THE ENERGY CRUNCH AND CONSTITUTIONAL REFORM

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The decade of the seventies has been remarkable for the stresses and strains imposed upon the western world by a handful of small, oil-producing states. Overnight, economies which had been developed on the basis of limitless and cheap hydrocarbon fuels were faced with both insecurity of supply and runaway prices.

For the present generation, and doubtless the next as well, "energy" equates to oil and gas. Other energy sources will make their contributions, but it is the hydrocarbon fuels which will govern a nation's energy fortunes. Compared to other countries of the western world, Canada finds itself in a uniquely favorable position. As we enter the eighties, we have a real prospect of achieving complete energy self-sufficiency by 1990. Our energy balance sheet shows a substantial surplus of natural gas in Alberta, two extraction plants already tapping the vast reserves of the Athabasca oil sands with several more slated for construction, the prospect of both oil and natural gas from the Arctic and substantial encouragement on the east coast.

No one would suggest that all this has come about because of Canada's constitution. It was not the British North America Act[1] that caused dinosaurs to deposit their bones in the primordial ooze of the shallow sea that once covered the prairies. But there is justification for the statement that if our constitution had failed to function adequately during the troubled years of the mid-seventies, many of the projects that today hold out the promise of self-sufficiency would never have gotten off the drawing board. The experience of the seventies suggests there must be something right about the present arrangement insofar as the development of our hydrocarbon potential is concerned. It also suggests that any consideration of reforms should start with an examination of how the B.N.A. Act functions in this vital area.

Constitutions, perfect or imperfect, do not operate in a vacuum. The most carefully drafted distribution of legislative powers, if applied rigidly, can lead to disaster, while a flawed document can often yield acceptable results, if treated with respect. From late 1973 through 1974 the confrontation over oil and gas revenues between Alberta and Ottawa took on the aspects of a bad Western. The result

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[1] 1867, 30 & 31 Vict., c.3 as am. (U.K.), hereinafter cited B.N.A. Act.

was a virtual abandonment of all exploratory effort by the oil industry which found itself caught between two squabbling governments. This, of course, was the exact opposite of what should have happened—faced with a threat to its overseas supply sources, Canada needed an accelerated exploratory programme. After an agonizingly long delay the two governments acknowledged what was taking place and made, if not peace, at least an uneasy truce. The episode offers convincing proof that, under a federal system, forbearance and common sense on the part of both levels of government are every bit as important as the words inscribed on the constitutional documents.

Even the most rabid advocate of provincial rights would concede that if this country ever does face a genuine energy crisis, it is only the federal government which is in a position to act effectively. The problems would be nationwide and would require nationwide remedies. Only Parliament can allocate supplies, impose rationing, control the movement of the product across the land and take the other draconian measures that would be required. On the other hand, provincial control over provincial resources should be protected against unjustified federal intrusion. Like so many matters in a federated state, it becomes a complicated and delicate balancing act.

I. *The Federal Powers.*

Peace, order and good government

The most important question that must be asked is whether the federal Parliament has the necessary authority to act in a crisis. The answer must be sought in that power which authorizes parliament "to make Laws for the Peace, Order and Good Government of Canada".

Although the peace, order and good government clause has been subjected to much judicial analysis through the years, there are still areas of ambiguity. Its present status could be summarized as follows:

(a) It has a residuary operation which becomes effective in those instances where the subject matter is not otherwise dealt with in either section 91 or section 92.[2]

(b) It becomes operative during a time of national emergency.[3]

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[2] *Munro* v. *National Capital Corporation*, [1966] S.C.R. 663, where federal legislation establishing the national capital was upheld under the peace, order and good government power, Cartwright J. noting that the matter did not come within any of the classes of the subjects enumerated in s.92.

[3] *In Re Board of Commerce Act*, [1922] 1 A.C. 191; *Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.*, [1923] A.C. 695; and *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396.

(c) It may also become operative when the subject matter has attained "national dimensions".[4]

(d) Under circumstances which justify its operation, it allows Parliament to legislate with respect to subjects normally within provincial competence.[5]

(e) Legislation passed under the emergency aspect of the clause may be temporary in nature and may depend upon the continued existence of the emergency.

