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SECTION 92A OF THE CONSTITUTION ACT, 1867

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Section 92A, the "resource amendment", was added to the Constitution Act, 1867 (formerly called the British North America Act, 1867) on April 17th, 1982 as part of the federal government's patriation package. It received far less publicity than the other elements of that package, particularly the Canadian Charter of Rights and Freedoms. Yet it may have significant implications for the future development of natural resources in Canada, especially in the western provinces, and for the ongoing process of federal-provincial relations. In this article, the author analyzes the scope and potential effect of the various provisions of section 92A in relation to provincial powers of indirect taxation and control of resource development, and attempts to assess the impact of section 92A by applying its provisions to the two recent decisions of the Supreme Court of Canada of significance in this area, CIGOL and Central Canada Potash.

L'article 92A, "l'amendement des ressources naturelles" a été ajouté à la loi constitutionnelle, 1867 (autrefois connue sous le nom d'Acte de l'Amérique du Nord britannique, 1867) le 17 avril 1982. Il faisait partie du projet de rapatriement établi par le gouvernement fédéral. Cet amendement a reçu moins de publicité que les autres dispositions de la nouvelle loi, notamment la Charte canadienne des droits et libertés. Cependant, il peut avoir une grande portée sur le développement des ressources naturelles au Canada, particulièrement dans les provinces de l'ouest et sur l'évolution des rapports entre le gouvernement fédéral et les gouvernements provinciaux.

Dans les pages qui suivent l'auteur analyse l'étendue et l'effet possible des différentes dispositions de l'article 92A en ce qui concerne la compétence législative des provinces en matière de taxation indirecte et de contrôle du développement des ressources naturelles. Il essaye d'en évaluer les effets en appliquant les dispositions de cet article à deux décisions récentes rendues par la Cour suprême du Canada dans cet important domaine, à savoir CIGOL et Central Canada Potash.

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Introduction

In an earlier article¹ I discussed the decisions of the Supreme Court of Canada in *CIGOL*² and *Central Canada Potash*³ and their implications for provincial natural resource taxation and control. That article concluded with the suggestion that the resource-producing provinces should have the power of indirect taxation in the natural resource field, and that the scope of the federal trade and commerce power should be clarified so that the producing provinces would have sufficient legislative power to control the development of their natural resources as part of their local economies.

The federal government's constitutional patriation package⁴ includes an amendment to the Constitution Act, 1867 (formerly the British North America Act, 1867) that adds thereto a new section 92A and a new Sixth Schedule pursuant to that section. Section 92A would give the provinces powers of indirect taxation in the resource area, and would also confer upon them some greater degree of control over their natural resources. The purpose of this article is to examine the provisions of section 92A to see just what they might accomplish for the resource producing provinces, and in particular to turn the clock back a few years and see what difference section 92A might have made to the results in *CIGOL* and *Central Canada Potash* had it then been in force.

I. Section 92A Analyzed.

1. Background of Section 92A.

Section 92A was a relatively late inclusion in the constitutional patriation package. That it is there at all is somewhat surprising, in that it is the only attempt in the package to alter directly the balance of federal and provincial legislative authority (as opposed to the "Canadian Charter of Rights and Freedoms" which limits both federal and provincial legislative powers but does not fundamentally disturb their balance). Its inclusion was apparently the result of a political bargain struck between the Liberals and the New Democratic Party as the price of the latter's support for the package, and it was in fact the latter who proposed the terms of the section at the committee stage. However, the version of section 92A ultimately accepted by the Liberals differs somewhat from that proposed by the New Democrats and, as will be discussed below, these differences may have substantial consequences.

¹ Moull, *Natural Resources: The Other Crisis in Canadian Federalism* (1980), 18 O.H.L.J. 1.

² *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, 80 D.L.R. (3d) 449, [1977] 6 W.W.R. 607.

³ *Central Canada Potash Co. Ltd v. Government of Saskatchewan*, [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609, 23 N.R. 481.

⁴ Constitution Act, 1982, Part VI, ss 50 and 51 (House of Commons, Canada, Dec. 2nd., 1981).

Perhaps more importantly, section 92A derives from a series of earlier proposals discussed at various First Ministers Conferences. The most recent of these seems to be the "best efforts" draft discussed by the First Ministers at the federal-provincial conference on the Constitution held in Ottawa on February 5th and 6th, 1979.⁵ Again, however, some elements of section 92A differ from those discussed in the past, and the effect of those differences may also be significant.

For convenience of reference, the texts of both section 92A (including the new Sixth Schedule) and the "best efforts" draft of February 1979 are set out in Appendix A.

2. *Definitional Problems.*

On even a cursory reading of section 92A, one is immediately struck by the number of technical terms in it that are not defined. Granted, subsection 92A(5) and the new Sixth Schedule give some meaning to the term "primary production" as used elsewhere in section 92A. But even that is done in such a way that further undefined terms are introduced. For instance, subclause 1(a) (i) of the Sixth Schedule defines "primary production", in part, in terms of the "recovery or severance" of a non-renewable natural resource "from its natural state", and in subclause 1(a) (ii) the Sixth Schedule appears to make a fine distinction between "processing or refining" a resource and a "manufactured product" resulting, one must presume, from something more than mere "processing or refining".

