# CONSTITUTIONAL VALIDITY OF PROVINCIAL OIL AND GAS LEGISLATION

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It has become very fashionable to have a "public image"; Prime Ministers turn from the affairs of state to worry about their "public image"; giant corporations, once frankly and exclusively devoted to the profit motive, now labour endlessly and extravagantly to ensure that they present the proper benevolent appearance to the public. The oil industry, without any conscious effort on its part, has had its own public image almost from the day the first gusher darkened the sky. The magic combination "oil and gas" evokes in the mind of the average member of the public such emotion-charged symbols as "black gold"; Texas millionaires in stetsons and cowboy boots enlivening the atmosphere of some New York nightclub; wild wells blowing out of control; all against a tasteful background of dollars. This montage of impressions is dominated by the theme of freedom; in John Q. Public's mind at least, the oil industry is one of the last bastions of free and independent action and one of the few remaining strongholds of the financial free booters.

Nowhere in the world of Madison Avenue fantasy is there a greater discrepancy between the image and the reality. Oil and gas has the dubious and unwelcome distinction of being one of the most heavily regulated and tightly controlled industries in Canada. In many of its activities, the industry is so regulated that it resembles a public utility rather than the free wheeling organization imagined by the public.

In Alberta, which is the heart land of the Canadian industry, there are no less than fourteen Acts[1] solely and directly concerned

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[1] Mines and Minerals Act, S.A., 1962, c. 49; Oil and Gas Conservation Act, S.A., 1957, c. 63; Right of Entry Arbitration Act, R.S.A., 1955, c. 290; Expropriation Procedure Act, S.A., 1961, c. 30; Pipeline Act, S.A., 1958, c. 58; Mineral Taxation Act, R.S.A., 1955, c. 203; Gas Resources Preservation Act, S.A., 1956, c. 19; Temporary Restriction on Alienation of

with oil and gas, twelve Acts[2] which have a direct bearing on the industry and forty sets of regulations. Saskatchewan is not far behind in the regulatory race with nine Acts[3] specifically connected with the industry. All of the provinces have some form of legislation dealing with oil and gas although, in some cases, this legislation seems to be more in anticipation of the happy day when discovery of petroleum will eliminate the deficits, than filling a present need. Superimposed on the provincial legislative structure, is a growing body of federal legislation and regulation.

From an operational point of view, the industry pays no attention to provincial, or even international, boundaries. Oil and gas are no respecters of legislative jurisdiction, nor are they concerned with the niceties of constitutional jurisprudence. Keeping within the proper legislative compartments, when dealing with a subject matter as far flung and active as the petroleum industry, calls for a high degree of drafting legerdemain. It will be interesting to review this situation and see how well the provinces have succeeded or whether their legislation is open to attack on constitutional grounds. Such an analysis requires at least a general understanding of the operations and scope of the industry.

## I. *The Industry.*

In the first seven months of 1962, Western Canada produced an average of 704,548 barrels of oil and natural gas liquids *per* day. The Province of Alberta produced 554,111 barrels *per* day during this period. The figures for natural gas production are equally impressive. Western Canada produced an average of 2,618,381 thousand cubic feet of gas *per* day during the seven month period. Once again, Alberta is the main source of supply as production from Alberta alone averaged 2,109,653 thousand cubic feet *per* day. While everyone can visualize a barrel of oil, the unit of measurement for gas is not so familiar. Perhaps the best clue to the significance of the gas production figures lies in the statistical fact that 140,000 cubic feet of gas will meet the average requirement

Mines and Minerals Act, S.A., 1955, c. 67; Electric Power and Pipeline Assessment Act, S.A., 1961, c. 29; Mineral Titles Clarification Act, S.A., 1956, c. 32; Mineral Titles Redemption Act, S.A., 1958, c. 44; Gas Utilities Act, S.A., 1960, c. 37; Mobile Equipment Licencing Act, S.A., 1959, c. 53; Land Titles Clarification Act, S.A., 1956, c. 26.

[2] For example, Workmen's Compensation Act, R.S.A., 1955, c. 370; Labour Act, R.S.A., 1955, c. 167; Electrical Protection Act, R.S.A., 1955, c. 99; Mobile Homes Licencing Act, S.A., 1957, c. 53.

[3] For example, Mineral Resources Act, S.S., 1959, c. 84; Oil and Gas Conservation Act, R.S.S., 1953, c. 327; Pipelines Act, S.S., 1954, c. 83; Mineral Taxation Act, R.S.S., 1953, c. 59; Mineral Contracts Renegotiation Act, S.S., 1959, c. 102.

of one person living under the climatic conditions of Western Canada for one year. In other words, Alberta each and every day produces enough gas to satisfy the needs of a community of nearly 15,000 souls for a full year.

The greater part of the production of both oil and natural gas finds its market outside the province of origin. In the case of Alberta, the average daily oil production of 554,111 barrels is accounted for as follows: 94,708 barrels consumed within Alberta; 57,349 barrels exported to British Columbia; 46,189 barrels exported to Saskatchewan; 9,280 barrels exported to Manitoba; 115,571 barrels exported to Ontario and the remaining 194,533 barrels are exported to the United States. Of the total daily gas production of 2,109,653 thousand cubic feet, only 419,882 thousand cubic feet are consumed in Alberta while 464,862 thousand cubic feet represents the shrinkage factor in processing the material and the remainder of 1,224,909 thousand cubic feet is exported to the other provinces and the United States.[4] Reducing these figures to percentages, we find that eighty-three per cent of the oil and fifty-eight per cent of the gas produced in Alberta enters interprovincial and international trade. At this point, I imagine, the constitutional lawyer will start to twitch gently. There is more to come.

Following the same perverse natural law that places iron ore deposits in Ungava and asbestos along the Yukon border, Western Canadian petroleum is located hundreds of miles from its major markets. Both oil and natural gas are transported to these markets by large-diameter pipelines. Canada is laced with approximately 6,000 miles of major transmission lines for oil and gas and there is an equivalent, or greater, mileage of local and gathering systems. There are two major oil lines; Interprovincial which moves the crude into Eastern Canada and the United States and Transmountain which transports crude to British Columbia and the Pacific North Western States. Both of these are Special Act companies incorporated under the provisions of the old federal Pipelines Act[5] and operating under permits granted by the Board of Transport Commissioners, the predecessors of the present National

[4] These figures were compiled from a number of sources, principally the monthly Comparative Summary of Production and Disposition published by the Alberta Oil and Gas Conservation Board. It is impossible to reconcile the figures exactly over any given period, because of movements in and out of inventory which cause a slight distortion. The ratios, however, are accurate.

[5] R.S.C., 1952, c. 211, now repealed by the National Energy Board Act, S.C., 1959, c. 46.

Energy Board. While their corporate structure is based on federal legislation, the operations of these oil pipelines are subject to certain restrictions and limitations imposed by provincial legislation.

Natural gas is transported through three major systems; Trans Canada which services Central and Eastern Canada and the North Central States; West Coast which transports British Columbia gas and a relatively small volume of North Alberta production to points in British Columbia and connects with an American system servicing the Pacific North West; and the Alberta Natural System which moves Alberta gas through British Columbia to a point of connection on the international border and ultimate consumption in California. Like the oil lines, these companies are all special Act companies incorporated under federal legislation. Two of them, Trans Canada and Alberta Natural, have to deal with a creation of the Alberta Legislature, the Alberta Gas Trunk Line.

### II. *The Alberta Gas Trunk Line.*

The Alberta Trunk Line Company is the pioneer of the grid method for the collection and transportation of natural gas. The company itself was incorporated by an Act of the Alberta Legislature[6] which, *inter alia*, empowers it to act as a common carrier of gas, to act as a common purchaser of gas, to construct gas pipelines and to purchase, process, transport, distribute and sell gas. The Act does not contain any provision to the effect that all gas destined for export from Alberta must be transported through this system, nor does any other relevant Act contain this restriction. It is a fact of economic life in Alberta, however, that no permit for export of gas from the province will be granted except on condition that it be transported within Alberta solely through the facilities of Alberta Trunk Line. Voting shares are allocated among gas export companies, gas producers or processors, utility companies and two qualifying shares are allotted to the two directors appointed by the Lieutenant-Governor in Council. The remaining five directors are elected by the three categories of companies which own the voting shares.

Since its incorporation in 1954, the Alberta Trunk Line Company has constructed 1,435 miles of pipeline within Alberta. These lines transport gas from the field or processing plant to a point of connection with the major interprovincial or international trunk lines at or near the boundaries of Alberta. The Trunk Line Com-

[6] S.A., 1954, c. 37.

pany does not own or operate any facilities outside the province, in fact, it is expressly prohibited from so doing by section 14 of the Act as follows:[7]

> The objects and powers of the Company do not authorize and shall not be interpreted to authorize the purchase, acquisition, construction, operation or control by the Company of any works or undertakings situate outside the Province of Alberta.