The circumstances that gave rise to the *Anti-Inflation Reference*[6] are remarkably similar to what could occur in the Canadian oil and gas situation. The court upheld federal anti-inflation legislation on the ground that it was a temporary measure to meet a national economic crisis. Laskin C.J. embarked on a comprehensive analysis of the "national dimensions" concept which would invoke the power in circumstances where the matter was of national interest or concern without amounting to an actual emergency. However, the fate of the "national dimensions" approach was left in limbo as the majority of the court were persuaded that the economic crisis posed by inflation activated the emergency aspect of the peace, order and good government power.

While it might have been helpful to learn whether "national dimensions" has any current viability, the view taken by the court of what constitutes an emergency makes the "national dimensions" criterion almost redundant, at least with regard to oil and gas. If the threat of inflation amounted to an emergency in 1975, then any significant worsening of the oil and gas situation would surely meet the test as well. It is noteworthy that the Anti-Inflation Act[7] did not contain an express statement that an emergency existed. The absence of such a declaration has sometimes been regarded as fatal, but the court encountered no difficulty in finding an emergency without it. Indeed, Laskin C.J. seems to suggest that the onus is on those who attack the legislation, and that before overturning the legislation the court would have to reach the conclusion "that the Parliament of Canada did not have a rational basis for regarding the Anti-Inflation Act as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperilling the well-being of the people of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole". The foregoing passage is worthy of attention not only for what it has to

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[4] *A-G Ontario* v. *A-G Canada*, [1896] A.C. 348.

[5] *Reference re Natural Products Marketing Act*, [1936] S.C.R. 398; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373.

[6] *Ibid.*

[7] S.C., 1974-75-76, c.75.

say about the onus, but also for its reference to "the interests of the country as a whole". Laskin C.J.'s use of the phrase is a striking demonstration of the near impossibility of separating the "national dimensions" approach from the emergency aspect of the clause.

The tack taken by the Supreme Court in the *Anti-Inflation Reference* would permit Parliament to deal with an imminent or existing energy crisis by such steps as the establishment of allocation and rationing schemes, fixing prices, and other preventive or remedial measures. On the other hand, the crisis would have to be real and apparent before existing provincial powers could be displaced. And this is as it should be.

Trade and commerce

There are many aspects of the oil and gas industry which, although not amounting to an emergency, nonetheless lend themselves to federal, rather than provincial, regulation. The petroleum substances themselves are important commodities in both interprovincial and export trade. The federal power to regulate trade and commerce as interpreted by the courts to mean only international and interprovincial trade, and maybe general regulations affecting the whole country,[8] is ideally tailored to the purpose.

In *Caloil Inc.* v. *A-G Canada*[9] federal regulations authorizing the National Energy Board to require imported gasoline to be sold only within a designated area were upheld under the trade and commerce head. Pigeon J. found that the restriction was intended to reserve the market in certain areas for the benefit of products from other parts of Canada. As such the enactment was, in its pith and substance, an incident in the administration of an extra-provincial marketing scheme.

The trade and commerce power also provides the basis for federal control over the export of Canadian oil and gas. This control has been exercised by the National Energy Board for twenty years without being challenged in the courts, presumably because the regulation of exports is so clearly a matter of international trade. Although the trade and commerce head can do the job by itself, the peace, order and good government power could also become operative under certain circumstances. A shortage of domestic crude to meet Canadian requirements (a situation which prevails today) coupled with a curtailment of foreign supplies, would give rise to an "emergency" every bit as severe as the one in the *Anti-Inflation Reference*, let alone being a matter with "national dimensions".

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[8] *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96.

[9] [1971] S.C.R. 543.

The pricing of oil and gas has become a matter of great economic impact throughout the country. While not as disastrous as an actual physical shortage, price has economic and political repercussions that are becoming more acute with every crack of the OPEC whip. If prices were left uncontrolled and attained levels that threatened the economy. the peace, order and good government power would be triggered. But it would be unfortunate, to say the least, if matters had to reach crisis proportions before the appropriate action could be taken. However, the price of a commodity is clearly an element in the regulation of the trade in that commodity[10] and the federal government has moved to regulate the price of oil and gas in both international and interprovincial trade.[11] The legislation does not affect the price in transactions which take place entirely within the province of origin, an illustration of how neatly the trade and commerce power fits the situation.

