JURISDICTIONAL DILEMMAS IN RESOURCE INDUSTRIES

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This paper highlights constitutional dilemmas posed by the Canadian constitution in matters of resource regulation, marketing and taxation, with particular emphasis on Saskatchewan. The background to and impact of the CIGOL case is examined, including a discussion of the issues of direct taxation and the trade and commerce power. Ancillary matters such as recovery of payments under invalid laws and techniques of interim relief also receive scrutiny. Similar problems in the potash and uranium industries are analyzed.

I. INTRODUCTION

The dilemmas posed by constitutional limitations on the powers of provincial governments and the federal government are not confined to oil and gas, but include all resources. Oil and gas are merely part of a larger question. Furthermore, the problems vary from region to region and province to province, and the approaches and solutions vary with the political philosophy of governments of the day.

The struggle is not new and will not go away even in the event of constitutional change. Corporations, whether private or publicly owned, will always be faced with the discipline of the bottom line and governments with the real or fancied "need" of politicians and tax gatherers. The words "fair", "reasonable," "just" and "unconstitutional" will continue to be heard. One should not expect any so-called solutions to be more than a temporary lull before another storm. In a huge country divided by regions, and governed by a federal system with divided constitutional powers, the possibilities of disagreement are endless.

II. HISTORY

Sections 91 and 92 of the British North America Act[1] give rise to most of the jurisdictional questions. Also significant is S. 109 which specifically reserves lands, mines, minerals and royalties to the provinces.

When Alberta and Saskatchewan were admitted to Confederation, Crown "lands, mines minerals and royalties incident thereto" continued to be vested in the Government of Canada.[2] It was only after a long political struggle that the natural resources of the prairie provinces were transferred to them in 1930.[3] These facts undoubtedly exacerbated the sensitivities of the western provinces about natural resource matters.

Having achieved control over natural resources, the prairie provinces asserted their position aggressively at the same time that the

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1. R.S.C. 1970, Appendices.
2. The Alberta Act, 4 & 5 Edw. VII, c. 42, S. 21; The Saskatchewan Act, 4 & 5 Edw. VII, c. 42, S. 21.
3. S.C. 1930, 20-21 Geo. V, c. 3; S.A. 1930, c. 21; S.C. 1930, 20-21 Geo. V, c. 41; S.C. 1930 20 Geo. V, c. 87.

postwar period gave rise to rapid expansion of resource development and a greater interest by government in the potential for revenue. By the 1960's there was much discussion about the appropriate role government should have in the development of resources. Theories were advanced about what was often termed the "fair share" of resources. At this time, the phrase "economic rent" became popular, and opinions were expressed about the appropriate profitability a resource developer should enjoy, particularly in respect of those resources which became known as "non-renewable resources".

By the end of the 60's there was a sharp leftward move in the political arena of western Canada. This gave impetus to increasing demands by government from resources. The fires of these demands were flamed by reports such as the Kierans Report[4] on mining in Manitoba, which recommended virtual take-over of mining and radical concepts such as high taxation to force cheap take-over.

Given the long-standing western frustration and alienation, the sudden prospect of enormous revenues which burst on the western provinces with the energy crisis in 1973 was undoubtedly too much for the policital side to pass up. Government greed on one side and industry bottom line on the other probably made a conflict inevitable.

The foregoing is a very brief outline of some of the historical factors which have influenced what has happened in the past five years in Saskatchewan and elsewhere.

III. SASKATCHEWAN OIL AND GAS TAXATION AND TH CIGOL CASE

The first energy legislation passed by the Saskatchewan Government in this period was Bill 42, The Oil and Gas Conservation, Stabilization and Development Act, 1973,[5] assented to on December 19, 1973. The fact that within five months of its passage three amending bills were enacted suggests that the original Bill 42 had certain weaknesses. These amendments were all made retroactive and deemed to come into force at the same time as the original statute. It is generally conceded that retroactive legislation of this nature is effective and binding providing that the resulting amended legislation is itself valid. On the other hand, the general principle is that retroactive delegated legislation is not valid unless specifically supported by legislation permitting or authorizing the retroactivity.

In the result it was necessary to deal with the legislation as though the amendments had been part of the original legislation. The fact of the amendments, however, did to some extent support colorability arguments. The resulting amended legislation did a number of things:

1. It enacted a so-called "mineral income tax" in respect of oil produced from freehold land.

2. It wiped out provisions of the Petroleum and Natural Gas Regulations, 1969 which had prescribed fixed royalties for a period of five years from April 1, 1973 for oil and for a period of two years from April 1, 1973 for gas. At the same time it imposed a "royalty surcharge" on Crown land at precisely the same rate as the mineral

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4. Kierans, *Report on Natural Resource Policy in Manitoba* (1973).

5. S.S. 1973-74, c. 72, as amended.

income tax. There was a saving provision to the effect that a producer would only pay either a mineral income tax or a royalty surcharge.

3. The mineral acreage tax which had been upheld in *Canadian Pacific Railway Company* v. *Att. Gen. Sask.*,[6] at a time when the rate was 3c per acre, was increased to 50c per acre in respect of undeveloped land.

4. Provisions were enacted for a scheme to control the marketing of crude within Saskatchewan. These provisions, however, have never been proclaimed.

5. Provision was made for expropriation of all freehold producing oil and gas rights of any person owning more than 1,280 acres (two sections) of rights. The compensation to such expropriated owners was based on the royalty such an owner would have received on prices for oil or gas fixed by the statute, payable either over the term of the productive life of the parcel or by a lump payment discounted by the prime bank lending rate to a present value.