Even the crucial term "non-renewable natural resources" is not defined, nor are such key words as "exploration", "development", "conservation" and "management"; yet it is the interplay of these terms that will delimit the scope of provincial legislative powers under subsection 92A(1). Of course, it is probably unrealistic to expect an exhaustive definition for each of these terms in section 92A itself. Nor is it really the purpose of this article to suggest such definitions, as the exact meaning may vary considerably from one type of extractive industry to the next and from the circumstances of one case to those of the next. For instance, the phrase "recovery or severance" may have to be interpreted flexibly to take into account the current variety of techniques of extracting different resources, as well as techniques available in the future that are not even thought of yet.

For the time being, then, one must assume that these terms will be given something like their ordinary, common-sense meanings when the courts come to construe them (as they surely will), though the past results in this regard have not always been very helpful. Take the term "conserva-

⁵ For a discussion of these proposals, see Harrison, *Natural Resources and the Constitution: Some Recent Developments and Their Implications for the Future Regulation of the Resource Industries* (1980), 18 *Alta L. Rev.* 1, at pp. 7-10 and Appendix A, pp. 22-24.

tion'' for example. It is reasonably clear at the moment that the *physical* conservation of a resource is already within provincial legislative authority.⁶ It is this principle that is used to justify provincial prorationing legislation, which limits the rate at which oil or gas may be produced from a particular well or pool so that the ultimate total recovery is maximized. However, it is not at all clear whether provincial legislative authority also extends to *economic* conservation, either in the sense of conserving the resource itself in order to maximize total economic recovery from it (for instance, where production rate restrictions are unlikely to increase the total *quantity* recovered over time) or even in the sense of conserving the industry that is engaged in extracting the resource in the province (as was the case in *Central Canada Potash*).⁷ While the insertion of the term "conservation" in subsection 92A(1) reinforces the provincial jurisdiction, it does nothing to clarify its extent so that the courts will still be faced with the task of determining exactly how far the term goes. Some legislation will probably not be too hard to deal with, for instance in respect of resources that are relatively scarce (such as oil and gas). But the cases that the courts are likely to see will be those at the "edges" of the definitions, where lines are difficult to draw with distinction and where judicial thinking can ebb and flow. It is at these "edges", for instance, that the courts might have to determine whether the term "conservation" can be applied in any meaningful way to such virtually inexhaustible resources as Saskatchewan potash.

3. *Indirect Taxation—Subsection 92A(4).*

Subsection 92A(4) is a relatively straightforward attempt to give the provinces the power to levy indirect taxation in the resource field. Indeed, it is virtually identical to subsection 92(5) of the February 1979 "best efforts" draft (see Appendix A).

On the whole, the provision seems to accomplish its goal. The introductory language is reminiscent of the language of the federal taxation power in head 3 of section 91, and has abandoned not only the "direct taxation" language of head 2 of section 92 but also most of the additional qualifications found there upon the provincial taxation power as it has existed previously. Under clause 92A(4) (a), the provinces will now be able to tax both the resource in place and its "primary production", or in other words both the resource itself *in situ* and the product that results from its severance, by any system of taxation including indirect taxation.

However, there are some aspects of the drafting of subsection 92A(4) that should be noted. For instance, head 2 of section 92 currently limits the

⁶ *Spooner Oils Ltd v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, [1933] 4 D.L.R. 545.

⁷ See, for instance, the comments of Laskin C.J.C., in *Central Canada Potash*, *supra*, footnote 3, at pp. 66 (S.C.R.), 625 (D.L.R.), 520 (N.R.).

provinces to taxation "within the province", and one of the recurring concerns expressed by various bodies was that provincial indirect taxation in the resource field should not fall on persons outside the province.⁸ Of course, given the classic definitions of "indirect taxation" it is to be expected that an indirect tax that falls upon production of a resource within a province will be exported from that province as part of the purchase price if the taxed production itself is exported from the province (as is usually the case with Western Canadian resources). It would accomplish little to restrict the provinces to indirect taxation that may not be "exported" even in this indirect manner, and the language of subsection 92A(4) does not seem to attempt this. The introductory words "in each province" seem to modify "legislature" rather than "taxation", and so are not directed to this point (which is confirmed by the introductory words of the French version of the provision).⁹ The words "whether or not such production is exported in whole or in part from the province" immediately following clause 92A(4) (b) must then be taken as implicitly recognizing that indirect taxation levied within the province might well follow the severed resource as it is exported from the province.

Some confusion may result from the proviso at the end of subsection 92A(4). The difficulty arises with respect to the indirect taxation of production that is exported both from the province and from Canada, rather than from the province to another part of Canada. The words "whether or not such production is exported in whole or in part from the province" immediately after clause 92A(4) (b) appear to authorize indirect taxation even when the resource is exported directly from Canada, but the following proviso respecting differential taxation applies only when the production is exported "to another part of Canada". On its face, then, the proviso may be read as permitting taxation that *does* differentiate between production exported from Canada and production not exported from Canada. But given the evident concern of the federal government regarding provincial legislation in relation to production exported from Canada, as will be discussed below in the context of subsection 92A(2), it is not easy to see why a provincial government might yet be able to regulate that export trade indirectly through differential taxation. This might lead to a very difficult exercise in categorization, the argument being that such differential taxation legislation is not "taxation" at all, and therefore not within the ambit of subsection 92A(4), but is really "in relation to" the regulation of exports from Canada and so cannot be upheld under section 92A.

