supreme Court to the Privy Council met with defeat.[78] But it is the opinion of Lord Chancellor Maugham, for the Board on the "raising of revenue" portion of section 92(2) that I turn to now. Lord Chancellor Maugham notes rather strongly that (emphasis added): [79]

> It may be stated at the outset, if indeed it is not self-evident, that <u>the mere fact that revenue to a greater or smaller amount would be raised in the Province by a highly selective measure of this unusual character is not sufficient to justify it as coming within s. 92</u>. Under the guise of a discriminatory taxation in the Province it would be easy not only to impair, but even to render wholly nugatory the exclusive legislative authority of the Dominion over a number of classes of subjects specifically mentioned in s. 91 by making them valueless…
>
> ...It is not competent either for the Dominion or a Province under the guise or the pretence or the form of its own powers to carry out an object which is beyond its powers…".And further "[the *Bank Taxation Act*] presents no serious difficulty… it is plain that the taxation is aimed simply at banks… <u>it is strange to find the Province singling out "in order to the raising of a Revenue for Provincial Purposes," banks and savings banks and no other wealthy corporation, body or persons in the province</u>. [80]

[75] *Ibid*, at page 149.
[76] [1960] S.C.R. 713 [*Texada*].
[77] *Ibid* at pages 724 and 725.
[78] *JCPC Alberta Statutes*, Supra note 20 at page 443.
[79] *Ibid*, at page 437.
[80] *Ibid*, at page 439.

It is Lord Chancellor Maugham's remarks in the *JCPC Alberta Statutes* decision that demonstrates that a tax's purpose levied under section 92(2) is not merely settled upon the occurrence of the raising of revenue alongside some other claimed or elucidated provincial purpose, but also the occurrence of raising that revenue must be a necessary and legitimate goal of the tax, not a tool or excuse for it. That a tax actually has a goal of raising revenue is further demonstrated in another Privy Council case from the same year where the Board struck down a British Columbia lumber taxing statute in *MacDonald Murphy Lumber Company*.[81] Similar to the later 1960s *Texada* case; *MacDonald Lumber* concerned a provincial statute that taxed lumber in a way that was in purpose an unlawful indirect (excise) tax. Being indirect and not direct the tax violated section 92(2) but furthermore it trenched upon the federal power over excise taxation and trade and commerce under section 122 and 91(2) of the *1867 Act* respectively. Lord Macmillan writing for the Board took notice that upon evaluation of the effect of the tax it operated such that the more the obvious purpose of the tax was complied with (selling locally instead of exporting), the less revenue would be generated by the tax and so the tax had the purpose of not really aiming to generate revenue for the province but to accomplish an ulterior purpose of compelling the taxed to do or refrain from doing a thing. His lordship at pages 723 to 724 remarking:

> "… the object of the tax is to encourage the utilisation within the Province of its home-grown timber and to discourage its exportation. The success of the tax, if this be its object, will thus be measured inversely by the revenue which it yields, which is not the normal characteristic of a tax impose "in order to the raising of a revenue for Provincial purposes."

From the four cases I have just discussed two primary conclusions can be made. From the two Supreme Court of Canada decisions in *Ref Alberta Statutes* and *Texada* a province cannot accomplish an ulterior non-provincial purpose through the section 92(2) power of taxation. From the Privy Council in the *JCPC Alberta Statutes* and the *MacDonald Lumber* decisions it is further clear that there will not be a provincial purpose if the tax is not really for the raising of a revenue. While a provincial purpose will be missing if it impermissibly trenches upon a federal head of power, such a purpose can also be missing where its very goal is not really for the taxation or the raising of a revenue. Those latter invalidations apply regardless of the impugned laws conflict with the federal powers.

While we may have had to travel somewhat of a convoluted road to patch together the decisions of the JCPC and the Supreme Court of Canada, the decisions are coherent and inline with the division of powers under the *1867 Act*. As stated in *Re: Inflation Act* and in section 91(3) of the *1867 Act* the federal parliament is given the broad and open-ended taxing power. Conversely as we have discussed in the above four cases and as found in section 92(2) of the same act, the provinces are given a highly constrained power of taxation. Furthermore, the federal parliament is assigned the plenary and residual legislative power in general while in *Re Initiative* the provinces have no residual power and must act only within section 92(1) to 92(16) of the *1867 Act*. This means the federal parliament fills any uncovered fields of legislative power while the province is limited to its sixteen fields[82] such that a province can *never* do anything not assigned to it, there is no residual 'wiggle room' for a province. When a province wishes to rely upon its taxation power under section 92(2) it therefore must ensure the tax is, on top of levied directly, done so (1) "for the raising of a revenue" and (2) "for a Provincial purpose". Where the

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[81] *MacDonald Murphy Lumber Company v. British Columbia (Attorney General),* 1930 CanLII 329 (UK JCPC) [*MacDonald Lumber*].

