THE FEDERAL CASE

G. A. HOLLAND*

INTRODUCTORY

The federal case for jurisdiction over pipeline systems is based primarily on the combined effect of s. 91(9) and s. 9(10) of the British North America Act, 1867.[1] The latter gives to the provincial legislatures jurisdiction over:

> s. 92 (10) Local Works and Undertakings other than such as are of the following Classes:—
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others or the Provinces, or extending beyond the Limits of the Provinces;

The former confers federal jurisdiction over:

> s. 91(29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

In addition, because of the interpretation that has in recent years been given to s. 91(2) of the British North America Act, 1867, — "The Regulation of Trade and Commerce" — that power can now be used to support the case for federal jurisdiction and to complement the authority which the Parliament of Canada has by virtue of s. 92(10a).

In order to facilitate the discussion of the Federal Case, two pipe line systems will be used as illustrations. In the case of oil, the system of Britamoil Pipe Line Company Limited and its connections with Interprovincial Pipe Line Company and Trans Mountain Oil Pipe Line Company will be used; in the case of gas, the Alberta Gas Trunk Line Company system and its connections with Trans-Canada Pipe Lines Limited will be used. These examples are thought useful because, in the case of Britamoil, all of the product gathered is exported out of the province, and, in the case of A.G.T.L., almost all of the product gathered is exported from Alberta. (In the year 1962, 99.48% of the product gathered by A.G.T.L. was exported.)

Britamoil, a provincially incorporated company and a wholly owned subsidiary of The British American Oil Company Limited, operates an oil pipe line system, including gathering lines, in central Alberta under a license from the provincial government. Interprovincial and Trans Mountain are federally incorporated companies operating under federal licenses. Their pipe line systems extend from Edmonton into other provinces of Canada. Britamoil picks up oil at the battery connections of the producers, the batteries being owned by the producers. Britamoil does not purchse the oil, but rather, transports it on a consignment basis. All oil transported by Britamoil is carried to Edmonton, where the oil is transferred by direct connection into the pipe line of either Trans Moun-

*G. A. Holland, The British American Oil Company Limited, Calgary.

1 30-31 Vict. c. 3. The constitutional setting is more fully developed in the preceeding paper, see p. 367, *ante*.

tain or Interprovincial. There are batteries of Trans Mountain or Interprovincial at Edmonton into which the oil is sometimes run, principally for measuring purposes. More often, the oil is measured by metering devices in the pipe line in which case it flows continuously through the Britamoil system into the Interprovincial or Trans Mountain system, and thereafter is carried directly out of the province.

Alberta Gas Trunk Line Company is a provincially incorporated company operating under license from the provincial government. A.G.T.L. accepts residue gas from various gas processing plants in Alberta and delivers a substantial portion of that gas into the facilities of Trans-Canada Pipe Lines Limited. A.G.T.L. has a direct connection at the "Alberta Gate" with the facilities of Trans-Canada. The "Gate" is located approximately one and one-half miles on the Alberta side of the Alberta-Saskatchewan border. Trans-Canada obtains title to the gas upon delivery from the gas processing plants to A.G.T.L. There is no interruption of the flow of gas, although metering devices are installed in the pipe line system which permits the measuring of gas. Trans-Canada transports the gas to markets in other provinces of Canada and to the United States.

Federal Case for Jurisdiction Over Pipe Lines as Interprovincial Works or Undertakings

As a preliminary point, it should be noted that there is no difference in principle between an undertaking specifically mentioned in s. 92 (10) (a), such as railways and telegraphs, and an undertaking, the subject matter of which comes within the general meaning of s. 92 (10) (a). In particular, it was held in the case of *Campbell-Bennett Ltd.* v. *Comstock Midwestern Ltd.*[2] that Trans Mountain Oil Pipe Line Company was a work or undertaking within s. 92 (10) (a) and was, accordingly, within the exclusive jurisdiction of the Parliament of Canada.

As a further preliminary point, the fact that the regulation of pipe lines and the interprovincial trade interferes with provincial jurisdiction over property and civil rights under s. 92 (13) is immaterial. The Privy Council and the Supreme Court of Canada have both stated that if a given subject matter falls within any class of subjects enumerated as federal matters in s. 91, it cannot be treated as covered by any of those provincial matters enumerated in s. 92 of the British North America Act. This was most emphatically indicated in *A.-G. Alta* v. *A.-G. Can.*[3] Lord Maugham L.C. states,

> As pointed out in the judgment of Duff C.J. (concurred in by Davis J.), it is well established that if a given subject-matter falls within any class of subjects enumerated in s. 91, it cannot be treated as covered by any of those within s. 92.

The basic position of the Federal Case is that it is within the exclusive jurisdiction of the Parliament of Canada to enact legislation regulating pipe line systems of the Britamoil-Interprovincial type or the A.G.T.L.-Trans-Canada type. There are two propositions of principle that are relevant here:

1. In the case of an undertaking coming within s. 92 (10) (a) it is not competent for a provincial legislature to interfere with the operations or proposed operations of the undertaking that are in the province; and

2 [1954] S.C.R. 207.
3 [1939] A.C. 117, 129.

2. In the case of such an undertaking, it is not competent for a provincial legislature to interfere with the local business of the undertaking, where such local business forms part of a single undertaking.

Today, the leading case relating to these two propositions is *A.-G. Ont. v. Winner.*[4] In this case, the Privy Council held than an extraprovincial bus line came within s. 92 (10) (a) of the British North America Act, and for that reason, it was beyond the power of the provincial legislature to interfere with any part of the bus line's operation notwithstanding that some parts of the undertaking were carried on solely within the province.

Lord Porter who delivered the judgment of the Privy Council, described the nature of the legislation purporting to regulate the Winner bus line and disposed of the argument that the province was merely regulating the use of its highways. He went on to state at page 580,

> There remains, however, the further question whether, although the licence cannot be limited in the manner imposed by the board, Mr. Winner can, nevertheless, as the Supreme Court adjudged, be prohibited from taking up and setting down purely provincial passengers, i.e., those whose journey both begins and ends within the province. So far as their Lordships are able to judge, none of the parties and none of the interveners suggested such a compromise in any of the courts in Canada.
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> Their Lordships might, however accede to the argument if there were evidence that Mr. Winner was engaged in two enterprises, one within the province and the other of a connecting nature. Their Lordships, however, cannot see any evidence of such a dual enterprise. The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities.

The parallel between the bus line in the *Winner Case* and the pipe line systems in Alberta is obvious. The same pipe line may carry both intraprovincial and extraprovincial oil and gas. In the former case, the transporting is wholly within the province, but it is part of the same undertaking.