As well, distinguishing between export "to another part of Canada" and export "from Canada" is not always easy. For instance, Saskatchewan

⁸ See Report of the Task Force on Canadian Unity: *A Future Together* (1979), p. 92, and Report of the Task Force on Canadian Unity: *Coming to Terms* (1979), pp. 96 and 102.

⁹ The French version of subsection 92A(4) begins with the following: "(4) La législature de chaque province a compétence pour prélever des sommes d'argent par tout mode ou système de taxation."

uranium destined for export from Canada might first be shipped to Ontario for partial refining and subsequent export. In this circumstance, assuming for the moment that the distinction must be made, does the prohibition against differential taxation apply because the export from the province is to another part of Canada in the first instance, even though it is never intended that such production will be consumed in Canada but, in fact, will be exported eventually? Conversely, what if Alberta oil were transmitted by pipeline directly to the United States but was destined for delivery at Sarnia and for consumption in Eastern Canada? As will be discussed below in the context of subsection 92A(2), a great deal may turn on how the destination of an "export from the province" is to be determined.

On the whole, however, subsection 92A(4) does seem to accomplish its goal. The chief problem with it may be in the proper characterization of "taxation" legislation that purports to fall within its scope. Thus, the courts may well be faced with the unenviable task of trying to determine whether what appears on its face to be taxation legislation in fact has some other primary motivation that requires it to be characterized as something else.¹⁰ This is not always an easy line to draw.

4. *Resource Control.*

(a) *Internal—Subsection 92A(1).*

The definitional problems noted above are perhaps most acute with respect to subsection 92A(1), for it is here that the bulk of the undefined technical terms are used. The interpretation of the subsection is also clouded somewhat by its history. While there are not substantive changes from the February 1979 "best efforts" draft (see Appendix A), the version of subsection 92A(1) originally proposed by the New Democratic Party contained the following concluding words:

... whether or not such production is exported in whole or in part from the province.

Since it is beyond the scope of this article to consider the special problems involved in the generation and production of electrical energy (and, for that matter, any particular difficulties with forestry resources), clause 92A(1) (c) will not be discussed here. And on the assumption that the definitional problems can be minimized or overcome, there is not much more than can be usefully said here regarding clause 92A(1) (a). The real focus, and the provision of most concern to the resource producing provinces, must be clause 92A(1) (b).

Clause 92A(1) (b), in perhaps its most important aspect, specifically authorizes provincial legislatures to make laws "in relation to the rate of

¹⁰ As was the case in the *Alberta Bank Taxation Reference* (*Attorney General of Alberta v. Attorney General of Canada*, [1939] A.C. 117) and the provincial "export tax" cases (*Attorney General for British Columbia v. McDonald Murphy Lumber Co. Ltd.*, [1930] A.C. 357, and *Texada Mines Ltd v. Attorney General of British Columbia*, [1960] S.C.R. 713).

primary production'' from non-renewable natural resources. However, it is not entirely clear just how far this power extends. In the first place, it is not clear whether laws in relation to the "rate" of production of a resource can include a total prohibition of the production of that resource in the province (which a province may desire to do for a variety of reasons). It may be that a province may prohibit the "development" of that resource, under the general language of clause 92A(1) (b), in the sense of refusing to allow mining or other development facilities to be put in place at all. But once such "development" has occurred, the use of the term "rate" in the latter portion of the clause seems to imply that some production must be permitted, and that a province may only be able to vary that "rate", within some unspecified limits, but not prohibit production outright by reducing that "rate" to zero. If this is so, it may also be that a restriction of production to an uneconomically low "rate" might be characterized by the courts as an indirect prohibition, and not as a regulation of the rate of production within the meaning of clause 92A(1) (b).

Secondly, the permitted provincial powers regarding the rate of primary production of a resource seem not to be absolute, since they are phrased as a subspecies of "laws in relation to . . . development, conservation and management of non-renewable natural resources". On this basis, it appears that the courts may be required to look behind the face of any rate-regulation legislation to determine its true purpose and intent.

For instance, a province may choose to restrict the rate of production of a particular resource for physical conservation reasons (as it can probably do already). Or the province might wish to restrict the rate of production in order to maintain an orderly development of the industry extracting that resource within its boundaries, so as to avoid economically disruptive "boom-and-bust" cycles. As noted above, this may also be a permissible "economic conservation" objective, although clause 92A(1)(b) itself seems to add little to whatever the existing provincial powers may be.

But what if a particular province enacting rate-restricting legislation is motivated primarily by a desire to reduce the quantities of the resource that are exported from that province? This might well happen if the industry extracting that resource is "over-developed" to the extent of collectively flooding available export markets from existing capacity. This might be said to be legislation in relation to "management" of the resource, but it could also be argued to be in relation to "export" instead. The courts might thus be forced into a different characterization of the legislation, notwithstanding that on its face it does nothing more than restrict or regulate the rate of primary production within the province. For instance, if the bulk of the production from the resource would otherwise be exported from the province, a court might be inclined to see the legislation as being "in pith and substance" in relation to export and therefore authorized (if to another part of Canada) under subsection 92A(2) and not under clause 92A(1) (b). But if the export would otherwise be directly from Canada a court might be

forced to conclude on similar reasoning that the legislation was not authorized at all under section 92A because, as will be discussed below, subsection 92A(2) does not permit a province to legislate with respect to the export of a resource from the province where that export is not "to another part of Canada".

