ENERGY AND THE NEW CONSTITUTION*

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The Constitution Act, 1982 contains two natural resource provisions which amend the British North America Act. On the face of these provisions, the formal jurisdiction which provinces can exercise over natural resources in general, and over onshore oil and gas in particular, has been substantially bolstered. It is unclear, however, whether these provisions add very much substantively to the powers the provinces possessed (or were exercising) prior to the passing of the Constitution Act, 1982. This paper will analyse the new natural resource provisions to determine how they will affect the jurisdiction provinces will have over the future development of onshore oil and gas, and the revenues to be derived therefrom.

I. INTRODUCTION

The Constitution Act, 1982 contains two natural resource provisions which amend the British North America Act (now the Constitution Act, 1867).[1] These provisions are sections 50 and 51, and appear in the Constitution Act, 1867 as section 92A and the Sixth Schedule respectively. The amendments appear to bolster the formal jurisdiction which provinces can exercise over natural resources in general, and onshore oil and gas in particular. Under subsection 92A (6), the provinces have at least the same rights and powers as they did before the enactment of the Constitution Act, 1982. Under subsections 92A (2) and (4), the provinces may enact laws in relation to the interprovincial export of natural resources and in relation to the raising of revenue by any mode or system of taxation, respectively, subject to non-discrimination and non-differentiation clauses. From the perspective of the provinces, the new powers over interprovincial export and indirect taxation are a welcome relief in the aftermath of *CIGOL* [2] and *Central Canada Potash*.[3] It is moot, however, whether these provisions add substantively to the powers the provinces had (or were exercising) prior to the passing of the Constitution Act, 1982. What is more vexing, though perhaps not unexpected, is that these provisions have not clearly delineated federal and provincial jurisdiction in this important area of the economy, leaving alive the real prospect of future federal-provincial conflicts over the control of energy development, and ultimately, energy revenue sharing.

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1. Constitution Act, 1982, *Canada Gazette*, Part III, September 21, 1982, (en. by Canada Act, 1982 (U.K.) c. 11.

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

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

The purpose of this paper is to analyze the new natural resource provisions of the Constitution Act, 1982 and to determine how they will affect provincial jurisdiction over the development of onshore oil and gas and provincial access to the revenues to be derived therefrom. Since Alberta currently produces more than eighty percent of Canada's oil and gas, this paper focuses on Alberta's jurisdiction. To a large extent, the future jurisdiction of the provinces will depend on the manner in which the courts interpret these new provisions. Of importance will be the provisions themselves and the relationship between these provisions and other sections of the Constitution Act, 1867, such as sections 91 and 92, which have in the past determined the jurisdiction the federal and provincial governments have exercised. These sections have been carried forward into the Constitution Act, 1982, giving great importance to the traditional case law in this area. Finally, of some probative value will be the "best effort" draft proposals upon which the new provisions were based and the political compromise between the federal Liberal government and the New Democratic Party that gave rise to these new sections.

Part II of this paper presents a brief history of the evolution of the new natural resource provisons. Parts III and IV of this paper outline the traditional heads of power under which the provincial and federal governments may exercise jurisdiction over natural resources. Part V of this paper analyzes the new section 92A in light of previous judicial decisions and other sources which a court might consider in determining the extent to which provincial powers have been increased. It shall be argued here that the new provisions have not clarified the scope of the federal powers over natural resources, and that, therefore, the increased provincial jurisdiction is ambiguous at best. Part VI of this paper contains certain conclusions.

II. A BRIEF HISTORY OF THE PROVISIONS

Section 92A was a creature of political compromise. The federal government had undertaken unilateral action to patriate the British North America Act. Initially, its "Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada", released October 2, 1981, had conspicuously excluded any reference to provincial control over natural resources. The federal government agreed to incorporate into the Resolution various amendments proposed by the federal New Democratic Party (NDP), including provisions concerning natural resources, in order to secure that party's support for the Proposed Resolution. The exchange of correspondence between NDP leader Mr. Edward Broadbent and Prime Minister Pierre Trudeau on October 20 and 21, 1981, is now in the public domain. Mr. Broadbent's letter made three demands with respect to natural resources. He asked that the Proposed Resolution confirm the provinces' right to manage and control their natural resources; that it specify their right to levy taxes in a non-discriminatory manner in relation to those resources; and that it provide the provinces with a concurrent power over interprovincial trade in those resources, to be exercised in a non-discriminatory manner and subject to federal paramountcy. The Prime Minister agreed to accept these demands, provided that the Proposed Resolutions were drafted to ensure

that the increased provincial power could not be used by a producing province to discriminate against other parts of Canada, a condition designed to entrench in the Constitution certain basic principles respecting the economic union of the provinces within Canada.

The present provisions did not originate from the New Democratic Party. They resemble very closely the "best efforts" draft proposals of 1980, which were the product of the Federal-Provincial Conference of First Ministers on the Constitution convened in September, 1980. Unfortunately, no federal-provincial consensus had been reached at this Conference on, *inter alia*, provincial control over natural resources. The lack of consensus on several issues, including the question of natural resources, precipitated the subsequent attempts of the federal government to patriate the British North America Act unilaterally.

To develop a legal background against which section 92A can be understood, it is necessary to consider the traditional heads of power through which the provincial and federal governments have exercised jurisdiction over natural resources.

III. PROVINCIAL POWERS

A. INTRODUCTION

Provincial jurisdiction over oil and gas resources stems from the various heads of power enumerated in and conferred by the Constitution Act, 1867. Provincial jurisdiction covers the entire gamut of resource exploration, development, production, marketing, pricing and taxation. In very general terms, the heads of provincial power enable the Legislatures to exercise jurisdiction in either a proprietary or a legislative capacity. The proprietary powers arise from sections 109 and 117, and the legislative powers arise mainly from section 92, although, as discussed below, the legislative powers granted by subsection 92(5) depend upon the proprietary powers contained in sections 109 and 117.

This Part of the paper reviews these various heads of power, and the case law interpreting them, to determine the provinces' traditional jurisdiction over natural resources, and thereby to determine those provincial rights from which the Constitution Act, 1982, cannot derogate, by virtue of subsection 92A (6). This "benchmark" of traditional jurisdiction will be important in analyzing what additional powers, if any, the provinces have acquired in the natural resources area. This Part of the paper will first consider the history of provincial ownership of natural resources under sections 109 and 117. The proprietary powers to which sections 109 and 117 give rise will then be discussed. Finally, provincial legislative powers under section 92, including those that depend on provincial ownership, will be analyzed.

B. PROVINCIAL OWNERSHIP

The various forms of public property existing at the time of Confederation were allocated between the new Dominion and the provinces by means of various sections in Part VIII of the Constitution Act, 1867. Under section 108, the Dominion was assigned the public works and pro-

perty of each province as enumerated in The Third Schedule, including, for instance, canals, public harbors, lighthouses, and so on. Section 117 confirmed that the residue was to remain with the provinces, that is, the provinces ". . . shall retain all their respective Public Property not otherwise disposed of in this Act". Part of the residue was specified in section 109, which provided that "all Lands, Mines, Minerals . . . belonging to the several Provinces" shall remain with the provinces.

It has been generally accepted that oil and gas resources fall within section 109. In *A.G. Ontario* v. *Mercer* (1883),[4] the Privy Council held that the word "Lands" in section 109 included mines and minerals. A similar interpretation was given to the expression "public lands" in *A.G. British Columbia* v. *A.G. Canada* (1889),[5] except that precious metals were excluded.

The constitutionally entrenched ownership to which these provisions gave rise applied to the four founding provinces: Ontario, Quebec, New Brunswick and Nova Scotia. The same provisions applied when Prince Edward Island, British Columbia and Newfoundland entered Confederation in 1871, 1873 and 1949, respectively although the last two provinces varied their terms of union with Canada to some extent with respect to these resources.[6] When the prairie provinces entered Confederation in 1905, however, they were not put in the same position as the other provinces with respect to public lands. Their public lands continued under Dominion ownership until 1930.[7] There is some question whether Alberta and Saskatchewan achieved a superior position with respect to the ownership of natural resources when these resources were transferred to them in 1930. In the *Reference Re Proposed Federal Tax on Exported Natural Gas* (1981),[8] the Attorney General of Alberta argued that section 1 of the 1930 Transfer Agreement had a *non obstante* clause that exempted the provincial ownership of natural resources from any federal powers under the Constitution Act, 1867. The Court held that it was not necessary to decide this issue.

There is little direct authority with respect to the constitutional entrenchment of public property, especially oil and gas resources.[9] Two recent cases from the Supreme Court of Canada, however, have lent support to the concept of constitutionally entrenched provincial ownership of provincial public property. In *A.G. Quebec* v. *Blaikie* (1979),[10] the Court found that Quebec's power to declare French the official language of the province was limited by section 133 of the Constitution Act. Section 133 was considered to be an "entrenched provision" that provided a guarantee to elected federal and provincial officials who wished to use

4. (1883) 8 App. Cas. 767 at 775 and 776 (P.C.).
5. (1889) 14 App. Cas. 295 (P.C.).
6. Michael Crommelin, "Jurisdiction Over Onshore Oil and Gas in Canada", (1975) 10 *U.B.C. Law Rev.* 86.
7. B.N.A. Act, 1930 (U.K.), 20-21 Geo. V, c. 26 (now Constitution Act, 1930).
8. (1981) 122 D.L.R. (3d) 48 (Alta. C.A.).
9. Alastair R. Lucas, "The October 28, 1980 Federal Budget and National Energy Program: Constitutional And Regulatory Issues" (1980) *Canadian Tax Foundation, Thirty-Second Tax Conference* 677.
10. (1979) 2 S.C.R. 1016.

either official language. In *Re B.N.A. Act and the Federal Senate* (1979),[11] the Court held that Parliament could not abolish the Senate unilaterally, because references to the Upper House in the Constitution Act indicated that the Senate was to be an integral part of the governmental institutions of Canada, and, hence, the institution known as the Senate was "entrenched".