6. There were substantial amendments to the Oil and Gas Conservation, Stabilization and Development Act, 1973 to permit the Minister of Mineral Resources to regulate, limit and allocate production.

7. There were restrictions imposed on the removal of equipment and cessation of production.

The government's concern about the validity of the legislation was demonstrated by S. 42A(2) which stated that if part of the statute should be *ultra vires*, the rest would stand.

This was the legislation in existence when Canadian Industrial Oil & Gas Ltd.'s (CIGOL) constitutional challenge went to trial. It should be emphasized that the enactments were substantially different when CIGOL decided to commence its action and when the writ was issued. Indeed, it was necessary to amend the pleadings as a result of the legislative amendments passed after the action had been commenced.

The legislation could only be challenged if it exceeded the constitutional powers of the province. The two major areas of attack were:

1. That the legislation was not direct taxation within the province in order to the raising of a revenue for provincial purposes within the provisions of S. 92 of the B.N.A. Act.

2. That it was legislation in relation to the regulation of trade and commerce within the exclusive jursidiction of the Parliament of Canada under S. 91 of the B.N.A. Act.

A. *Direct Taxation Within the Province in Order to the Raising of a Revenue for Provincial Purposes*

There have been a number of cases since Confederation interpreting S. 92(2). The basic rule was established by Lord Hobhouse in *Bank of Toronto* V. *Lambe*,[7] when he adopted the test of John Stuart Mill:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself

6. [1952] 2 S.C.R. 231.
7. (1887) 12 A.C. 575 at 582.

at the expense of another; such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.

There are a number of refinements to be considered in applying the general principle. For instance, the designation of the tax does not determine whether or not it is direct. Terminology does not govern.[8] However, if a tax is an "income tax," as that phrase is understood, it would be a direct tax. In *Forbes* v. *Att. Gen. Man.*[9] Lord MacMillan said at 268: "Now, all are agreed that an income tax is the most typical form of direct taxation." Some types of taxes, for example land taxes, are always considered to be direct taxes. Other types such as customs are always considered to be indirect.

In *City of Halifax* v. *Estate of J. P. Fairbanks*,[10] Viscount Cave L.C. said at 126:

It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity.

Viscount Simon L. C. said in *Atlantic Smoke Shops, Limited* v. *Conlon and Others*:[11] "It is the general tendency of the impost which has to be considered." Another test used from very early days is that of Lord Shelborne in *Att. Gen. Que.* v. *Walter Reed*:[12]

The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; but if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the Act in question.

Taxes on commodities are usually indirect taxes as is illustrated by the statement of Viscount Haldane in *Att. Gen. B.C.* v. *C.P.R.*:[13]

Fuel oil is a marketable commodity, and those who purchase it, even for their own use, acquire the right to take it into the market. If therefore comes within the general principle which determines that the tax is an indirect one.

His Lordship put it another way in *Att. Gen. Man.* v. *Att. Gen. Can.*:[14]

Turning to the only remaining question, whether the tax is in substance indirect, and bearing in mind that by S. 5 the liability is expressed as if it were to be a personal one, it is impossible to doubt that the tax was imposed in a form which contemplated that someone else than the person on whom it was imposed should pay it. The amount will, in the end, become a charge against the amount of the price which is to come to the seller in the world market, and be paid by someone else than the persons primarily taxed. The class of those taxed obviously includes an indefinite number who would naturally indemnify themselves out of the property of the owners for whom they were acting.

A case of significance when a tax on commodities is to be considered is *The King* v. *Caledonian Collieries, Limited*.[15] Lord Warrington of Clyffe stated at 362:

The respondents are producers of coal, a commodity the subject of commercial transactions. Their Lordships can have no doubt that the general tendency of a tax upon the sums re-

8. *E.g., Att. Gen. Man.* v. *Att. Gen. Can.* [1928] A.C. 561.
9. [1937] A.C. 260.
10. [1928] A.C. 117.
11. [1943] A.C. 550 at 564.
12. (1884) 10 A.C. 141 at 144.
13. [1927] A.C. 934 at 938.
14. [1925] A.C. 561 at 568.
15. [1928] A.C. 358.

ceived from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

It is said on behalf of the appellant that at the time a sale is made the tax has not become payable, and therefore cannot be passed on. Their Lordships cannot accept this contention; the tax will have to be paid, and there would be no more difficulty in adding to the selling price the amount of the tax in anticipation than there would be if it had been actually paid.

He also said at 363:

Some attempt was made in argument to support the tax on the ground that it is analogous to an income tax, which has always been regarded as the typical example of a direct tax; but there are marked distinctions between a tax on gross revenue and a tax on income, which for taxation purposes means gains and profits. There may be considerable gross revenues, but no income taxable by an income tax in the accepted sense.

Other considerations to be borne in mind are statements such as those of Locke J. in *Texada Mines Limited* v. *Att. Gen. B.C.*,[16] where The Mineral Property Taxation Act of British Columbia was held to be *ultra vires*. He said at 721:

The question to be determined is not whether a tax upon minerals in the ground is a tax upon land and prima facie a direct tax, a proposition which no one would contest, but rather is whether the *Mineral Property Taxation Act* is an enactment in the exercise of the provincial power to raise a revenue for provincial purposes by direct taxation, or legislation the true nature of which is to impose an export tax upon the export of ore and concentrates from the Province and an indirect tax and which trespasses upon the legislative authority of Parliament as to the regulation of trade and commerce.