[82] There are other occult grants of competence like sections 92(A), or 95, and some other powers are found in other acts that are part of the Constitution but are not found in the main two documents, e.g. *Statute of Westminster 1931* (UK).

province trenches upon *something* that belongs to the federal parliament under section 91, it will not be provincial purpose and therefore *ultra vires*. And, when a province seeks to accomplish *anything* with a section 92(2) tax that is not for the purpose of the raising of a revenue, it too will be *ultra vires* whether or not it is trenching upon section 91.[83] It is appropriate at this point to cite the Supreme Court of Canada in *McKay et al. v. The Queen*:

> It is scarcely necessary to add that, just as the legislature cannot do indirectly what it cannot do directly, it cannot by using general words effect a result which would be beyond its powers if brought about by precise words.[84]

3.4 - THE TAX HAS AN INVALID PURPOSE

The Quebec plan to tax nonvaccinated persons and presumably lift that taxation burden should they thereafter become vaccinated is not a proper purpose. Just as Alberta's Social Credit party's social credit purpose was to inhibit banks so to support their novel currency plan, the purpose here appears quite blatantly to be that Quebec sought to cause financial hardship on nonvaccinated persons to coerce their participation into Quebec's vaccination scheme. Just as Alberta sought to put financial hardships on banks and credit institutions to coerce support of their social credit scheme, Quebec was seeking to put financial hardships on nonvaccinated persons to coerce them to support the Quebec social vaccination scheme. The Quebec taxation plan also appears similar to the *Texada* case such that in that case British Columbia was not seeking to raise revenue or administer a regulatory scheme but to compel a certain group of corporate persons to construct a smelter. In the *Texada* case as in here, the purpose of the Quebec tax appears clear, it is to inhibit or punish persons not supporting a desired provincial policy so that those same persons would comply with what the province wanted them to do, and it was not for the raising of a provincial revenue let alone for a provincial purpose.

The Quebec tax did not have a proper provincial purpose, it had an ulterior purpose.

I now move to the quantum of the tax as the quantum of a tax may also give legislative evidence and reveal that a tax is not for the purpose of the raising of a provincial revenue when analysing its practical effects. How this differs from the "provincial purpose" appears more so to be that it is evidence of or against the existence of a provincial purpose. Where a provincial purpose might be apparent in a tax, that purpose may be undermined if the structure of that tax is such that the more it is complied with the less revenue it generates.

[83] *JCPC Alberta Statutes*, Supra note 20, at page 442, argument from *modus tollens*, the *ultra vires* finding of a provincial statute does not render the conclusion of the same matter *intra vires* of Parliament meaning a provincial statute can be *ultra vires* by itself, whether or not it is in conflict with Parliament under section 91, although that will be the most common reason.
[84] [1965] SCR 798 at page 806.

3.5 - THE TAX'S SUCCESS DEMONSTRATES IT IS NOT FOR RAISING REVENUE.

With this I turn to the earlier mentioned *MacDonald Lumber* case. In *MacDonald Lumber* British Columbia levied a tax on timber but rebated the near entirety of the tax if that lumber was processed in mills in British Columbia such that the higher the compliance with the provincial policy the less tax revenue would be generated. Turning specifically to the remarks of Lord MacMillan I shall reproduce them again even though I did so earlier but this time with a specific emphasis:

> … the object of the tax is to encourage the utilisation within the Province of its home-grown timber and to discourage its exportation. The success of the tax, if this be its object, will thus be measured inversely by the revenue which it yields, which is not the normal characteristic of a tax impose "in order to the raising of a revenue for Provincial purposes.

In *MacDonald Lumber* the remarks of Lord MacMillan were pivotal in determining that British Columbia was really trying to coerce local lumber milling in a way that was aimed at preventing cheaper exportation to Washington State, and thus the tax was for an improper purpose, excise taxation.

I submit it is safe to say, based on the Quebec tax idea, that Quebec would cease to demand the tax on nonvaccinated persons who became vaccinated and that this would be a specific part of the taxing legislation. Just as the Board in *MacDonald Lumber* saw through the "tax" in British Columbia because its revenue would shrink with increasing compliance, so too would that be the goal and effect in Quebec. As their "tax" succeeded there would be fewer and fewer persons to draw revenue from until there were none. That is not a tax with a purpose for the raising of a revenue, but for compelling a behaviour, such a fact would doubtless be important in a *Charter* challenge too, but this is not our scope.