To date, the Trunk Line Company has only two such points of connection. The one servicing Trans Canada is approximately one and one-half miles inside Alberta on the Saskatchewan border. There is a meter station located one and one-quarter miles inside Alberta which is owned and operated by Trans Canada. Title to the gas is transferred from Alberta Trunk Line to Trans Canada at a point approximately one-quarter of a mile upstream from the meter station. There is no physical interruption or disturbance of the flow of gas at this transfer point, merely a change in ownership and custody. The gas continues to flow through the short stretch of pipe owned by Trans Canada, passes through the meter station and continues through the Trans Canada system to markets in Canada and the United States.

The connection with Alberta Natural on the British Columbia border differs somewhat in that the meter station is owned and operated by Alberta Trunk and ownership of the gas is transferred downstream of the meter station but still on the Alberta side of the border. Metering does not involve any disruption of the gas flow; as a general rule, the gas rate is measured as the gas flows through a number of smaller diameter "header" lines in which measuring devices have been inserted. This system permits a volumetric calculation of the quantity of gas. Although undue emphasis seems to have been placed on the mechanical details at the point of connection, these will become relevant when I return to consider the constitutional status of the grid system.

### III. *Province in Dual Role.*

Ownership of a substantial portion of the mineral rights in Western Canada is vested in the provincial Crown. In Alberta the provincial Crown owns approximately eighty-one per cent of the mineral rights. The right to explore, drill and produce petroleum and natural gas is granted by the Crown under various types of standardized documents known as Crown Petroleum and Natural Gas Reservations, Crown Petroleum and Natural Gas Permits,

[7] *Ibid.*

Crown Petroleum and Natural Gas Leases, Crown Natural Gas Licences. In Alberta, the Crown, as the mineral landlord, has imposed certain conditions in these documents. Basically, these conditions prohibit the mineral lessee from exporting natural gas outside the Province of Alberta unless the consent of the Lieutenant-Governor in Council has been obtained and provides that the lessee's interest will be terminated by any violation. The provisions of the Alberta Oil and Gas Conservation Act and the Gas Resources Preservation Act,[8] are incorporated as terms of the lease.

These restrictions and terms which have been imposed by Alberta as a requirement of acquiring and holding petroleum and natural gas rights from the provincial Crown are really separate and apart from this enquiry which is confined to the constitutional status of provincial legislation, although it should be remembered that these limitations originate with legislation. A provincial government, in its executive capacity, can only dispose of property rights, vested in the Crown, under an empowering statute. In the case of Alberta, the statutory power to dispose of provincial Crown mineral rights is conferred by the Mines and Minerals Act[9] which, *inter alia*, authorizes the imposition of a term in the leases restricting the right of the lessee to export gas from Alberta. It would seem that provincial legislation could validly impose such a restriction as an incident of ownership of the mineral rights but, as will be seen under the Trade and Commerce portion of this article, the legislation may still be open to attack on constitutional grounds. Even if the provisions of the Mines and Minerals Act were invalidated, there would remain the further question of the status of the restrictions and limitations actually embodied in existing leases and permits. Would these restrictions automatically collapse or would they have an existence independent of their legislative source? Questions of this type open the way to many fascinating legal problems, but my concern is with the status of provincial legislation *per se*. The existence of the restrictions under Alberta Crown leases and permits should not be ignored, however, as they may represent a second line of defence if the provincial legislation is struck down by the courts.

## IV. *Legislation and Regulation.*

A towering pyramid of legislative and regulatory sanctions, regulations and prohibitions has been superimposed on the physical operation of the oil and gas industry. A good deal of the legislation

[8] *Supra*, footnote 1, see discussion *infra*. [9] *Ibid.*

in Western Canada is repetitive and covers much of the same ground in each province. Alberta has been the most energetic in enacting legislation and an analysis of its enactments will serve to illuminate some of the problems in this area; any comments will, of course, apply with equal force to similar legislation in the other provinces.[10]

The Oil and Gas Conservation Act[11] is the cornerstone of the entire legislative structure. It constitutes the Oil and Gas Conservation Board and sets forth the ground rules for its operations. The objects of the Act are described as follows in section 4:

> The intent and purpose of this Act are:
> (a) To effect the conservation of the oil and gas resources of the Province,
> (b) To prevent the waste of oil and gas resources of the Province,
> (c) To secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, completing, reworking, testing, operating and abandonment of wells and in all operations for the production of oil and gas, and
> (d) To afford to each owner the opportunity of obtaining his just and equitable share of the production of any pool.

To that end, the Board is constituted the licencing authority for the drilling and production of all wells within the province and is empowered to recommend to the Lieutenant-Governor in Council regulations prescribing the spacing units for wells, the type of equipment to be used in drilling, methods of completing or abandoning wells, and many other like matters designed to ensure proper operating practices in drilling and production. The Board is also granted certain other powers, including one that is nothing less than the basis on which all oil production is governed today. Section 36,[12] although somewhat lengthy, is important enough to be quoted in full:

> (1) The Board may, by general or special orders, restrict the amount of oil or gas or both that may be produced in the Province
> (a) by fixing a provincial allowable for oil not exceeding the market demand as determined by the Board,
> (b) by allocating the provincial allowable for oil in a reasonable manner among the producing pools in the Province by fixing the amount of oil that may be produced from each pool without waste to meet the provincial allowable so determined, and
> (c) by distributing the portion of the provincial allowable allocated

[10] Certain Acts and Regulations of the provinces deal with matters which are clearly within their legislative power *e.g.*, safety regulations pertaining to the drilling and operation of wells, royalties payable to the Crown, *etc.*

[11] *Supra*, footnote 1.

[12] *Ibid.*

to a pool in an equitable manner among the wells in the pool, for the purpose of giving each well owner the opportunity of producing or receiving his just and equitable share of the oil in the pool.

(2) The Board, with the approval of the Lieutenant-Governor in Council, may, by general or special orders, restrict the amount of oil or gas or both that may be produced from one or more pools within the Province where gas from the pools may be used to supply a market area

(a) by limiting, if such limitation appears necessary in a particular case, the total amount of gas that may be produced from any of the pools, having regard to the efficient use of gas for the production of oil and to the efficient utilization of the gas reserves of the Province, and so that the demand of the market is allocated in a reasonable manner among the pools, and

(b) by distributing the amount of gas that may be produced from a pool in an equitable manner among the wells in the pool, for the purpose of giving each well owner the opportunity of producing or receiving his just and equitable share of the gas in the pool.

In practice, the Board exercises the power given by section 36 by fixing a "provincial allowable" for oil production for each month. Prior to the beginning of each month, the Board will determine the market demand by obtaining from all potential purchasers their nominations for Alberta crude for the forthcoming month. Market demand is defined by section 2(i) as follows:[13]

> . . . "market demand" means the amount of oil or gas reasonably needed for current consumption, use, storage and working stocks within *and outside the Province;* . . .

Having obtained the total market demand, the Board allocates this volume among the various pools and fields in the province in the manner described in subsections (a), (b) and (c) of section 36(1). In working out this allocation, the Board uses a complicated formula which first allocates to each well its minimum production known as the "economic allowable" and the remaining production is then prorated on a number of factors, the main one being the productive characteristics of the particular reservoir. Naturally, the Board also takes into consideration the type of crude nominated by the individual purchasers; a purchaser desiring light, high-gravity crude will not be forced to take heavy, asphaltic crude. But the purchaser has no say as to whose crude he will purchase, he cannot for example nominate for so many barrels of X company's crude from a certain field. Section 36 is the basis of the famous prorationing scheme under which the production of Alberta crude is administered. Despite the National Oil Policy, there is

[13] *Ibid.* Italics mine.

still substantial surplus producing capacity in Western Canada, so that the existence of the prorationing scheme is of great importance. It must be borne in mind, however, that by far the greater part of the crude so prorationed is destined for markets outside the province.

The similar power to prorate gas production, granted to the Board by section 36(2) has not yet been utilized. So far, the Board has been content to allow the gas to be produced in accordance with the long term contractual arrangements between the individual producers and the pipeline company buyers. Recent developments indicate, however, that the Board may be forced into implementing some type of prorationing for gas, as supply has finally caught up with demand and a growing number of producers are finding themselves with gas wells located in close proximity to existing pipelines but shut in because their production has not been purchased. This situation has already led to two applications to the Board by dissatisfied producers and there are indications that there will be a growing clamor for relief as the present demand for gas simply cannot accommodate the production from new discoveries. If this situation becomes critical, one of the more obvious courses open to the Board would be to exercise the power conferred by section 36(2) and, despite the existence of long term contracts for the sale and purchase of gas, allocate the market among the various fields within the province.