He stated further at 722:

It is to be remembered that in the Saskatchewan case (*Canadian Pacific Railway Company et al* v. *The Attorney General for the Province of Saskatchewan et al.*) the taxation imposed upon lands found to be within a producing area was at a rate not exceeding 10 mills on the dollar of the assessed value. The present legislation authorizes an annual tax of 10 per cent of the assessed value, or ten times the rate which might be imposed in Saskatchewan, a material matter to be considered. This point is not mentioned in the judgements delivered in the Court of Appeal. The extent of the tax imposed was one of the decisive matters that were considered in holding the *Bank Taxation Act of Alberta* invalid, both in the judgements of this Court delivered by Sir Lyman Duff and of the Judicial Committee on the appeal.

In the *Alberta* case, that the *Bank Taxation Act* was ultra vires as being in relation to banks and banking was considered to have been made clear by the fact that the taxation while in form direct was so excessive as to be in effect prohibitive, and that to operate a bank in the province, created under Dominion power, would have been financially impossible.

A comparatively recent case to be considered in determining whether a tax is direct or indirect is *Nickel Rim Mines Limited* v. *Att. Gen. Ont.*[17] A tax was held to be direct as a tax on income because it was an annual tax based on annual assessment not known at the time of sale of the commodity and was a tax of a limited quantity levied against profits and on money received.

These are the general principles relating to whether or not a tax is direct or indirect within S. 92(2).

B. *The Regulation of Trade and Commerce*

Section 91(2) confers exclusive legislative authority on the Parliament of Canada in relation to the regulation of trade and commerce. It was recognized from a very early time that the federal power over trade and commerce has limitations.[18] Nevertheless, there are many

16. [1960] S.C.R. 713.
17. (1966) 53 D.L.R. (2d) 290, *aff'd* [1967] S.C.R. 270.
18. *E.g.*, *Citizens Insurance Co. of Can.* v. *Parsons* (1881) 7 A.C. 96.

instances in which the courts have found that a province has improperly enacted legislation in relation to trade and commerce and thus acted beyond its power. For example, The Grain Marketing Act of Saskatchewan was struck down *In re The Grain Marketing Act, 1931,*[19] because it trenched upon the exclusive federal jurisdiction in grain marketing. A similar example is *Lawson* v. *Interior Tree Fruit & Vegetable Committee of Direction.*[20] Provincial legislation relating to marketing has been struck down in *Att. Gen. Man.* v. *Manitoba Egg and Poultry Association,*[21] (the chicken and egg case) and in *Burns Foods Ltd. et al* v. *Att. Gen. Man. et al.*[22] In these cases substantial extraprovincial connections were of importance although it is recognized that where a transaction incidentally has an effect upon interprovincial trade there is no restriction on the provincial power. In the chicken and egg case Laskin J. stated at 709:

> The stage of dealing at which the regulation is imposed and its purpose, on which economic data would be relevant, are important considerations in assessing provincial competence. This emerges clearly from *Carnation Milk Company Ltd.* v. *Quebec Agricultural Marketing Board, supra,* where this court rejected a contention that the regulatory scheme, as reflected in three challenged orders, constituted an unlawful invasion of federal power in relation to export. What was there involved was the fixing of prices, by arbitration if agreement could not otherwise be reached, at which milk and dairy products produced in the province were to be sold by provincial producers, operating under a joint marketing plan, to a distributor and processor in the province. The fact that the processed products were largely distributed and sold outside the province did not react upon the validity of the scheme whose purpose was to improve the bargaining position in the province of provincial producers in their dealings with manufacturers or processors in the province. The regulatory scheme under attack did not involve a marketing control which extended through the various stages of production, distribution and consumption.

The principles laid down by Pigeon J. in the *Burns Foods Ltd.* case at 737 are pertinent:

> If the federal Parliament cannot regulate local trade because it would be more efficient to regulate it together with the extra-provincial trade, a fortiori a provincial Legislature cannot regulate interprovincial trade in a given product because this appears desirable for the effective control of intra-provincial trade. In other words, the direct regulation of interprovincial trade is of itself a matter outside the legislative authority of any Province and it cannot be treated as an accessory of the local trade. This is not a case of subjecting all goods of a certain kind within a Province to uniform regulations, such as the rental sale price (as in *Home Oil Distributors Ltd. et al v. Attorney-General for British Columbia et al* (1940) S.C.R. 444). It is a case of directly regulating extra-provincial trade operations in their essential aspects namely, the price and all other conditions of sale.

In short, interprovincial or international overtones are significant factors. While an incidental impact on interprovincial or international trade does not render legislation invalid, legislation directed at such trade is invalid. This always gives rise to the "pith and substance" test, that is, is the legislation in pith and substance in relation to interprovincial and international trade and commerce or is it in pith and substance something relating to property and civil rights in a province or matters of a local or private nature in the province?

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19. (1931) 2 W.W.R. 146.
20. [1931] S.C.R. 357.
21. [1971] S.C.R. 689.
22. (1974) 40 D.L.R. (3d) 731.

C. *The CIGOL Case*

Within a month of the coming into force of Bill 42, CIGOL notified the government that it intended to take action to challenge the legislation. It sought to make arrangements to hold payments of the tax and so-called royalty in abeyance pending the court decision. The government was unwilling to accept any such arrangement and demanded payment in full of the levies under the enactment. This was of importance because it clearly established duress. While one can argue that the mere passing of a taxing enactment constitutes duress, it is certainly much safer to have an actual act of duress. The need for this is based on the principle of law that money paid under a mistake of law may not be recovered unless paid under duress.