3.6 - APPLICATION OF THE AQV TEST TO THE QUEBEC VACCINATION TAX

Now to apply the four limb AQV test to the Quebec vaccination tax. The question may be stated as this "Can the province of Quebec levy a tax on persons not having a certain condition of their body, *at all*?".

Limb 1) Is the general competence of the making body to do the impugned action *at all,* being challenged?

This limb is the entrance gate to ensure a question clearly suitable to a GQV is treated as a GQV and not an AQV. Here the question can be more directly paraphrased as "Can Quebec levy *a tax* on nonvaccinated persons *at all/ever*". Paraphrased this way, the question is asking about sheer competence; it does not ask "can Quebec levy a tax on nonvaccinated persons *in this way*" but asks "*at all/ever*". In this case the government of Quebec was to levy a tax on nonvaccinated persons, and the question is whether they ever could have such a taxation ability, not about whether they have some sort of jurisdiction that is being breached. As the very ability to levy a tax on persons for vaccination status is being challenged *in toto* we have our answer to limb one.

The answer to this limb is yes, the general capacity of the province to do the impugned action at all is being challenged, and not a particular way of doing the impugned action.

Limb 2) Is the making body's competence located within a single head of power, or can it be cobbled together from multiple heads?

As detailed *ad nauseum* in Part II, the provincial taxing power is located within a single head of power, it is not cobbled from other heads. If a province wishes to tax it must abide by section 92(2) of the *1867 Act* alone, no other power is available to a province for taxation. While a province may levy fees, fines, or taxes, for the purposes of defraying a valid provincial regulatory scheme under section 92(9) (think of licensing bars and restaurants) there is no regulatory scheme covering people's bodies *simplicitor* and if there could be one it would be the federal criminal law power. As there are no other heads to consider we have our answer to limb two.

The answer to this limb is yes, the claimed competence is found only in the head of power section 92(2).

3) Does the single head of power contain specific limits on the making body's competence?

As I also discussed *ad naseum* in Part II, the taxation power has specific limits built into it. The provincial tax must be (1) [For the] raising of a revenue, and (2), [F]or valid provincial purposes. Being a tax, the province must meet these conditions of section 92(2) or the tax will not be *intra vires*. As the taxation power and the case law demonstrates that provincial taxes under section 92(2) must be for the raising of a revenue and for a provincial purpose, the head of power has specific limits within it, therefore we have our answer to limb three and our test we apply for limb four.

The answer to this question is yes, the claimed single head of power contains specific limits on the making body's competence.

4) Applying this single head of power's limits, has the making body adhered to that single head of power's limits?

It is this limb that the heavy lifting is done. The limits of the head of power have been determined at limb three, the tax must be direct and for (1) the raising of a revenue, and (2) for valid provincial purposes. A failure of either limb results in the tax being *ultra vires*. The presumed vaccination tax would fail both limbs one and two.

For limb one the tax must be for the raising of a revenue. This would fail for the reasons I hinted at earlier in the discussions around *MacDonald Lumber* and more specifically the words of Lord MacMillan. Presumably the tax being levied on nonvaccinated persons would cease to be levied on the same persons once they became vaccinated. Therefore, the more the population complied with the purpose of the tax the less revenue the tax would bring in. This would clearly demonstrate that the tax was not for the raising of a revenue but for the coercion of a group of the population, this is not a tax for the raising of a revenue but for the furthering of a provincial policy, it thereby fails.

Additionally, notwithstanding that the tax would not be for the raising of a revenue, the tax would fail as not being not a valid provincial purpose. In *Re Alberta Statutes* the purpose was coercive toward banks to comply and support a policy or plan of the province, taxation was the tool not the purpose. Similarly, it would seem inescapable that the Quebec non-vaccination tax, ceasing to be levied on the same persons

upon vaccination, would be anything different than that in *Re Alberta Statutes*. The purpose also tracks closely with *Texada* where the purpose was to coerce the iron mining industry to build a smelter by taxing them unless they refined (and thereby built) a smelter in British Columbia, those who refined the ore in British Columbia would pay no such tax. The purpose of the Quebec tax is to coerce a behaviour and not to function as a tax, it thereby fails.

As the operation of the Quebec non-vaccination tax would result in less and less revenue the more its legislative objective was complied with, it is not for the purpose for the raising of a revenue. And, as the legislative objective is for coercing a group of persons to comply with a goal of the government, the purpose is not valid.