Works and undertakings

Like our neighbor to the south, Canada is criss-crossed with an extensive network of pipelines. Large diameter transmission lines carry both oil and gas from Alberta eastward to Ontario and Quebec, as well as to the west coast, and plans are afoot to attach Maritime markets to the western Canadian gas supply.

Although pipelines may not have been in the contemplation of the Fathers when they drafted the B.N.A. Act, steamships, railways and canals were very much so. The logic of having such projects under provincial jurisdiction when they were purely local in character but under federal jurisdiction when they extended beyond the bounds of a province seems inescapable. This balancing of jurisdiction was achieved by first bringing local works and undertakings within provincial competence by section 92.10 and then excepting therefrom:

> 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:

The works and undertakings so excepted were then transposed to federal jurisdiction by section 91.29.[12] An extraprovincial pipeline system constitutes an "undertaking" within the meaning of section 92.10.a.[13]

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[10] *Burns Foods Ltd.* v. *A-G Manitoba,* [1975] 1 S.C.R. 494, (1974), 40 D.L.R. (3d) 731.

[11] Petroleum Administration Act, S.C., 1974-75-76, c.47.

[12] I discussed federal jurisdiction over pipelines in Ballem, Constitutional Validity of Oil and Gas Legislation (1963), 41 Can. Bar Rev. 199, at p.219.

[13] *Campbell-Bennett Ltd.* v. *Comstock Mid-Western Ltd. and TransMountain Pipeline Co.,* [1954] S.C.R. 207, [1954] 3 D.L.R. 481.

The major pipeline systems are of great economic import because they determine the flow of their vital hydro-carbon cargoes for years in the future. The federal regulatory system exercises control over whether or not a particular pipeline is to be built, the route it will follow, its method of construction and operation and the charges for its transportation services. Canada has now had twenty-five years of experience with interprovincial and international pipelines and the contribution they have made to the national economy indicates there is no need to tinker with the existing jurisdictional arrangement in this area.

The declaratory power

Section 92.10.c is the stuff provincial nightmares are made of. This provision, lodged, with fine irony, in the midst of the provincial powers under section 92, removes from the provinces and confers upon Ottawa jurisdiction over:

> c. Such Works as, although wholly situate within the Province, are before or after their execution decided by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

The exact reason why this provision was included in the B.N.A. Act is not entirely clear. Presumably it was to make sure that projects such as the Welland Canal and the St. Lawrence canals would be under federal control.[14]

Whatever its original purpose, sub-section (c) bestows upon parliament an extraordinary power to unilaterally enlarge its jurisdiction. This untoward result has never been described more clearely than by Duff J. in *Reference re Waters and Water-Powers:*[15]

> The authority created by s.92(10c) is of a most unusual nature. It is an authority given to the Dominion Parliament to clothe itself with jurisdiction—exclusive jurisdiction—in respect of subjects over which in the absence of such action by Parliament, exclusive control is, and would remain vested in the provinces. Parliament is empowered to withdraw from that control matters coming within such subjects, and to assume jurisdiction itself. It wields an authority which enables it, in effect, to rearrange the distribution of legislative powers effected directly by the Act and, in some views of the enactment, to bring about changes of the most radical import, in that distribution;[16]

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[14] Confederation Debates, 1865, p.40. See also Laskin, Canadian Constitutional Law (4th ed., 1973, by Abel), p.478.

[15] [1929] S.C.R. 200, [1929] 2 D.L.R. 481.

[16] *Ibid.*, at p.220 (S.C.R.). Later in the same passage the learned judge referred to "works and undertakings" which is puzzling inasmuch as the reference in s.92.10.c is only to "works". Laskin speculates that this may be nothing more than a lapse on Duff J.'s part. Inasmuch as the words appear within quotation marks and are obviously meant to refer to s.92.10.c, there can be little doubt but that it was nothing more than judicial inadvertence.