After establishing duress and finally settling the pleadings and pretrial steps, the action was brought on for trial in midsummer of 1974. It was necessary prior to the trial to make a number of decisions on the evidence to be called and the general thrust that the case ought to take. One of the early decisions was not to pursue the plaintiff's right to an Examination for Discovery of an officer of the defendant government. It became apparent that there would not be ready cooperation in bringing the action to an early trial. Accordingly, it was decided that any admissions which might be obtained on Examination for Discovery could just as readily be obtained by serving a subpoena on the appropriate governmental representatives and having them testify at trial.

On principle there is not much scope for admissibility of evidence in a case hinging on whether or not a tax is direct or indirect. There is much more scope for evidence when legislation is challenged on the basis that it is in pith and substance in relation to trade and commerce and is colorable, its intent and purpose to do something indirectly which could not be done directly. The evidence showed that the land holdings of CIGOL comprised virtually all types of interest in oil and gas in Saskatchewan, that 98% of the oil produced in Saskatchewan went out of the province because of the nature and quality of the oil, and that the system of transportation of oil had been developed in a way which necessitated export of oil. Expert evidence was very much restricted at trial but the judge accepted an expert opinion that the so-called "mineral income tax" was unlike any income tax ever before known.

A strong argument could be made from the outset that the tax was not an income tax but an indirect tax, because it was based on the difference between a number originally called "international well-head price" determined by the Minister (later called "well-head value"), and a smaller number prescribed by the statute. Since the statute had fixed both the upper and lower number, a producer was compelled to raise the price to his purchaser to the upper number or go broke. It seemed clear that this was a tax designed to be passed on to the purchaser, and therefore a classic indirect tax. There was more difficulty with the royalty surcharge. Starting with the premise that a royalty is a recognized reservation by an owner and is not *per se* a tax, the royalty surcharge could only be challenged if it could be shown to be a tax. For this reason the case was built on the premise that the

royalty surcharge was not in reality a royalty but was colorable taxation, identical in amount and calculated the same way as the mineral income tax, which was indirect taxation. It was the theory of the case that the Bill was designed to fix the price of oil destined for interprovincial and international markets, and that in passing legislation for such a purpose a province was acting beyond its constitutional powers.

At trial[23] Hughes J. refused to accept the submissions. He held that in the case before him he had only to consider the position of CIGOL. By following this premise he was able to hold that CIGOL did not fix the price of an interprovincial and international commodity nor pass on the tax because all of its production was sold in Saskatchewan to another company. This did not deal with the case of companies such as Imperial Oil Limited and Gulf Oil Company which produce their own oil and ship it by pipeline to another province for refining and subsequent sale to a consumer. Since on principle constitutional challenges require an overview and not a consideration of only the specific facts of the plaintiff, it is submitted that he was in error on this point.

In the Court of Appeal[24] Culliton C. J. S. dealt with the case as one of general application. He based his decision (concurred in by the other justices) on the premise that the intention of legislation of this sort must be gleaned from the four corners of the statute. He concluded that there was no price fixing by the government, but that the price was determined by market conditions and the government simply took the extra profits occasioned by the rise in oil prices. He held this not to be enactment of a tax intended to be passed on to others.

In the Supreme Court of Canada[25] the decision was reversed. Martland J. and six of the nine judges concurred for the majority and Dickson J. wrote a dissenting judgement concurred in by de Grandpre J. The net result was that both the mineral income tax and royalty surcharge were held *ultra vires* and unconstitutional, and certain other portions of the statute were also held *ultra vires*.

It is significant that all nine judges agreed that the "mineral income tax" (as the tax was called in the statute) was not an income tax as that term is understood in the authorities which say that an income tax is a direct tax. In addition, all nine judges agreed that the royalty surcharge was not a royalty but was a tax the same as the mineral income tax. Martland J. pointed out that the royalty surcharge was applicable to expropriated freehold land and that in such cases the transfer to the Crown was expressly made subject to any lease already in effect for the lands. While the Act preserved the rights of the freehold lessees by continuing their leases, it nevertheless subjected them to the royalty surcharge. He held that a levee thus imposed could not be a royalty because the royalty had been fixed by the terms of the freehold lease and these terms had been expressly preserved by the expropriating provisions. To be enforceable the "royalty surcharge" must therefore be a tax.

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23. [1975] 2 W.W.R. 481 (Sask. Q.B.).
24. (1976) 65 D.L.R. (3d) 79, [1976] 2 W.W.R. 356 (Sask. C.A.).
25. (1978) 80 D.L.R. (3d) 449 (S.C.C.).

Martland J. also held that the provisions in the Crown leases subjecting them to royalties at rates prescribed from time to time referred to "royalty" in the customary sense of a share of production obtained by a lessee. The existing royalties prior to Bill 42 were genuine royalties and these had not been changed. The new so-called "royalty surcharge" was not a royalty in accordance with Crown lease agreements but was imposed as a levee upon the share of production and a tax upon production. He said:[26]

It is contended that the imposition of these taxes will not result in an increase in the price paid by oil purchasers, who would have been required to pay the same market price even if the taxes had not been imposed, and so there could be no passing on of the tax by the Saskatchewan producer to his purchaser. On this premise it is argued that the tax is not indirect. This, however, overlooks the all important fact that the scheme of the legislation under consideration involves the fixing of the maximum return of the Saskatchewan producers at the basic well-head price per barrel, while at the same time compelling him to sell at a higher price. There are two components in the sale price, first the basic well-head price and second the tax imposed. Both are intended by the legislation to be incorporated into the price payable by the purchaser. The purchaser pays the amount of the tax as a part of the purchase price.