The Board established by the Oil and Conservation Act[14] is charged with duties and responsibilities under other provincial legislation. The Pipeline Act[15] applies to all pipelines within the province with the exception of a pipeline for which there is in force a certificate or an order of exemption issued by The National Energy Board under the federal National Energy Board Act[16] and certain other exceptions that are irrelevant to this inquiry. The Act prohibits the construction of an oil or gas pipeline without first obtaining a permit. Application for the permit is made to the Department of Mines and Minerals and copies of all such applications are to be supplied to the Oil and Gas Conservation Board. In the case of oil lines, the Board is only required to notify the Department of Mines and Minerals of any objections it may have, whereas its specific approval or disapproval is required in the case of gas lines. In view of the present government policy that Alberta Trunk Line shall own and operate all gas lines within the province, applicants for the construction of gas lines are now a

[14] *Ibid.* [15] *Ibid.* [16] *Supra*, footnote 5.

very exclusive club. There is no similar policy restriction in the case of oil lines and it is in this area that the Pipeline Act is particularly significant.

An additional permit is required under the Act for the operation of a pipeline and section 22 prohibits an operating pipeline from discontinuing the transportation of petroleum without governmental consent. The Act also prohibits the sale or leasing of an existing pipeline without first obtaining the consent of the Minister of the Department of Mines and Minerals.

There are seven oil pipeline systems now operating in Alberta which transport oil from the individual fields to the terminals of the two export transmission companies, Interprovincial and Transmountain. All seven of the pipeline systems were constructed and now operate under permits granted pursuant to the Pipeline Act or its legislative predecessor. All of them have connections with the terminals of both export companies. The provincial pipeline systems transport oil from the field directly into tankage owned by the export companies at their terminals. Custody of the oil is transferred when it enters the export company's tank. The oil is held by the export company in its storage until it has been measured to determine the quantity and for collection into a "batch" of crude of similar type and gravity for transmission through the main line. This process seldom takes more than one or two days and, with the turning of a valve, the oil flows out of the tank through header pipelines into the main line of the export company, and to markets in Canada and the United States.

The Gas Resources Preservation Act[17] is the third weapon in the legislative arsenal used by the Province of Alberta to exert complete control over its mineral resources. The object of the Act is stated to be the preservation and conservation of the oil and gas resources of the province and to provide for their effective utilization, having regard to the present and future needs of persons within the province. This language would appear to fit the whole matter very neatly into one of the legislative compartments under section 92 of the British North America Act.[18] The manner in which the "needs of persons within the Province" are to be protected is set forth in section 5 of the Gas Resources Preservation Act and this section is quite revealing:[19]

> Application for permit to remove gas.
> (1) A person,

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[17] *Supra*, footnote 1.
[18] 1867, 30 & 31 Vict., c. 3.
[19] *Supra*, footnote 1.

(a) who produces or has the right to produce gas within the Province,
(b) who purchases or otherwise acquires or has entered into a contract to purchase or otherwise acquire property in gas within the Province, or,
(c) who transports, or has entered into a contract with the owner, producer, purchaser or acquirer of gas undertaking to transport, gas produced within the Province, and who proposes to remove gas, or cause it to be removed from the Province may make application to the Board for a permit authorizing the removal of gas.

The Board referred to is the Oil and Gas Conservation Board and the effect of the section is to require a licence from the Board before any gas can be removed from the province. It is another example of control by licence which has become so characteristic of the industry in Western Canada. Once an application has been made, the Board will convene a hearing at which all interested parties have the right to intervene. Since the permit, if granted, will establish the market and distribution pattern for one or more gas fields over a period in excess of twenty years, there usually are a number of interested parties who intervene in a most strenuous fashion.

After hearing the applicant and the submissions of interested parties, the Board must decide whether it will grant the permit to export gas. The Gas Resources Preservation Act itself specifically enjoins the Board from granting a permit unless it is satisfied that the present and future needs of persons within the province can be met without the gas in question, having regard to the established reserves and the trends in growth and discovery of reserves in the province. This disposition means that the applicant, to be successful, must satisfy the Board that the gas in question is surplus to the present and future needs of the province. The Act specifically empowers the Board to insert such terms and conditions in any permit as it feels necessary. In particular, the Act states that any permit may include the following terms:[20]

Terms and conditions in Permit.
Without limiting the generality of Clause (a) of subsection 1 of Section 8, the terms and conditions prescribed in a permit may include: . . .
(d) the conditions under which the removal of gas by the permittee may be diverted, reduced or interrupted,
(e) a condition that the permittee will supply gas at a reasonable price to any community or consumer within the Province that is willing to take delivery of gas at a point on the pipeline transmitting the gas, and that, in the opinion of the Board, can reasonably be supplied by the permittee.

[20] *Ibid.*, 1. g.

The Gas Resources Preservation Act[21] also contains certain general limitations that will override any conditions contained in a specific permit. Section 10 clothes the Board with authority, in the event of an unforeseen emergency jeopardizing an adequate supply of gas to consumers within the province, to require the diversion of any gas intended for industrial use outside the province to such other uses as the Board may direct. The intent of this section is very clear, it means that any gas exported from the province for industrial use may, at any time, be diverted to meet requirements within the province, despite the existence of a long term export permit. The limitation of this diversionary right to only that gas used for industrial purposes makes good practical sense. In the first place, most large industries are equipped to utilize a secondary source of fuel and, secondly, it is not hard to imagine the political hue and cry if homeowners in Ontario and Idaho were suddenly deprived of their domestic fuel. The practical implications of this power are rather startling. Approximately fifty per cent of the total volume of gas currently exported by Trans Canada is devoted to industrial uses, approximately seventy-five per cent of the gas exported by Westcoast goes to industry and virtually 100% of the current exports of the Alberta Natural system is also sold to industries. To indulge in an understatement, this power, if valid, seriously undermines the status of any existing export permit.

The right granted to the Board by section 13 of the Gas Resources Preservation Act[22] is equally threatening. This section authorizes the Board to cancel the permit of a permittee who fails to comply with any term or condition of the permit or who wilfully contravenes any provision of the Act or any regulation or order made under it. The Board cannot arbitrarily cancel an existing permit, there must have been a violation by the permittee of some term of the permit, the Act, or a regulation, and a hearing is also required before the power of cancellation can be used. There is no doubt, however, that the Board does have the power to cancel and the permittee may be subjected to this penalty for the violation of a regulation that was not even in existence at the time the permit was granted.

### V. *Trade and Commerce.*

It is interesting and instructive to hold this edifice of "control by licence" up against the light of constitutional jurisprudence and

[21] *Ibid.* [22] *Ibid.*

see how well the draftsmen have succeeded in fitting their cloth to the intricate design fashioned by the courts. Obviously, the Trade and Commerce power of the Dominion is the first hurdle that the provincial legislation must overcome in its search for constitutional validity. The Trade and Commerce power is found under subsection 2 of section 91 of the British North America Act as follows:[23]

> It shall be lawful for the Queen . . . to make laws for the peace, order and good government of Canada, in relation to all matters not covered within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters covered within the classes of subjects next hereinafter enumerated, that is to say: . . .
> 2. The regulation of Trade and Commerce.

Constitutional lawyers are familiar with the varying fortunes of the Trade and Commerce power, from the *Parson's* case[24] which first inhibited and limited the very wide language of section 91(2), to the virtual emasculation of the power in the *Snider* case[25] where it was held that the power, by itself, could not justify Dominion legislation except as invoked in aid of jurisdiction conferred independently by some other head of section 91. From its nadir of the *Snider* case, the Trade and Commerce power has finally climbed back to equality with the other heads of jurisdiction in section 91 and in the *Murphy* case[26] the power, for the first time, was used by the courts as the sole and independent basis for significant Dominion legislation. At the moment, however, we are not concerned with the rather sorry performance of the Trade and Commerce power as a source of Dominion legislation but, with its role as an obstacle to provincial legislation. In this area, it has been very successful indeed.

The constitutional validity of oil and gas legislation has yet to be tested before the courts.[27] For many years, however, both

[23] *Supra*, footnote 18.

[24] *Citizens Insurance Company of Canada and Queen Insurance Company* v. *Parsons* (1881), 7 App. Cas. 96 (P.C.).

[25] *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785 (P.C.).