While the question is more directly raised, perhaps, in relation to subsection 92A(2) because of the express language of subsection 92A(3), the paramountcy position is also of some importance with respect to clause 92A(1) (b). Some comfort can be taken from the argument that subsection 92A(1) is not intended to be subject to the federal trade and commerce power because, unlike subsection 92A(2), it is not expressly made subject to subsection 92A(3). It is also true that the introductory words of subsection 92A(1) include the term "exclusively". But it should be remembered, in the first place, that the paramountcy doctrine was judicially developed and required no specific legislative impetus for that development (other than the "notwithstanding" language in the introductory words of section 91), and, in the second place, that the introductory language of section 92 itself contains the same word "exclusively". Accordingly, there is no sound assurance that federal paramountcy might not rear its head over subsection 92A(1) just as much as it might over subsection 92A(2).

Finally, one must wonder why the federal government insisted upon the deletion of the concluding words of the New Democratic Party version of subsection 92A(1). Was this deletion intended to mean that legislation under subsection 92A(1), and particularly under clause 92A(1) (b), cannot apply to the production from resources that is subsequently exported from the province? If so, the provision becomes factually nonsensical because of the proportionate volumes of production exported from the major producing provinces. As well, even under the present case law provincial conservation legislation can be valid, it seems, even if some of the production would have been exported but for such legislation.¹¹ On the face of the final version of subsection 92A(1) itself, there is nothing to suggest that provincial legislation cannot incidentally *affect* production destined for export even though, as noted above, if that legislation is *aimed* at export rather than at development, conservation or management it might have to be upheld, if at all, under subsection 92A(2). This being so, the retention of the concluding words proposed by the New Democratic Party might have clarified the result. Their deletion only muddies it.

(b) *Export—Subsections 92A(2) and (3).*

Subsection 92A(2) is a provision of interest for the resource producing provinces, particularly those in Western Canada, because of the propor-

¹¹ See *Spooner Oils Ltd v. Turner Valley Gas Conservation Board*, *supra*, footnote 6. The export question seems to have caused far more concern in the lower courts than in the Supreme Court of Canada: see the decision of the Alberta Supreme Court, Appellate Division, [1932] 4 D.L.R. 750, [1932] 3 W.W.R. 477, and the decision of the trial court, [1932] 4 D.L.R. 729, [1932] 2 W.W.R. 454.

tions of their resources that are exported from the province. As occurred in both *CIGOL* and *Central Canada Potash*, the courts have tended to view legislation respecting resources that are subsequently exported to be in some way "in relation to" the export of those resources, so that specific legislative authority in respect of export may turn out to be a fundamental component of any provincial legislative scheme purporting to control development of those resources.

However, it is in subsection 92A(2) that one of the most significant changes was made from the version originally proposed by the New Democratic Party, which did not confine provincial legislative authority by reference to the destination of the exported production. The government's addition of the words "to another part of Canada" after the phrase "export from the province" also represents a significant change from subsection 92(3) of the February 1979 "best efforts" draft (see Appendix A). A further, though probably less significant, change from that draft is the addition of the words "or in supplies" in the concluding non-discrimination language of subsection 92A(2):

Subsection 92A(3) expressly provides for federal paramountcy in respect of provincial laws enacted pursuant to subsection 92A(2). This represents virtually a complete turnabout from the paramountcy proposals of subsection 92(4) of the February 1979 "best efforts" draft (see Appendix A), which would have given provincial legislation paramountcy over federal "trade and commerce" legislation (although not, it should be noted, over other heads of federal legislative authority) except in two limited and stated circumstances. Again the consequences may be substantial.

One must wonder, in the first place, why it was thought necessary to confine provincial legislative authority by adding the words "to another part of Canada" in subsection 92A(2). The effect of the addition is to remove completely any provincial power to legislate regarding an export of production from the province that also happens to be an export from Canada. The result could certainly be capricious. For example, Saskatchewan potash may be shipped directly south to the United States, so that its export is presumably beyond Saskatchewan's reach under subsection 92A(2). But if that potash were sent to Ontario, Saskatchewan would then be permitted to legislate regarding its export so long as such legislation did not discriminate in prices or in supplies. And how is one to determine the subject matter or reach of "export" legislation where it deals generally with the export of production of a particular resource from the province, some to other parts of Canada and some from Canada?

A further complication arises if there is anything to the point made above regarding the ultimate destination of production exported from a province. What, for instance, is the position if Saskatchewan potash is shipped by rail to Vancouver for loading on a vessel bound for China? In

that situation, where the ultimate consumer of the resource is outside Canada although the immediate export from the province is to another part of Canada, is the "export" to be regarded as being "to another part of Canada" or as being "from Canada" for the purposes of the subsection? Conversely, where a resource intended for consumption in Canada is transmitted through the United States (such as Alberta's oil and gas might be), is that "export" to another part of Canada, because that is where the resource ends up, or is it export "from Canada" because that is what happens when the resource crosses the boundary of the producing province?

Caprice aside, the end result here seems to be to remove provincial legislative jurisdiction in respect of export from Canada even where Parliament has not legislated in respect of that export, and does not intend to so legislate. It may be that the goal of the federal government is to maintain some kind of "pure" federal jurisdiction in international trade. While that principle may be an important one to maintain, there also may be good reasons, of both principle and practice, why the provinces may wish to legislate regarding export whether the production is going east or south, and there seems to be little reason why they should not be able to do so, at least as long as Parliament has not exercised its jurisdiction over international trade.