Nor has the federal government been backward in exercising this unilateral authority; there have been no less than 470 such declarations.[17] Notable among them has been the one which declares all grain elevators in Canada heretofore or hereafter constructed to be works for the general advantage of Canada.[18] This stratagem effectively transferred jurisdiction over the grain trade, which until then had eluded Parliament, to the Dominion. It has also been used to reinforce federal jurisdiction over atomic energy by declaring present or future works used in connection therewith to be for the general advantage of Canada.[19] Possibly because it has become such a sensitive and politicized issue in the tug-of-war over resources, the declaratory power has not been invoked in recent years.

The potential application of the declaratory power to oil and gas is staggering. Almost everything about the industry is a "work"—the well itself is an assembly of steel casing, valves and pipes; the plants that process the raw substances to make them marketable consist of buildings and equipment; the flow lines, storage tanks and countless other items in the production stream are physical facilities. An oil sands plant with its heavy mining equipment, extraction and processing vessels and towers, is a "work" to end all works.

The question of whether or not the peace, order and good government power has been properly invoked by Parliament is reviewable by the courts. However, this is not the case when dealing with a declaration made under section 92.10.c. All that needs to be established is (a) that the declaration was duly passed: "Parliament is the sole judge of the advisability of making [a] declaration as a matter of policy"[20] and (b) that the subject matter of the declaration is a "work". An affirmative answer to (b) would be a foregone conclusion in the case of oil and gas installations.

A declaration confers jurisdiction not only over the physical shell of the work itself, but the activity that is carried on in connection therewith. The effect of a declaration is the same as if the work had been specifically enumerated in section 91.[21] In *The Queen* v. *Thumlert*[22] a declaration with respect to feed mills was held to enable Parliament to "direct what grain may go in and out of such

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[17] Hogg, Constitutional Law of Canada (1977), p.330.

[18] Originally enacted as S.C., 1925, c.33, s.234; currently Canada Grain Act, S.C., 1970-71-72, c.7, s.43.

[19] Atomic Energy Control Act, R.S.C., 1970, c.A-19, s.17.

[20] *Luscar Collieries Ltd.* v. *McDonald*, [1925] S.C.R. 460, at p.480, [1925] 3 D.L.R. 225, at p.239, per Mignault J. See also *The Queen* v. *Thumlert* (1960), 20 D.L.R. (3d) 335, 28 W.W.R. 481.

[21] *Montreal* v. *Montreal Street R.Co.*, [1912] A.C. 33, 1 D.L.R. 681.

[22] *The Queen* v. *Thumlert, supra,* footnote 20.

mills, who may be permitted to sell grain to feed mills and the terms upon which grain may be delivered to them''.[23] If one visualizes this happening to oil and gas facilities, it is not difficult to understand why the producing provinces are so uptight over section 92.10.c.

If the constitution is to be amended, the abolition of the declaratory power assuredly will be at the head of the provincial shopping list. Not only is it unilateral and far reaching, it has the fatal drawback of infallibility. If the federal government requires the degree of regulation over oil and gas matters that could be achieved by a declaration, surely it can only be under circumstances sufficiently severe to justify the employment of the peace, order and good government provision.

Expropriation

The B.N.A. Act does not deal specifically with the matter of expropriation. It seems safe to say that provincial governments cannot expropriate federal property because legislation respecting such property is within the exclusive and paramount jurisdiction of Parliament.[24] The federal government does have the power to expropriate property owned by the provincial government but, fortunately for the maintenance of a proper balance between the two levels of government, the use of this power has been severely restricted by the courts. The limitation is not capable of precise definition, but it would appear that expropriation of provincial property will be confined to those situations where there is simply no other way of achieving the federal purpose, for example, expropriation of land to construct railways and canals.[25] A power of expropriation so narrowly defined does not represent a threat to a province's control over its mineral resources.

Taxing power

Section 91.3 confers upon Parliament the power to raise money by any mode or system of taxation. As most of us can attest, the federal taxing power knows no limitation and it has been the principal method by which Ottawa has obtained a share of oil and gas revenues. The federal power to tax, however, does not extend to provincial property. Section 125 of the B.N.A. Act provides that no property belonging to any province shall be liable to taxation, and this means that a province's share of the revenue from its own oil and

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[23] *Ibid.*, at p.357 (D.L.R.).

[24] In *B.C. Power* v. *A-G British Columbia* (1963), 44 W.W.R. N.S. 65 (B.C.), Lett C.J. went so far as to invalidate provincial legislation purporting to expropriate the personal property of a dominion company.