[26] *Murphy* v. *C.P.R.*, [1958] S.C.R. 626, (1958), 15 D.L.R. (2d) 145; see Ballem, Comment, (1956), 34 Can. Bar Rev. 482.

[27] This statement is subject to one minor qualification in that the Alberta Appeal Court has considered the validity of the old Turner Valley Gas Conservation Act in *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board*, [1932] 3 W.W.R. 477. The Board prohibited, or severely limited, the production of gas which was flared after the liquid naphtha had been

the Dominion and the provinces have been seeking the legislative formula that would permit them to control the agricultural industry. Their efforts in this regard have been scrutinized by the courts on many occasions and the results should permit a fairly accurate prognosis of the judicial fate that awaits provincial oil and gas legislation. This is particularly true since there is a marked physical resemblance between the agricultural and the petroleum industries. Both start with a product that is either cultivated or extracted within the confines of a particular province and thereafter becomes an important commodity in international and interprovincial trade.

There is an embarrassment of judicial riches in the field of decisions on the constitutionality of agricultural legislation. *Lawson* v. *Interior Tree Fruit and Vegetable Committee & A. G. of Canada*[28] is possibly the best starting point for this analysis. The Legislature of British Columbia had enacted the Produce Marketing Act.[29] Under Section 3 of the Act a "Committee of Direction" was constituted with the power to control and regulate the marketing of all tree fruits and vegetables grown or produced in a certain portion of the province. The Committee was also "so far as the legislative authority of the Province extends" empowered to determine at what time and in what quantity and from and to what places, and at what price the product may be marketed, and to make orders and regulations in relation to such matters. There is a striking similarity between the powers granted to the "Committee of Direction" and those possessed by the Oil and Gas Conservation Board.

Duff J. noted that, under the Act, any shipper of products would be subject to the Committee's dictation as to the quantity of which he may dispose, as to its origin and destination and as to all the terms of sale. He concluded that the Act "is an attempt to

separated out of the gas stream. The Appeal Court held that in "pith and substance" the legislation was not aimed at the production or export of naphtha, which was mostly sold within Alberta with small exports to Saskatchewan and Montana, but was both in purpose and effect an enactment for the conservation of natural gas where it was being wasted. Large volumes of gas were being wasted in order to produce a few barrels of liquid naphtha. The liquid naphtha had some extra-provincial implications in that a portion of it was exported, although the greater part was refined within Alberta. It was the wasting of the natural gas, however, that was the true subject matter of the legislation, and this waste took place entirely within the province and was clearly within its jurisdiction. The circumstances that were present in the *Spooner* case have long since disappeared, along with the legislation in question, and the decision would be of very limited and doubtful applicability in the context of the industry as it is today.

[28] [1931] S.C.R. 357. [29] S.B.C., 1926-27, c. 54.

control the manner in which traders in other Provinces, who send their agents into British Columbia to make arrangements for the shipment of goods to their principals, shall carry out their interprovincial transactions. I am unable to convince myself that these matters are all, or chiefly, matters of merely British Columbia concern, in the sense that they are not also directly and substantially the concern of the other Provinces, which constitute in fact the most extensive market for these products . . . . Such matters seem to constitute 'matters of interprovincial concern', that is to say, of direct, substantial and immediate 'concern', to the receiving Province as well as to the shipping Province. Otherwise you seem to denude the phrase of all meaning. No doubt the Committee also regulates the local trade in British Columbia, but the regulation of the trade with other Provinces is no mere incident of a scheme for controlling local trade; it is of the essence of the statute and of the object and character of the Committee's activities".[30] Cannon J., in concurring with Duff J., that the legislation was *ultra vires*, pointed out that the Act, if restricted to the local provincial market, would have affected less than ten per cent of the fruit and vegetables grown in British Columbia. The comparable percentage for oil would be seventeen per cent.

*Re Sheep and Swine Marketing Scheme*[31] was another attempt by a provincial legislature to regulate the marketing of a product grown within its borders. The Prince Edward Island Legislature enacted the Agricultural Products Marketing Act[32] which followed the familiar pattern of constituting a Board. The Board proposed to exert control over the marketing of these products by passing an order that all sheep and swine marketed in the province shall be sold through and by the Board. The validity of the proposed order was brought before the Supreme Court *in banco* by reference. The evidence indicated that the great majority of sheep and swine raised in Prince Edward Island found their market outside the province. Supporters of the marketing scheme advanced the classic "pith and substance" argument, that the products had been raised within the province and therefore the province could validly legislate with respect to such products as property within the province or a matter of merely local nature. Coupled with the "pith and substance" rule was its inseparable companion, the doctrine of "incidental affection". This is the universally accepted constitutional principle that, once legislation is determined, in its true

[30] *Supra*, footnote 28, at p. 365.
[31] [1941] 3 D.L.R. 569.
[32] S.P.E.I., 1940, c. 40.

meaning and effect, to lie within a valid head of jurisdiction, the fact that its operation may incidentally affect an area within the scope of the other legislative power, will not invalidate it. These constitutional principles will be particularly relevant when oil and gas legislation makes its first appearance before the Bench, and I shall return to consider their application to this type of legislation.

In the *Sheep and Swine* case, however, the court experienced no difficulty in disposing of this argument. "We know in our Province we have only one packing plant capable of processing hogs. This packing plant handles only a very small proportion of the hogs produced in the Province. The local market handles very few hogs. What then must our producers of live hogs do to market their products which is their main or principal concern or consideration? They must rely on the market outside our Province. This market outside the Province of Prince Edward Island is the main or principal concern of all sheep and swine producers. It is no incidental matter. . . . The sheep and swine marketing scheme and its proposed orders in attempting under the guise of dealing with transactions wholly within the Province in reality is encroaching on the forbidden field."[33] The court examined both the Act and its practical effect on the industry and determined that its true intent was not to control merely local transactions but to exert complete power over a market which, for the most part, extended beyond the boundaries of the province and hence was *ultra vires*.

The marketing of grain has contributed mightily to the jurisprudence in this area. In the *Grain Marketing Act* case,[34] the court considered a scheme for marketing grain which had certain obvious parallels to existing arrangements for the marketing of oil and gas from Alberta. The Saskatchewan Legislature had passed the Grain Marketing Act[35] which established the Saskatchewan Grain Co-operative and constituted it the agent for the growers with the exclusive right to sell all grain grown in Saskatchewan and destined to be marketed, either within or without the province. Again the evidence established that the great majority (at least seventy per cent) of the grain grown in Saskatchewan was exported to other provinces or foreign countries. The scheme was struck down as *ultra vires* on the ground that it was directed mainly to "trade and commerce". In the words of Martin J.A., "it seems clear that a provincial Legislature, under the authority conferred upon it by head 13 of Section 92, 'Property and civil rights in the Province',

[33] *Supra*, footnote 31, *per* Saunders J., at p. 576.
[34] *In re The Grain Marketing Act*, [1931] 2 W.W.R. 146 (Sask. C.A.).
[35] S.S., 1931, c. 87.

or by head 16, 'Matters of a merely local or private nature in the Province', can only legislate in regard to and regulate transactions which have their beginning and end in the Province; it cannot, under the pretence of legality, with respect to property and civil rights in the Province, extend its field of operation so as to interfere with export trade. It is quite true that provincial Legislation upon the subjects assigned to the Province is not invalid because it has an effect upon persons outside the Province, but such effect must be only the indirect result of the legislation, and must not be its main purpose and object."[36]

There are two cases where the provincial legislation on agricultural marketing was held to be valid. The decisions were made in circumstances which undermine any support they may have given to the validity of the oil and gas legislation. The first one is a decision of the Privy Council in *Shannon* v. *Lower Mainland Dairy Products Board.*[37] The British Columbia Legislature had passed the Natural Products Marketing Act which provided in section 4 as follows:[38]

> The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the transportation, packing, storage, and marketing of natural products within the Province, including the prohibition of such transportation, packing, storage, and marketing in whole or in part.

The Act empowered the Lieutenant-Governor in Council to set up a marketing Board to establish schemes for the control and regulation within the province of any natural product. The decision of the Privy Council turned on the fact that, not only did the Act recite that its operation was confined to the province, but also, in reality, the transactions that it purported to control were so confined to the province. "The answer is that on the construction of the Act as a whole it is plain that transportation is confined to the passage of goods whose transport begins within the Province to a destination also within the Province."[39] The appellants contended that, whatever may have been the intention of the legislature, the province had in fact encroached upon the Dominion's power over trade and commerce. Obviously, the evidence satisfied the Privy Council that such was not the case; "If they could have established that contention they would have been in a stronger position."[40] This feature makes the *Shannon* case of very dubious applicability

[36] *Supra*, footnote 34, at p. 181.
[37] [1938] A.C. 70, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.
[38] R.S.B.C., 1936, c. 165.
[39] *Supra*, footnote 37, at p. 607 (W.W.R.).
[40] *Ibid.*, at p. 608.

to the oil and gas situation where the majority of the transactions extend beyond Provincial boundaries.