One way to test the situation is to look at it from the viewpoint of subsections 92(3) and (4) of the February 1979 "best efforts" draft (see Appendix A). Those provisions would have permitted the provinces to legislate regarding export from Canada, but always subject to federal paramountcy under clause 92(4) (b) for federal laws in relation to the regulation of international trade and commerce. In effect, then, a provincial legislature would have been permitted to legislate in respect of export from Canada unless Parliament enacted its own conflicting legislation. To take a very simple example, Saskatchewan could have enacted legislation regulating the export of potash from the province generally. If Parliament objected to that scheme in respect of potash exported to the United States, it could quite simply have overridden it by enacting legislation to the contrary pursuant to head 2 of section 91, which legislation would then have been paramount under clause 92(4) (b). The same result would have obtained even under subsections 92A(2) and (3) as proposed by the New Democratic Party, despite the broader paramountcy rules of the latter provision. But under the present subsection 92A(2), the provinces cannot even get into the "export from Canada" game in the first place. This may have potentially serious consequences in the future for the producing provinces, as it leaves an obvious legislative and geographical gap in their authority.

A second, though somewhat less serious, problem in subsection 92A(2) arises in the interpretation of the non-discrimination provision at its end. Once a resource has been severed and enters into the flow of interprovincial trade and commerce, can the producing province then simply

prohibit or restrict its export from the province (for instance, to ensure adequate supplies within the province)? It seems that it cannot, because that would probably represent discrimination "in supplies" exported to another part of Canada. It may be that the "discrimination" spoken of here is discrimination as between various destinations within Canada but outside the producing province, but it is possible to read the concluding language as preventing also discrimination as between the producing province and the rest of Canada. The same is also true of price discrimination.

And one wonders, for instance, what the result is to be if a province desires to restrict the export of raw product from the province in order to encourage the growth of a local processing industry. One example of this might be attempts by Alberta to encourage the development of a local petrochemical industry. It is not at all clear that this is permissible under subsection 92A(2) since an export restriction (even "to another part of Canada") imposed on a raw product, on its face permitted by the subsection, could still be seen as a colourable attempt by the producing province to regulate interprovincial trade in the manufactured products that result from processing or refining that raw product (which, presumably, could be freely exported from the province). Again, the courts might be faced with a very delicate task of characterization here.

A third, and potentially much more serious, problem is the switch in the paramountcy position from subsection 92(4) of the February 1979 "best efforts" draft (see Appendix A). That draft would have left Parliament a residual two-pronged trade and commerce power notwithstanding general provincial paramountcy for laws enacted pursuant to subsection 92(3) of the draft. The two prongs would have been the powers to legislate in relation to the regulation of international trade and commerce, and to legislate in relation to the regulation of domestic trade and commerce where necessary to serve a compelling national interest that was not merely an aggregate of local interests. It should be noted that subsection 92(4) of the draft would not have altered the usual federal paramountcy for other section 91 heads of power, such as the "peace, order and good government" power (especially, perhaps, in its emergency aspect), or under head 29 of section 91 in respect of works declared to be "for the general advantage of Canada" pursuant to clause (c) of head 10 of section 92.

It is hard to see why these overriding federal legislative powers would not have been sufficient, and so it is curious that the federal government has thought it necessary to retain full federal paramountcy in subsection 92A(3) for all federal laws in relation to domestic trade and commerce in resources. And it is questionable whether the federal interest here is of sufficient weight to be paramount in the absence of a demonstrable "compelling national interest" of the kind mentioned in subsection 92(4) of the February 1979 "best efforts" draft. The result now seems to be that even the limited gains of the producing provinces under subsection 92A(2) can

always be overridden by federal legislation enacted pursuant to subsection 92A(3).

For example, assume that a particular oil producing province desires to conserve its resources for the future and ultimately maximize its own return from them. As is presently the case generally, most of its oil is exported to other parts of Canada, and virtually none is exported from Canada. Accordingly, it enacts a relatively high minimum price for all its oil whether exported from the province or not (thus avoiding any price discrimination problems). As the province does not want to encounter any "discrimination in supplies" difficulties under the concluding words of subsection 92A(2), it does not pursue the alternative course of legislatively reducing maximum production rates to artificially low levels (which might not accomplish its maximization-of-returns goals in any event given alternative, though relatively expensive, supply sources).

However, say that the federal government wishes to preserve the competitive advantages for the petrochemical industry in provinces consuming that oil, and so legislates a fairly low maximum price for all oil exported from that province (much as it may now do under the Energy Administration Act).¹² Under subsection 92(4) of the February 1979 draft, the provincial legislation would have been paramount unless the federal government could show that its legislation was enacted to meet a "compelling national interest"; and if the federal government could indeed show such a compelling national interest in supporting a competitive advantage for those petrochemical industries, it would not have been very hard to accept the result of federal paramountcy. But under subsection 92A(3), the federal legislation would be paramount as an exercise of the trade and commerce power under head 2 of section 91 even in the absence of such a compelling national interest. Is that a proper balancing of federal and provincial interests?