For these reasons it is my opinion that the taxation scheme comprising the mineral income tax and the royalty surcharge does not constitute direct taxation within the province and is therefore outside the scope of the provincial power under sub. 92(2) of the *British North America Act*.

He held that the effect of the legislation was to set a floor price for Saskatchewan oil purchased for export by the appropriation of its potential incremental value in the interprovincial and international markets or to insure that the incremental value is not appropriated by persons outside the province. He agreed with Culliton C.J.S. that the purpose of the legislation was to drain off substantial benefits that would have accrued to the producers due to the unprecedented price of crude oil. He stated:[27]

In an effort to obtain for the provincial treasury the increases in the value of oil exported from Saskatchewan which began in 1973, in the form of a tax upon the production of oil in Saskatchewan, the legislation gave power to the Minister to fix the price receivable by Saskatchewan oil producers on their export sales of a commodity that has almost no local market in Saskatchewan. Provincial legislative authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market. It involves the regulation of interprovincial trade and trenches upon subs. 91(2) of the *British North America Act*.

The dissenting decision of Dickson J. contains a number of significant statements. For example, he pointed out:[28]

Implicit in this, and more important than a vestige of indirectness, is the prohibition of the imposition by a province of any tax upon citizens beyond its borders. Additionally, a province cannot, through the ostensible use of its power to tax, invade prohibited fields. It cannot by way of taxation regulate trade and commerce or prohibit the free admission of produce or manufactured goods from other provinces. It must confine itself to the raising of a revenue for provincial purposes.

He was unable to find that the tax was a commodity tax. He also held that the so-called "mineral income tax" is not an income tax in any generally recognized sense of the term. In doing so he distinguished *Nickel Rim Mines Ltd.* v. *Att. Gen. Ont.*[29] He pointed out that the tax

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26. *Id.* at 463.
27. *Id.* at 464.
28. *Id.* at 475.
29. (1966) 1 O.R. 345.

was not levied on net income but was in essence a flat sum not necessarily reflective of actual expense experiences, for expenses were discretionary and not inherently deductible. In addition, the tax was levied not on a price received, but on a ministerial figure. He said, "In sum, an income tax is a tax upon gross receipts less expenses. In the instant tax it is possible that these two figures will be subject to ministerial determination."[30] He held that the well-head value was not an arbitrary figure but on a proper construction of the statute was simply a safeguard against selling at less than fair market value. In short, he stated that the tax does not set the price but the price sets the tax. He said that the royalty surcharge was to the same effect but that the amount of tax payable will depend upon the price actually received for the oil and not upon any exercise of ministerial authority. This finding is a bit puzzling with respect to royalty surcharge, for the regulations as amended in May of 1974 by an amendment to The Mineral Resource Act[31] required the minister to fix the well-head value (originally called "international well-head price"). The upper number in the equation for the royalty surcharge is required to be determined by the minister and in fact was determined. However, in the end he stated:[32]

> I cannot stress too strongly the point that purchasers would be paying the same price whether the tax existed or not. This fact, to my mind, conclusively prevents the levy from being in the nature of an indirect tax or an export tax. It is not passed on to purchasers to augment the price they would otherwise pay. Instead, they pay exactly the price they would pay in the absence of the tax and the producers are taxed on the profits they would otherwise receive.

Dickson J. held that the obligation relating to the royalty surcharge arose by legislative command, not by a process or negotiation between free will resulting in a meeting of minds. He found that the royalty surcharge is the same levy as is imposed in other terms as mineral income tax; but he also held that the fact that it was a tax was not fatal because of his opinion that it was direct.

Dickson J. was unable to say that the flow of commerce was in any way impeded by the legislation unless it can be said to relate to price. He concluded that, in enacting the legislation, Saskatchewan had a bona fide, legitimate and reasonable interest to advance in relation to taxation and natural resources; this interest was out of all proportion to the burden (if there can be said to be a burden) imposed on the Canadian free trade economic unit through the legislation. The effect, if any, on the extra-provincial trade in oil is indirectly and remotely incidental to the manifest revenue-producing object of the legislation under attack. In the result he would have dismissed the argument that the legislation was in pith and in substance in relation to trade and commerce.

C. *Lessons From the CIGOL Case*

What are the lessons to be learned? The first is that governments are unwise to rush into legislation such as Bill 42 without careful study and consideration. Undoubtedly CIGOL will ultimately recover, with

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30. *Supra*, n. 25 at 477.
31. R.S.S. 1965, c. 50 as amended by S.S. 1973-74, c. 64.
32. *Supra*, n. 25 at 482.

interest, the money paid under the unconstitutional provisions, as directed by the Supreme Court of Canada. However, the government of Saskatchewan has now enacted Bill 47, The Oil Well Income Tax Act, 1978 which it states is intended to tax retroactively amounts equal to the sums already exacted by way of unconstitutional mineral income tax and royalty surcharge. On the face of it the new legislation appears to be an income tax. If so, it would be valid. But there are a number of questions to be answered before concluding that it does carry out this goal. The obvious question is whether it is colorable legislation seeking to do indirectly what could not be done directly. Until the regulations are passed, it is hard to comment further: while the tax is stated to be on oil well income (which is stated to be the aggregate of receipts less the outlays and expenses at a rate to be prescribed) there are vast discretionary powers, and their exercise may be determinative of the validity of the legislation. In addition, CIGOL may be in a slightly different position than others since it has a judgement of the Supreme Court of Canada. The question may arise whether or not the new legislation seeks to set aside the judgement.