The provincial Legislatures were given these public lands to provide a source of revenue for their various governmental functions. The Judicial Committee of the Privy Council said of section 109 in *A.G. Ontario* v. *Mercer*:[12]

> The general subject of the whole section is of a high political nature; it is the attribution of royal territorial rights, for purposes of revenue and government, to the provinces in which they are situate, or arise.

The provincial Legislatures have a proprietary interest only in oil and gas resources contained in public lands.[13] A significant amount of oil and gas is held in freehold because, prior to 1887, Crown grants of both Dominion and provincial lands did not reserve minerals to the Crown. In 1887, Dominion policy changed, and all land granted west of the Third Meridian (a line which roughly bisects Saskatchewan) reserved minerals to the Crown. Two years later, the same policy was adopted with respect to land east of the Third Meridian. As a result, public ownership of oil and gas resources in Ontario, Quebec and the eastern provinces is not significant, but the Crown in the right of Alberta and Saskatchewan own approximately eighty percent of the mineral rights in those provinces.[14]

The provinces' proprietary rights over public lands confer both legislative and proprietary capacity over their control and disposition. These provincial powers shall now be considered.

C. PROPRIETARY POWERS

1. Introduction

Provincial ownership of public lands, by itself, determines neither the existence nor the scope of the provinces' proprietary power over those lands. If a proprietary power was to arise, it seems reasonable to assume that a province, with respect to its constitutionally-entrenched ownership of oil and gas resources, would enjoy the same status as a freehold owner of resources, enjoying the authority to control and dispose of these resources in a market economy. The scope of this power, however, would not be absolute, because it would be subject to the normal restrictions inherent in the common law and imposed by validly-enacted legislation. Moreover, in exercising its proprietary powers, a province would not be obliged to act in its legislative capacity under section 92(5) of the Constitution Act, 1867 when dealing with its proprietary interests in natural resources on public lands.

The provinces' proprietary power has been referred to in case law as the "executive power" or the "proprietary right".

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11. (1979) 30 N.R. 271 (S.C.C.).
12. *Supra* n. 4 at 778.
13. *Id.* at 775 and 776.
14. *Supra* n. 6 at 92.

This section of the paper considers three issues regarding provincial proprietary powers: 1) does a proprietary power exist?; 2) does a proprietary power exist independently of a legislative power, conferring on the province a potentially greater jurisdiction to control and dispose of its resources in its proprietary, rather than in its legislative capacity?; and 3) to what extent does legislation validly enacted under section 91 restrict the provincial proprietary power?

The relationship between a province's proprietary power and validly enacted federal legislation will first be considered. Once this nexus has been established, the existence of a proprietary power which is independent of the legislative powers will be analyzed.

2. Proprietary Power and Federal Legislation

A province is interested in its public property in order to control the commercial exploitation of its natural resources by means of permits, licenses and leases and in order to gain from this exploitation through the imposition of license fees, rents and royalties.[15] The proprietary power is not inviolable. The Privy Council stated in *A.G. Quebec* v. *Nipissing Central Railway Co. and A.G. Canada* (1926):[16]

> While the proprietary right of each Province in its own Crown lands is beyond dispute, that right is subject to be affected by legislation passed by the Parliament of Canada within the limits of the authority conferred on that Parliament.

The capacity of Parliament to affect provincial proprietary rights can be quite dramatic, ranging from the one extreme of extinguishing provincial proprietary powers to the other extreme whereby the provincial government can dispose of its property as it pleases, acting as if it were a private owner in a classic market economy, completely unconstrained by any government legislation. In *Nipissing*, federal railway legislation authorizing expropriation of "lands of the Crown" was held to be applicable to provincial Crown lands, thereby extinguishing the provincial proprietary interest in the land.

The converse case is *Smylie* v. *R.* (1900),[17] in which the federal government challenged an Ontario statute stipulating that a condition be inserted in all Crown timber licenses requiring timber cut thereunder to be processed in Canada. Although the *ratio* of the case addressed subsections 91(2) and 92(5), as discussed in Part III.C.3 below, Moss J.A. observed, in supporting the Ontario statute, that:[18]

> . . . I see no reason for thinking that the Legislature may not, in respect of this property, do what any subject proprietor might do, when proposing to dispose of his property, viz., attach to the contract a condition not impossible of performance, or unlawful per se, or prohibited by an existing law.

This *dictum* supports the proposition that in the absence of federal legislation, a province, as a proprietary owner, may do as it pleases in disposing of its property. In this instance, Ontario had acted in its capacity as a property owner according to existing law and there was no validly

15. Peter W. Hogg, *Constitutional Law of Canada*, (1977) 393.

16. [1926] A.C. 715 at 723 and 724 (P.C.).

17. (1900) 27 O.A.R. 172 (Ont. C.A.).

18. *Id.* at 192.

enacted federal law restricting the right of the province to attach whatever conditions it saw fit.

3. Independent Proprietary Power

The existence of an independent proprietary power over public lands was first noted in *R.* v. *Robertson* (1882), a case dealing with provincial power over provincially-owned fisheries, where Strong J. indicated that:[19]

> . . . the provincial governments may, without special legislation and in the exercise of their right of property, restrict their use in any manner which may seem expedient just as freely as private owners might do.

In *A.G. Canada* v. *Western Higbie* (1945),[20] the existence of a residual power came into question. The issue was whether there was a residual prerogative power under which the executive of the British Columbia government could transfer land to the Dominion, in the absence of statute, by using an Order-in-Council. Of the five Justices of the Supreme Court of Canada who heard the appeal, Rinfret C.J. and Taschereau J. held that, in the absence of a restrictive statute, the Crown was free to convey Crown lands on the advice of the appropriate executive, reasoning that at common law, the Crown had a right to transfer its lands by virtue of the prerogative, and in the absence of express terms, a statute should not be construed as interfering with Crown rights.[21] Of the remaining Justices, Kerwin and Hudson JJ. did not come to a conclusion on the issue, and Rand J. said only that "in the absence of legislation, such a residue may remain in relation to dealings with [property] in a provincial aspect",[22] an assertion which suggests that there would be no residual power if the dealing in property affected a "Dominion aspect".[23]

The case law regarding the existence of an independent proprietary power is unsettled. Adding to the confusion is the issue whether such a power gives rise to a jurisdiction equal only to that which could be enjoyed under a valid legislative power. *Bonanza Creek Gold Mining Co. Ltd.* v. *The King* (1916)[24] is authority that the proprietary and the legislative powers are co-extensive. Lord Haldane claimed that under the British North America Act:[25]

> . . . the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers.

This "matching" principle denies the independence, but not the existence, of a proprietary power. Hence, it appears that although a province may exercise a proprietary power, its jurisdiction can be no greater

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19. (1882) 6 S.C.R. 52 at 136.
20. [1945] S.C.R. 385.
21. Gerald V. La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (1969) 20.
22. *Supra* n. 20 at 432.
23. S.I. Bushnell, "Comments — Constitutional Law — Proprietary Rights and Control of Natural Resources" (1980) LVIII *Can. Bar Rev.* 157 at 163.
24. [1916] A.C. 566 (P.C.).
25. *Id.* at 580.

than the scope of the legislative power determined under subsection 92(5).

But the proposition that the "matching" principle in *Bonanza* enables a province to exercise a jurisdiction under its proprietary power only equivalent to what it could exercise under its legislative power is somewhat suspect. *Brooks-Bidlake and Whittal, Limited* v. *A.G. British Columbia et al.* (1923)[26] is an example of a province exercising proprietary powers that are beyond its legislative competence. In that case, the British Columbia government issued timber licenses over provincial Crown lands. These licenses were issued for one year, but were renewable annually if the conditions of the Oriental Orders in Council Validation Act were met. The appellant was refused a renewal of its license, because it had breached one of the conditions by using both Japanese and Chinese employees. The Privy Council held in favour of the provincial government, on the ground that such conditions came under subsection 92(5), the provincial head of legislative control over public lands, and did not run afoul of subsection 91(29), the federal head of legislative power over aliens. However, the interpretation given by the Privy Council a year later, in the *Oriental Reference* (1924),[27] intimated that the *ratio* of *Brooks-Bidlake* might be otherwise. Although the Privy Council upheld *Brooks-Bidlake*, it drew a distinction between a condition inserted in the executive grant of a license, the breach of which affected future property rights, and a statute regulating insertion of such restrictive conditions, the breach of which would be the loss of the license. The Privy Council indicated that *Brooks-Bidlake* had been decided on the former basis: that is, that the case involved the proprietary power to attach conditions to a grant, and not the legislative power under subsection 92(5) to do the same. This is not an implausible result, since there was valid federal legislation in force prohibiting the type of discrimination contained in the Oriental Orders statute.

Moreover, *Smylie* [28] supports the proposition that the provincial proprietary power may exceed the legislative power in the absence of federal legislation. However, the *Smylie* case is wrongly decided if its *ratio* is that a province may use a conditional grant under subsection 92(5) to prohibit the export of unprocessed timber where there is no valid federal legislation governing the export of timber. The list of classes of subjects in sections 91 and 92 are exclusive. If either Parliament or a Legislature fails to legislate to the full limit of its powers, its failure does not augment the power of the other level of government.[29] The conditional grant was *ultra vires* as a legislative power. The dilemma is resolved, however, if we accept that Moss J.A., in his second argument, was alluding to a proprietary power which, unlike a legislative power, is not affected by the exclusivity principle.