Lord Porter then disposed of the possibility of fragmenting the undertaking into different parts. He states at page 580:

> The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether, it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two? . . .
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> The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking.
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> In coming to this conclusion their Lordships must not be supposed to lend any countenance to the suggestion that a carrier who is substantially an internal carrier can put himself outside provincial jurisdiction by starting his activities a few miles over the border. Such a subterfuge would not avail him. The question is whether in truth and in fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is inter-provincial. Just as the question whether there is an interconnecting undertaking is one depending on all the circumstances of the case, so the question whether it is a camouflaged local undertaking masquerading as an interconnecting one must also depend on the facts of each case and on a determination of what is the pith and substance of an Act or regulation.

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4 [1954] A.C. 541.

The Winner Case followed the earlier cases of *Toronto* v. *Bell Telephone Company*[5] and *Regulation of Radio*.[6] *The Bell Telephone Case* is significant, for it illustrates that once a work or undertaking is held to come within s. 92(10)(a), then it is wholly within the jurisdiction of the Parliament of Canada, notwithstanding that some of its operations may be only provincial in scope. Bell Telephone had been incorporated by a federal statute, which purported to permit the company to carry on its business both within and without the province of Ontario. Their Lordships were of the view that once the undertaking came within s. 92(10)(a), the exclusive jurisdiction to regulate that undertaking was vested in the Parliament of Canada. It was further argued that the Bell Telephone undertaking could be split into its provincial and extraprovincial parts for jurisdictional purposes. That argument was disposed of at page 59 as follows:

> The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places.

In the *Radio Reference* the Privy Council relied to some extent on the treaty making powers of the Parliament of Canada conferred by s. 132 of the B.N.A. Act, but also referred to the scope of Parliament's jurisdiction under s. 92(10)(a). Viscount Dunedin states at page 314:

> The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instruments. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. *Brodacasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other* (italics supplied).

After referring to the *Bell Telephone Case*, he comments at page 316:

> Consequently the words of Lord MacNaghten do carry a lesson as to the futility of trying to split what really is one undertaking into two.

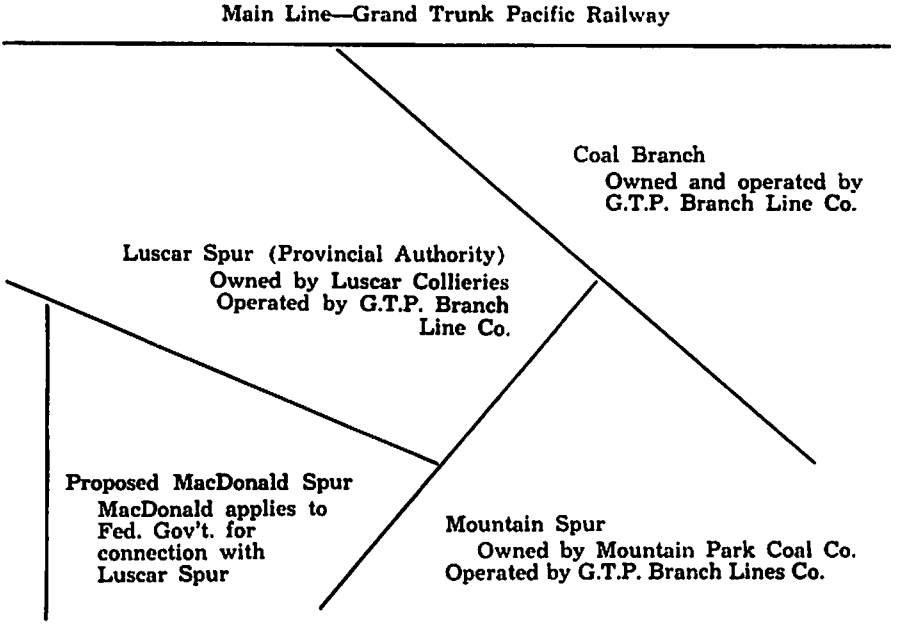
It is therefore submitted that the *Winner Case* was reiterating the interpretation that had been placed on s. 92(10)(a) by the *Bell Telephone Case* in 1905 and by the *Radio Reference* in 1932. It is clear that if there is a single undertaking comprising an extraprovincial business so as to come within s. 92(10)(a) then although a branch of that undertaking is intraprovincial, such an undertaking is, in its entirety, within the legislative jurisdiction of the Parliament of Canada. In the case of pipe line systems, it is submitted that the undertaking cannot be broken up into extraprovincial and intraprovincial parts to determine jurisdiction, unless these parts constitute separate undertakings. It is suggested that in the pipe line system described above, there is, in fact, but one undertaking.

So far as the transportation of gas within Alberta by A.G.T.L. or the gathering of oil by Britamoil is concerned, it is part of the same undertaking as the extraprovincial transporting of these products. An inter-

5 [1905] A.C. 52
6 [1932] A.C. 304.

provincial undertaking is not split into separate undertakings by provincial boundaries. The local undertaking is linked up with the interprovincial undertaking so as to form one system, and accordingly the local undertaking comes under the jurisdiction of the Parliament of Canada. The establishment of valves or metering devices is no more relevant than is the establishment of stations in the case of railways. The test to be applied when there is any question of ultra vires is what is the true nature and character of the undertaking. Therefore, it becomes a question of fact as to whether the necessary elements are present to constitute an interprovincial undertaking.

The *Luscar Collieries Case*[7] is the leading case on what constitutes a separate branch of an undertaking within a province in the case of railways. Its facts are best described by the use of a diagram:



MacDonald applied to the Board of Transport Commissioners of Canada for an order authorizing the MacDonald Spur to tie into the Luscar Spur. The application was opposed by Luscar Collieries on the grounds that the Luscar Spur was not within the legislative jurisdiction of the Parliament of Canada, and therefore, that the federal Board had no authority to hear the application.

When the case was heard in the Supreme Court of Canada Duff J. set out the following test:[8]

> Whether or not a line of railway operated as a branch of a Dominion railway—that is to say, a railway within s. 92(10a), extending beyond the limits of a province or connecting two or more of the provinces—is an integral part of the Dominion railway in such a way as to give the Dominion jurisdiction over the branch, must be largely a question of fact to be determined from all the circumstances of the case.

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[7] *Luscar Collieries Ltd. v. MacDonald and the C.N.R.*, [1927] A.C. 925.
[8] [1925] S.C.R. 460, 475.

He then went on to refer to the operating agreements pursuant to which the Mountain Park Spur and the Luscar Spur were operated and came to the conclusion that:

> In fact, the Mountain Park Branch of the Luscar Branch are worked as part of the undertaking of the Grand Trunk Pacific Railway Company as a railway in operation; they are part of the railway which, under the name of the Grand Trunk Pacific Railway, connects the province of Alberta with the other provinces of the Dominion. The fact alone that the legal title has not yet passed to the Grand Trunk Pacific Branch Lines Company does not seem in itself to be a circumstance sufficiently important to segregate them from the principal line for the purposes of legislative jurisdiction.