[25] *Reference re Water and Water-Powers, supra*, footnote 15.

gas is not subject to federal taxation. It was the provisions of section 125 that led to the bitterest dispute yet between Alberta and the federal government. As the value of oil and gas skyrocketed, Alberta started to escalate its royalty rates, thus collecting an ever increasing share of the wellhead price. Section 125 placed this royalty beyond the reach of the federal taxing authorities. The federal riposte was to amend the Income Tax Act to provide that monies paid to the provinces by way of royalties or mineral taxes had to be included in an oil company's taxable income, even though the luckless company would never realize a penny of these riches.[26]

The sharing of revenue issued would be exacerbated if a producing province were to "provincialize" the industry. If Alberta, for example, took over the oil industry within the province, then, under section 125, all the proceeds flowing from these minerals would be immune from federal taxes. It is only through taxing the income generated by the private sector that Ottawa participates in production revenues.

The federal government has also used its taxing power to impose an export tax on crude oil sold to the United States. In the years since its imposition of 1973, the export tax has put hundreds of millions of dollars into the federal coffers and these millions have been used to subsidize the cost of foreign crude imported into Canada. For reasons of supply security, however, these export volumes have been virtually eliminated, taking the federal revenues down with them.

The disappearance of crude oil exports means that Canadian crude oil will be sold only within the country. An attempt by Ottawa to levy taxes or other imposts on such movement or sale might encounter an obstacle in section 121 of the B.N.A. Act which provides that "all Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces". Whether crude oil and natural gas are articles of the classes described in section 121 is an open and debatable question. If they fit anywhere, it must be as "produce" although it is unlikely that the Fathers had anything other than agricultural products in mind when they used this word. The better view would seem to be that section 121 does not apply to these hydrocarbon substances but, until the matter has been resolved by the courts, it remains a potential barrier to any federal initiative.

Dominion paramountcy

It is inevitable from the nature of oil and gas operations that there will be some matters of equally valid concern to both the

[26] S.C., 1974-75-76, c.26.

federal and provincial governments. For example, a province may legislate in its role as owner of natural gas while the federal government may enact valid legislation having to do with the interprovincial or international trade in the same commodity. So long as there is no conflict between the two pieces of legislation, both should remain in effect. In the event of a conflict, however, the structure of the federation and the overriding interests of the country as a whole dictate that the federal legislation should prevail. And that is what happens presently. The courts have enunciated the doctrine of Dominion paramountcy which establishes that, while there can be a domain in which valid provincial and federal legislation may co-exist if they are not in conflict, if there is a conflict, the federal legislation must prevail.[27]

Federal Ownership

Onshore

The federal government has no ownership of minerals lying within provincial boundaries save for certain comparatively small exceptions such as national parks and Indian reserves. Its ownership is confined to those lands lying outside any existing province, which means the Yukon and the Northwest Territories. When the time comes for these territories to be granted provincial status, precedent would suggest that the minerals within their boundaries will belong to them.

Title to minerals under certain land areas is clouded by native claims. But this is not a matter which affects the legislative jurisdictional relationship between the federal and provincial governments, and it is one whose resolution will be largely political. Appropriate amendments to the constitution may be required to implement the result, but it will not bear directly upon the distribution of legislative powers between federal and provincial governments.

Offshore

In view of the negotiations currently underway between the federal and provincial governments, the present legal status of the ownership of offshore minerals is likely to be of purely academic interest. It is obvious that the political process will result in radical changes which will transfer significant ownership and control to those provinces bordering on the sea.

If one were to take a snapshot of the offshore mineral ownership at this moment in time, it would show:

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[27] *A-G Canada* v. *A-G British Columbia*, [1930] A.C. 111, [1930] 1 D.L.R. 194.