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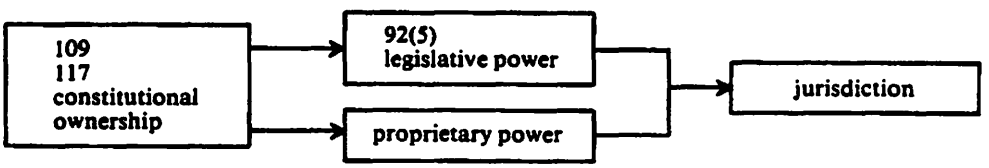
26. [1923] A.C. 450 (P.C.).
27. *A.G. B.C.* v. *A.G. Can. (Oriental Orders Reference)* [1924] A.C. 203 (P.C.).
28. *Supra* n. 17 at 192.
29. *Supra* n. 15 at 95.

The upshot of *Bonanza*, *Brooks-Bidlake* and *Oriental Reference*[30] is that, if the last two cases prevail, sections 109 and 117 give rise to independent provincial proprietary and legislative powers over public lands, and the proprietary power can exceed the provinces' legislative competence when Parliament has not legislated to the full extent of its powers. This proposition does not violate the established constitutional doctrine that one cannot achieve indirectly what one cannot achieve directly, because the provincial proprietary powers are independent of the legislative powers and are co-extensive with them only when the federal government has legislated to the full extent of its powers.

The significance of this proposition is that a province which wishes to exert jurisdiction over its public lands would have a greater authority under its proprietary powers than under its legislative powers, especially subsection 92(5), when Parliament has not fully exercised all of its powers under the Constitution Act. The proprietary powers under sections 109 and 117 are a temporary advantage only, because Parliament, in legislating to the full extent of its powers, can reduce these proprietary powers until they are co-extensive with the provincial legislative powers.

The circumvention of subsection 92(5) has been depicted below:



D. LEGISLATIVE POWERS

1. Introduction

Under section 92, a provincial Legislature has several heads of power under which it can exercise its authority over oil and gas resources. These various heads (or "classes of subjects") are subsections:

1. 92(5), the power of management and sale exercisable over the public lands;
2. 92(2), the power to levy direct taxes within the province in order to raise a revenue for provincial purposes;
3. 92(13), the power to make laws in relation to property and civil rights within the province; and
4. 92(16), the residuary power to make laws over all matters of a merely local or private nature in the province.

These various heads of provincial power will now be reviewed.

2. Subsection 92(5)

(a.) Introduction

The most important head of provincial power in this context is subsection 92(5), which empowers a Legislature to dispose of its public lands.

30. *Supra* notes 24, 26 and 27, respectively.

This legislative head is important for two reasons. First, most of Canada's current oil and gas production occurs in Alberta and Saskatchewan, where the Crown in right of the Province owns approximately eighty percent of the oil and gas resources. Second, the ability of a province to manage and develop its public lands is realized through subsection 92(5). As a result, the Province of Alberta, for instance, will argue that the legislative nexus among sections 109, 117 and 92(5) is the constitutional basis upon which the Province, in its capacity as owner, can legislate to manage, control, and dispose of these resources as it sees fit. The producing provinces have enacted very aggressive legislation with respect to their public lands, even though the case law with respect to the scope of subsection 92(5) is ambiguous.

(b.) Case Law

The meaning of the words "management and sale" and "public lands" in 92(5) have been judicially considered in only a few cases. The tendency of the courts has been to give a normal meaning to the term "public lands", including all incidents to land. As discussed in Part III.B, above, *Mercer* is authority that mines and minerals are included in the word "Lands" in subsection 92(5),[31] and this was confirmed in *A.G. British Columbia* v. *A.G. Canada (Precious Metals)*, with the exception of precious metals.[32] The Privy Council has indicated, in *dicta* in *A.G. Canada* v. *A.G. Ontario* (the *Fisheries* case)[33] that fishing rights are included in the term "public lands", as an incident to land.[34] Thus, if oil and gas resources are construed as incidents to Crown land, they come within subsection 92(5).

In the *Fisheries* case, the Privy Council considered the scope of subsection 92(5) in relation to fisheries, a narrowly-defined class of subjects under the federal subsection 91(12). It held that, though a province had the right under subsection 92(5) to dispose of fisheries which were the property of the province, that right of disposition, "including the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed of", must conform with validly-enacted federal legislation. Their Lordships made no reference to the provinces' management powers under subsection 92(5).

In *Brooks-Bidlake*,[35] the Privy Council considered subsection 92(5) in relation to a provincial statute which validated conditions in Crown grants prohibiting the employment of Japanese and Chinese labourers. Although valid federal legislation under subsection 91(25) was in place, the provincial statute was held to be *intra vires*. However, the *ratio* of this case is unclear, because, in the *Oriental Reference*[36] a year later, the Privy Council neither confirmed nor denied their judgment in the earlier case, and decided the later case on different grounds.

31. *Supra* n. 4 and accompanying text.
32. *Supra* n. 5 and accompanying text.
33. [1898] A.C. 700 (P.C.).
34. *Id.* at 707, 709 and 712.
35. *Supra* n. 26.
36. *Supra* n. 27.

Finally, in *Smylie* v. *The Queen*,[37] the validity of an Ontario statute making it a condition of all Crown timber licenses that the timber be processed in Canada, was challenged. The Ontario Court of Appeal held that the statute was *intra vires* the Province, because the restrictive condition was in relation to a matter coming within subsection 92(5), rather than subsection 91(2). The Court made no attempt to define the limits of either class of subjects.

In summary, the case law does not offer much guidance as to what limits can be placed upon the "management and sale" powers of the provincial legislatures under subsection 92(5). Whether some of the more assertive provincial schemes can be characterized as encroachments upon federal classes of subjects has not been subject to judicial review.

(c.) Exploration and Production

In considering the authority a provincial Legislature may exercise over production and exploration under subsection 92(5), two issues must be determined: first, the type of grant or license involved, and second, the type of scheme created to regulate production. Analyzing grants or licenses identifies the interest created by the Crown, and, as a result, one can determine the time at which the Crown's title to the oil and gas is extinguished. Analyzing production regulation schemes provides a framework by which the provincial marketing schemes can be assessed.

In Alberta, the lease agreement between the Crown, as lessor, and the producer, as lessee, is governed by the Mines and Minerals Act, which states that a lease grants the rights to the petroleum which is the property of the Crown in a given location and subject to any exceptions in the lease.[38] The nature of the interest granted is not specified in the lease. There are three possibilities. The first is that the Crown has made an absolute grant of the oil and gas *in situ*, such that the Crown has relinquished not only title to, but also control over the production of the resource. The second is that the lessee does not have an interest in land, but only a bare licence to conduct activities within the leased premises. The third is that a producer has an interest in land, enabling it to take title to the non-royalty oil once it has been extracted, while the Crown, as lessor, retains title to the oil *in situ*, to its royalty in kind, and to the reversionary rights on the termination of the grantee's interests.[39] Although the nature of the interest granted by a Crown oil and gas lease has never been judicially determined, the third type of interest is the most probable, because, in *Berkheiser* v. *Berkheiser* (1957),[40] the Supreme Court of Canada held that the standard freehold lease grants a *profit à prendre*.

Under the second and third possibilities above the Alberta government may control the method and rate of production from its public lands under subsection 92(5). This control, however, may end at least for the producer's share, and perhaps for the lessor's share as well, upon pro-

37. *Supra* n. 17.

38. R.S.A. 1980, c. M-15, s. 97.

39. David E. Thring, "Alberta, Oil and the Constitution" (1979) XVII *Alta. Law Rev.* 69 at 76 and 77.

40. [1957] S.C.R. 387.

duction, because the production is neither "public land" nor an incident thereof. Furthermore, it is arguable that the Crown's share suffers the same fate since the royalty share has been severed from the land.[41] However, as discussed below, in Alberta the marketing of oil and gas from Crown lands is predicated on the scope of subsection 92(5) extending beyond the wellhead.

The regulation of production from Crown petroleum and gas leases under subsection 92(5) could, in principle, take several legislative forms. In Alberta, for instance, the Oil and Gas Conservation Act[42] is directed toward physical conservation. The Act prohibits physical waste and imposes production limitations to maximize the physical production from a pool. This type of production regulation was held to be *intra vires* the Province in *Spooner Oils Limited and Spooner* v. *The Turner Valley Gas Conservation Board and A.G. Alberta* (1933),[43] where the Supreme Court of Canada upheld legislation that severely restricted the output of natural gas in the Turner Valley field, even though some of the gas would have been exported to Montana and Saskatchewan. The Court held that the "pith and substance" of the legislation was the prevention of the wasteful burning of natural gas, a matter assigned to the provinces under subsections 92(13) and 92(16). Conservation legislation would be buttressed by subsection 92(5) where Crown petroleum and natural gas fields were involved.

Alberta's production cuts in 1981 could also be characterized as a regulation of production under subsection 92(5). Alberta Bill 50[44] authorized three sixty-thousand-barrel-a-day reductions in production under Alberta Crown oil and gas leases (not freehold leases), with the first reduction effective March 1, 1981. The reduction applied to all Crown leases by virtue of the "compliance with laws clause" in those leases, which stipulates that present and future provincial laws are incorporated as conditions of the lease. The Bill could be characterized as subsection 92(5) legislation, because it aimed directly at resource management by regulation of production levels: oil and gas resources *in situ* were simply to remain in the ground. However, the legislation could also be characterized as an *ultra vires* encroachment upon the federal "trade and commerce" power under subsection 91(2), because it aimed at indirectly affecting oil and gas prices (by causing the importation of more higher-priced oil) which the Federal government had set unilaterally under valid federal legislation.[45] The Bill was never judicially challenged.