This much is clear: there are limits on provincial jurisdiction and provincial governments will fight very hard to exceed them. On the other hand, one would be mistaken in overlooking the determination of the federal government to preserve the territory which it has staked out for itself. One of the major culprits in the resource taxation dilemma was the disallowance of provincial royalties as a deduction under Canadian income tax law. The legislation to this effect imposed a double whammy on all resource industries. Every time prices were increased, royalties would be increased; and while paying out these royalties, a producer, unable to deduct them from income, was squeezed even more. In the case of the oil industry, every time the price went up Saskatchewan took all of the price increase under Bill 42. Yet the industry was taxed on the increase so that each oil increase resulted in less for the industry. Since this problem carries over to all resource industries, it would be a mistake to consider only the provincial governments as the culprits in the resource grab.

D. *Recovery of Payments Under Invalid Laws*

The legal principle of duress has already been mentioned, along with the fact that CIGOL itself has a judgement from the Supreme Court of Canada. As part of its defence, however, the Government of Saskatchewan contended that S. 5(7) of The Proceedings against the Crown Act[33] was a bar to recovery. That provision reads as follows:

> S. 5. - (7) No proceedings lie against the Crown under this or any other section of this Act in respect of anything heretofore or hereafter done or omitted and purporting to have been done or omitted in the exercise of a power or authority under a statute or a statutory provision purporting to confer or to have conferred on the Crown such power or authority, which statute or statutory provision is or was or may be beyond the legislative jurisdiction of the Legislature; and no action shall be brought against any person for any act or thing heretofore or hereafter done or omitted by him under the supposed authority of such statute or statutory provision, or of any proclamation, order in council or regulation is or had been or may be within the jurisdiction of the Legislature enacting or the Lieutenant Governor making the same.

33. R.S.S. 1965, c. 87.

In answer, CIGOL pleaded that if the provision could be construed as a bar it was in itself *ultra vires*. The Saskatchewan courts did not find it necessary to deal with this point because they upheld the legislation. However, the government of Saskatchewan found itself embroiled in a somewhat analogous dispute with the potash industry within months of commencement of the CIGOL case. Briefly, on April 29, 1974 the government announced a new tax to be known as a "reserve tax" and brought in legislation to authorize it. At about the same time the amendments were enacted relating to Bill 42. The potash reserve tax was brought into force by Regulations passed in the fall of 1974, effective retroactively to July 1, 1974. The potash industry negotiated unsuccessfully with the government about the tax and early in July, 1975 launched a constitutional challenge to it.

Like the oil industry it was faced with the question of whether or not it might withhold payment of the tax pending disposition of the case and whether or not there was duress. As a consequence, the industry withheld payments due for the quarter commencing July 1, 1975, and requested deferral pending the decision. The government of Saskatchewan again reacted by demanding payment and threatening legal consequences if payment was not made. The potash industry then sought an order for interim relief. As before, the government relied on S. 5(7) of the Proceedings against the Crown Act. The industry sought to forestall this by asking for an order that the monies be paid under the direction of the court, to be repaid in the event of success. The theory was that there ought to be preservation of the tax. But it was recognized that the government might logically say it should have the tax in the interval in case it was valid, and that it should be the custodian.

The potash industry was unsuccessful in Saskatchewan courts.[34] But in the Court of Appeal Chief Justice Culliton almost specifically upheld the validity of S. 5(7) of the Proceedings against the Crown Act. In his decision he stated:[35]

> As well, in my opinion, Johnson J. was right in his interpretation of Section 5(7) of *The Proceedings against the Crown Act*, when he said that section precluded the recovery of taxes paid pursuant to the legislation or regulations, even if such legislation or regulations should be found invalid. This was the view expressed by Gordon J. A., in *Cairns Construction Limited vs Government of Saskatchewan*, 27 W.W.R. (NS) 297. While it was argued that the views so expressed by Gordon J. A. were obiter, such views, in my opinion, correctly interpret the legislation.

The refusal of the interim relief was appealed to the Supreme Court of Canada. Dickson J., in a unanimous decision,[36] held that S. 5(7) of the Proceedings against the Crown Act was itself *ultra vires* insofar as it purported to bar recovery of tax paid under an unconstitutional law. This is an important milestone for it affirms the view first expressed in *British Columbia Power Corporation, Limited* v. *British Columbia Electric Company Limited et al*[37] that a legislature cannot usurp rights over which it has no jurisdiction and then protect its action by preventing legal proceedings to right the invalidity. It would

34. *Amax Potash Ltd. et. al.* v. *Government of Sask.*, [1976] W.W.R. 569 (C.A.)
35. *Id.* at 575.
36. [1977] 2 S.C.R. 576, 6 W.W.R. 61.
37. [1962] S.C.R. 642.

otherwise be destroying by indirect means the constitution under which the legislature was created and existed. This theory had evolved from New South Wales in *Commissioner for Motor Transport* v. *Antill Ranger & Company Proprietary Ltd.*[38]

The important principle is that under a federal system there are limitations on the legislative power of both provinces and the federal parliament. These limitations cannot be avoided, circumvented or defeated by indirect means. How far this doctrine will be carried remains to be seen, for it is a new principle different from the British theory which evolved under a unitary system of parliament. Its logic is surely unquestionable but its application to a situation such as that which arises under the present Bill 47 is unclear.

E. *Interim Relief*

While interim relief was declined in *Amax Potash Limited et al.* v. *Government of Sask., supra,* it was also considered in the CIGOL case. The case was brought under the Proceedings against the Crown Act. The statute freed litigants from the need for a fiat from the Crown before suing the Crown, but nevertheless imposed some restrictions on the remedies against the Crown. Prior to the statute it was possible, in an appropriate case, to obtain an injunction.[39] The Act prohibits injunctions by the following provision:

> S. 17. - (2) Where, in proceedings against the Crown, any relief is sought that might, in proceedings between persons be granted by way of injunction or specific performance, the court shall not, as against the Crown grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties.