In the *Farm Products* case,[41] the Supreme Court of Canada held that the Ontario Farm Products Marketing Act[42] was *intra vires* the provincial legislature. The Act followed the inevitable pattern of establishing a board to control the marketing of farm products and contained the usual limitation "within the Province". The trade and commerce power of the Dominion was in the forefront of the arguments advanced against the validity of the provincial enactment. The terms of the reference, however, directed the court to assume, regardless of the facts, that the Act applied only to intra-provincial transactions. The late Chief Justice adopted a definition of "intra-provincial" as "existing or occurring within a Province" and the entire case revolved on the basic assumption that the marketing was confined within the province. This directed assumption limits the applicability of the decision to the narrow terms of the reference itself, but, in delivering their opinions, the learned judges made it abundantly clear that they would have reached an opposite result in the absence of such a direction. "Once an article enters into the flow of inter-provincial or external trade, the subject matter and all its attendant circumstances cease to be a mere matter of local concern."[43] "That demarcation must observe this rule, that if in a trade activity, including manufacture or production, there is involved a matter of extra-provincial interest or concern, this regulation thereafter in the aspect of trade is by that fact put beyond Provincial power."[44] As a result of these and other similar pronouncements, the *Farm Products* case remains more of a threat, rather than a support, to the validity of provincial oil and gas legislation.

All of the foregoing cases have one thing in common. In the final analysis, each one was resolved with a single determination, what was the true effect, or "pith and substance" of the legislation? The judicial phraseology differs from case to case, but the underlying question is always the same; is the legislation truly "in relation to" a valid head of jurisdiction? Rand J. gave one of the clearest statements of this enquiry as he distinguished "between legislation in relation to agriculture and legislation which may produce a favorable effect upon the strength and stability of that

[41] *In the Matter of a Reference Respecting the Farm Products Marketing Act, R.S.O., 1950, Chapter 131, as Amended*, [1957] S.C.R. 198.
[42] R.S.O., 1950, c. 131.
[43] *Supra*, footnote 41, *per* Kerwin C.J., at p. 205.
[44] *Ibid.*, *per* Rand J., at p. 210.

industry".[45] Everything turns on the court's appraisal of the true effect of the legislation, regardless of the intention of the enacting body. In fact, the "pith and substance" rule is so fundamental that I sometimes wonder if the other constitutional rules and doctrines are anything more than examples of the rule in operation.[46]

The courts applied the "pith and substance" rule to provincial efforts to control agriculture by legislation and found them wanting. There would not appear to be any compelling reason why the courts would not reach the same result when they come to consider provincial oil and gas legislation. There are certain obvious and important similarities between the two industries, both start with a basic product which, at that point of time, is clearly subject to provincial jurisdiction. These products, however, do not remain within the confines of the originating province but become commodities in external trade. At that point, when the product forms a part of external trade, a change takes place, and what was originally under provincial jurisdiction comes under the sole and exclusive power of the Dominion. The words of Locke J., in discussing an agricultural product, would seem to apply to oil and gas with equal force; "to attempt to control the manner in which traders in other Provinces will carry out their transactions within the Province, or to prohibit them from purchasing natural products for export, is not a matter of merely provincial concern but also directly and substantially the concern of the other Provinces. I cannot think that from a constitutional standpoint the fact that the buyer for the packing house elects to have the hog killed before it is exported or cut up and, after the treatment, exported his hams, bacon or other pork products, can affect the matter."[47] Oil and gas are certainly "natural products" and, by merely substituting words, for instance, "refinery" for "packing house", "oil" for "hog", "processing" for "treatment", "asphalt, crude, natural gasoline or propane" for "hams, bacon or other pork products", the above passage fits the petroleum situation like a glove.

There is one significant difference between agricultural products and oil and gas. The latter are wasting and depleting assets. They cannot be constantly renewed like grain or livestock. This introduces the factor of conservation. The ultimate recovery of oil from a given pool will be affected seriously by the manner and

[45] *Reference re validity of Section 6 of the Saskatchewan Farm Security Act*, [1947] S.C.R. 394, [1947] 3 D.L.R. 689.

[46] For the classic description of the rules of constitutional interpretation, see MacDonald, Judicial Interpretation of the Canadian Constitution (1935-36), 1 U. of T. L. J. 260.

[47] *Supra*, footnote 41, at p. 232.

rate of production. Many valuable by-products will be lost unless natural gas is processed, and unless discoveries are maintained at a certain level the margin between reserves and current production will fall to a point where it could endanger future supplies.

These, and a number of other equally important conservation practices, are reflected in the provincial legislation. For example, the system of prorationing the existing markets for oil contains an element of conservation in that the maximum rate at which a well can produce without damaging the reservoir, is one of the factors used by the Board in allocating production. The ratio between reserves and production is subjected by the Conservation Board to the most minute and detailed examination under the Gas Resources Preservation Act.[48] The Board cannot permit any exports of gas from the province until all the foreseeable requirements of the province for at least thirty years are met. Only gas which is surplus to these requirements may be exported.

These conservation practices were not present in the agricultural cases. If such were possible, the conservation element could be said to strengthen the bases on which the province could legislate before the petroleum substances entered extra-provincial trade. Once this entry has been made, however, an appraisal of the existing judicial pronouncements virtually forces one to conclude that the conservation aspect cannot affect the final outcome. The courts have said repeatedly that when a trade activity involves a matter of extra-provincial interest or concern, its regulation in the aspect of trade is put beyond provincial power. Whatever may have been the intention, the effect of the provincial enactments is clearly to regulate the petroleum industry in its aspect of trade. In the oil prorationing scheme, the province now regulates with respect to oil what was expressly declared *ultra vires* with respect to agricultural products in the *Lawson* case,[49] namely, the quantity which may be disposed of, and the places from which it may be produced.

In the case of natural gas, the provincial authorities go even further, and, by restricting the right of constructing gas pipelines within the province to Alberta Gas Trunk, effectively regulates the route and the very identity of the shipper itself. The gas export permits that have been granted to date are very specific on the question of quantity and spell out the exact maximum daily and annual volumes that may be exported from the fields specified in the permit. The permits also specify the precise date on which export must commence and the date on which the permit will

[48] *Supra*, footnote 1.

[49] *Supra*, footnote 28.

expire. In addition to the limitations imposed by the permit itself, there are the overriding restrictions and powers created by the Gas Resources Preservation Act, notably the statutory power to divert gas destined for industrial use outside the province. This system of controls is as ambitious as any ever attempted in the field of agriculture and, in the light of existing jurisprudence, would share the same judicial fate.

## VI. *Pipelines.*

Virtually all of the oil and gas which is exported from Alberta is carried through the major interprovincial and international transmission lines. Some of the by-products, such as sulphur and liquid petroleum gasoline, are transported in extra-provincial trade by tank car or tank truck but these volumes are insignificant when compared to the quantity of crude oil and gas transported by the major pipelines.

In the case of both crude oil and natural gas, the main lines, with the exception of Westcoast, have their point of origin within the Province of Alberta, although in the case of two major gas lines, their origin is barely within the provincial boundary. These extra-provincial lines, both oil and gas, were constructed and operate under permits granted by Dominion authorities. The lines which transport the product from the field or plant to a point of connection with the main lines, however, were constructed and operate under provincial permits.

I have already dwelt at considerable length on the manner in which the connection is made. It will be recalled, however, that, in the case of both oil and gas lines, the connection is about as direct as is possible to imagine. Indeed, in the case of the gas lines there is no physical interruption in the actual flow of the product through the system. The only change that occurs is a transfer of custody from the provincial to the Dominion concern at a specified point on the pipeline. There is no change in diameter of the line, nor is there any change in the rate of flow of the gas; there is merely a shifting of legal responsibility. In the case of oil lines, the physical connection is not quite as direct since there is an intervening period when the material is stored in the tankage of the main line company. It should be noted, however, that the provincial lines connect directly with this tankage and the export lines are also tied in to the same tankage.