(d.) Marketing

The Alberta Legislature has created a statutory vehicle that is predicated upon the scope of subsection 92(5) extending beyond the wellhead. The Alberta Petroleum Marketing Commission (A.P.M.C.),

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41. *Supra* n. 39 at 77.
42. R.S.A. 1980, c. O-5, as am.
43. [1933] S.C.R. 629.
44. The Mines and Minerals Amendment Act, S.A. 1980, c. 32.
45. *Supra* n. 9.

established by the Petroleum Marketing Act,[46] markets all petroleum produced from Alberta Crown lands whether the petroleum is bound for extra-provincial or local markets. The Commission receives both the Crown's royalty share and the lessee's share of production. The Act does not empower the Commission to regulate sales of freehold oil and gas, a power clearly beyond the scope of subsection 92(5).

Although the Commission sets prices for oil and gas sold to inter-provincial markets, it is ostensibly not in violation of the federal "trade and commerce" power, because the A.P.M.C.'s prices are determined by a Federal-Alberta agreement. Although this agreement is not a formal legislative delegation of federal regulatory powers, it represents a significant federal involvement in the pricing process. In the event of a pricing impasse, the Federal government is empowered by the Energy Administration Act[47] to set prices unilaterally which are binding on the Commission. The conventional wisdom is that the Commission's ostensible powers to set prices unilaterally in lieu of a federal-provincial pricing agreement are *ultra vires* the province.

(e.) Royalties

The scope of a provincial legislature's jurisdiction to raise revenue with respect to Crown land under section 109 is broad, and can include licensing fees, exploration permits and royalties. A royalty arises out of a lessor/lessee relationship in which the lessee agrees to pay to the Crown an amount out of, or as a share of, his production in consideration for the right to use Crown land. The Legislature cannot collect royalties on freehold land, because it has no proprietary interest in those lands.

The right to collect royalties arises out of section 109, as a proprietary power, or out of subsection 92(5) in conjunction with section 109, as a legislative power exercised with respect to a proprietary power. As discussed in Part III. C, above, to the extent that federal legislation has not occupied the entire scope of any one of the classes of subjects in section 91, the provincial proprietary power will be broader than the provincial legislative power.

Under subsection 92(5), the Crown in the right of the province can grant rights in a lease in either a legislative capacity or a contractual capacity arising from the authority of legislative act. If the Crown acts in the former capacity, the rights conferred upon the lessee will not create a vested interest because the lessee holds at the pleasure of the Crown with respect to a further exercise of legislative capacity derogating from these rights. If the Crown acts in a contractual capacity, the lessee acquires a vested interest, defined by the terms of the contract. It has been suggested that the latter position would prevail in the courts.[48]

Problems arise when the Crown seeks to effect binding changes after the contract has been executed. For instance, a provincial legislature may wish to vary retroactively the royalty provisions in a contract in order to

46. S.A. 1973, c. 96 (now R.S.A. 1980, c. P-5).

47. S.C. 1974-75-76, c. 47, as am.

48. Rowland J. Harrison, "The Legal Character of Petroleum Licences" (1980) LVIII *Can. Bar Rev.* 483 at 500.

capture the increased "value" of Crown oil and gas reserves occasioned by rising world prices. Two different cases will emerge, depending on the approach it takes. On one hand, if the new royalty obligations are imposed by retroactive amendment to provincial legislation, the Crown is interfering with vested rights and may be obliged to pay compensation. On the other hand, if the change in contractual terms takes effect as a provision of the contract, there is no interference with the vested rights of the lessee.[49] Authority for the first case is found in *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board* (1933);[50] for the latter case: *A.G. Alberta* v. *Huggard Assets Ltd. et al* (1953).[51] In *Huggard Assets*, a variable royalty, predicated upon the clause "such royalty, if any, from time to time prescribed by regulations", enabled the Privy Council to find these words sufficiently clear to incorporate future royalty regulations. However, if the reservation is not in clear and precise terms, there is a presumption against a right of unilateral variation.[52]

Alberta Crown petroleum and natural gas leases contain provisions which enable the terms of the contract to be changed unilaterally. There may be two limits to this approach. The first is legal, namely, that as a matter of contract law, the future changes are void, because they are beyond the contemplation of the parties at the time the agreement was executed. The second is practical, namely, that uncertainty and unlimited arbitrary changes may generate a reluctance among lessees to engage in oil and gas activities in that jurisdiction.

In *Canadian Industrial Gas and Oil Ltd.* v. *Government of Saskatchewan* (1978) (hereafter, "*CIGOL*"),[53] a royalty surcharge designed to capture the increase in the value of Saskatchewan oil and gas resources was found to be an indirect tax, even though the increase in the royalty payable by the lessee fell within the purview of *Huggard Assets* as a properly executed contractual variable royalty. Martland J., for the majority, held that the royalty surcharge was not a genuine royalty because the 100 percent levy was inconsistent with the customary practice that a royalty was a share of the production.[54]

3. Subsection 92(2)

Subsection 92(2) empowers the provinces to make laws in relation to "direct taxation within the province in order to the raising of a revenue for provincial purposes". The provision specifies five requirements of a valid provincial tax: 1) it must be a tax; 2) it must be a direct tax; 3) it must be within the province; 4) it must be in order to raise a revenue; and (5) the revenue must be for a provincial purpose.[55] By contrast, under subsection 91(3), the federal government may levy any form of taxes, including direct or indirect taxes.

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49. *Id.* at 487.
50. *Supra* n. 43.
51. [1953] A.C. 420 (P.C.).
52. *Supra* n. 48 at 488.
53. *Supra* n. 2.
54. *Id.* at 561 and 62 (S.C.R.), 458 and 459 (D.L.R.).

The distinction between a direct and an indirect tax was discussed by the Privy Council in the *Bank of Toronto* v. *Lambe* (1887).[56] Their Lordships relied on the rather simplistic formulation by John Stuart Mill that:[57]

> 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 at the expense of another . . .

The test the Privy Council used in *Lambe* in applying Mill's formulation was to look at the general tendency of the tax, not at its ultimate incidence. The test was a legal, not an economic one. It embodied the then most obvious indicia of direct and indirect taxation.[58] Were the test an economic one, it would be difficult to envisage any valid forms of direct taxation, because even an income tax could be characterized as indirect, since individuals seek to pass on their higher tax burden in the form of higher wages and salaries.

In *CIGOL*[59] the royalty surcharge imposed upon Crown lands and the mineral income tax levied upon freehold lease production were assessed on their general tendencies. Martland J. held that these taxes were indirect, despite the fact that, because the price of oil was artificially frozen, the producers appeared to be unable to recover the taxes from others. The producer simply acted as a conduit through which the increased value of each barrel of oil above the basic wellhead price was channelled into the hands of the Crown by way of the tax with the consumer paying the increase in value. Moreover, the majority of the Court held that the tax was an export tax, because most of the oil produced in Saskatchewan was bound for interprovincial or international markets.[60]

Ultimately, the Saskatchewan government circumvented the *CIGOL* judgment by means of Bill 47, The Oil Well Income Tax Act,[61] a measure designed to enact an income tax on the profits received from oil well production.

4. Subsections 92(13) and 92(16)

Subsection 92(13) confers authority on the provinces to make laws in relation to property and civil rights in the province, and subsection 92(16) confers provincial jurisdiction over "all matters of a merely local or private nature in the province". These very extensive heads of provincial legislative power must inevitably be considered in conjunction with section 91(2), the federal trade and commerce power, when provinces seek to exercise jurisdiction over the production and marketing of products, some of which enter interprovincial or international trade. In the context

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55. G.V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981) at 57.
56. (1887) 12 A.C. 575 (P.C.).
57. *Id.* at 582.
58. *Supra* n. 55 at 80.
59. *Supra* n. 2 at 565 and 566 (S.C.R.), 462 (D.L.R.).
60. *Id.* at 567 (S.C.R.), 463 (D.L.R.).
61. The Oil Well Income Tax Act, R.S.S. 1978, c. O-3.1 (Supp.).

of oil and gas resources these federal and provincial heads of power determine the ultimate mix of jurisdiction over intra- and extra-provincial pricing and production.

The courts have paid little attention to the relationhip between subsections 92(13) and (16), being satisfied to mention both without distinguishing between them. If there is a distinction, it may be that the former seeks to regulate social relationships whereas the latter regulates economic activity.[62]

As discussed at Part III. D.2(d) above, the present Alberta petroleum marketing mechanism, the A.P.M.C., markets petroleum produced from Alberta Crown oil and gas leases, representing approximately eighty percent of all petroleum produced in Alberta. The relevant head of power with respect to the marketing of Crown production is subsection 92(5). Subsections 92(13) and (16) are relevant to the production and marketing of freehold oil and gas production. Although the A.P.M.C. is not obliged to handle freehold production, it will do so as an agent, effectively controlling the pricing (in lieu of a federal-Alberta pricing agreement) and marketing of that production because a producer could not hope to sell his freehold production for a price higher than that set by the A.P.M.C. for Crown oil, given the preponderance of Crown oil marketed.[63]

It is interesting to speculate whether subsections 92(13) and (16) could assume a greater importance in Alberta's marketing of oil if the Petroleum Marketing Act and its statutory vehicle, the A.P.M.C., were struck down as being beyond provincial competence for marketing at least the lessee's share of production from Crown lands or, perhaps, all production from Crown lands. At stake is whether subsections 92(13) and (16) empower the provincial government to price production past the wellhead. Clearly, if no oil and gas entered extra-provincial markets, the provincial government could fix the price in local markets. Where the production enters extra-provincial markets, the question arises whether a province may burden interprovincial trade in the course of regulating intra-provincial trade.[64]

The case law suggests that provinces initially had a very extensive power to regulate marketing within the province, despite the burdens imposed on others. In *Shannon* v. *Lower Mainland Dairy Products Board*[65] and in *Home Oil Distributors* v. *A.G. British Columbia*,[66] provincial marketing schemes to price milk and fuel, were held to be *intra vires*, even though interprovincial trade was involved. In *Carnation Co.* v. *Quebec Agricultural Marketing Board*,[67] the Supreme Court of Canada held that the regulation of the price paid to the producers for goods which left the province after processing was within provincial com-

62. *Supra* n. 6 at 101.
63. Peter Tyerman, "Pricing of Alberta's Oil" (1976) XIV *Alta. L. Rev.* 427 at 430.
64. *Supra* n. 15 at 310.
65. [1938] A.C. 708 (P.C.).
66. [1940] S.C.R. 444.
67. [1968] S.C.R. 238.

petence, even though most of the milk which Carnation had to buy at a higher price left the province. The Court ruled that the marketing law merely "affected" interprovincial trade.