The answer to this question is no.

3.7 - CONCLUSION TO THIS PART

The Quebec tax on the nonvaccinated is not, nor can ever be, a tax pursuant to section 92(2) of the *1867 Act*, it is thus *ultra vires in toto* the province of Quebec. The grant of power to the provinces over taxation —the AQV field— is narrowly tailored to only allow the province to create a tax that is both, for the raising of a revenue, and for valid provincial purposes. Quebec was seeking to legislate a tax on non-vaccinated bodies—the AQV structure—which targeted a group of persons not for the purpose of the raising of a revenue but to coerce compliance with a desired provincial policy or outcome much like the province of British Columbia was doing in *Texada*. By not being for the raising of a revenue the province has built a structure it was not permitted to build. By being the object of coercing private persons to take a particular action, get vaccinated or pay a tax, the structure it sought to erect was built outside of the field for which it was permitted to be erected upon. In an AQV analysis it is not important to identify what field the structure was improperly built upon only that it was built somewhere it cannot be built. I further note the field normally identified with governing a private person's actions or omissions is section 91(27) of the *1867 Act*, the criminal law, a field belonging solely to Parliament. As the province cannot create a general non-optional regulatory scheme on "bodies that happen to be in Quebec at some point" it cannot rely on other heads of power like section 92(9) or 92(15) of the *1867 Act* for which to support the tax. A tax of this structure, on the bodies of persons, can only be supported under section 92(2), and that field comes with the limitations of direct taxation for the purposes of the raising of a revenue. But the tax built is not for the purposes of the raising of a revenue and therefore does not comply with the limitations set upon it by section 92(2). The structure is unauthorised and *ultra vires*.

Upon application of the AQV analysis there is no ability under section 92(2) of the *1867 Act* for the Assembly of Quebec to tax the nonvaccinated for being nonvaccinated.

PART IV: GQV CONSIDERATIONS

This fourth and final part of the article has little to do with the AQV test discussed earlier. Instead, this part seeks to question the ability of a province to implement a non-vaccination tax by demonstrating that—AQV aside—the provinces are also likely out of jurisdiction on a GQV analysis. As discussed earlier in Part II, the test that applies to a GQV analysis is the more familiar two-part pith and substance test of characterisation followed by classification. To jog the memory this test can be summarised as: (1) characterisation is the step that succinctly describes the appearance and *apparent* purpose of the impugned instrument to discern the what and the why behind it; (2) classification is the legal application of how the impugned instrument does or does not fit into the available heads of power given to the provinces and the federal parliament in order to divine whether it is within jurisdiction.

This part of the paper is incomplete and is abstract and theoretical. Without ever being provided the very wording of the now withdrawn tax we are hamstrung in how to apply a GQV analysis, we have no content upon which to characterise and classify. Unlike with our AQV where we can deal with finality about whether a thing can be done at all, in any way; a GQV presumes a thing can be done in some ways and not others. Without having the wording or form of which way the thing or action is to be done the GQV discussion is limited to expectations and hypotheticals. I make no secret that this part is sparse, somewhat discursive, and is not so much a rigorous legal or philosophical analysis but rather an academic curiosity on the potential questions and concerns that could come up.

That aside, I have identified at least three areas of concern that I think any non-vaccination tax would run into or must deal with under a GQV analysis, no matter the form. First, is that in order to determine whether a tax is direct or indirect there needs to be some quantification as to how much and when the tax is to be levied. Second, I suggest that because people and their bodies are not provincial citizens, being capable of movement and transitory will, it is hard to define a person's body as being something for the purposes of taxation within a province. And third, that it would be very difficult for any province to craft a "health contribution tax" on the non-vaccinated without running up against current federal health legislation and parliament's exclusive heads of power over the criminal law and citizenship.

Following this brief discussion I will finally conclude this paper.

4.1 - PROVINCIAL TAXES MUST BE DETERMINED BY SOME QUANTIFIABLE REFERENCE

Similar but distinct from the earlier discussion on how provincial taxes have an inbuilt AQV test which requires: the impugned tax to be direct, for provincial purposes, *and* for the raising of a revenue, there is a further evidentiary or statutory interpretive limit or qualification. The further limit is that while a direct tax means the "person" is taxed,[85] the quantum for the determination of the tax or whether the tax applies at all, is done based upon the presence and value of rendered or accrued gains of material goods,

[85] What is a direct tax is a complicated constitutional question involving John Stuart Mill, many Privy Council decisions, and questions on whether the tax is intended or actually does get passed down to a further person or whether it is intended or does get paid by the primary person directly taxed. For the purposes of this paper a tax on a person's body appears direct and so I have elected not to go into that detailed dive.