It should be noted that Duff J. had previously commented "We do not have before us any information as to the arrangements between the Grand Trunk Pacific Company and the branch lines company." The finding of an integrated operation was determined by the facts of the operation and not by the niceties of any operating contracts. It should also be noted that the court did not hesitate in deciding that Parliament had jurisdiction over the MacDonald Spur, even though the MacDonald Spur had no operating agreement with the other two branch lines.

In the Privy Council Lord Warrington of Clyffe specifically agreed with Duff J.'s comments. At page 932, he states:

> Their Lordships agree with the opinion of Duff J. that the Mountain Park Railway and the Luscar Branch are under the circumstances hereinbefore set forth, a part of a continuous system of railways operated together by the Canadian National Railway Company, and connecting the Province of Alberta with other Provinces of the Dominion. It is, in their view, impossible to hold as to any section of that system which does not reach the boundary of a Province that it does not connect that Province with another. If it connects with a line which itself connects with one in another Province, then it would be a link in the chain of connection, and would properly be said to connect the Province in which it is situated with other Provinces.
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> In the present case, having regard to the way in which the railway is operated, their Lordships are of the opinion that it is in fact a railway connecting the Province of Alberta with others of the Provinces, and therefore falls within s. 92, head 10(a), of the Act of 1867. There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the Province of Alberta. If under the agreements hereinbefore mntioned the Canadian National Railway Company cease to operate the Luscar Branch, the question whether under such altered circumstances the railway ceases to be within s. 92, head 10(a), may have to be determined, but that question does not now arise.

The case of *North Fraser Harbour Commissioners* v. *B.C. Electric Railway Company*[9] purported to answer the question left unanswered by the Privy Council in the *Luscar Collieries Case*. The *B.C. Electric Case* held that the Central Park Line, of which only a relatively insignificant one mile stretch was connected with two other railways that were within federal jurisdiction, did not fall within Parliament's jurisdiction under s. 92(10)(a). The Supreme Court went on to distinguish the *Luscar Collieries Case* on the basis that the entire Luscar Spur was operated under central management and control, as contrasted to the Central Park Line where only a minute portion was affected by an operating agreement with the C.N.R.

Consequently, it is submitted that it is immaterial that branches or parts are owned by different and separate legal entities. The fact of physical connection is not in itself sufficient to bring the works within s. 92(10)(a), but physical connection combined with central management

9 [1932] S.C.R. 161.

or operation is sufficient to bring the undertaking within s. 92(10) (a) and therefore within federal jurisdiction.

The interpretation given to s. 92(10) (a) by the Privy Council and the Supreme Court in the case of railways was applied to a pipe line system by the federal Board of Transport Commissioners in the *Westspur Case*[10]. Westspur was an oil pipe line company incorporated by special Act of the Parliament of Canada.[11] The company gathered oil in south-eastern Saskatchewan and thereafter transported the oil out of the province. Westspur sought permission to transfer its gathering lines to Producers Pipe Line Limited, a provincial company which was not a company that could operate a pipe line under the federal Pipe Lines Act.[12] Accordingly, only if the gathering system was to cease being part of the Westspur extraprovincial pipe line system by the transfer could the Board authorize it. Using the analysis employed in the railway cases, the Chief Commissioner, C. D. Shepard, set out five questions of fact to be determined with respect to the gathering system to establish whether, when separated, the facilities of Producers Pipe Line Limited would come within provincial jurisdiction under s. 92(10) (a). The findings of the Chief Commissioner were set out as follows:

> In determining whether Westspur's gathering lines in the event that their sale to a Provincial company is approved, (a) can be, and (b) would be, in fact, local in character, at least five factors must be considered:
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> (1) physical connection,
> (2) ownership,
> (3) operation,
> (4) purpose of the gathering lines,
> (5) whether the gathering lines in quesiton are part of the undertaking of Westspur.
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> As to (1), physical connection, the Luscar and North Fraser decisions are authority for concluding that mere physical connection does not necessarily make the gathering line part of the interprovincial system. It is also common knowledge that numerous local telephone and railway lines connect with interprovincial systems. Section 7(d) of the Pipe Lines Act gives power to a Special Act Company to join its line with any pipe line.
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> As to (2), ownership, it has already been indicated earlier in this Judgment that the Board agrees with Applicant's contention that the character of the system, or parts of it, is not determined by ownership.
> As to (3), operation, the Board is unable to conclude that the proposed sale, if approved, coupled with the proposed segregation of operations and bookkeeping to the extent described in the evidence of Mr. Hay, as quoted herein, will result in any real separation of the trunk line business from the gathering line business.
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> As to (4), purpose of the gathering lines, it seems obvious that, while gathering lines are required for the benefit of the producers, they are equally required as feeders to the trunk lines.
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> As to (5), whether the gathering lines in quesion are part of the undertaking of Westspur, the Board is unable to conclude on the case made that where the gathering lines in question were originally voluntarily asserted by Westspur to be part of the Westspur interprovincial system their purpose can now be concluded to be primarily local in character rather than an integral part of an interprovincial undertaking. This is not to disregard the obvious fact that the purpose of a gathering line, to transport oil to the so-called trunk line is the same regardless of whether it is a local line constructed by a provincial company or part of a pipe line system constructed by an extraprovincial company under the jurisdiction of this Board.
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> Under the circumstances of this case, the Board finds that Westspur's undertaking ,including its gathering lines, is one and indivisible and that its gathering lines cannot be considered to be severable units to the extent that, even with a change of operation and ownership, they would cease to be part of an extra-

10 (1957), 76 C.R.T.C. 158.
11 1954 Can. c. 83.
12 R.S.C. 1952, c. 211.

provincial line. This does not mean or imply that under no circumstances can they be severed, e.g., when their operation is abandoned.

The Board therefore finds on the evidence before it in this case that the gathering lines in question cannot be held, as a matter of law, to be local in character.

The last conclusion would appear to be the resulting position once items 1 to 4 had been answered. In particular, it should be noted that under item 3, the Board found sufficient co-ordinated control of the two companies to bring the entire system within s. 92(10) (a), notwithstanding that there was a finding of fact[13] that, if the application were granted, the two companies would be segregated and the operations different. It is submitted that the Board made this finding because the ultimate control would remain centralized.

It should be noted however, that it was possible to follow the railway cases in the *Westspur* decision because all the elements present in the *Luscar Case* were present in the Westspur system. Consequently, it was not necessary to break any new ground or to consider what might have been the jurisdiction in circumstances such as the A.G.T.L.-Trans-Canada system.