(a) The federal government owns and controls all mineral rights beyond the low water mark of British Columbia.[28]

(b) The Federal government owns all mineral rights beneath that inland sea, Hudson's Bay, even though no less than three provinces, Manitoba, Ontario and Quebec, border upon it. This follows from the fact that the boundaries of these provinces, when they were extended northward, were defined as following the shoreline.[29]

(c) The underwater rights of a littoral province are co-extensive with its "inland waters", which the Canadian Supreme Court equates to waters which were under the colony's control at the time it joined the union.[30]

The snapshot becomes somewhat blurred when the lens is focussed on the Maritime provinces and Newfoundland. At the very least, the "inland waters" of the three Maritime provinces could turn out to be surprisingly extensive. Not only did the boundaries of the former colonies extend out from the coastline,[31] but they asserted legislative jurisdiction within the three nautical mile limit that defines the territorial sea. Each had passed Acts empowering customs officials to board and seize any ships hovering within that distance from the coast.[32] Sable Island, that overgrown sand bar lying some 200 kilometres off Nova Scotia's coast, belonged to the colony before it was transferred to the Dominion by the Third Schedule to section 108 of the B.N.A. Act. Just what effect, if any, the pre-confederation exercise of jurisdiction by Nova Scotia over Sable Island would have had on the ownership of the intervening sea bed poses an interesting question that now is likely to remain unanswered.

For a number of years Newfoundland has been marshalling arguments in support of its claim to offshore minerals. In the *Offshore Mineral Reference* the Supreme Court of Canada, when dealing with Canada's west coast, adopted the test of the extent of the "realm" at the time of union. The realm is co-extensive with the geographical area under the jurisdiction of the state at any given

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[28] *Re: Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792.

[29] (1912), 2 Geo. V, cc.32-40, 45.

[30] *Supra*, footnote 28.

[31] The pre-confederation boundaries of New Brunswick may have included the southern half of the Baie des Chaleurs along with a portion of the Bay of Fundy, while Nova Scotia's boundaries probably also extended into the Bay of Fundy. See La Forest, Natural Resources and Public Property Under the Canadian Constitution (1969), pp.85 *et seq.*

[32] See La Forest, Canadian Inland Waters of the Atlantic Provinces (1963), 1 Can. Yearbook Int. L. 149.

point in time. The results of applying this test to the circumstances of Newfoundland would be instructive but, like the "inland waters" of the Maritime provinces, seem destined to remain forever unknown. If the matter had come before the courts, Newfoundland undoubtedly would have commenced its arguments with Term 37 of the Terms of Union[33] which, like section 109 of the B.N.A. Act, 1867, grants to Newfoundland all lands, minerals, mines and royalties belonging to it at the date of union. By 1949, the year when Newfoundland joined Canada, international law had recognized the claim of littoral states to the continental shelf.[34]

For a brief period of its history following the enactment of the Statute of Westminster in 1931,[35] Newfoundland was a self-governing dominion. Shortly thereafter, a bankrupt economy led it to revert to colonial status and administration by a commission. Term 7 of the Terms of Union, however, revives its constitution as it existed immediately prior to the 16th day of February, 1934. Thus it could be argued that Newfoundland joined confederation as a self-governing dominion which, by international law, would be capable of exercising sovereignty over the continental shelf. The continental shelf is an expanding concept which currently includes areas to a depth of 200 metres, or beyond where the depth allows exploitation of the natural resources.[36] Having the potential to exercise jurisdiction is not quite the same thing as its actual exercise, however. And Newfoundland's claim to the continental shelf, as distinct from the territorial sea, might have been undermined by the fact that in the past its own Supreme Court has taken the position that Newfoundland's jurisdiction was confined to the three mile limit.[37]

Whatever the true legal status of competing federal and provincial claims to underwater resources might be, it will be overruled by intergovernmental negotiations. Already it is clear that the coastal provinces will end up with the minerals and the provinces bordering on Hudson's Bay and the St. Lawrence waterways also may be the beneficiaries of federal largesse. If the current policy is carried to its logical conclusion, the northern territories, on achieving provincial status, will inherit the mineral riches beneath the Beaufort Sea and other arctic waters. The granting of submarine minerals to a province is of a different order of magnitude than provincial ownership of minerals within its boundaries. The littoral

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[33] British North America Act, 1949, Schedules, 12-13 Geo. VI, c.22 (U.K.).

[34] *Supra*, footnote 28.

[35] 22 Geo. V, c.4 (U.K.).

[36] 1958, Geneva Convention on the Continental Shelf, 1970, Can. T.S., No. 4.