intangible goods, or the inherent values thereof. For example, a person cannot be issued a sales tax if they have not made a sale, nor demanded to pay an income tax if they have not brought in any income even though these taxes are levied direct against the person and not the product or income. So, while I describe this part as "you cannot tax a person" it is to be taken as meaning that you cannot tax a person for merely being a person because there is no quantification upon which to determine the tax as there is no transition of tangible or intangible property or increase in value of the same. Rather, if one takes a pause, a vaccinated body may be viewed as "more valuable" after having been vaccinated and thereby perhaps only the vaccinated could be quantifiable by the increase in the value of their body. Similarly, a flat fee for getting vaccinated would be more fitting as a direct tax before any type of non-occurrence of vaccination, it makes more sense one could be taxed per inoculation than per non-inoculation. It should also not escape the philosophically inclined to note that if it is the case that a person "owns" their body and therefore the body is the property being taxed of the "person" then the idea of a person "owning" one's body is quite a Cartesian dualist concept. Is the government of Quebec committing itself to the recognition that people are souls that own bodies? Surely that must be an imposition of religious values against the portion of the population with materialist beliefs. With that interesting note aside, I wish to touch upon an example in Canadian history that did effectively flat tax a body.

The infamous "Chinese Head Tax" was levied by the federal parliament on prospective Chinese immigrants as a means to deter their immigration and it continued until 1948.[86] What must be compared and contrasted is as follows. The "tax" was called a "fee"[87] which does have importance in our narrow legal discussion on characterisation and then classification, however, having been based upon an aspect of a person's bodily composition, in this case their racial national origin,[88] it is quite comparable to a tax on the presence or absence of having had an inoculation. Notably, the tax was legislated by the federal parliament at the behest of the Province of British Columbia. This request to Parliament is presumably because the province knew its slim taxation power under section 92(2) of the *1867 Act* was not sufficient to empower their own tax for the same purpose.[89] In 2001 victims of the head tax attempted to sue the federal government seeking financial redress for the imposition of the head tax as being a violation of their *Charter* rights.[90] While the law suit was doomed to fail because the *Charter* does not apply retroactively, it is important to note that the trial judge found, albeit in obiter, that the taxes clearly would not survive a *Charter* challenge in the present day.[91] As any non-vaccination tax today, provincial or federal, would certainly be subject to similar *Charter* scrutiny the comparisons are warranted and do not weigh in favour of the constitutionality of the tax on *Charter* grounds. The takeaway here, however, is that the only historical example of taxing a body without reference to a value of a good, tangible or intangible, was a power only reasonably found in the unlimited taxing power of Parliament being quite distinct from the provinces' narrow taxing power.

Having compared a historically relevant example and determined that a tax on a body appears, if ever allowed, to be within the sole federal taxation power, I return now to the limitation that a provincial tax must be triggered or determinable based upon the transfer of tangible or intangible goods. There is no 'smoking gun' quotation from the Privy Council, old English texts, or the Supreme Court of Canada that

[86] See for instance the *Chinese Immigration Act* 1885, c. 71, and its later sister acts by the same name.
[87] *Ibid*, section 13.
[88] *Ibid*, section 1.
[89] Government of British Columbia, "Federal Head Tax", (no date), https://www2.gov.bc.ca/gov/content/governments/multiculturalism-anti-racism/chinese-legacy-bc/history/discrimination/federal-head-tax (accessed in early 2022).
[90] *Mack v. Canada (Attorney General)*, 2001 CanLii 27983 (ON SC).
[91] *Ibid*, at para 52.

specifically requires provinces to tax based upon quantities determinable as to goods or services. I have searched extensively and have found no discussion or comments expressly requiring a reference to goods or services in some quantifiable way as it may be that no such attempt to levy a tax without reference to some quantifiable good or service has been tried before, or at least challenged. However, that taxes must have a reference to some quantifiable good or service can be inferred from the discussion of the Supreme Court of Canada in *Allard Contractors v. Coquitlam* ("*Allard*") such that in order for a court to be able to determine whether a tax is direct or indirect the court must be able to discern if the tax is able to be passed on and in doing so an analysis must be made in relation to goods or services calculated to a per unit commodity flat fee, or when the tax is levied, or some other quantifiable determination.[92] *Allard* concerned a series of municipal levies on commercial excavation of gravel and soil that initially began as per-instance flat fees but eventually, at least in part, included a per-volumetric executed variable fee, before ultimately becoming a per-volumetric unit executed fee. In *Allard* the volumetric fee was ultimately found to be an indirect tax but was saved on the grounds that it was part of a regulatory scheme for the maintenance of roads and services used by the heavy gravel laden trucks.[93] For our purposes however, it appears that a quantifiable determination as to a commodity or service is necessary in order to broach the question of whether a tax is direct or indirect. For Parliament deciding whether a tax is direct or indirect is not necessary due to its unlimited ability to use any method of taxation. But for a provincial tax it seems it would have to be the case that if the court cannot determine whether a tax is direct or indirect the tax would have to be struck down as being impermissibly vague to the point of being unauthorised by the section 92 heads, specifically section 92(2). As we do not have the wording of the withdrawn tax we have no conclusion on this, but we do know that any drafter of the non-vaccination tax would have to wrestle with this question.