However, *dictum* in the *Reference Re the Farm Products Marketing Act*[68] suggests that once goods enter the flow of interprovincial commerce, their pricing is not within subsections 92(13) and 92(16). Further, *A.G. Manitoba* v. *Manitoba Egg and Poultry Association* (1971)[69] is authority that goods moving into the extra-provincial flow are not subject to provincial pricing regulation. Finally, in *Central Canada Potash Co. Ltd.* v. *Government of Saskatchewan* (1979)[70] the Supreme Court of Canada held that regulations to prorate the production and marketing of potash, most of which entered extra-provincial trade, were *ultra vires* the province. In *CIGOL*,[71] although admittedly the Supreme Court of Canada was considering subsection 92(2) and not subsections 92(13) and (16), it was held that the province could not control the price of the resource where all of that resource was exported from the province.

There are two approaches to these cases. The "labelling" approach looks at whether the marketing scheme incidentally affects extra-provincial pricing, or whether it is aimed at extra-provincial pricing. This approach is rather simplistic because it looks at the conclusions, but not the substance, of the courts' reasoning.

A second approach looks to the substance of the decisions. An argument can be made that a province regulating the production and marketing, including the pricing of manufactured goods as opposed to primary goods, in extra-provincial markets is in a stronger position. In *Carnation*, the Supreme Court held that the direct regulation of the price of a processed good, *i.e.* processed milk, was within provincial competence, whereas in *CIGOL*, it held that the indirect regulation of the price of an unprocessed good, *i.e.* oil, through the imposition of royalties and taxes, was not. Hence, it seems that in order for a province to strengthen its position in regulating prices for goods bound for extra-provincial markets, some form of processing or upgrading of natural resources would be required. It is difficult to speculate as to how much upgrading of primary resources such as oil and gas would be required to fall within the ambit of the principles outlined in *Carnation*. Moreover, the marketing scheme cannot be within provincial competence if the only market for the processed goods is the export market. In *Canada Potash*, Laskin C.J.C. in distinguishing *Canada Potash* from *Carnation*, stated:[72]

> There was no question here of any concluded transaction of sale and purchase in the Province as was the situation in the *Carnation* case.

This finding was made despite the fact that in *Carnation* much of the processed milk was destined for export.

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68. [1957] S.C.R. 198.
69. [1971] S.C.R. 689.
70. *Supra* n. 3.
71. *Supra* n. 2.
72. *Supra* n. 3 at 629 (D.L.R.).

Finally, *Reference Re Agricultural Products Marketing Act* (1978)[73] is authority that when the federal and provincial governments undertake co-operative action to create an orderly and efficient marketing scheme which requires regulation in both intra- and extra-provincial trade, provincial regulation aimed at pricing extra-provincial trade will be valid. The provincial marketing scheme falls under provincial authority with respect to intra-provincial trade, and under delegated federal authority with respect to extra-provincial trade.

It is interesting to note that the scheme considered in the 1978 *Marketing Reference* is analogous to the mechanism by which Alberta markets its oil under its statutory extension of subsection 92(5), the Petroleum Marketing Act. Although there is no formal delegation in the latter case, much of the scheme derives from federal involvement in determining prices. As witness the first nine months of 1981, the issue whether the Petroleum Marketing Act is *intra vires* Alberta may never be subject to judicial review as long as Alberta, in the event of an energy pricing impasse, unilaterally charges the price which the federal government has scheduled.

IV. FEDERAL POWERS

A. INTRODUCTION

The jurisdiction which the federal Parliament can exercise over oil and gas resources stems from the various heads of power enumerated in and conferred by the Constitution Act, 1867. These powers are much more extensive than those possessed by the provinces, even though the federal powers do not stem from proprietary interests.

This section will review these various heads of power. This review is important to an understanding of the new section 92A., because the federal powers determine the formal and practical limits to the provinces' increased jurisdiction over the trade and taxation of natural resources. The following legislative heads will be briefly considered:

1. the preamble to section 91, which gives the federal Parliament the power to make law for the peace, order, and good government of Canada ("pogg");
2. subsection 91(2), the power to make laws in relation to the regulation of trade and commerce in Canada;
3. subsection 91(3), the power to levy any form of taxation for the raising of revenue;
4. subsections 91(29) and 92(10), the declaratory power that empowers Parliament to seize control of local works normally under provincial jurisdiction; and
5. the general power of expropriation, which is not related to a legislative head, but can be exercised if the purpose which Parliament wishes to accomplish cannot be achieved under a legislative head.

Before reviewing these powers, a brief comment about federal ownership is necessary.

B. FEDERAL OWNERSHIP

With the exception of national parks and Indian reserves, Parliament has little proprietary interest in oil and gas resources within the provinces. Its ownership of natural resources on lands outside this region.

73. (1978) 84 D.L.R. (3d) 257, 19 N.R. 361 (S.C.C.).

however, is quite extensive. The "Canada Lands", an area almost twice as large as that comprised by the ten provinces, has substantial oil and gas resources, the potential of which is only now being developed. The "Canada Lands" include the Yukon and Northwest Territories and the area off the Canadian coastlines. The jurisdictional dispute over offshore lands, including proprietary interests therein, is the subject of another paper published in this edition of the Petroleum Law Supplement.

C. LEGISLATIVE POWERS

1. "Pogg"

The "pogg" power in Canada has a long and varied history. It is not necessary to review this history, except to mention the three general tests respecting the invocation of "pogg" powers. The first is the residuary approach. In the Preamble to section 91, the power to make laws under "pogg" is defined in relation to matters not coming within the classes of subjects or heads of legislative powers assigned to the provincial Legislatures. As a result, matters not coming within section 92 must be within the power of Parliament, and matters not assignable to either list of heads of power under sections 91 or 92 come within "pogg".

The second test is the "national concern" (or "national dimensions") criterion. The "national concern" test can be traced to *Russell* v. *The Queen* (1882),[74] where a federal statute, the Canada Temperance Act, was upheld by the Privy Council on the basis that it did not fall within any of the provincial heads of legislative powers, although no mention was made about the relevant federal head. In *A.G. Ontario* v. *A.G. Canada (Local Prohibition)* (1896),[75] Lord Watson of the Privy Council explained the *Russell* decision as resting of the "pogg" power. His Lordship enunciated a "national concern" test, as follows:[76]

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial . . . and that which . . . has become a *matter of national concern*, in such sense as to bring it within the jurisdiction of the Parliament of Canada. (Emphasis added)

The "national concern" aspect of the "pogg" power arises where a problem is "beyond the power of the provinces to deal with", as, for example, where the failure of one province to act would injure the residents of the other provinces.[77] Other examples of situations in which the "national concern" test has been applied are the regulation of aeronautics,[78] radio,[79] and the establishment of a green belt around the National Capital.[80]

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74. (1882) 7 A.C. 829 (P.C.).
75. [1896] A.C. 348 (P.C.).
76. *Id.* at 361.
77. *Supra* n. 15 at 260.
78. *Johanneson* v. *West St. Paul* [1952] 1 S.C.R. 292.
79. *Re C.F.R.B.* [1973] 3 O.R. 819 (Ont. C.A.).
80. *Munro* v. *National Capital Commission* [1966] S.C.R. 663.

The third test is that "pogg" may be invoked in times of national emergency. The early case law suggested that the "pogg" power could be invoked when there were "highly exceptional" or "abnormal" circumstances, such as "war or famine",[81] or "cases arising out of some extraordinary peril to the national life of Canada, such as cases arising out of a war".[82] In *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (1923),[83] the Privy Council held that a price control regime established during the war was a valid exercise of the "pogg" power, on the basis that "in a sufficiently great emergency such as that arising out of war", the federal government can make laws normally within the competence of provincial legislatures.[84]

The most recent decision respecting the emergency "pogg" power is *Reference Re Anti-Inflation Act* (1976),[85] where the Anti-Inflation Act was upheld as an emergency measure by a 7:2 majority of the Justices of the Supreme Court of Canada, even though the Act did not assert the existence of an emergency. Two features of the case are interesting. The first is that the Court displayed extreme deference to Parliament, holding that the onus was on the opponents of the Act to establish that no "rational basis" (as four of the majority held) for the Act existed.

The second feature is the attempt of Beetz J. to reconcile the "emergency" and "national concern" tests. Unlike Laskin C.J. and three concurring Justices, who thought the difference between "national concern" and "emergency" was one of degree and not of kind, Beetz J. and essentially four others, a majority, differentiated the two tests in kind and in degree. In Beetz J.'s view, an "emergency" is not an example of a "national concern", and the "pogg" power serves two functions.[86] The first is that Parliament can establish permanent jurisdiction over "distinct subject matters which do not fall within any of the enumerated heads of S.92 and which, by nature, are of national concern".[87] The second is that Parliament can exercise temporary jurisdiction over all subject matters needed to deal with an emergency (which, by definition, is temporary).