[37] *Rhodes* v. *Fairweather* (1888), 7 Nfld. L.R. 321; *The Queen* v. *Delephine* (1889), 7 Nfld. L.R. 378.

provinces, with the possible exception of Newfoundland, will be receiving property they had no valid legal claim to.

Be that as it may, the only remaining legal issue will be to ensure that the eventual outcome of the negotiations is enacted in such a fashion as to form part of our constitution. At the moment that requires legislation by the United Kingdom Parliament.

II. *Provincial Powers.*

Unquestionably, the province of origin has a very substantial stake in the utilization and control of its mineral resources. In the absence of any overriding national circumstances, a province should be able to legislate with respect to the realization of revenues from the resource, its proper management and development, purely local transactions in it and the deployment of the resource as a policy instrument. While a number of heads under section 92 are relevant to provincial legislative jurisdiction over resources, the simple and non-legislative fact of ownership is probably the most important factor.

Ownership

The high visibility of Alberta's multi-billion dollar Heritage Fund attracts covetous glances from other parts of the country and some view it as placing an intolerable stress on confederation. It must be remembered, however, that, under section 109, the original uniting provinces retained the minerals within their boundaries. Thus, the 1930 legislation[38] which transferred title to minerals to the four western provinces did nothing more than place them in the same position as the original provinces. Provincial ownership of minerals has been a feature of confederation since its inception and the fact that for the moment geological roulette appears to favor one particular region is not a sufficient reason to reverse basic principles.

Government ownership in the prairie provinces is something less than one hundred per cent. In Alberta, for example, the figure is eighty-one per cent. In the early years of land settlement, homesteaders acquired patents and grants without any reservation of mines and minerals. The practice of issuing titles without reserving minerals to the Crown was not abandoned until 1887 for lands west of the mid-point of the province of Saskatchewan and 1889 for lands east of that point.

Royalties and taxes

Ownership of the minerals obviously gives the provincial government ready access to the revenues generated therefrom.

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[38] The British North America Act, 1930, 20-21 Geo. V, c.26 (U.K.).

Normally these revenues are obtained through payments made by private industry to acquire rights to explore and produce the minerals and, more importantly, through the collection of royalties from the proceeds of sale. An owner of a resource unquestionably has the right to collect such royalties, although Saskatchewan managed to trip itself up when it attempted to collect what the court in *Canadian Industrial Gas & Oil Ltd.* v. *Saskatchewan*[39] found to be an indirect tax in the guise of royalty.

The legislation under attack in the *CIGOL* case created what was termed a "royalty surcharge" which was designed to automatically appropriate to the government the entire proceeds of any increase in the value of crude oil. The Supreme Court held that this device was not a royalty but a tax, and an indirect one at that, since the producer upon whom it was levied was meant to pass it on to the ultimate customer. The provincial taxing power being restricted by section 92 to direct taxation, the Act was struck down. Saskatchewan has subsequently attempted to repair the situation by the Oil Well Income Tax Act[40] which levies what is claimed to be a direct tax. While the *CIGOL* decision sheds considerable light on the provincial power to tax and created a great deal of resentment on the part of the Saskatchewan government, it does not in any way undermine the provincial power to collect revenue through a conventional royalty.

Management of public lands

Section 92.5 authorizes provincial governments to make laws for the management and sale of the public lands. One need look no further for justification of the regulatory machinery established by the provinces for the disposition of Crown minerals. It also goes a considerable distance to support conservation legislation, at least insofar as it deals with such matters as production methods, the enhancement of ultimate recovery, safety precautions and the like.[41] However, if provincial legislation went beyond true conservation measures and attempted to affect extra-provincial marketing by, for example, prorating oil production to market demand, it could run afoul of the federal trade and commerce power.[42]

Local transactions

Section 92.13 dealing with property and civil rights and head 16, matters of a merely local or private nature in the province, confer

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[39] [1977] 6 W.W.R. 607, hereinafter cited *CIGOL*.

[40] S.S., 1977-78, c.26.

[41] *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, [1933] 4 D.L.R. 545.