The Dominion has undoubted jurisdiction over extra-provincial

pipelines under the combined effect of section 92(10) and section 91(29).[50]

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, . . .
> (10) Local Works and Undertakings other than such as are of the following classes:
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Provinces. . . .
> (c) Such Works as, although wholly situate within the Province are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
> 91. (29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Section 92(10) lists certain matters and expressly removes them from the jurisdiction of the provinces. These matters then come under the operation of section 91(29) and are transferred to the legislative jurisdiction of the Dominion.[51]

The combined effect of these two subsections places those pipelines which connect provinces, or extend beyond the limits of one particular province, clearly within Dominion legislative jurisdiction. Thus, the Interprovincial and Transmountain oil systems, and the West Coast, Trans Canada and Alberta Natural gas systems, all operate under Dominion permits. What about those other pipeline systems which, although technically may stop short of a provincial boundary, have a direct and continuous connection with the extra-provincial system? Is it realistic to draw a distinction between the two?

An inquiry of this nature leads inevitably to the case of *Luscar Collieries* v. *MacDonald*.[52] This case dealt with Dominion railways, but it has been made abundantly clear that an extra-provincial pipeline system constitutes an "undertaking" within the ambit of section 92(10)(a) and hence is on an equal footing with a Dominion railway system.[53] The fact pattern in the *Luscar* case was as follows: Grand Trunk Pacific Branch Lines Company, part of the system of the Canadian National Railways, constructed a branch line

[50] *Supra*, footnote 18.
[51] *Montreal* v. *Montreal Street Railway*, [1912] A.C. 333, (1912), 1 D.L.R. 681, (P.C.), affirming (1910), 43 S.C.R. 197.
[52] [1927] A.C. 925, [1927] 4 D.L.R. 85, [1927] 3 W.W.R. 454.
[53] *Campbell-Bennett Ltd.* v. *Comstock Mid-Western Ltd. and Trans-Mountain Pipeline Co.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481.

from the main line of the Grand Trunk Railway System to a point at or near Coalspur, Alberta. This branch line was constructed under the authority granted by an Act of the Parliament of Canada. The Mountain Park Coal Company Limited was authorized by an Act of the Legislature of Alberta to construct, maintain and operate a line from its collieries to connect with the line of the Dominion Company at Coalspur. The Mountain Park Company entered into an agreement with Grand Trunk whereby the latter operated the extension from Coalspur for the account of the Mountain Park Company. The agreement also provided that the Mountain Park Company was to be reimbursed, over a period of years, its entire cost of constructing the extension. The reimbursement was to take the form of freight rebates and as soon as Mountain Park had recouped the construction costs, ownership of the extension would be transferred to Grand Trunk.

Subsequently, the Luscar Company was authorized, by an Act of the Legislature of Alberta, to construct a further extension which, in turn, would connect with the Mountain Park line and, through it, with the Grand Trunk System. This second extension, although constructed and owned by the provincial company, was operated under the same arrangement as the Mountain Park Branch. The appellant owned a coal mine in the vicinity of the Luscar Collieries and applied to the Dominion Board of Railway Commissioners for an order granting him running rights over the Luscar Branch and permission to construct approximately 1,000 feet of spur track to connect his mine to the branch with a "Y" switch. The Luscar Company objected to this application on the grounds that the Board of Railway Commissioners had no jurisdiction, since its line was a provincial railway and, therefore, outside the ambit of the Dominion Railway Act. Both the Supreme Court of Canada and the Privy Council held that the Mountain Park and Luscar Branches formed part of a continuous system of railways connecting the Province of Alberta with other provinces of the Dominion. The Privy Council emphasized the physical continuity of the system as follows:

"It is, in their view, impossible to hold as to any section of that system which does not reach the boundary of a province that it does not connect that province with another. If it connects with a line which itself connects with one in another province, then it would be a link in the chain of connection, and would properly be said to connect the province in which it is situated with other provinces. In the present case, having regard to the way in which

the railway is operated, their Lordships are of opinion that it is in fact a railway connecting the Province of Alberta with others of the Provinces, and therefore falls within section 92(10)(a) of the Act of 1867. There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the Province of Alberta."[54]

The Privy Council left unresolved one very important point in the *Luscar* case. The two provincial branch lines, although constructed under provincial legislation and owned by provincial companies, were operated by the Grand Trunk Company. Both the Supreme Court of Canada and the Privy Council referred to this common operation and incorporated it in their decisions. The Privy Council expressly reserved on the point of whether a change in the operational pattern would affect its finding. "If under the agreements hereinbefore mentioned the Canadian National Railway Company should cease to operate the Luscar Branch, the question whether under such altered circumstances the Railway ceases to be within section 92(10)(a) may have to be determined, but that question does not now arise".[55]

Subsequently, Canadian courts used the element of common operation to distinguish the *Luscar* case in situations where it represented an obstacle to the "correct" decision. In other words, the courts, when faced with a situation where it would be against common sense to hold that the undertaking in question was Dominion rather than provincial, elevated the fact of common operation to rank as the pivotal point in the Privy Council's decision, which it clearly was not, and then used the absence of common operation as grounds for not applying the *Luscar* case.

In *North Fraser Harbour Commissioners* v. *B.C. Electric Railway Co.*,[56] the Supreme Court of Canada had to deal with the following fact pattern: The British Columbia Electric, which was incorporated in England, operated street railways and inter urban services in and around the City of Vancouver under a provincial licence, including a service known as the Central Park Line which ran along the streets of Vancouver and thence in a southeasterly direction to the City of New Westminster and along some of the

[54] *Supra*, footnote 52, at pp. 458-459 (W.W.R.).
[55] *Ibid.*, at p. 459.
[56] [1932] 2 D.L.R. 728; see also *S.M.T. (Eastern)* v. *Ruch*, [1940] 1 D.L.R. 190, where the Trial Division of the New Brunswick Supreme Court held that a provincial highway is not a work or undertaking connecting two provinces and therefore within Dominion jurisdiction simply because it abuts on a highway of another province.

streets in that city. The Vancouver and Lulu Island Railway Company incorporated under a provincial Act, but subsequently declared to be a work for the general advantage of Canada under section 92(10)(c) of the British North America Act,[57] constructed a line which commenced at a point of connection with the Canadian Pacific Railway in Vancouver and thence to New Westminster. Approximately one mile west of New Westminster, the Lulu Island branch connected with the British Columbia Electric branch and the latter continued in an easterly direction for one mile to a point where it made physical connection with the Canadian National Railway lines at New Westminster.

By agreement with the Canadian Pacific Railway, British Columbia Electric Company operated the Lulu Island Railway, which had been declared a Dominion work and leased by the Canadian Pacific Railway. The Lulu Island line was operated with electric rolling stock and presumably this is why the operation was assumed by British Columbia Electric. The case involved only the one mile portion of the British Columbia Electric system that extended from the terminus of the Lulu Island branch to a point of connection with the Canadian National Railway in New Westminster.

This one mile of trackage was a very different proposition from the branch lines in the *Luscar* case. In the latter situation, the branch lines had been constructed specifically to connect with the continental railway, and indeed their sole purpose was to haul freight from the collieries to the main line. All these factors were absent in the British Columbia Electric situation. The one mile of trackage was part of the existing inter urban system, its main function was to carry passengers and freight between the two communities, Vancouver and New Westminster. It even used radically different equipment as its operation was electric as compared to the steam operation of the Canadian National Railway. In addition, the system which it connected to the Canadian National Railway was itself nothing more than a local line which had been declared to be a work for the general advantage of Canada.

The Supreme Court of Canada distinguished the *Luscar* case on the grounds of lack of common operation, and in so doing, cast doubt upon physical connection as sufficient to transfer the undertaking to Dominion jurisdiction. "The mere fact that the Central Park Line makes physical connection with two lines of railway under Dominion jurisdiction does not seem to be of itself sufficient to bring the Central Park Line, or the portion of it con-

[57] *Supra*, footnote 18.

necting the two federal lines, within Dominion jurisdiction."[58] Physical connection as a basis for Dominion jurisdiction was first questioned in the *Montreal Street Railway* case.[59] In that case, a purely local railway had been subjected to a declaration under section 92 (10)(c) of the British North America Act, and hence was brought under Dominion jurisdiction. This railway connected with another purely provincial line and the two systems had entered into operating agreements which set forth the terms under which through traffic would be transported from one system to the other. There was evidence that the Dominion line was discriminating as to services and rates against one of the wards in the City of Montreal. The Federal Board of Railway Commissioners after a hearing, ordered the Dominion line to cease the discrimination, and the Board also ordered the connecting provincial line to do whatever was necessary to enable the Dominion railway to carry out the terms of the order. The Supreme Court of Canada held that the Transport Commissioners did not acquire jurisdiction over the provincial line merely because it connected with a local railway that had been brought under Dominion jurisdiction by a declaration under section 92(10)(c).