The judgment in *Anti-Inflation* strongly suggests that the "pogg" power would have a very far-reaching effect in allowing Parliament to gain control of the oil and gas industry, notwithstanding the province's proprietary interest under subsection 92(5). An energy shortage characterized as an energy emergency would enable the federal government to render nugatory the province's jurisdiction over its oil and gas industry for the duration of the emergency. Such federal jurisdiction could permit the federal government to regulate all supplies and all uses of energy products in Canada. The Energy Supplies Emergency Act, 1979[88] is the statutory vehicle by which this objective would be accomplished.

81. *Re Board of Commerce Act, 1919 and Combines and Fair Practices Act, 1919* [1922] 1 A.C. 191 at 200 (P.C.).

82. *Toronto Electric Commissioners* v. *Snider* [1925] A.C. 396 at 412 (P.C.).

83. [1923] A.C. 695 (P.C.).

84. *Id.* at 705.

85. [1976] 2 S.C.R. 373.

86. *Supra* n. 15 at 264.

87. *Supra* n. 85 at 457.

88. Energy Supplies Emergency Act, 1979, S.C. 1978-79, c. 17.

On the other hand, an energy shortage which is not yet an emergency but which could be characterized as a matter of national concern, because, for instance, the energy security of the country is jeopardized, would permit the federal government to control production for much longer periods of time.[89] The Alberta production cut-back legislation discussed previously[90] may have been subject to this "pogg" power, because, although the consequent reductions in production did not create an energy supply emergency, especially when international spot markets were awash in oil, the legislation could have been characterized as a matter of "national concern".

2. Trade and Commerce

The subsection 91(2) trade and commerce power creates a large federal jurisdiction over the regulation of oil and gas resources. Its limit in this area is the point at which the provincial legislative heads under subsections 92(13) and (16) begin.

The leading case with respect to the limits between federal jurisdiction under subsection 91(2) and provincial jurisdiction under subsections 92(13) and (16) is *Citizen's Insurance Co.* v. *Parsons* (1881).[91] The issue was the validity of a provincial statute which stipulated that certain conditions were to be included in all fire insurance policies entered into in the province. The Privy Council held that the statute was valid provincial legislation under subsection 92(13), because the trade and commerce power should not be read to include:[92]

> . . . the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, . . .

but only to include:[93]

> . . . political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.

The case law since *Parsons* has generally held that the trade and commerce power is confined to: 1) interprovincial or international trade and commerce, and 2) "general" trade and commerce,[94] a general category that shall not be discussed in this section.

Intra-provincial trade and commerce is a provincial matter under subsections 92(13) and (16). Of course, the limit of the provincial legislative power upon the federal power, and *vice versa*, when goods are produced in one province, some of which are consumed there and the rest of which enter the flow of interprovincial trade and commerce, is an issue of major significance to the natural resources sector.

Initially, the trade and commerce power was severely restricted by the Courts. Federal marketing schemes which sought to control prices, or quantities, or both, were struck down. In *R.* v. *Eastern Terminal*

89. *Supra* n. 9 at 694.

90. *Supra* n. 44 and accompanying text.

91. (1881) 7 App. Cas. 96 (P.C.).

92. *Id.* at 113.

93. *Id.*

94. *Supra* n. 15 at 268.

Elevators Co. (1925),[95] the Supreme Court of Canada held that a federal statute regulating the grain trade was beyond federal competence, because the statute, in order to be effective, sought to regulate local works such as grain elevators. Moreover, in *A.G. B.C.* v. *A.G. Canada* (1937),[96] a federal statute that sought to create marketing schemes for natural products, the principal market of which was extra-provincial, was held invalid because it included intra-provincial transactions within its scope. Finally, in *Canadian Fed. of Agriculture* v. *A.G. Que.* (1951),[97] the Privy Council held invalid a federal prohibition that sought to protect the dairy industry, because it affected intra-provincial transactions.

This narrow reading of the trade and commerce power was gradually reversed. In *R.* v. *Klassen* (1959),[98] the Manitoba Court of Appeal held that a federal statute could regulate an intra-provincial transaction as long as it was incidental to the primary purpose of the statute which was the regulation of the interprovincial and export trade in grain. The Supreme Court refused leave to appeal the *Klassen* decision. In *Caloil* v. *A.G. Canada* (1971),[99] federal regulations empowering the National Energy Board to require imported oil to be sold within a designated area (east of the "Ottawa Valley Line", only) were upheld, because the restriction in a local market was an incident in the administration of an extra-provincial scheme.

Under the Energy Administration Act,[100] the federal government has given statutory expression to its trade and commerce powers over extra-provincial and international pricing. The Act authorizes the federal Minister of Energy to enter into pricing agreements with the producing provinces. If there is no agreement, the federal government can set prices unilaterally. Moreover, the National Energy Board, established in 1960, is the statutory vehicle by which the federal government exercises jurisdiction over the export of oil and gas.[101] The constitutional validity of the Board's jurisdiction over oil and gas exports has never been challenged judicially.

3. 91(3) and Its Limit Under 125

Subsection 91(3) empowers the federal government to raise "Money by any Mode or System of Taxation", a phrase that includes all forms of indirect taxes, such as customs and excise, as well as direct taxes, such as income tax and license fees.

The federal taxing power is limited, however, to raising money by taxation. This limitation may create problems because taxes generally have a dual nature: that of raising revenue and that of regulating "trade and commerce". The latter effect occurs because the imposition of taxes will always affect the flow of trade. A tax specifically designed as a means of

95. [1925] S.C.R. 434.
96. [1937]A.C. 377 (P.C.).
97. [1951] A.C. 179 (P.C.).
98. (1959) 20 D.L.R. (2d) 406 (Man. C.A.).
99. [1971] S.C.R. 543.
100. *Supra* n. 47.
101. National Energy Board Act, R.S.C. 1970, c. N-6.

regulating a local industry within provincial competence under subsections 92(13) or (16) would be beyond the legislative competence of the federal government, because a government cannot achieve through indirect means what it is not able to achieve through direct means. A tax which achieved both ends, however, may be valid, if the Court held that the "pith and substance" of the legislation was the raising of revenue, even though the legislation incidentally regulated a local industry within provincial competence.

The taxing power under subsection 91(2) is also constrained by section 125, which states that "No Lands Or Property belonging to Canada or any Province shall be liable to Taxation". Section 125 confers intergovernmental immunity from taxation, but the immunity is not absolute. A tax on provincial Crown property, the "pith and substance" of which is the valid federal regulation of trade and commerce, is not beyond federal competence: *A.G. British Columbia* v. *A.G. Canada* (the Johnny Walker case) (1924).[102] But a federal tax, the "pith and substance" of which is to raise revenue from provincial land, is not within federal competence: *Reference Re Proposed Federal Tax on Exported Natural Gas* (1981).[103]

In *Johnny Walker*, the issue was whether section 125 provided immunity to a provincial Crown liquor-importing agency with respect to customs duties imposed by the federal government. The Privy Council held in favour of the federal government, on the ground that the levy was validly imposed under subsection 91(2), although their Lordships recognized the dual nature of the levy. On the other hand, in the *Natural Gas Reference*, the issue was whether section 125 afforded the provincial government immunity from a levy imposed by the federal government on all natural gas to be exported from Canada. The Supreme Court of Canada held that the levy on provincially-owned gas was designed to raise revenue, and was, on the basis of section 125, *ultra vires*.

These cases can be reconciled on two grounds. The first is the characterization process. One levy was characterized as having a "pith and substance" which was within subsection 91(2); the other, as within subsection 91(3). The second ground is that section 125 applies to lands and property under sections 109 and 117. In *Johnny Walker*, the liquor was not "public land" under section 125, even though the Crown had a proprietary interest in the liquor. On the other hand, the Court in the *Natural Gas Reference* held that natural gas came within sections 109 and 117, being property that would provide the Alberta government with the fiscal basis to carry out its government functions. The Court extended the immunity from a tax on provincial property to a tax on the transaction by which the Crown in the right of the Province disposes of its property.

The constraint which section 125 imposes on the federal taxing power offers some interesting possibilities. Alberta could rearrange its entire gas industry to evade federal taxes. For instance, Alberta could undertake its own production, transportation and export arrangements with respect to its own gas. Eventually, it could refuse to renew Alberta Crown leases,

102. [1924] A.C. 222 (P.C.).

103. (1981) 122 D.L.R. (3d) 48 (Alta. C.A.).

employing the oil and gas companies as service contractors whose remuneration was a fee for services rather than a share of the gas production.[104] The Alberta Court of Appeal in the *Natural Gas Reference*, however, warned that the "provincialization" of a resource, if carried to an extreme, would be a colourable device. The Court declined to offer guidelines about the point at which such legislation would become colourable and lose the immunity afforded by section 125.

Crown immunity could also apply to wholly-owned provincial Crown corporations. Problems would arise, however, where the Crown corporation is only partially Crown owned. Would the percentage holdings of shares or of directorships be the appropriate test to determine whether section 125 applied?

Alberta's new royalty structure in 1974, which was designed to capture the oil price increases, was immune from federal taxation. However, the federal government's response was to make provincial royalties non-deductible in the calculation of federal income taxes. The result was a combination of federal taxes and provincial royalties which exceeded one hundred percent of the producers' income. Both Parliament and Alberta had to modify their tax and royalty schemes as a consequence.

4. Declaratory Powers

Parliament can assume jurisdiction over a local work by declaring the work to be for the general advantage of Canada. This declaratory power involves two steps. First, the federal government declares the local work to be for the general advantage of Canada and thereby withdraws it from provincial jurisdiction under paragraph 92(10)(c). Secondly, the federal government assumes jurisdiction over the local work under subsection 91(29).