On the face of it, therefore, the Act has substituted a declaratory judgement for an injunction or specific performance.

This provision has been criticized by S. A. de Smith:[40]

> Perhaps the most unfortunate aspect of the present law is that it would seem that no interlocutory relief can be obtained to restrain any unlawful act done by the Crown or its servants acting in that behalf, apart from the power of the high court to suspend the operation of a compulsory purchase or similar order pending the determination of a statutory application to quash that order. It has been held that sec. 21(1) of the *Crown Proceedings Act*, which empowers the Court to make a declaratory order against the Crown in lieu of an injunction, applies only to declaratory orders that are definitive of the rights of the parties; it does not require the Court to make an interim declaration of rights, corresponding to an interlocutory injunction against the Crown, and it is not the practise of the Courts in any event, to grant interim declarations.

Two English cases have applied this provision literally.[41] The principle is that declaratory judgements can only be given as final judgements and not on an interim basis. The result is that an interim declaratory judgement cannot be given. In seeking interim relief, CIGOL was faced with these principles. On the basis of them, Johnson J. ruled[42] that he could not grant an interlocutory or interim declaratory order. However, he recognized that S. 5(7) of the Proceedings against

38. [1956] A.C. 527.

39. *E.g., C.P.R.* v. *Att. Gen. Sask.* [1948] 2 W.W.R. 414.

40. De Smith, *Judicial Review of Administrative Action* 464 (1973).

41. *Underhill* v. *Ministry of Food* [1951] 61 T.L.R. 730, 1 All E.R. 591; *International General Electric Co. of New York Ltd.* v. *Commissioners of Customs & Excise* [1962] Ch. D. 784, 2 All E.R. 398.

42. *Canadian Industrial Gas & Oil Ltd.* v. *Government of Sask.* [1974] 4 W.W.R. 557.

the Crown Act might bar CIGOL's recovery and commented on the apparent conflict between government self-interest and a citizen's right to expect fair play and probity from government. His decision was handed down before the Supreme Court of Canada's decision in the *Amax Potash Case, supra*. The decision was based on clear authority from England, and was not considered to be appropriate for appeal. While it is a trial level decision and subject to a different ruling by an appellate court, the rationale would not be easily disturbed.

There is one other possibility which has not been dealt with by the courts. As already indicated, an interim injunction was available prior to The Proceedings against the Crown Act.[43] At that time constitutional challenges were customarily launched on the basis of the *Dyson* principle, an English decision which held that the courts might grant declaratory judgements against the Crown.[44] It can be contended that the Proceedings against the Crown Act has not abolished this procedure: the procedure was available before the Act was passed and could not be taken away by a provincial legislature because that would defeat the very constitution within the principles enumerated in the *Amax Potash* case and the *British Columbia Power Corporation* case, *supra*. If this is so, the procedure is still available and an interim injunction would lie. Perhaps the answer is to sue both under the Proceedings against the Crown Act and under the *Dyson* principle, seeking interim relief under the latter and judgement under the former. This is one of the interesting issues remaining.

Another issue still unresolved at the time of writing is the right to interest. The decision of Martland J. in the *CIGOL* case awarded interest on the payments of taxes and so-called "royalty surcharge" from the respective dates of payments. The right to do so has been questioned by the government of Saskatchewan on the ground that interest cannot be awarded against the Crown unless specifically authorized, and no such authority exists. This issue was argued before the Supreme Court of Canada in June 1978, with judgement reserved.*

IV. DEVELOPMENTS IN OTHER RESOURCE INDUSTRIES IN SASKATCHEWAN

A. *The Potash Problem*

Reference has already been made to litigation by the potash industry which resulted in an interlocutory decision with important constitutional ramifications. While there are differences between potash mining and production of oil and gas, there may also be analogies.

There are only nine potash mines in Saskatchewan, so their numbers are comparatively small. When the industry was established in the 50's and 60's, successive governments, commencing with the old CCF government, entered into agreements with companies establishing mines to fix royalties and taxes based on production until 1981.

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43. *See* text accompanying n. 39, *supra*.

44. *Dyson* v. *Att. Gen.* [1911] 1 K.B. 410, [1912] 1 Ch. 158.

* On October 3, 1978, the Supreme Court of Canada issued judgement against the Saskatchewan government on this point.

The potash industry had encountered many difficulties in its early years, and this resulted in the establishment of a prorationing scheme for production and sale of potash. Almost inevitably this worked a real or fancied hardship on some of the industry. Central Canada Potash Limited challenged the constitutional validity of the potash conservation regulations which established the prorationing scheme. The regulations stated that they were passed in the interest of conservation, but Disbery J.[45] held that the regulations were legislation in relation to trade and commerce and *ultra vires*. This decision was overturned by the Saskatchewan Court of Appeal,[46] in part because of amending legislation enacted in the interval. That decision has been appealed to the Supreme Court of Canada; at writing, the case has been argued but the decision is still pending.* It is of interest to the oil industry because it involves consideration of both physical and economic conservation. The ultimate decision may have an impact on oil and gas conservation laws.