It should be noted that both of the above cases involved connections with railway systems that normally would not have been under federal jurisdiction. The railways that are brought under federal jurisdiction by a declaration under section 92(10)(c) are quite different from those which are inherently Dominion because of the element of connecting two or more provinces or extending beyond the limits of one province as required by section 92(10)(a). The element of extension or connection is not even mentioned in section 92(10)(c), whereas it is the entire raison d'être of section 92(10)(a).

The element of common operation is, of course, absent from the pipeline structure but, despite the above cases, it still remains a moot point whether this would lead to a different result than that achieved in the *Luscar* case. The main pipeline systems are clearly works and undertakings within section 92(10)(a) of the British North America Act and this by itself, would seem to represent valid grounds for distinguishing both the *Montreal Street Railway*[60] and the *North Fraser*[61] cases. In addition, the authority of the *Montreal Street Railway* case has been seriously eroded

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[58] *Supra*, footnote 56, at p. 736.
[59] *Supra*, footnote 51.
[60] *Ibid.*
[61] *Supra*, footnote 56.

over the years, particularly by the implications of *S.M.T. (Eastern) Limited* v. *Winner*.[62]

It must also be remembered that all of the above cases dealt with railways which, while they have many points of similarity, also possess many significant differences from pipelines. For one thing, the point of connection with pipelines is much more direct and continuous than could ever be achieved with railways. Also, and most important in the light of the Supreme Court of Canada's comments on common operation, the pipeline systems are virtually automatic, in the case of the gas lines, there is not so much as a valve to mark the point of connection. For these reasons, it is suggested that the mechanical application of the *North Fraser* case to the pipeline situation could be misleading and in the light of the broad definition of "undertaking" followed by the Privy Council in the *Winner* case, a present day court might be very reluctant to be governed solely by the test of common operation.

In the *Winner* case the Privy Council was required to determine whether a provincial Act had any application to a motor bus system that operated from Massachusetts through New Brunswick to a destination in Nova Scotia. The respondent carried not only through passengers on his system but also transported passengers between intermediate points, including points entirely within the bounds of one province. The New Brunswick Motor Carrier Board, established under a provincial Act[63] granted a licence to the respondent which permitted him to operate motor buses from Boston through the Province of New Brunswick on specified highways to Halifax and Glace Bay in Nova Scotia but not to embus or debus passengers within the Province of New Brunswick. The respondent defied the limitations imposed by the licence and continued not only to embus and debus interprovincial and international passengers in New Brunswick, but also to transport passengers between points entirely within New Brunswick. This act of defiance raised the issue of the validity of the provincial enactment insofar as it attempted to regulate the respondent's system. The Supreme Court of Canada determined that the provincial Act was *ultra vires* except as to that part of the respondent's undertaking which was confined to carrying passengers from place to place within the Province of New Brunswick. This compromise which, as was pointed out by the Privy Council was not sought by either side, would have permitted the embusing and debusing of passengers on interprovincial or international journeys but prohibited the

[62] (1954), 13 W.W.R. (N.S.) 657.

[63] S.N.B., 1937, c. 43.

carriage of persons on a journey wholly within the province. This piece of judicial surgery was repudiated by the Privy Council as their Lordships followed the more realistic course of looking at the undertaking as a whole.

> The question is not what portion of the undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?[64]

The Judicial Committee applied this overall approach to the facts of the respondent's bus system and concluded that the intra-provincial and extra-provincial aspects were in fact one and indivisible and should not arbitrarily be separated. Consequently, the Motor Carrier Act and the licence issued under its provisions were *ultra vires* the province insofar as they applied to the respondent's transportation system and Winner was entitled to operate within the bounds of New Brunswick free from any of the restrictions imposed by the licence.

In delivering judgment, their Lordships made a comment which could aptly be applied, in reverse, to some aspects of the existing provincial grid system: "In coming to this conclusion their Lordships must not be supposed to lend any countenance to the suggestion that a carrier who is substantially an internal carrier can put himself outside provincial jurisdiction by starting his activities a few miles over the border. Such a subterfuge would not avail him. The question is whether in truth and in fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is interprovincial. Just as the question whether there is an interconnecting undertaking is one depending on all the circumstances of the case, so the question whether it is a camouflage local undertaking masquerading as an interconnecting one must also depend on the facts of each case and on a determination of what is the pith and substance of an act or regulation."[65]

The *Winner* case is not helpful on the point of divided operation, since the motor bus system had always been under unified management. It does, however, indicate that the courts will now take a very realistic attitude and examine the undertaking in its entirety, and will no longer be distracted by a "subterfuge". If this reasoning is applied to the *North Fraser* case, its most likely

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[64] *Supra*, footnote 62, at p. 679.

[65] *Ibid.*, at p. 680.

effect would be to reduce the common operation aspect to its original and proper level under the *Luscar* case, where it was merely one of a number of factors evaluated by the court in determining the character of the particular railway system. If the realistic approach taken by the court in the *Winner* case continues, common operation may turn out to be one of the less important factors, since as a matter of pure logic, this aspect should be outweighed by the directness and continuity of the connection. No evidence appears to have been presented in the *Winner* case as to the proportion of the traffic that was purely provincial in nature, but it was clearly indicated that the motor carrier made a regular practice of transporting passengers between points entirely within one province. Despite this fact, a provincial licence which purported to regulate the activities of the motor carrier within the province was held to be *ultra vires* even insofar as it related to the purely provincial traffic. The crude oil feeder pipelines, although mainly engaged in transporting crude destined for extra-provincial trade, also have a certain volume of local traffic. Some of them are connected by branches to local refineries and deliver crude as required. By far the greatest portion of their volume continues on to the connection with the main lines. The physical connection may be said to be somewhat indirect since they tie into tankage owned by the export companies rather than the main line system itself. This manner of connection is not unlike the situation where a freight car may be shunted from a spur line on to the siding of a continental system for a period of time while awaiting pickup by a through freight train. The *Luscar* case would certainly cover this latter situation and hold that the mere fact of the freight car being shunted on to a siding would not destroy the extra-provincial aspect of the undertaking.

The gas grid system does not enjoy the possible benefit of intervening tankage, its connection with the extra-provincial system is direct and continuous. It also possesses a certain local traffic in that it may divert gas to local distribution companies and industries along its route. At the present time, this local traffic amounts to something less than one-half of one per cent of its total volume. It is abundantly clear from the *Winner* case that the existence of this minuscule local traffic would not be sufficient to bring the undertaking within provincial jurisdiction.

VII. *The National Energy Board Act and Dominion Paramountcy.*

The validity of a good portion of provincial oil and gas legislation

may be subject to attack from yet another quarter, that venerable rule of constitutional jurisprudence known as Dominion Paramountcy. The rule was stated very succinctly by Lord Tomlin in the *Fisheries* case: "There can be a domain in which provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail."[66] There are a number of conditions which must be met before the rule of Dominion Paramountcy applies. In the first place, both the Dominion and provincial legislation must be truly *intra vires;* the rule does not operate to extend the jurisdiction granted by sections 91 and 92 of the British North America Act. The overlapping of valid legislation can be achieved through the operation of the "aspect" doctrine; provincial legislation may be valid as relating to one aspect of a given subject matter while the Dominion may enact valid legislation with respect to another aspect of the same subject matter. Mr. MacDonald cites the example of Dominion legislation which prohibits certain conduct and is valid under the criminal law power while similar legislation by a province may be equally valid as merely attaching a penalty for breach of a provincial Act relating to "property and civil rights".[67] The Dominion Paramountcy rule also requires that there be an actual conflict or collision between the two pieces of legislation; they must produce a different result. Insofar as there is an actual conflict, the rule provides that the provincial legislation is suspended in favour of the Dominion. If, for any reason, the Dominion legislation were repealed the provincial enactment would once more become operative.

The corollary of the Paramountcy rule should also be examined. The proposition, usually known as the "unoccupied field" doctrine simply states the obvious deduction that otherwise valid provincial legislation cannot be overridden by nonexistent Dominion legislation. It should be borne in mind that the provincial enactment must be validly founded under some head of section 92; mere abstinence by the Dominion cannot enlarge the provincial jurisdiction.

The application of the above principles to provincial oil and gas legislation requires one basic and rather heroic assumption.

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[66] *In the Matter of a Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act, 1914. Attorney-General for Canada* v. *Attorney-General for British Columbia et al.*, [1929] 3 W.W.R. 449, at p. 453.

[67] *Op. cit.*, footnote 46, at p. 274.