In the case of railways, there are two main propositions respecting the establishment of federal jurisdiction; 1) that physical connection is not enough and 2) that centralized control of some sort must be present. However, there are vital differences between the features of railways and pipe lines, for unquestionably in the case of pipe lines the physical connection is significantly more important due to the nature of the products being transported. Once there is a physical connection, co-ordinated management and control follow as a matter of course. Unlike the traffic of railways, which requires a superabundance of direct management and control over day to day operations, the traffic in a pipe line must have a centralized plan of management as a condition precedent to its coming into existence, and thereafter, it is the physical connection that is the significant feature. A pipe line system cannot function without centralized and co-ordinated operations achieved by a complex of purchase contracts, processing contracts and transmission contracts. Accordingly, there is that centralized management and control referred to in the *Luscar Case*.

It is not suggested that the same sort of centralized management as was present in the *Luscar Case,* exists in the case of A.G.T.L. and Trans-Canada. In fact, such management is prohibited by the incorporating Acts of A.G.T.L.[14] But it is submitted that the degree of centralized control that existed in the *Luscar Case* is not essential in the case of pipe line systems due to the nature of the facility.

In the case, for example, of the A.G.T.L.-Trans-Canada system, the gas flows from the wellhead through a gathering system, on through a gas

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13 For the findings of fact, see Appendix I at the end of this paper.

14 The Alberta Gas Trunk Line Company Act, S.A. 1954, c. 37, ss. 14, 15:

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

15. (1) Notwithstanding the provisions of section 13, the company shall not enter into any contract, agreement or arrangement with a gas export company whereby the gas export company gains or might gain any control over the affairs, functions, operations, management or business of the company or its trunk lines or pipe lines.

(2) Any contract that the company enters into in contravention of subsection (1) is void.

processing plant, into the A.G.T.L. system and thence into the Trans-Canada Pipeline. There is no significant interruption in this flow although the ownership changes at various points and the gas is metered at various points. It is the physical connection that has predetermined the character of the undertaking as distinguished from railway branches where the character can be completely changed by a change in the centralized operations. It is submitted that the only thing that changes the character of a pipe line system is termination of the physical connection.

It should also be noted that the gas purchase contracts, pursuant to which Trans-Canada obtains its gas, are entered into with the producers who own the gas reserves in the field. Trans-Canada undertakes to purchase from the producer certain quantities of residue gas, but before this contract of purchase can be carried out, there must be a gathering system, a processing plant, and delivery to and transportation by A.G.T.L. It is not possible for this complex to function without co-ordinated control. It is submitted that the comments of Viscount Dunedin in the *Radio Reference* are very significant on this point. At page 315 he states,

> Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other.

In the *Winner Case,* the Privy Council indicated that a person could not create a federal undertaking simply by fictitiously locating part of that undertaking just across a provincial border. Lord Porter stated at page 581,

> In coming to this conclusion their Lordships must not be supposed to lend any countenance to the suggestion that a carrier who is substantially an integral carrier can put himself outside provincial jurisdiction by starting his activities a few miles over the border. Such a subterfuge would not avail him.

By the same line of reasoning, a pipe line cannot become a local work or undertaking simply by falling short of a provincial boundary and using another corporation to form that part of the undertaking that physically crosses the provincial boundary. Therefore, it is no answer to say that A.G.T.L. is not within s. 92(10) (a) simply because the part of the pipe line system of which it is the owner is located wholly within the province, and its objects do not permit it to operate an interprovincial undertaking.

There is a further argument in favour of federal jurisdiction over A.G.T.L. under s. 92(10) (a). It is clear that Trans-Canada itself is an interprovincial work and undertaking; but Trans-Canada without the supply of gas from the producers through A.G.T.L. would be unable to function. If A.G.T.L. is under provincial jurisdiction, the province could legislate so as to completely emasculate the operations of Trans-Canada. Trans-Canada could not operate without A.G.T.L., and this fact is very strong evidence in favour of the view that A.G.T.L. and Trans-Canada together constitute a single interprovincial undertaking. It would create a complete absurdity if Trans-Canada were authorized by the Federal Government to export gas from Canada and to construct the Trans-Canada Pipe Line System, only to have the entire undertaking frustrated by provincial regulation of A.G.T.L. The *Comstock Case*[15] held that a

[15] *Campbell-Bennett* v. *Comstock Midwestern Ltd.* [1954] S.C.R. 207. Section 79 of the National Energy Board Act, which purports to annul the effect of this case, is discussed in the preceding paper, see p. 372, *ante.*

provincial mechanics' lien could not be enforced against an interprovincial work coming within s. 92(10)(a), on the ground that the provincial legislation could have the effect of completely disrupting the federal undertaking. Kerwin J. stated at page 212:

> The result of an order for the sale of that part of Trans Mountain's oil pipe line to the County of Yale would be to break up and sell the pipe line piecemeal, and a provincial legislature may not legally authorize such a result.

From this case the principle can be taken that the Parliament of Canada has jurisdiction over such undertakings to the full extent necessary to prevent disruption of the federal work by provincial statutes or regulations. The constitutional test is whether there is, in fact, a single undertaking. The fact that Trans-Canada cannot function without A.G.T.L. would clearly indicate that Trans-Canada together with A.G.T.L. is a single undertaking. It is further submitted that this same argument can be applied to the Britamoil-Interprovincial system.

A.G.T.L. has, by its enacting statute,[16] kept its ownership completely separate from the other parts of the gas transportation system of which it is a part. But the cases have time and again held that ownership is immaterial. A.G.T.L. differs in another respect from the rest of the systems in that it does not own the gas it carries; but it is submitted that this factor also is irrelevant, for the railway cases were not decided on the basis of ownership of the goods carried.

It is not contended that the cases lead irresistably to the conclusion that the Parliament of Canada has legislative jurisdiction over pipe lines such as Britamoil and A.G.T.L. But, such a conclusion is a small step for a federally-orientated court to take, and it is submitted that the Supreme Court of Canada has exhibited such an orientation in the *Farm Products Case,* now to be discussed.

Federal Case Under the Trade and Commerce Power

In addition to jurisdiction over pipe lines under s. 92(10)(a), it is submitted that the Parliament of Canada has jurisdiction over products transported by pipe lines by virtue of the trade and commerce power of s. 91(2). The trade and commerce power traditionally has been restricted to include only international trade, interprovincial trade and trade affecting more than one province, together with matters incidental thereto. It is suggested that the interpretation given to s. 91(2) in *Reference re The Farm Products Marketnig Act,*[17] reiterated in *Murphy* v. *C.P.R.,*[18] now recognizes exclusive jurisdiction in the Parliament of Canada to regulate the subject matter of interprovincial trade. In the case of oipe lines, if the product carried is involved in interprovinicial trade, then the Parliament of Canada has exclusive jurisdiction over all aspects of the pipe line system.