The definition of a "work" under paragraph 92(10)(c) includes at least the physical shell of an operation and may also extend to the activity related to the work. Such a declaration was upheld in *R.* v. *Thumlert* (1960),[105] where a declaration empowered Parliament to "direct what grain may go in and out of such mills, who may be permitted to sell grain to feed mills and the terms upon which grain may be delivered to them".[106] More recently, *Jorgenson* v. *A.G. Canada* (1971)[107] widened the purview of a declaration, by permitting federal jurisdiction not only over the delivery, receipt, storage and processing of grain, which are all activities performed in the "works", but also with respect to future works.

The phrase "for the general advantage of Canada" is not subject to judicial review because it involves matters of policy about which only Parliament can decide when making a declaration.[108]

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104. *Supra* n. 9 at 685.

105. (1960) 20 D.L.R. (2d) 335 (Alta. S.C.).

106. *Id.* at 357.

107. [1971] S.C.R. 725.

108. *Luscar Collieries Ltd.* v. *McDonald* [1925] S.C.R. 460 at 480, *per* Mignault J.

The federal government could use the declaratory power with respect to the oil and gas industry. The entire physical plant of the oil and gas industry would qualify as "works" within the meaning of paragraph 92(10)(c), as would, perhaps, the compelling or regulating of production, in light of *Jorgenson* and *Thumlert*. However, it is unlikely that natural resources *in situ* would constitute a "work", and herein lies an important practical and legal limit to this power. It is arguable that the control of production by the federal government under a declaration is distinct from the power to grant rights to Crown oil and gas *in situ*, a power which would remain vested in the provincial government under subsection 92(5). If the rights to extract oil and gas were to be cancelled by the province, or were allowed to expire over time, the federal government would be unable to maintain production.[109]

5. Expropriation

The federal government has a right to expropriate both privately- and provincially-owned property. This right is not absolute and, in fact, is narrowly confined by the Courts to valid federal purposes and to circumstances in which there is no other way to achieve that federal purpose.[110] In *Nipissing*,[111] the expropriation of provincial public lands for a federally-regulated railway was upheld, because the expropriation power was "necessarily incidental" to the exercise of an essential federal legislative jurisdiction.

Most federal powers will support the expropriation of property. Under the declaratory power, a local work could be brought within federal jurisdiction by a declaration, and then expropriated.[112] It is doubtful that full-scale expropriation would be used to obtain federal jurisdiction over provincial natural resources. It is difficult to envisage circumstances in which expropriation could achieve more than such far-reaching legislative heads as the "pogg" and declaratory powers. Moreover, the federal power of expropriation must be necessary to achieve an otherwise valid federal purpose.

V. SECTION 92A.

A. INTRODUCTION

The significance of the new provisions of the Constitution Act, 1982 with respect to provincial jurisdiction over natural resources will depend upon two different groups. The first is the judiciary; the second is the "political actors".

B. THE POLITICAL ACTORS

The political actors are the individuals of the various political parties who were involved in giving effect to these natural resource provisions.

109. *Supra* n. 6 at 127.

110. John Ballem, "The Energy Crunch and Constitutional Reform" (1979) LVII *Can. Bar Rev.* 740 at 747.

111. *Supra* n. 16 at 725.

112. *Supra* n. 15 at 395.

With so many diverse actors, who often took contradictory positions, the resource provisions must be seen as a constitutional *quid pro quo* struck with respect to two different bargains. The first was the arrangement between the various parties in the House of Commons, specifically the bargain struck between the Liberals and the New Democratic Party in October, 1981, as discussed in Part II, above. The second was the political compromise made by the various provincial governments in securing such other provisions as an amending formula, in exchange for a set of natural resource provisions, that, as we shall discover shortly, were less comprehensive than the earlier "best effort" draft proposals. The result of these compromises, however, was a political understanding between the federal and the various provincial governments, not so much as to their respective legal rights and powers, but as to the jurisdictional practice, or a constitutional *modus vivendi*, for the development of the oil and gas industry. This practice involves a pragmatic working relationship whereby jurisdiction is to be exercised for the mutual benefit of both levels of government, without judicial review of what the governments may regard as "encroachments" by the other side on their respective legislative powers.

This form of *modus vivendi* is not new. Consider the discussion in Part III. D. 2(d), above, with respect to the informal delegation between the federal Minister of Energy and the A.P.M.C. The Alberta position is that its proprietary rights under subsection 92(5) extend beyond the severance of the oil from the land, and empower Alberta to give the A.P.M.C. jurisdiction over the pricing of oil produced from Alberta Crown lands. The federal government, on the other hand, considers that its trade and commerce powers under subsection 92(2) could be extended to the wellhead. Neither side has tested its position by a reference, by which a government can refer questions of law for an advisory opinion. Rather, Alberta and the federal government have entered into an agreement, whereby the federal Energy Minister discusses with his provincial counterpart the price of oil destined for interprovincial trade. Although this *modus vivendi* was badly strained by the 1981 pricing impasse, that impasse was ended by a new energy pricing agreement, rather than by a reference to the courts.

The difficulty with this form of working federalism is that it tends to be transitory. The political actors who gave rise to the arrangement pass from the scene, leaving the field to others who wish to exert control in these "jurisdictional grey areas". The result is conflict, and judicial review, initiated either by way of a reference or by a private citizen who wishes to challenge the application of a statute empowered by these new natural resource provisions. In any event, it is inevitable that the courts will have to interpret the new constitutional provisions, ultimately providing legal content to the federal-provincial *modus vivendi*.

C. THE JUDICIARY

In approaching the question of how a court will interpret section 92A., it is best to consider what sources and values the judiciary may and should draw upon in giving content to the form of these provisions. The

provisions are not self-applying, and a literal reading of them will not provide a definitive answer. Nor can the "purpose" or "intention" of the provisions be sufficient in itself. A provision does not have an intention, although it may satisfy a purpose in clothing the intentions of its framers. But there were many framers: the Prime Minister, the federal Minister of Justice, the leader of the federal New Democratic Party, and the provincial Premiers, perhaps all of whom had somewhat different intentions. It is clear that there are no easy answers to the dilemma of providing content to form, but only a range of sources that may have different degrees of probative value to a court.

The highest probative value would be accorded to the previous case law respecting natural resources. This case law has determined to a large extent the scope of the provincial rights and powers which are preserved by subsection 92A.(6). Perhaps of equal probative importance is the "mischief" the new provisions seek to correct.[113] From the provincial perspective, the "mischief" may be the expanded role which the Supreme Court has given to the trade and commerce power, especially in the *CIGOL* and *Central Canada Potash* cases.[114] From the federal perspective, the "mischief" may be the need to entrench certain basic principles of economic union which may be threatened by assertive provincial resource schemes. Of lesser importance in construing section 92A. is extrinsic evidence, such as references to Hansard or legislative history. The use of such aids to interpretation has increased recently. In the *Anti-Inflation Reference* (1976),[115] Beetz J., with Martland and Pigeon JJ. concurring, cited and used a White Paper which had been laid before Parliament. Unfortunately, however, the available extrinsic evidence may not resolve the debate about section 92A. Moreover, legislative history often involves a myriad of conflicting documents. Are the Courts equipped to apply a value-free historical analysis to these documents? Although these probative problems are not easy to resolve, it seems likely that the "best effort" draft proposals of 1979 and 1980, and the Broadbent-Trudeau correspondence of October 1981, may be admissible extrinsic evidence with respect to the statute as a whole, albeit not with respect to interpretation of a particular provision.

D. THE NEW PROVISIONS

Subsection 92A.(1) provides:

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

It should be noted that subsection 92A.(1) does not define "development, conservation, and management of natural resources". It is unclear

113. *Id.* at 85.

114. *Supra* notes 2 and 3.

115. *Supra* n. 85 at 438 and 439 and 471 and 2.

whether "conservation" means only physical conservation, or whether it includes economic conservation in the sense used by Culliton C.J.S. in *Central Canada Potash Co.* v. *A.G. Canada*:[116]

> . . . adopted for the purpose of conserving and maintaining the industry in Saskatchewan as a viable industry through a programme of controlled production and price stabilization.

Nor is subsection 92A.(1) clear about the subject matter to which a "legislature may exclusively make laws in relation". Does such a power confirm both subsection 92(5) as to Crown land and subsections 92(13) and (16) as to freehold land, or does subsection 92A.(1) refer only to Crown land? The intention seems to be to include both Crown and freehold land, because the phrase "non-renewable natural resources . . . in the province" does not distinguish between Crown and freehold lands.

The expression "rate of primary production" as used in paragraph 92A.(1)(b) causes concern. Does this expression shelter provincial production cut-back legislation, such as Alberta's Bill 50, from federal control, or do the federal "pogg" and declaratory powers remain intact? It seems that the federal powers have been preserved, because, in the absence of a specific reference to these federal powers, the doctrine of implied repeal cannot be invoked.

Furthermore, as discussed below, where there is valid but conflicting federal legislation, the effect of subsection 92A.(3) may be that the province does not have any greater jurisdiction than it had before the constitutional amendment. The diminution of provincial legislative powers by the federal trade and commerce power effected by subsection 92A.(3) was not present in the 1980 draft proposals, which stated that:[117]

> such [subsection 1] legislation shall not be invalid merely because part or all of the product may enter interprovincial or international trade.

It may be that the only purpose served by subsection 92A.(1) was to confirm in the new constitution the legislative jurisdiction which the provinces already had.

The second subsection, 92A.(2) states:

> 92A.(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.