The paramountcy problem assumes other aspects here too. For instance, there is no proposal that the clause 92(10)(c) declaratory power be repealed or confined, although that has been urged in the recent past.¹³ Such a declaration by Parliament is not inconceivable at some future time in respect of oil and gas producing or upgrading facilities. It is already in force for uranium,¹⁴ of which Saskatchewan and British Columbia have large deposits. Thus, even if provincial paramountcy over the federal trade and commerce power were given, at least to the extent set out in subsection 92(4) of the February 1979 draft, the federal government could always do

¹² Energy Administration Act, S.C. 1974-75-76, c.47 (formerly called the Petroleum Administration Act).

¹³ See Ballem, *The Energy Crunch and Constitutional Reform* (1979), 57 Can. Bar Rev. 740, at pp. 747 and 756.

¹⁴ Atomic Energy Control Act, R.S.C. 1970, c.A-19, s.17.

an "end run" around provincial jurisdiction by having Parliament invoke its declaratory power under clause 92(10) (c).

These paramountcy problems exist, it is submitted, not only for subsection 92A(2) where that paramountcy is expressed, but also for subsection 92A(1) where it is implied only (see above). For instance, what if a province wanted to slow the pace of the development of a particular resource in order to steady the growth of a remote region of the province where the resource is located? On the other hand, say the federal government desires to hasten the pace of that development in order to increase export sales. Even though subsection 92A(1) says that the provincial legislature may "exclusively" make laws in relation to the development of resources, section 92 itself contains the word "exclusively" in its introductory language and that has not prevented the paramountcy of conflicting federal legislation aimed at the same subject matter. The paramountcy doctrine is not an easy one to formulate or to apply,¹⁵ and its apparent retention by implication in subsection 92A(1) is disturbing.

5. *Preservation of Provincial Powers—Subsection 92A(6).*

One should not leave a general discussion of section 92A without some discussion of subsection 92A(6), which preserves unimpaired any powers or rights of the legislature or government of a province before the enactment of section 92A. It is to the same effect as subsection 92(7) of the February 1979 "best efforts" draft (see Appendix A), with some conforming changes of language.

The general thrust of subsection 92A(6) seems to be to indicate that section 92A only adds to, and does not subtract from, provincial legislative powers already possessed (such as those under heads 5, 10, 13 and 16 of section 92). Also, it presumably means that there is to be no derogation from other provincial powers, such as those enjoyed by a provincial government under section 109 as the proprietor of provincial Crown lands and their mineral resources.¹⁶

The point may not be of mere idle curiosity, especially with regard to subsection 92A(3). That provision might be read as suggesting some enhanced federal legislative authority when federal legislation conflicts with a "law" of the province which, presumably, would include necessary provincial enabling legislation pursuant to head 5 of section 92 in exercise of (or empowering the provincial Crown to exercise) the province's proprietary rights under section 109. One effect, then, of subsection 92A(6) would be to preserve whatever value there may be in the old case law on the

¹⁵ See, for instance, Colvin, *Legal Theory and the Paramountcy Rule* (1979-80), 25 McGill L.J. 82.

¹⁶ For a recent discussion of provincial proprietary rights under section 109, see Bushnell, *Constitutional Law—Proprietary Rights and the Control of Natural Resources* (1980), 58 Can. Bar Rev. 157.

extent of the provincial Crown's section 109 rights.¹⁷ Without subsection 92A(6), given the breadth of subsection 92A(3), there might well have been an argument that federal trade and commerce legislation could now override such a provincial "law" exercising that province's proprietary rights to a greater extent than it could have done before.

II. *CIGOL and Central Canada Potash Revisited.*

Given the ordinary uncertainties of interpreting and applying any new legislation, and in particular legislation containing the technical ambiguities and interpretive uncertainties of section 92A, it is not easy to predict how particular cases will go. Moreover, particular cases in this field (and especially those that reach the courts) often involve special facts or unusual legislation, so that it is even difficult to predict how the cases might come before the courts let alone how they will be decided. However, in the resource area there are two important recent Supreme Court of Canada decisions on subjects addressed by section 92A, and one way of assessing the future impact of section 92A is to see how (if at all) the *CIGOL* and *Central Canada Potash* decisions might have been decided differently had it then been in force.¹⁸

1. *CIGOL*.

The *CIGOL* litigation arose from legislation enacted by the Province of Saskatchewan in response to the sharply escalating price of oil that resulted from the Arab-initiated oil crisis of October 1973. The legislation in question, colloquially known as "Bill 42",¹⁹ comprised three major elements:

- (1) the expropriation of the underlying freehold mineral rights in a large part of the province's producing tracts not already held as Crown lands;
- (2) the imposition of a "royalty surcharge" upon oil produced from Crown lands (including those expropriated); and
- (3) the levying of a "mineral income tax" upon oil production not subject to royalty surcharge.

Both the royalty surcharge and the mineral income tax were intended to appropriate to the provincial government the windfall increase in the price of oil that resulted from the Arab actions of late 1973. In essence,

¹⁷ *Smylie v. The Queen* (1900), 27 O.A.R. 172; *Brooks-Bidlake & Whittall Ltd v. Attorney General of British Columbia*, [1923] A.C. 450, [1923] 2 D.L.R. 189, [1923] 1 W.W.R. 1150.

¹⁸ For a fuller discussion of the legislation, background circumstances and reasons in the *CIGOL* and *Central Canada Potash* decisions, see Moull, *op. cit.*, footnote 1, at pp. 11-16 and 27-31.