The decision of the Supreme Court of Canada in the *Farm Products Case* must today be considered as the definitive statement of the trade and commerce power under s. 91(2). In this case, Rand J., after referring to the restricted scope placed on s. 91 (2) in previous cases, stated at pages 212 and 213:

> The powers of this Court in the exercise of its jurisdiction are no less in scope

16 The Alberta Gas Trunk Line Company Act, S.A. 1954, c. 37.
17 [1957] S.C.R. 198.
18 [1958] S.C.R. 626.

> than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee had modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretative formulations, and that incident of judicial power must, now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a function inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.

Accordingly, if previous interpretations of s. 91(2) are not appropriate for the current economic and social needs of this country, then it is a proper function of the Supreme Court of Canada to recast the interpretation of that section so as to meet present day needs. This being the case, the earlier decisions, while continuing to be of interest as to the scope of federal jurisdiction under s. 91(2), must give way to the decisions in the *Farm Products Case* and the *Murphy Case* as the definitive statement of the present day law on the subject. In fact, Rand J. indicated that the earlier cases did not provide "a clear guide to the jurisdiction of the federal government".[19]

The *Farm Products Case* dealt with a reference by federal authorities as to the constitutional validity of certain parts of the Ontario Farm Products Marketing Act. This Act provided for the controlled marketing of farm products by a system of boards and committees. It also applied to articles "manufactured or derived, in whole or in part" from farm products. Under this Act, "marketing" meant buying, selling, assembling, packing, shipping for sale or storage and transportating in any manner by any person. The Supreme Court was instructed to assume that the Act only applied to local trade within the province, but even in this circumstance, the validity of the legislation could not be assessed without reference to the jurisdiction of the Parliament of Canada under s. 91(2). Rand J. stated at page 208:

> The enquiry must take into account regulatory power over acts and transactions which while objectively appearing to be consumated within the Province may involve or possess an interest of interprovincial or foreign trade, which for convenience I shall refer to as external trade.

The *Farm Products Case* set out the basic principle that if a trade activity "involved a matter of extraprovincial interest or concern" that activity was to be within the exclusive jurisdiction of the Parliament of Canada. Rand J., at pages 210 and 211 interprets the trade and commerce power as follows:

> A producer is entitled to dispose of his products beyond the Province without reference to a provincial marketing agency or price, shipping or other trade regulation; and an outside purchaser is entitled with equal freedom to purchase and export. . . . The Dominion power implies responsibility for trade beyond Provincial confines, and the discharge of this duty must remain unembarrassed by local trade impediments. If the processing is restricted to external trade, it becomes an instrumentality of that trade and its single control as to prices, movements, standards, etc., by the Dominion follows: Re *The Industrial Relations and Disputes Investigation Act* (1955 S.C.R. 529, 1955 3 D.L.R. 721). The licensing of processing plants by the Province as a trade regulation is thus limited to their operations in local trade. Likewise the licensing of shippers, whether producers or purchasers, and the fixing of the terms and conditions of shipment, including prices, as trade regulations, where the goods are destined beyond the Province, would be beyond Provincial power.

[19] [1957] S.C.R. 198, 209, 210.

It follows that a producer of oil and gas in Alberta is entitled to dispose of his oil and gas, including any products processed therefrom, outside the Province without reference to a provincial board or provincial legislation which purports to regulate the price, transportation or other aspect of trade. The licensing of processing plants by the province is limited to their operation in local trade within the province. Similarly, it follows that the licensing of pipe line companies transporting oil and gas outside the province is beyond provincial jurisdiction.

It is submitted that in the processing of oil or gas and the manufacture of by-products destined for external trade, the jurisdiction of the province is limited to such matters as wages, workmen's compensation, insurance, taxes and other matters of purely local concern. Again reference is made to the judgment of Rand J. At page 213, he stated:

> The reaches of trade may extend to aspects of manufacture. In *Attorney-General for Ontario* v. *Attorney-General for the Dominion et al.*, the Judicial Committee dealt with the question whether the Province could prohibit the manufacture within the Province of intoxicating liquor, to which the answer was given that, in the absence of conflicting legislation of Parliament, there would be jurisdiction to that effect if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the Province. This involves a limitation of the power of the Province to interdict, as a trade matter, the manufacture or production of articles destined for external trade. Admittedly, however, local regulation may affect that trade: wages, workmen's compensation, insurance, taxes and other items that furnish what may be called the local conditions underlying economic activity leading to trade.

Rand J. further referred specifically to processors and shippers that were "engaged partly or exclusively in external trade", and stated that the province did not have the power to regulate these processors or shippers by a licensing system.

The judgements of Locke J. and Kerwin C.J. are to similar effect.[20] It should be noted that Kerwin C.J. referred to the proportion of trade activity directed towards sales beyond the province that would be necessary in order for the activity to come within s. 91(2), but stated that it was not possible to fix the minimum proportion, and further indicated that the test must at all times be whether the activity constituted "trade in matters of inter-provincial concern".

In the *Murphy Case*,[21] the principles set out in the *Farm Products Case* were reiterated and confirmed. The rights of the province with respect to local or private matters are subordinate to the paramount and exclusive authority specifically defined and reserved to the Parliament of Canada.[22] The power of the Parliament of Canada under s. 91(2) is to be curtailed only to the extent necessary to prevent extinction of the provincial powers over local and private matters.

This decision made it abundantly clear that provincial authority does not extend to the regulating of trade between provinces. Rand J. stated at pages 637 and 638:

> In the situation before us, the intended shipment was to be one of transportation across a provincial line for the purposes and in the course of business. It makes no difference whether business is connected or associated with the owner's production of raw material in another province or with that of strangers; in either case the merchandise and the transportation serve exactly the same purpose, and

20 [1957] S.C.R. 198, 230-234 (Locke J.); 204 (Kerwin C.J.).
21 [1958] S.C.R. 626.
22 *See*, Rand J. [1938] S.C.R. 626, 640.

ownership is irrelevant. The merchandise was to move between interprovincial points in the flow of goods of an economic and business character and that is sufficient.

It is suggested that oil and gas produced in any province could easily be in the place of the farm products dealt with in the *Farm Products Case*. The *Farm Products Case* did not indicate the proportion of trade devoted to extraprovincial trade necessary to vest jurisdiction in the Parliament of Canada. In fact, the case indicates that the test is not merely one of proportion. However it is apparent that in such cases as Britamoil, where substantially all the production is being exported, the Parliament of Canada would have exclusive jurisdiction. It is submitted that in the case of the A.G.T.L.-Trans-Canada complex, the Parliament of Canada would have exclusive jurisdiction because, 1) a large percentage of the gas is being exported and, 2) the gas is transported by an interprovincial undertaking within s. 92(10)(a). Once a product enters into the flow of interprovincial trade, such matter and all its attendant substances cease to be a mere matter of local concern. If, in a trade activity, including manufacturing and production, there is involved a matter of extraprovincial interest or concern, its regulation thereafter in the aspect of trade is put beyond provincial power.