If we can assume that the provincial legislation would not be invalidated on the basis that it encroached upon the Dominion trade and commerce power or its jurisdiction over interconnecting works and undertakings, even then the legislation may be threatened by the Dominion Paramountcy rule. The Parliament of Canada has enacted the National Energy Board Act which, in certain instances, seems to be in actual conflict with existing provincial legislation and contains the elements of a potential conflict over a very wide area. As an example of an existing conflict, section 83 delineates the conditions that must be met before a licence will be granted to export gas from Canada. This section requires the National Energy Board to satisfy itself that the gas to be exported is surplus to the reasonably foreseeable requirements of Canada as a whole. The Board obviously has to consider the needs of all the provinces, including Alberta, before it can declare any gas to be surplus. In the last application before the Energy Board, it determined the requirements of Alberta and arrived at a different figure than the one employed by the Alberta Conservation Board when it awarded the same applicant an export permit from the province. Surely this represents an actual conflict yielding a different result.

The National Energy Board Act has been tailored to mesh with existing provincial regulations and procedures. Nonetheless, there are many provisions which could lead to a direct collision with the provinces. Section 87 provides that the requirement of a licence for export may be applied to oil in the same manner as is presently applicable to gas. It does not require much imagination to realize what this could do to the prorationing of oil by the provinces. Under section 22, the National Energy Board is required to review matters relating to the "exploration for, production, recovery, manufacture, processing, transmission, transportation, distribution, sale, purchase, exchange and disposal of energy and sources of energy" within and outside of Canada. The Board is also to recommend any measures which it feels to be necessary or advisable for the controlled supervision, conservation, use, marketing and development of energy. The Act specifically restricts these powers of review and recommendation to those within the jurisdiction of the Parliament of Canada. In view of the nature of the petroleum industry, this jurisdiction extends further than is generally recognized and the operation of the Paramountcy rule could lead to startling results if the Energy Board were to exercise its powers under section 22.

## VIII. *Who Can Legislate?*

If the existing pattern of legislative control over the petroleum industry were subjected to judicial review, it would most likely emerge from battle with several very large and gaping holes. The surviving legislation would constitute, at best, only piecemeal coverage. Even the most ardent supporter of free enterprise will acknowledge that the industry, if it is to function properly, requires a consistent and comprehensive code of regulations. In its Canadian development, the petroleum industry has been virtually built around certain basic economic factors that are solely the creations of local legislation. If these factors, such as prorationing and gas export controls, disappeared, they would require immediate replacement with reasonable facsimiles or the industry would suffer, at the very least, a serious setback. The question remains, who can validly legislate in this area of activity?

The courts have been tireless in their assurances that, between them, the provinces and the Dominion possess a totality of legislative power. In practice, however, this totality has been very elusive. The practical difficulty arises from the impossibility of separating the Dominion and provincial aspects of a particular subject matter of legislation. The oil and gas industry, which starts out with a local product that eventually enters external trade, is a classic illustration of this difficulty. There are areas in the transition stage from local to extra-provincial where it is mechanically and legalistically impossible to distinguish between those aspects in the production and marketing that are within Dominion jurisdiction and those that are purely provincial. This uncertainty can lead to the creation of a legislative "no mans land".[68] In the case of oil and gas legislation, it must be admitted, the provinces have made a very courageous invasion of "no mans land" but there is reason to doubt their continued survival in this area.

The Dominion has by all odds the best chance of success as a sponsor of legislation which could adequately cover the field. There are two methods which the Dominion could employ, one being purely unilateral and the other involving co-operation with the provinces. The first method requires a declaration by the Dominion under section 92(10)(c) of the British North America Act with respect to local wells, pipe lines, refineries and processing plants. This technique was used successfully by the Dominion

[68] In previous contributions, I have explored in some detail the various techniques that have been used to achieve the totality of legislative jurisdiction. See (1952), 30 Can. Bar Rev. 1050 and (1954), 32 Can. Bar Rev. 788.

after the decision in *The King* v. *Eastern Terminal Elevator Co.*[69] In that case, the Supreme Court of Canada held that the Dominion did not have authority to regulate grain elevators even if sixty to seventy per cent of the trade in grain was external.[70] Duff J., however, pointed out very explicitly that the Dominion could acquire such jurisdiction by a declaration properly framed under section 92(10)(c). The Dominion accepted this piece of judicial advice and declared the elevators to be works for the general advantage of Canada.[71] The latest form of this declaration is remarkably straight forward: "All elevators in Canada heretofore or hereafter constructed are hereby declared to be works for the general advantage of Canada." The efficacy of such a declaration was demonstrated in *Regina* v. *Thumlert*[72] in which the court held that the Canadian Wheat Board Act[73] was *intra vires* the Dominion even insofar as it controlled a particular shipment in and out of an elevator which was to take place entirely within the province. The declaratory power, used in conjunction with trade and commerce and interconnecting works, could enable the Dominion to exert virtually complete legislative control over the industry.

The second method involves cooperation between the Dominion and provincial authorities and has received judicial sanction in *P.E.I. Potato Marketing Board* v. *Willis*.[74] The procedure is for the Dominion, by appropriate legislation, to delegate its regulatory powers to a board already constituted, with respect to local matters, by the legislature of the province. Although neither the Dominion nor the provinces can delegate to each other,[75] since this would constitute an unauthorized enlargement of their respective jurisdictions, it is now well settled that the Dominion can validly delegate to a provincially appointed board. In the *Willis* case, the province enacted the Agricultural Products Marketing Act[76] which empowered the Lieutenant-Governor in Council to establish a marketing board to administer schemes for the marketing of natural products within the province. The board had the power to perform any function or duty and to exercise any rights imposed

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[69] [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

[70] While an analysis of the bases for legislative action by the Dominion is outside the ambit of this work, one wonders what is left of the *Eastern Terminal* case after the *Winner* decision.

[71] The latest form of this declaration is to be found in Canada Grain Act, R.S.C., 1952, c. 25, s. 174.

[72] (1959), 28 W.W.R. (N.S.) 481.

[73] R.S.C., 1952, c. 44.

[74] [1952] 2 D.L.R. 726.

[75] *Attorney-General of Nova Scotia* v. *Attorney-General of Canada*, [1951] S.C.R. 31.

[76] *Supra*, footnote 32.

or conferred upon it by the Dominion. The Dominion carried out its part through the Agricultural Products Marketing Act which contained section 2(1):[77]

> The Governor in Council may by order grant authority to any board or agency *authorized under the law of any Province* to exercise powers of regulation in relation to the marketing of any agricultural product locally within the Province, to regulate the marketing of such agricultural product *outside* the Province *in interprovincial and export trade* and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the Province.

These powers were duly conferred upon the provincial board with the result that the same board could validly regulate both the local and the external aspects of the potato industry. Clearly, this device would have overcome the difficulties encountered in the *Sheep and Swine* case.[78]

The same technique was used to undo the result of the decision in the *Winner* case[79] where the Privy Council disallowed restrictions embodied in a licence issued by a provincial board with respect to an extra-provincial motor bus system. Immediately after the decision the jurisdiction was delegated by the Dominion to the provincial boards under the Motor Vehicle Transport Act.[80]

It is not difficult to picture how this device would operate in the oil and gas industry. The provincial legislature would constitute a board, such as the existing Alberta Oil and Gas Conservation Board, charge it with the duty and obligation to regulate the various aspects of the industry within the province and, at the same time, grant it the power and capacity to accept any duty or obligation imposed upon it by the Dominion. The Dominion could then confer the necessary power to regulate the industry in its interprovincial and international aspects. Such a procedure would be of unquestioned validity and would also achieve the much desired "totality of legislative jurisdiction".

There is no reason to believe, however, that the Dominion will abdicate its powers of control over this particular industry. It is one thing to permit a provincial board to regulate the trade in potatoes, or to regulate certain local aspects of an international motor carrier. It is an altogether different thing to turn over control of an industry which has become a vitally important part of Canada's economic life. This year, the gross wellhead value of the estimated oil and gas production will approximate $740,000,

[77] S.C., 1949, c. 16; now R.S.C., 1952, c. 4. Italics mine.
[78] *Supra*, footnote 31. [79] *Supra*, footnote 62. [80] S.C., 1954, c. 59.

000.00. This is a good round sum in itself and is made even more significant by the fact that a substantial portion represents foreign trade and has a material and favourable effect on Canada's international balance sheet. By any criterion, these are strong and compelling reasons why the Dominion may be reluctant to join in a delegation device that would enable a provincial board to exercise complete control over the petroleum trade. For similar reasons, it is difficult to visualize the provinces delegating their powers to a Dominion board.

This much appears to be certain: the next few years will see provincial legislation challenged on constitutional grounds, and if a significant portion of this legislation be invalidated, the nature of the industry itself will require precipitate action to plug the legislative gaps. There are several methods that could be employed and the initiative would lie with the Dominion.