[42] See *op. cit.*, footnote 12.

ample jurisdiction over events which are entirely provincial in scope. Thus Alberta can validly fix the price of gas which is not only produced but consumed within the province.[43] On the other hand, it is most likely beyond its power to fix the price of its gas which is marketed outside the province because that becomes an item of extra-provincial trade. The province might have some success in blurring the issue by structuring a sale of the substance at the wellhead before moving into ex-Alberta markets. It cannot fix the price, however, when Ottawa has occupied the field by passing the Petroleum Administration Act[44] under which such prices are determined. Again this is, on balance, the right result.

Local works and undertakings

For the same reasons why a province should have the right to legislate with respect to transactions that are completed within its borders, it should be able to legislate with respect to an undertaking such as a pipeline which operates entirely within the province. The opening words of section 92.10 confer jurisdiction over such local works and undertakings on the province.

The circumstances under which a provincial pipeline may be transformed into a federal undertaking pose some of the more intriguing questions in present day constitutional law. A pipeline that delivers oil from a field outside Red Deer to a refinery in Edmonton is clearly provincial. But what of a pipeline which delivers oil to the terminal of an interprovincial pipeline which then carries it to markets in Ontario? Or a provincial gas gathering grid which collects gas from various points throughout Alberta and delivers it to the provincial border for transmission by a federally incorporated pipeline to the United States? Do these undertakings lose their provincial aspect and become part of a system which falls under federal jurisdiction?

Questions of this sort lead one directly to *Luscar Collieries* v. *McDonald*[45] where a spur line connecting a coal property to the main railway system was, although constructed and owned by a provincial company, nonetheless found to be part of a continuous system of railways connecting the province with other provinces and thus under federal jurisdiction. The spur line was operated by the main railway company and the courts have on occasion used the absence of common operation to distinguish *Luscar*, particularly where every

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[43] Natural Gas Pricing Agreement Act, S.A., 1975, c.38.

[44] *Supra,* footnote 11.

[45] [1927] A.C. 925, at p.927, [1927] 4 D.L.R. 85.

aspect of the line in question was truly "local" except for the connection with another system.[46]

In *Kootenay & Elk Railway Co.* v. *C.P.R.*[47] it was held that a provincially incorporated company could receive authority, albeit from a federal regulatory agency, to construct a railway line which stopped one-quarter inch north of the United States border where it would connect with a line built through Montana to a point one-quarter inch south of the border. The Supreme Court of Canada, however, did point out that once the line was joined with its American counterpart, an overall undertaking of international character might emerge.

If the courts were called upon to determine who has jurisdiction over provincial pipeline systems such as the extensive gas gathering operations of The Alberta Gas Trunk Line Company Limited, there is a strong chance that they would be found to form part of an extra-provincial undertaking under section 92.10.a. But this would be of little consequence in the overall scheme of things since the operation of a gathering system, however extensive, does not determine matters of general policy. While the regulatory jurisdiction of the National Energy Board would be enlarged, the existing federal policy making authority would not be increased in any meaningful way. Nor would Alberta's present degree of control over gas removed from the province be materially diminished. Which may explain why the existing arrangement has remained undisturbed.

Conclusion

In general, one can only conclude that Canada has been well served by its constitution in oil and gas matters. The B.N.A. Act recognizes areas of legislative competence for both governmental levels with a tilt in favour of the federal. This corresponds very well with the realities of oil and gas. The overlapping of the jurisdictional compartments permits a very necessary flexibility and the ambiguity that still lingers in certain areas is a useful lubricant.

A cautionary note might be sounded about the possible erosion of the federal ability to share in the resource revenues, particularly when coupled with the surrender of offshore mineral rights. Although it seems almost laughable to question the efficacy of the federal taxing power, one can conjure up scenarios where section 125 could place the normal collection channels in jeopardy. So long

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[46] *North Fraser Harbour Commission* v. *British Columbia Elk Railway Co.*, [1932] 2 D.L.R. 728; *City of Montreal* v. *Montreal Street Railway Co.*, [1912] A.C. 333.

[47] (1972), 28 D.L.R. (3d) 385 (S.C.C.).

as present conditions obtain, however, Ottawa will have no difficulty in extracting its share. In fact, only one item cries out for remedial action; the unilateral and arbitrary federal declaratory power under section 92.10.c should be eliminated.

The framework is already in place. The thing to do is to use it properly.