Before moving on it should go without question, as I mentioned earlier in this paper, that regular persons and their bodies are not licensed actors nor participants in a provincial regulatory scheme simply for existing in a corporeal form, pun intended.[94] While *Allard* upheld an indirect tax as properly belonging to section 92(9) of the *1867 Act*, there is no valid provincial regulatory scheme on mere bodily existence or composition. The court in *Allard* goes on twice to note that section 92(9) cannot be expanded to turn anything the province wants into a regulatory scheme for the purposes of indirect taxation for 'recoupment of regulatory expenses' Saying (emphasis in original):

> The breadth of this language might be taken to suggest that indirect taxation had been introduced into s. 92(9) without qualification, a result which would rob s. 92(2) of any independent meaning. However, it is important to underscore "that what was involved here was a regulatory scheme by way of licences otherwise within provincial competence, and that the licence fees were levied for the purpose of supporting the scheme"…
>
> … I am pressed, however, to mention that a power of indirect taxation in s. 92(9) extending substantially beyond regulatory costs could have the more serious consequence of rendering s. 92(2) meaningless. And, in any event, the facts of this case do not demand a final resolution on that point.[95]

Allard appears to stand for the proposition that the quantification reference of a tax is a necessary step in order to determine whether a tax is direct or indirect. As provinces are limited to direct taxation determining whether a tax is direct or indirect is a necessary step in constitutional judicial review of an

[92] *Allard Contractors v. Coquitlam*, [1993] 4 S.C.R., page 396.
[93] *Ibid* pages 408-409.
[94] For a concise discussion of this topic see *Rio Hotel*, Supra note 61, at paras 32-41.
[95] *Ibid* pages 400, 404-405.

impugned provincial tax. In the case of the Quebec's non-vaccination tax as we lack the wording or form, we cannot know what the quantification reference would have been.

4.2 – THERE IS NO PROVINCIAL "CITIZEN"

There is little concrete to be said on this point. A provincial tax on a person's body has never been done before. And unlike the federal Chinese Head Tax the provinces occupy a limited domain within the greater Canadian border. Whereas the federal government has an effective way of charging an "entrance fee" no matter where the poor Chinese labourer entered the country, the provinces have their internal fief and must contend with the provisions of the *1867 Act* and the *Charter* that demand the free flow of trade and goods (section 121 of the *1867 Act*) and people (section 6 of the *Charter*). People cannot readily be said to be located within a given province in the same way a corporation, a bottle of coke, or piece of land can be. Without the wording or form of the withdrawn non-vaccination tax there is nothing more to add for this point that would not be musing on the stars except on the question of citizenship. Justice Rand writing concurring majority opinions in *Saumur* and in *Switzman v. Elbling* notes two interesting things. One, is that a Canadian citizen is a citizen of the country as a whole and not of a province to be treated like property to that province. And two, that as citizens, where provincial statutes dilute the rights of citizens such that a citizen living in one province may be an unequal participant in confederation than another, such statutes will run afoul of Parliament's jurisdiction over citizenship. Justice Rand in *Saumur* remarking (emphasis added):

> It was urged by Mr. Beaulieu that the city as proprietor of the streets has authority to forbid or permit as it chooses, in the most unlimited and arbitrary manner, any action or conduct that takes place on them. The possibilities of such a proposition can be easily imagined. But it misconceives the relation of the province to the public highways. The public entitled to use them is that of the Dominion, **whose citizens are not of this or that province but of Canada.** What has been confided to the provinces is the regulation .of their use by that public.[96]

While in *Switzman* he adds (emphasis added):