¹⁹ The Oil and Gas Conservation, Stabilization and Development Act, 1973, S.S. 1973-74, c.72.

royalty surcharge and mineral income tax were calculated in the same way, as 100% of the difference between the former and the newly-enhanced well-head prices of Saskatchewan oil.

In the Supreme Court of Canada, the expropriation aspect of Bill 42 was upheld, but both the royalty surcharge and the mineral income tax were held to be *ultra vires*. The majority decision, written by Martland J., found that the royalty surcharge was not a true royalty at all, but was in substance a form of taxation. Judged as taxation legislation, both the royalty surcharge and the mineral income tax were found to be wanting under head 2 of section 92 because they were indirect taxation. This finding was based largely on the theory that the provincial Minister of Mineral Resources had been given the power to establish the price for which Saskatchewan oil was to be sold, so that an oil producer was forced to charge at least that price to his customers in order to recoup the amount of tax he would have to pay. This, the majority concluded, constituted the "passing on" of the tax as part of the purchase price, thus rendering the tax indirect. And given that almost all of Saskatchewan's oil is exported from the province, the majority also found that the royalty surcharge and mineral income tax constituted an "export tax"; and because the provincial Minister was, in their view, thus given the power to fix oil prices in the export market, this "taxation" legislation was also bad because it infringed upon the federal trade and commerce power under head 2 of section 91.

Viewed simply as taxation legislation, it is likely that subsection 92A(4) would have saved the Bill 42 levies because they could be fairly easily characterized as indirect taxation in respect of "non-renewable resources in the province" or at least "the primary production therefrom". And there would probably not have been any difficulty with the non-differentiation proviso at the end of subsection 92A(4), because Bill 42 did not differentiate in the imposition of its levies on the basis of whether oil was exported from the province or not.

However, the issue is not quite as clear-cut as that, given the conclusion of Martland J., on the "export tax" feature found in Bill 42. (This feature was probably secondary to the indirect taxation holding in the mind of the majority, although it was certainly an important consideration; its later significance, however, is illustrated by the manner in which it was seized upon by Laskin C.J.C., in *Central Canada Potash*.) The problem again might be one of characterization, in that a true "export tax" aimed at the export of production from the province might also have to be justified under subsection 92A(2). As noted above, and as is amply illustrated by *CIGOL* itself, the courts are not really hesitant to reclassify what appears to be taxation legislation as some other kind of legislation if a different motivation is evident. The saving grace is, of course, that Saskatchewan could probably have found legislative authority for such export legislation in subsection 92A(2), in that virtually all of the oil in question was exported from the province "to another part of Canada", and the legislation did not

discriminate either in prices or in supplies exported. But had the oil been flowing south rather than east, Saskatchewan might have found significant barriers in its way.

2. *Central Canada Potash.*

The legislation in question in *Central Canada Potash* resulted from an over-supply of Saskatchewan potash production in the late 1960's that threatened the impairment of the local potash producing industry. The legislation (in fact, a combination of legislation, regulations and ministerial orders)²⁰ had two main themes. First, each potash producer was required to obtain a production licence, under which his annual allowed production was limited by a formula tied in part to market demand. Secondly, each such production licence established a minimum or "floor" price for potash produced under that licence. Virtually all of Saskatchewan's potash is exported from Canada, with the largest proportion going directly to the mid-western United States (which was also the market in which the production over-supply was causing the most damage). The underlying authority for this scheme, in part supported by legislated definitions,²¹ was said to be the "economic" conservation of Saskatchewan potash and of the local potash producing industry which, but for prorationing, might have seriously and permanently injured itself through costly over-competition.

In the Supreme Court of Canada, Laskin, C.J.C. (for a unanimous court), acknowledged in passing the view of the Saskatchewan Court of Appeal that "economic" conservation could be a permissible provincial motivation (although his view of the case meant that he did not have to—and thus did not—reach a firm conclusion on this point). He further acknowledged that production controls are "ordinarily" within provincial legislative competence. But in the end he found that the potash prorationing scheme was *ultra vires* as being primarily a marketing scheme intended to fix the price of potash in the export market. The main authority quoted for this proposition was the majority judgement of Martland J., in *CIGOL*.

The *Central Canada Potash* decision is a much harder one to analyze under section 92A than *CIGOL*, in part because of the sparsity of reasoning in the Supreme Court of Canada. Leaving aside, for the moment, the actual price-fixing aspects of the prorationing scheme, it may be that its production control features could have been justified under clause 92A(1) (b) since the legislation did, in fact, purport to regulate the "rate of primary production" of potash in the province. The difficulty is, however, that it is not entirely clear that the underlying motivation for this rate-regulation legislation was "development, conservation and management" within the

²⁰ The Potash Conservation Regulations, 1969, Sask. Reg. 287/69, as am.; adopted pursuant to The Mineral Resources Act, R.S.S. 1965, c.50, as am.

²¹ S.S. 1976, c.36, ss 2(1) and 2(3).

meaning of clause 92A(1) (b). At best, what was to be developed, conserved and managed was the province's potash resources in an economic, rather than physical, sense. But it is probably more accurate to say that it was the potash industry, not the mineral itself, that was to be "conserved" from its own destruction. Accordingly, the argument might have to be that "economic conservation" of an industry as a provincial resource is "conservation" within the meaning of clause 92A(1) (b). It is not easy to see that the Supreme Court of Canada would have accepted this argument, especially given the apparently overriding factor that virtually all of Saskatchewan's potash is exported from the province (and most, in fact, exported from Canada).