Prohibitions Against Provincial Exports

It has been settled for some time that a province cannot regulate or restrict the export of natural products beyond its borders. Section 121 of the British North America Act reads as follows:

> All articles of growth, produce or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the provinces.

Rand J. commented on this section in the *Murphy Case* at page 642 as follows:

> I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.

Earlier, at page 638, Rand J. had commented that "'Free', in s. 121, means without impediment related to the traversing of a provincial boundary."

The Gas Resources Preservation Act, 1956,[23] purports to prevent the export of natural gas from Alberta except under permit issued by the Oil and Gas Conservation Board of Alberta. Section 5(1) of that Act reads as follows:

> 5. (1) A person
> (a) who produces or has the right to produce gas within the Province,
> (b) who purchases or otherwise acquires or has entered into a contract to purchase or otherwise acquire property in gas within the Province, or
> (c) who transports, or has entered into a contract with the owner, producer, purchaser or acquirer of gas undertaking to transport, gas produced within the Province,
>
> and who proposes to remove gas, or cause it to be removed, from the Province may make application to the Board for a permit authorizing the removal of gas.

[23] R.S.A. 1956, c. 19.

Section 23 provides for penalties of up to one thousand dollars for each day

> 21. A person who removes gas produced in the province to a place elsewhere than within the Province is guilty of an offence unles a subsisting permit has been granted authorizing the removal of such gas from the Province.

Section 23 provides for epnalties of up to one thousand dollars for each day on which an offence under the Act is committed.

It is submitted that this Act is ultra vires because:

1. It is contrary to s. 121 of the British North America Act;
2. It has the effect of regulating the operation of interprovincial pipelines over which the Parliament of Canada has exclusive jurisdiction under s. 92(10)(a), as indicated earlier;
3. It purports to regulate the movement of interprovincial trade, which is, for the reasons set out in the *Farm Products Case*, within the jurisdiction of the Parliament of Canada under s. 91(2).

The provincial government in Alberta has attempted to bolster its position in regulating exports by inserting a term dealing with export in leases that are granted by it covering mineral rights owned by Her Majesty the Queen in right of Alberta. Clause 3 of such leases requires that the lessee agree to comply with the provisions of The Gas Resources Preservation Act, 1956. Clause 3, as it appears in the Crown Petroleum and Natural Gas Lease, reads as follows:

> 3. The lessee shall comply with the provisions of The Oil and Gas Conservation Act, and The Gas Resources Preservation Act, 1956, and any Act or Acts passed in substitution for them or either of them, and any order of the Oil and Gas Conservation Board made pursuant to any of such Acts, and any regulations that at any time may be made under the authority of any such Acts, and all such provisions, orders and regulations shall be deemed to be incorporated into this lease and shall bind the lessee in the same manner and to the same extent as if the same were set out herein as covenants on the part of the lessee. Each and every provision, order or regulation hereafter made shall be deemed to be incorporated into this lease and shall bind the lessee as and from the date it comes into force, but in the event of conflict between any order or regulation hereafter made and any order or regulation previously made the order or regulation last made shall prevail.

It is submitted that clause 3 does not assist the province in its constitutional position because the provincial government cannot require any person to comply with a provincial statute that the provincial legislature does not have the power to enact.

Clause 6 of the form of Crown Oil and Gas Lease presently being used by the Government purports to require, as a condition of the lease, that no gas produced from the lease area shall be exported without a permit from the provincial government. Clause 6 reads as follows:

> 6. The lessee covenants, and it is an express condition upon which this lease is granted, that natural gas produced from the location shall be used within the Province of Alberta, unless the consent of the Lieutenant Governor in Council to its use elsewhere has been previously obtained. Upon breach of this covenant and condition occurring, whether with or without the consent or knowledge of the lessee, this lease, in so far as it relates to the natural gas within and under the location, shall forthwith be terminated, shall become null and void, and shall cease to have any further force and effect, and the natural gas within and under the location shall thereupon revert to Her Majesty, freed and discharged from any interest or claim of the lessee or any other persons whomsoever claiming by, through or under the lessee.

However, it is suggested that clause 6 does not assist the province because it is unenforceable due to the fact that the province does not have the power to make such a term the condition of an oil and gas lease.

The province can dispose of land owned by Her Majesty the Queen in right of Alberta only pursuant to valid provincial legislation. For the reasons set out above with respect to the Gas Resources Preservation Act, 1956, the province cannot enact legislation that restricts the export of natural products from the province. Under the Mines and Minerals Act, 1962,[24] the provincial legislature has authorized the Minister to dispose of Crown oil and gas rights. The Act vests in the Minister the power to prescribe the terms and conditions of the lease. One of such conditions may be a prohibition against export of gas except with a permit.[25] Pursuant to this authority, the Minister has included the above mentioned clause 6 in the Crown leases that dispose of rights to gas underlying Crown lands. It is axiomatic that the legislature cannot delegate to the Minister a power that the legislature does not itself have. That is, the legislature cannot authorize the Minister to impose a condition in a lease that the legislature itself does not have the power to impose.

It is submitted that it cannot be contended that the provincial legislature, by the Gas Resources Preservation Act, 1956 is merely enacting legislation for the conservation of natural resources in the province. Insofar as the Crown in right of Alberta owns approximately ninety-one per cent of the mineral rights in the province, legislation purporting to authorize this condition clearly constitutes a scheme regulating the export of gas from the province. As demonstrated in the *Comstock Case*,[26] it is the effect and not the intent that is the governing factor in determining the validity of provincial legislation.

Prerogative Powers

It is also suggested that the provincial government cannot rely on any prerogative or proprietary right of the Crown to include clause 6 in the oil and gas lease. Firstly, it is submitted that there may be no prerogative right of the Crown to lease or otherwise alienate Crown lands in the manner of an oil and gas lease. The Crown in England surrendered in 1702 to Parliament the right to dispose of Crown lands as follows:[27]

> As from 25th March 1702, all grants, leases or other assurances made or granted by the Crown of lands or other hereditaments (advowsons of churches and vicarages only (excepted) in England, Wales, or the town of Berwick-upon-Tweed, belonging to the Crown, or persons in trust for the Crown, in possession, reversion, remainder, use or expectancy to any person, body politic or corporate, by which any estate or interest may pass from the Crown, are void and of no effect, unless the grant, lease, or assurance is made for a term or estate not exceeding thirty-one years or three lives, or for a term of years determinable upon one, two, or three lives, and unless made to commence from the date of the making thereof; and, if the grant, lease, or assurance is made to take effect in reversion or expectancy, unless the same, together with any estates in possession, does not exceed three lives or the term of thirty-one years in the whole.