The basis of the discriminatory behaviour is not specified in subsection 92A.(2). Is it discrimination between the producing province and the rest of Canada, a broad interpretation, or discrimination *inter se* the other provinces, a narrower interpretation? It seems likely that provincial production cut-back legislation would escape both bases if it involved reductions that were prorated over all of the provinces.

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116. [1977] 1 W.W.R. 487 at 508 (Sask. C.A.), *per* Culliton C.J.

117. Federal-Provincial Conference of First Ministers on the Constitution, *Legal Texts Forming Appendices to CCMC Reports to First Ministers*, Document 800-14/060, Ottawa, September 8 to 12, 1980 (also contains 1979 "Best Efforts Draft" with accompanying explanatory text of each provision).

Moreover, the quantitative and qualitative indicia to measure discrimination are not specified. For example, with respect to price discrimination, does charging the same price for oil at the boundary of the exporting province escape the discriminatory provision, even though the prices in other provinces will vary with transportation costs; or does charging the same price across Canada escape the discriminatory provisions, even though some consumers receive the benefit of "reverse discrimination" (like affirmative action), because they should have been charged more for transportation costs? If the latter form of pricing is non-discriminatory, who is to bear the transportation costs: the ultimate consumer through some form of blended pricing, or the producing province? With regard to quantity discrimination, will the export of the same amount of oil *per capita* to each province, irrespective of regional variations in per capita consumption, constitute non-discrimination; or does subsection 92A.(2) require that varying amounts of oil *per capita* be exported according to regional variations in consumption? Can Alberta withhold supplies from an industrial user in another province in order to develop its own petrochemical industry?

Two things are certain about subsection 92A.(2). First, unlike the 1979 and 1980 draft proposals, the concurrency in laws in relation to "non-discriminatory" price and supplies extends only to interprovincial trade, not to international trade. Second, because of the definition of "primary production" in section 51, the *Carnation* principle[118] cannot be applied to shield a provincial marketing scheme from the non-discrimination clause in subsection 92A.(2) or the federal paramountcy clause in subsection 92A.(3). Section 51 defines "primary production" to include a product resulting from processing or refining the resource, if it is not a manufactured product. In *Carnation*, the processing that took place in Quebec was making evaporated milk from raw milk, a step which would appear to be analogous to processing or refining a resource. Presumably, manufacturing in milk would involve some further step, for example the packaging of the product or the making of cheese, although the distinction between processing and manufacturing cannot be inferred from the facts of the *Carnation* case. Hence, it seems as if, by including "processing" in the definition of primary production, the producing provinces have lost the benefit of the *Carnation* principle, *i.e.* the ability to charge extra-provincial consumers higher prices than intra-provincial consumers as an incidence of the higher cost of doing business in the exporting province.

The explanatory note in the 1979 "best effort" draft proposals[119] sought to define the degree of processing as something which would extend the jurisdiction of the provincial legislative authority beyond a mere severance of the substance from the ground, but not to manufacturing. This explanatory note has had the ironic effect of casting doubt on the A.P.M.C. being a statutory expression of 92(5) beyond the well-head.

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118. *Supra* n. 67 and accompanying text.

119. *Supra* n. 117.

The third subsection, 92A.(3), states:

> 92A.(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.

This subsection confirms the common law paramountcy doctrine, which states that, in the event of a conflict between otherwise valid federal and provincial legislation, the provincial law is rendered inoperative to the extent of the inconsistency. If the inconsistent part cannot be severed from the rest of the statute, the entire provincial law is rendered inoperative, although a repeal of the federal law revives the provincial law.[120] This subsection is redundant to the extent that in its absence the common law paramountcy doctrine would apply.

Unlike the 1979 "best effort" draft proposals, subsection 92A.(3) does not establish a test that must be met by a federal law before the doctrine of paramountcy can be applied. The 1979 test allowed a provincial law in relation to export to prevail over a federal law, except to the extent that the federal law was "necessary to serve a compelling national interest that was not merely an aggregate of local interests" or was "in relation to the regulation of international trade and commerce".[121]

The absence of this limitation is significant. It means that the provincial powers under subsection 92A.(2) may be completely impaired in practical terms because the federal government may be able to pass otherwise valid federal legislation under its trade and commerce power that is wholly inconsistent with provincial legislation, rendering the provincial law inoperative, until, if such time arises, the federal law is repealed.

A comparison of the new provisions with the "best effort" draft proposals of 1979 and 1980 indicates that the new provisions provide lesser powers than the draft proposals. From the provincial perspective, the most significant are the loss of an international concurrent power and the loss of a paramountcy test, not only over interprovincial trade (that was a restriction of federal power to circumstances amounting to a compelling national interest), but also over international trade. Since the 1979 "best effort" draft proposals were accepted by all of the provinces except Quebec and Alberta, it appears that the provinces must have exchanged the more powerful resource provisions for something else, most likely a different constitutional amending formula than the one initially proposed.

It is difficult to determine whether the provinces' current position is superior to the one they enjoyed before the constitutional amendments. If the A.P.M.C. legislation is *ultra vires* Alberta, then subsections 92A.(2) and (3) clearly augment provincial powers, although the extent to which these powers are augmented depends upon whether Parliament exercises its paramountcy power. But if the A.P.M.C. legislation is *intra vires* Alberta, then the provinces are in an inferior position under the new provisions, because they now must share the field subject to federal paramountcy. Moreover, the *Carnation* principle has been lost to the pro-

120. *Supra* n. 15 at 113.

121. *Supra* n. 117.

vinces. They now must share the jurisdiction over interprovincial prices with the federal government under a statutory definition of processing that is not much different than the processing underlying the *Carnation* principle.

The fourth section, 92A.(4), states:

> 92A.(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.

This provision confers on the provinces a plenary taxing power that is very similar to the one enjoyed by the federal government under subsection 91(3). Presumably, the taxing power must be used for a provincial purpose, although this is not specified. Moreover, it is arguable that the phrase "whether or not such production is exported in whole or in part from the province" displaces *CIGOL*,[122] permitting the imposition of an export tax by the province. The argument is suspect, however, because subsection 92A.(4) permits taxation in respect of another province, not another country. Moreover, *CIGOL* was decided on two different grounds: indirect taxation, and trade and commerce. The first is now open to the province, but the characterization of a tax as regulating trade and commerce is subject to the paramountcy provisions of subsection 92A.(3).

From a practical standpoint, the conferral of plenary taxing powers does provide a province with another revenue-raising instrument. But without a federal-provincial taxing agreement, very burdensome double taxation of the oil and gas industry could result, because unless there is a conflict, the common law paramountcy doctrine will not apply to provisions covering the same tax field.[123]

The non-differentiation aspect of the tax provision is clearer than the non-discrimination clause in subsection 92A.(2). A uniform tax on all production will satisfy this clause.

Subsection 92A.(5) provides that the meaning of "primary production" is that assigned by the Sixth Schedule contained in section 51. The meaning of "primary production" was discussed above.

The sixth subsection, 92A.(6), is a non-derogation clause, preserving pre-1982 provincial rights and powers. In this instance, the case law will have a high probative value. But since the case law has not explored many constitutional "grey areas", the effect of this provision is not very significant in determining the outcome of a jurisdictional conflict. The subsection does not delineate the provinces' powers and rights.

Perhaps the non-crystallization of previous powers and rights is desirable, because it preserves the basis for a "working federalism" that

122. *Supra* n. 2.

123. *Supra* n. 15 at 402.

gropes for solutions through political negotiation and compromise. On the other hand, without a better delineation of powers and rights, political negotiations may give way to tactics which, while attempting to strengthen a government's bargaining position, destroy the very oil and gas industry over which jurisdiction is sought. Unfortunately, where the appropriate balance lies between the two approaches is a question that has bedevilled many a federal system, the answer to which has so far evaded us.

VI. CONCLUSION

The new provisions in the Constitution Act, 1982 provide the provinces with new powers to levy indirect taxes with respect to non-renewable natural resources, and to make laws in relation to the prices and supplies of exports of natural resources to other parts of Canada. These new powers are not absolute, however, as they are subject to non-differentiation and non-discrimination clauses, respectively. Moreover, the power to make laws in relation to prices and supplies of exports is subject to federal paramountcy which, in principle, if the federal law is wholly inconsistent with the provincial law, can render the provincial law inoperative. In addition, the taxing power can still run afoul of federal trade and commerce provisions if it is characterized by a Court as regulating interprovincial trade and commerce.

The new provisions confer lesser powers than those to which all governments, except Alberta and Quebec, had agreed at the Federal-Provincial Conference of First Ministers on the Constitution in February, 1979. Perhaps these lesser powers were the price several provinces paid in having other changes adopted in the Constitution Act, 1982, especially the Alberta government's successful championing of a constitutional amending formula that not only required greater provincial support for, but also removed the veto which the two most populous provinces of Ontario and Quebec would have had over constitutional change.[124]

It is hoped that these new provisions will allow both the federal and provincial governments to achieve a sensible scheme for the orderly and efficient production and marketing of onshore oil and gas resources, and a just disposition of the revenues therefrom. A "working federalism" should emerge, with the delineation of the exclusive jurisdiction one level of government or the other has over various aspects of the oil and gas industry established not so much by legislative enactment and subsequent judicial review as by practical agreement that works to the mutual benefit of both levels of government. But in the event that this "working federalism" should break down in the future, recourse to these new provisions by the provincial governments will yield neither the predictable nor the much-expanded jurisdictional authority that the provincial governments initially sought.

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124. Compare section 38(1)(b) of the Constitution Act, 1982 with section 46(1)(b) of the "Consolidation of Proposed Constitutional Resolutions" tabled by the Minister of Justice in the House of Commons on February 13, 1981 and the amendments approved by the House of Commons on April 23, 1981 and by the Senate on April 24, 1981.

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