The Potash Proration Fee Regulations,[47] were passed to provide a fee to persons licenced under the Potash Conservation Regulations.[48] This fee was originally calculated at the rate of 60c per ton of potash but was increased to $1.20 per ton in 1973.[49] If the Potash Conservation Regulations are struck down, the fee would presumably fall as well: it is imposed on persons licenced under those Regulations and if they are invalid no one would be licenced under them. In addition, the potash industry has joined in a challenge to these regulations as being an indirect tax. That case cannot be tried until a final determination of the *Central Canada* case determines the validity of the Potash Conservation Regulations, 1969.

The existence of contracts with the potash industry fixing royalties and taxes based on production until 1981 presented a problem to the government of Saskatchewan when it wished to impose heavier taxes on the potash industry. It is probably for this reason that The Potash Reserve Tax Regulations and the enabling legislation under The Mineral Taxation Act[50] were enacted in their present form. The reserve tax has been challenged in the *Amax* case on the same grounds as those in the *CIGOL* case, namely that it is an indirect tax and is in pith and substance legislation in relation to trade and commerce.

Finally, much of the potash industry has joined in an action against the government for breach of contract in its imposition of the potash proration fee and the potash reserve tax. No doubt this action cannot be disposed of until it is determined whether the proration fee and reserve tax are valid.

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45. *Central Canada Potash Ltd.* v. *Att. Gen. Sask.* [1975] 5 W.W.R. 193 (Sask. Q.B.)
46. [1977] 1 W.W.R. 486 (Sask. C.A.).

* On October 3, 1978, judgement was issued against the Saskatchewan government by the Supreme Court of Canada, which held the potash scheme unconstitutional.

47. Sask. Reg. 95/72 (1972).
48. Sask. Reg. 287/69 (1969).
49. Order in Council 1270/73, Saskatchewan Gazette, Oct. 5, 1973.
50. S.S. 1973-74, c. 65.
51. S.S. 1975-76, c. 1.

Following the various court actions brought by the potash industry, the government announced a policy of acquisition of up to one-half of the potash industry in the late fall of 1975. The concept of ownership of part of the industry was not entirely new, for statements to this effect had been found in previous public statements as early as the fall of 1973. Pursuant to the policy, The Potash Corporation of Saskatchewan Act, 1975[51] and The Potash Development Act, 1976[52] were introduced in the late fall of 1975 and passed on January 28, 1976. The first statute continued the Potash Corporation of Saskatchewan as a vehicle for Crown ownership. The Crown corporation had originally been constituted under the Crown Corporations Act,[53] and the legislation defines its powers statutorily. The Potash Development Act, 1976 provided for expropriation or purchase of existing mines and a system of compensation therefor.

The Government of Saskatchewan has acquired a number of potash mines and interests in others, and has announced that it has completed its acquisition plans. While this has been going on, the challenges to the proration fee and reserve tax have not been tried. But the reserve tax case has been entered for trial and presumably will come on for hearing shortly.

B. *Uranium*

The other resource industry which has received attention by Saskatchewan is the uranium industry. Reports indicate that there are enormous uranium reserves in northern Saskatchewan. If these reserves are developed the industry will have a great economic impact on the province. In seeking to impose a system of taxation, the government of Saskatchewan has not had the problem of freehold ownership which it faced with the oil industry. Nor has it had the problem of contracts fixing royalties and taxation which existed in the potash industry. The fact the development has come later has also proved advantageous to the industry in its relations with the government, for a system of royalties and taxation has been worked out with the industry which, so far, has avoided an industry-government confrontation. By amendment[54] to The Mineral Disposition Regulations, 1961, a system of royalties for uranium has been enacted. These are fairly complex with a basic royalty and a graduated royalty which takes into account operating costs and expenses. While there is no indication of poor relations between the uranium industry and the government, it would be inappropriate not to mention that the royalty system for uranium involved a long and somewhat agonizing period of negotiation, falling as it did on the heels of oil and potash disputes.

V. CONCLUSION

This is a general overview of five years of resource taxation and the dilemmas of the resource industries in Saskatchewan. Whether solutions can be found that will satisfy everyone or whether legal battles will continue are matters for conjecture.

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52. S.S. 1975-76, c. 2.
53. R.S.S. 1965, c. 39.
54. Sask. Reg. 208/76 (1976).

There is one lesson which ought to have been learned and never forgotten in dealing with governments. If a government is prepared to agree to taxes, royalties, fees or impositions at a certain level for a fixed period of time, one should insist that it be enshrined in legislation. It should not be covered merely by contract or regulation. It may be that a government will break its word or its contract by passing legislation. But if the obligation is already in legislation it cannot do so in secrecy, without public debate and awareness. This is bound to have a moderating influence and afford a reasonable opportunity to arrive at rational and more or less mutually acceptable results. On the other hand, if the rules can be changed by Order in Council, passed by the cabinet *in camera*, there is virtually no restraint on government excesses.

Looking to the future, one can only assume that human nature is bound to prevail. In a federal system there is a division of powers. Whatever the division, it seems inevitable that from time to time one government or another will enact legislation which encroaches on the jurisdiction of another. This is bound to lead to conflict and disagreement. Even if governments can settle the conflicts between themselves, the impact on private persons will lead to judicial testing of enactments. Judicial definitions of direct and indirect taxation are of necessity imprecise, and legislative draftsmen will always have the ingenuity to seek new means of levying impositions on taxpayers. The imprecision of the law on the question of whether a tax is direct or indirect cannot compare, however, with the scope of arguments which may be raised on whether or not legislation is in relation to trade and commerce. The key is whether the legislation is one in which the aim and purpose is to legislate in provincial matters or in matters in which the predominant factor is interprovincial or international trade. It is inevitably difficult to be objective in such a matter.