The oil and gas leases granted by the Alberta government under The Mines and Minerals Act, 1962,[28] provide for an initial term of years (pre-

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24 R.S.A. 1962, c. 49.

25 S. 122 of the Mines and Minerals Act, R.S.A. 1962, c. 49 reads as follows:
122. A lease shall be in such form as may be determined by the Minister and may include a condition providing that the natural gas produced shall be used within the Province, and such other terms and conditions as the Minister may prescribe.
S. 152 of the Mines and Minerals Act reads as follows:
152. A natural gas lease shall be in such form as may be determined by the Minister and may include a condition providing that the natural gas produced shall be used within the Province and such other terms and conditions as the Minister may prescribe.

26 See p. 401, *ante*.

27 The Crown Lands Act, 1702 Imp. c. 7. The provisions referred to appear at pages 411 and 412 of Pickerings Statutes, Vol. 10, but it is written in Middle English and for that reason, the translation of the clause is as it appears in 7 *Halsbury*, p. 487 (3rd ed.).

28 S.A. 1962, c. 49.

sently ten years, formerly twenty-one years) but provide for renewals of the lease in accordance with The Mines and Minerals Act, 1962. The Act permits renewals so long as petroleum or natural gas is produced from the location. Accordingly it is submitted that such oil and gas leases are of a type that come within the prohibition of the Crown Land Act of 1702.

The better view is that, once surrendered, a prerogative right cannot be regained by the Crown, or may be revived only by express legislative enactment.[29] Neither the British North America Act, 1867, The Alberta Act of 1905, nor the Alberta Natural Resources Transfer Act of 1930 has operated so as to regain for the Crown in right of Alberta the prerogative that was surrendered in 1702.[30] For these reasons it is submitted that no prerogative right to dispose of minerals owned by Her Majesty in right of Alberta now exists or ever has existed.

A Canadian case relevant to this subject is *A.-G. of Canada* v. *Western Higbie and Albion Investments Ltd.*[31] In this case, the validity of an order in council passed by the British Columbia government was questioned on the basis that there was no statutory authority for the order in council, which may have alienated provincial Crown lands for parts of public harbours in British Columbia. The various judgments distinguished between a transfer of land by a province to an individual and a "transfer" between the provincial Crown and the federal Crown. The latter transfer is regarded as only a matter of administration and control and not an alienation by the Crown. However, the case was decided on the basis that the order in council was an admission of fact as to the location of public harbours when British Columbia entered Confederation, and probably the case is only an authority for this particular point.

In the case of *Huggard Assets Limited* v. *A.-G. Alta.*,[32] the Privy Council considered the applicability of the Statute of Tenures, 1660 to the Northwest Territories. The Privy Council indicated by way of obiter dicta the Statute of Tenures did not apply to the Northwest Territories because the purpose of that Act was to abolish certain oppressive incidents of futile military tenure which had never existed in the Northwest Territories. But it is submitted that this reasoning would not affect the applicability of the Crown Lands Act of 1702, which coming at a later date, was designed to limit the prerogative powers of the Crown. The purposes of the two Acts were totally distinct.

As an alternative argument, it is submitted that, if at one time a prerogative right did exist in the provincial Crown to dispose of Crown mineral rights, that prerogative can exist only in the absence of provincial legislation dealing with the subject matter in respect of which the prerogative power exists. This rule of law is set out in *Halsbury's Laws of England*[33] as follows:

> Where by statute the Crown is empowered to do what it might heretofore have done by virtue of its prerogative, it can no longer act under the prerogative, and must act under and subject to the conditions imposed by the statute; but the statute may expressly preserve the right to act under the prerogative.

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29 *See* 7 *Halsbury*, art. 947, at p. 452, and n.(p) (3rd ed.).
30 *See* Appendix II for details.
31 [1945] S.C.R. 385.
32 (1953) 8 W.W.R. (N.S.) 561.
33 7 *Halsbury*, art. 465, at p. 222 (3rd ed.).

The leading case in which this rule was stated is *A.-G.* v. *DeKeyser's Royal Hotel Limited.*[34] This case concerned a claim against the Crown for compensation for the compulsory use of a hotel for military purposes during wartime. The Crown alleged that possession had been obtained pursuant to royal prerogative right to make use of such facilities in time of war. The Defence Act of 1842 had authorized the Crown to take possession of such premises and set out the compensation to be paid for the use thereof. The House of Lords held that this Act had replaced the prerogative right. At page 539, Lord Atkinson states:

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative the prerogative is merged in the statute. I confess I do not think the word 'merge' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same—namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.

It is submitted that because the province of Alberta has, by the Mines and Minerals Act, 1962, set out the method for disposing of oil and gas rights in Alberta, any prerogative power to dispose of those rights that might previously have existed is now displaced by that legislative enactment.

As was argued earlier, certain portions of the Mines and Minerals Act, 1962, are probably *ultra vires* as constituting a scheme prohibited by s. 121 of the British North America Act, 1867. However, it is suggested that other parts of the Mines and Minerals Act, 1962, would not be *ultra vires* and, remaining in force, would bring the rule in *DeKeyser's Case* into operation.

Further, it is submitted that the constitutional position of the Crown in right of Alberta cannot be such as would permit the Crown, in exercise of its royal prerogative, to enforce a prohibition that is specifically contrary to s. 121 of the B.N.A. Act. For this reason, s. 121 can be construed as a limitation on any alleged prerogative. Section 121 of the B.N.A. Act is a statute that itself would come within the rule in the *DeKeyser's Case*. It is a statute that constitutes a restriction on the powers of the province, and as such, would supersede any prerogative power of the provincial Crown that might have permitted the provincial Crown to restrict exports from the province.

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[34] [1920] A.C. 508. This case was approved and followed in the more recent case of *Re Azoff-Don Commercial Bank* [1954] Ch.D. 315.

CONCLUSION

Rand J. in the *Farm Products Case* not only set out in an accurate and lucid manner the true nature of the trade and commerce power, but also referred to the vital economic needs of this country:

> The true concept of trade is that of a dynamic, the creation and flow of goods to consumption or utilization. . . . This country is one economic unit; in freedom of movement, its business interests are in the extra-provincial dimension . . . ".

APPENDIX I

The following are the findings of fact set out in Part 4 of the Westspur judgment:

(d) The evidence makes it plain that at the present time there is joint management between Westspur and Producers.

The following questions and answers appear at p. 5365:

(Chief COMMISSIONER): 'Q. I suppose one reason you have no problbem is that there is in fact joint management of Producers and Westspur?—A. At the present time, yes, at least, joint administration.

Q. Mr. Harvie is general manager of both companies and you are president of both companies?—A. Yes.

Q. And there is no intention of altering that?—A. Yes, I think when our present contracts have been completed at the end of the year that we will have Mr. Harvie do more of the administrative work of the two companies, but I think we will separate out personnel and operating people especially and trunk line people.'