> This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As Such an inherence in the individual it is embodied in his status of citizenship. Outlawry, for example, divesting civil standing and destroying citizenship, is a matter of Dominion concern. Of the fitness of this order of government to the Canadian organization, the words of Taschereau J. in Brassard et al. v. Langevin[32] should be recalled:
>
> > The object of the electoral law was to promote, by means of the ballot, and with the absence of all undue influence, the free and sincere expression of public opinion in the choice of members of the Parliament of Canada. This law is the just sequence to the excellent institutions which we have borrowed from England, institutions which, as regards civil and religious liberty, leave to Canadians nothing to envy in other countries.
>
> Prohibition of any part of this activity as an evil would be within the scope of criminal law, as ss. 60, 61 and 62 of the Criminal Code dealing with sedition exemplify. Bearing in mind that the endowment of parliamentary institutions is one and entire for the Dominion, that Legislatures and Parliament are permanent features of our constitutional structure, and that the body of discussion is indivisible, apart from the incidence of criminal law and civil rights, and incidental effects of legislation in relation to

[96] *Saumur*, at page 333.

> other matters, the degree and nature of its regulation must await future consideration; for the purposes here it is sufficient to say that it is not a matter within the regulation of a Province.

No matter the form the non-vaccination tax was intended to take, it is likely that the issue of whether a person can be considered locatable in the province for the purpose of taxing their body would be difficult to reconcile.

4.3 THE PROPOSED TAX IS OTHERWISE IN CONFLICT WITH FEDERAL LEGISLATION AND THE CRIMINAL HEAD OF POWER

As with the previous two points above I will say little on this point. Also with the previous two I am hamstrung by having no words or form of the non-vaccination tax for which to conduct a more rigorous GQV analysis. That said, lingering contentions to a non-vaccination tax that appears to have as its aim the coercion to get an inoculation, when the participant is not part of a provincial regulatory administrative scheme, that may be an intrusion into the criminal law power of Parliament. The one "regulatory" scheme for which we all are opted into beyond our consent is that of the criminal law. One need not drive a car if they wish not to opt into the provincial licensing scheme and its penalties and fees. One need not operate a business and trade in goods if one wishes not to be covered by a similar set of provincial (and federal) regulatory schemes. But one may not "opt out" of the criminal law, you are in it whether you like it or not. Without the text of the non-vaccination tax it is impossible to know if the form of it would have been to force the opt-in of all persons not considered vaccinated. If it did, however, it seems likely that the province is doing obliquely what it cannot do directly, criminalise or sanction all persons for an activity or omission, the true domain of the federal criminal law power.

There is other talk that depending again on the wording of the non-vaccination tax the province could end up being in direct conflict with section 10 of the *Canada Health Act*.[97] The *Canada Health Act* is the act responsible for the transfer of billions of dollars from the federal coffers to the individual provinces for the running of healthcare services. It is near certain that the province's healthcare systems rely on significant amounts of federal health transfer payments in order to run at the capacity they do now.[98] Section 10 of the *Canada Health Act* sets a condition that in order for the provinces to qualify for such health transfer payments they must adhere to universal payment of health services:

> **Universality**
>
> **10** In order to satisfy the criterion respecting universality, the health care insurance plan of a province must entitle one hundred per cent of the insured persons of the province to the insured health services provided for by the plan on uniform terms and conditions.
>
> 1984, c. 6, s. 10

One may immediately note that requiring some persons to pay a "health contribution" in order to be entitled to access medical care in Quebec does not sound very much like adhering to the requirement of

[97] *Canada Health Act*, R.S.C.1985, c C-6, s. 10.
[98] Canadian Institute for Health Information, *National Health Expenditure Trends 1975 to 2019*, page 25 (accessed early 2022, at *https://www.cihi.ca/sites/default/files/document/nhex-trends-narrative-report-2019-en-web.pdf*).

universality. This is further buttressed by the Senate of Canada's standing committee's 2003 final report on "The Health of Canadians – The Federal Role, Volume Six: Recommendations for Reform" where at 17.1 the Final Report describes the principle of "universality" which says, among other things (emphasis added):

> The principle of universality is one the Committee holds dear. It ensures that access to publicly funded health services is available to everyone, everywhere, and that no one is discriminated against on the basis of such factors as income, age, and health status. We believe that universal insurance coverage and the access it provides to the publicly funded hospital and doctor system has served Canadians extremely well. Accordingly, it should be preserved.[99]

As I have said enough times without the wording we cannot know if the non-vaccination tax would run afoul of the universality requirement of the *Canada Health Act*, or maybe the citizenship caveat as said by Justice Rand, or the criminal law power of parliament, or whether the wording would be insufficient for a court to decide whether the tax was direct or indirect. Yet these concerns would appear to be restraints to any form of a non-vaccination tax and so are food for thought. With that said, it is time to conclude this paper.