Accordingly, the court might well have been inclined to characterize even the production control features of the prorationing legislation as being primarily "in relation to" the export of the resource. If so, the legislation likely could not have been justified under subsection 92A(2) because most of that production was not exported "to another part of Canada". (Of course, if clause 92A(1) (b) need not be read this restrictively, so that *any* provincial legislation limiting the rate of production of a resource will be valid no matter what its motivation may be, then clause 92A(1) (b) might well have saved this feature of the scheme.)

However, the case itself also involved the establishment of a minimum price, and it was this price-fixing aspect that made it fairly easy for the court to characterize the whole scheme as marketing legislation aimed at the export market. This aspect would have to be considered under subsection 92A(2) rather than under clause 92A(1) (b), and even given that there was no price or supply discrimination as regards the rest of Canada, the scheme could still not have been valid as regards the bulk of Saskatchewan potash exported from Canada.

Accordingly, the result of *Central Canada Potash* probably would have been the same notwithstanding section 92A. It is hard to see why this should be so, given the evident lack of legislative interest of the federal government and Parliament in regulating the Saskatchewan potash industry. And it is ironic that the February 1979 "best efforts" draft, coming only four months after the decision was released, probably would have saved the whole prorationing scheme, marketing features and all.²²

Conclusions

Heritage Funds and the like notwithstanding, the basic issue in the federal-provincial fight over resources is not so much money as economic power.²³ Resource development is very important for the producing provinces, which largely have no other secure economic base (except agriculture,

²² See in this regard the conclusions of Harrison, *op. cit.*, footnote 5, at pp.9 and 13.

²³ See Harrison, *op. cit.*, *ibid.*, at pp.1 and 11.

which is usually far from secure). And the ability to control the development of those resources is crucial to the provinces that are charged with the management and development of their local economies.

Section 92A represents a start in this regard, and as such is welcome. But it is a flawed attempt to surmount the problems created by *CIGOL* and *Central Canada Potash*. The main villains here are the export "to another part of Canada" restriction in subsection 92A(2) and the federal paramountcy provisions of subsection 92A(3), and it is my submission that the first application of our new amending formula should be for the purpose of removing the former and of restoring the latter to the position of the February 1979 "best efforts" draft. For good measure, the heavy-handed mechanism of the federal declaratory power under clause 92(10) (c) should also be repealed, or at least its reach restricted in the resource area so as not to impinge unduly upon otherwise valid provincial legislative aims. Surely the emergency aspects of "POGG" and federal trade and commerce paramountcy of the limited kind proposed in February 1979 would be adequate national economic levers for the federal government.

Unfortunately, it may well take another *CIGOL* or *Central Canada Potash* to bring these problems home, and it seems not unlikely that the uncertainties of section 92A will eventually throw the whole problem back into the hands of the courts, and particularly the Supreme Court of Canada. As both cases demonstrate, the courts have not always found it easy to deal effectively with these kinds of problems for both functional and institutional reasons. Yet section 92A reopens the whole field for fresh litigation to redraw the boundaries of federal-provincial legislative roles in the resource field, and its two major deficiencies and other interpretive difficulties seem almost designed to invite resort to the litigation process. As others have noted, the federal-provincial "chess game" of executive federalism is likely to continue even after the Constitution is amended, since some practical arrangements in the field will still have to be worked out no matter what the Constitution says.²⁴ But as has also been observed, the involvement of the courts after these practical arrangements were worked out the last time around resulted in the unfortunate *CIGOL* and *Central Canada Potash* decisions.²⁵ And so it is understandable if section 92A is greeted with less than complete enthusiasm, when we had the chance to clear the air but missed it.

Appendix A

Section 92A

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

²⁴ *Ibid.*, at pp.18-19.

²⁵ Dupré and Weiler, *A Sense of Proportion and a Sense of Priorities: Reflections on the Report of the Task Force on Canadian Unity* (1979), 57 Can. Bar Rev. 446, at pp.463-464.

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom; and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom.

Whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,

(a) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

February 1979 "Best Efforts" Draft

Resource Ownership and Interprovincial Trade

92. (2) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, exploitation, extraction, conservation and management of non-renewable natural resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, exploitation, conservation and management of forestry resources in the province and of sites and facilities in the province for the generation of electrical energy, including laws in relation to the rate of primary production therefrom.

(3) In each province, the legislature may make laws in relation to the export from the province of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for prices for production sold for export to another part of Canada that are different from prices authorized or provided for production not sold for export from the province.

(4) Any law enacted by the legislature of a province pursuant to the authority conferred by subsection (3) prevails over a law enacted by Parliament in relation to the regulation of trade and commerce except to the extent that the law so enacted by Parliament,

(a) in the case of a law in relation to the regulation of trade and commerce within Canada, is necessary to serve a compelling national interest that is not merely an aggregate of local interests; or

(b) is a law in relation to the regulation of international trade and commerce.

(5) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom; and

(b) sites and facilities in the province for the generation of electrical energy and the primary production therefrom.

Whether or not such production is exported in whole or in part from the province but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(6) For purposes of this section,

(a) production from a non-renewable resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil or refining a synthetic equivalent of crude oil; and

(b) production from a forestry resource is primary production therefrom if it consists of saw-logs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

(7) Nothing in subsections (2) to (6) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of those subsections.