(e) The evidence also makes it plain that if this application is granted, it is the intention to segregate the operations of the two companies, although Mr. Hay will continue as President and Mr. Harvie will continue as General Manager of both companies.

The following questions and answers from pp. 5373 et seq. are relevant to this point:

(Mr. MacPHERSON): 'Q: Now, one other thing, I think probably you might explain to the Board how you propose to carry on the operation of the Westspur on the one hand and Producers on the other if this application is granted?—A. Well, if the application is granted we intend to segregate the two companies, Producers and Westspur, and have Mr. Harvie as administrative officer but having separate managers for each company, separate payrolls and separate personnel employed by each company, one group working for Producers in the gathering sphere of the business and the other group working for Westspur in the trunk line system operations. And there will, of course, be separate sets of books, separate accounting, separate maintenance and separate tariffs—tariffs published individually by each company, the one tariff covering gathering—

Q. Would the operation of each be carried on independently?—Yes, the operations would be carried on independently.

The Chief COMMISSIONER: Q. Mr. Hay, what do you mean by Mr. Harvie being the administrative officer, what would he do?—A. Well, Mr. Harvie and myself have been elected by the shareholders and we represent the interests of the shareholders in directing the policy of the companies. But the operation and management of each company would be, could be segregated and would be segregated under managers for each company.

Q. You and Mr. Harvie would be the policy department of both companies but the operations would be under different— —A. that is right. I might add that I am not full time on this job.

Q. No.—A. Mr. Harvie is and Mr. Harvie really would be directly responsible for the general policy of each company.' . . .

'A. Yes, he would be expected to see that each management lived within the management and operations that were relative to its sphere.

Q. So that to the extent he would be directing management?—A. Yes, that is right, he would be directing management.'

(f) Westspur is a wholly owned subsidiary of Producers ,and the directors of each company, with one exception, are the same, as shown by the following questions and answers at p. 5371:

'Q. Now, as far as Westspur is concerned, what is the position?—A. At the present time Producers owns all of the shares issued by Westspur except the qualifying shares for directors.

Q. Then in so far as the directors are concerned, who are the directors?—A. I am sure that I can name them, but the directors of Westspur and the directors of Producers are the same with the exception that Mr. Cruikshank is a director of Producers and is not a director of Westspur.'

(g) Mr. Harvie's evidence makes it clear that there must be very colse co-operation between Producers, the gathering lines system, and Westspur, the trunk line system.

At p. 5322, following a series of questions and answers describing the operating problems of gathering and trunk lines, the following questions and answers appear:

(Chief COMMISSIONER): 'Q. And that would require co-operation between the branch line operator and the trunk line operator?—A. Yes, sir.

Q. Very close co-operation?—A. Yes sir, very close co-operation, but there are tanks available at terminals to handle temporary shut-downs.'

and, at p. 5324, is found this further question and answer:

(Mr. MacPHERSON): 'Q. In answer to the Chief Commissioner you said there had to be close co-operation between the gathering and the trunk systems. Does there have to be close co-operation also between the producers and the gathering line?—A. It is essential that the producers and the pipe lines are in contact at all times and that both organizations are aware of the difficulties inherent in both producing and pipe lines.'

APPENDIX II

The British North America Act, 1867, (R.S.C. 1952, v. 6 p. 6187) set out in pt. 3 that the Governor General is the Queen's personal representative. The Lieutenant-Governor of each province is, with respect to provincial matters, given, by s. 62 of the Act, powers parallel to those of the Governor-General with respect to federal matters. Accordingly, at the time of Confederation the Governor-General and the Lieutenant-Governors would only have the perogative powers that the Queen in England had in 1867. Section 146 of the Act provided for the admission of the territories into the Dominion.

The Rupert's Land Act, 1868 (Imp.) 31-32 Vict. c. 105, (R.S.C. 1952, v. 6 p. 6223), provided for the surrender of the Hudson's Bay lands back to Her Majesty the Queen and s. 5 of the Act permitted Her Majesty to vest the powers of government over the territories in the Government of the Dominion of Canada.

The Temporary Government of Rupert's Land Act, 1869 (Imp.) 32-33 Vict. c. 3, (R.Sc. 1952, v. 6 p. 6227) continued the existing laws in force. Section 5 of this Act reads as follows:

> 5. All the laws in force in Rupert's Land and the North-Western Territory, at the time of their admissions into the Union, shall so far as they are consistent with the 'British North America Act, 1867,'— with the terms and conditions of such admission approved of by the Queen under the 146th section thereof,—and with this Act,—remain in force until altered by the Parliament of Canada, or by the Lieutenant Governor under the authority of this Act.

Order in Council dated June 23, 1870 (*see*, M. Olivier, *British North America Act* and *Selected Statutes*, 157 (1962)), which was authorized by the Rupert's Land Act, 1868, ordered and declared that on July 15, 1870, Rupert's Land and the Northwest Territories were to be admitted into the Dominion of Canada. The government of Canada was from that date given power to legislate with respect to those areas. Section 146 of the British North America Act 1867, anticipated this Order in Council.

By the North West Territories Act 1886, c. 50, s. 11, the law of England as it was on 15 July, 1870 became the law of the area that is now Alberta, insofar as it was applicable.[1]

The Statute Law Revision Act, 1893, (*see*, M. Olivier, *British North America Act and Selected Statutes*, 117 (1962) repealed the Rupert's Land Act of 1867, but did not affect any existing principle or rule of law or establish any prerogative.

The Alberta Act, 1905, (Imp.) 4-5 Ed. 7, c. 3 (R.S.C. 1952, v. 6 p. 6297), by s. 10, conferred on the Lieutenant-Governor of Alberta all the powers that had theretofore been exercised or vested in the Lieutenant-Governor of the Northwest Territories. Section 3 provides for the adoption and application of the British North America Act, 1867-1886. Section 21 reserved Crown lands and all mines and minerals to Canada.

The Alberta Natural Resources Agreement, dated December 14, 1929, was given the force of law by, firstly, the Alberta Natural Resources Act (Statutes of Canada 1930, c. 3) and secondly, The British North America Act, 1930 (Imp.) 21 Geo. 5, c. 26 (R.S.C. 1952, v. 6 p. 6343). By clause 1 of that agreement, the Alberta Crown lands were made subject to the laws of Canada then applicable (that is, the Dominion Lands Act of 1872) but the clause entitled the province to enact its own law for this purpose. The applicable federal laws could be administered by the province until such time as the province might otherwise legislate. Clause 1 means that any prerogative power would not be revived except by express act of the Alberta legislature, and it is submitted that the Alberta legislature has not done this with respect to the prerogative rights to dispose of Crown lands.

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1 See Coté, *Introduction of English Law into Alberta*, p. 262, *ante*.