CONCLUSION

Unlike above, the conclusion will be brief. This paper was divided into four parts and was drafted under the circumstances of the now withdrawn and never tendered Quebec non-vaccination tax. In Part I, we discussed the composition of the Constitution of Canada, how it is made up of many documents, principles, conventions, and court decisions. We further discussed that the *Charter* plays no part in constitutional challenges made pursuant to the *1867 Act*, and how the *Charter* is not a grant of authority nor changed the competence between Parliament and the provinces. Part I ended with a look at pre-*Charter* sources of political and human rights that developed and still exist in Canada waiting to be utilized and sitting there free from the limits of *Charter* jurisprudence.

In Part II we discussed the novel application of a new constitutional test called Actual Questions *of Vires*. This *AQV* was concerned with situations where the question is "can this making body make this (law) *at all*" and not "can this making body make this (law) *in this way*." The AQV test was described as being concerned with the constitutional grant of power known as the "field" and the form of the impugned enactment known as the "structure". A set of examples was given using a municipal building permit that authorised the builder to build a specific garden shed out of wood in a specific part of the builder's property. The building permit that set the building materials, where, and who could build the shed was the AQV field, while the shed itself was the AQV structure. Examples were given of making the shed out of metal, or placing it on the front driveway instead of the back lawn as examples of an unauthorised structure. Or of building a swimming pool instead of a shed as an unauthorized field. Further examples such as building the shed correctly but beyond certain property boundaries would better be described as a GQV, or General Question of *Vires*. Thus AQV and GQV, GQV using the pith and substance test, were

[99]Senate of Canada, *Health of Canadians – The Federal Role,* Standing Committee for Social Affairs, Science and Technology, Final Report, Volume Six: Recommendations for Reform, Part VIII: The Canada Health Act, Chapter 17, 17.1.

distinguished. An AQV was triggered where our builder built something utterly unauthorised or contemplated by the empowering municipal permit while the GQV was concerned with whether the built structure was not as contemplated.

In Part III we discussed all things provincial taxation. This consisted of describing the difference between the Parliament's plenary and unlimited right to use any mode of taxation with the narrower provincial grant to tax according to section 92(2) of the *1867 Act*. While Parliament can and has used the taxation power for all numbers of coercive and ulterior purposes the provinces have not been permitted to do the same. The provinces are limited in their taxation power, aside from within a valid regulatory scheme, to tax (1) directly, (2) for the raising of a revenue, and (3) for provincial purposes. Privy Council and Supreme Court of Canada cases such as *Ref re Alberta Statutes*, *MacDonald Lumber*, and *Texada* were used to demonstrate that the provinces could not use their taxation power to accomplish ulterior purposes, and that a tax would not be considered for the raising of a revenue when on its construction the more it was complied with the less revenue would be generated. Then we applied the four limbs of the AQV test. The Quebec non-vaccination tax was challenged as being wholly outside the competence of the province, per AQV limb one. The tax was based upon a single head of power, per AQV limb two. That single head of power contained direct limitations on what could be done under that head of power, per AQV limb 3. And the Quebec tax was not for the raising of a revenue as compliance would lead to less revenue than non-compliance and also that the coercion of the target was not a valid provincial purpose and so concluded that Quebec's non-vaccination tax was something it could not do at all, per AQV limb 4.

Finally in Part IV we discussed that without the wording or form of the withdrawn non-vaccination tax one could only hypothesize on hurdles or roadblocks to the tax under the pith and substance test of a GQV analysis. In doing so three areas of concern were noted. The first was wondering how the tax would be drafted to make quantitative reference for how much and when the tax would be triggered, and that this is necessary for a court to determine whether a tax is direct or indirect. With the provinces limited to direct taxation it was presumed that a failure to provide for quantitative reference may cause the tax to fall for vagueness. The second concern was that there are no "citizens of a province" and other general questions as to how for the purposes of taxation within the province a person and their body could be geographically locatable. The fourth concern touched upon possible conflict between Quebec's tax and federal law such as the *Canada Health Act* or by running afoul of the federal parliament's exclusive jurisdiction for the criminal law and citizenship.

In the end I hope I have demonstrated the use of the AQV test as a powerful additional tool for constitutional jurisprudence when a making body is depending on a sole power with internal limits in order to legislate an impugned enactment. And, I hope I have demonstrated how the province of Quebec's non-vaccination tax was *ultra vires* the competence of the Assembly of Quebec.