NATURAL RESOURCES AND THE CONSTITUTION: SOME RECENT DEVELOPMENTS AND THEIR IMPLICATIONS FOR THE FUTURE REGULATION OF THE RESOURCE INDUSTRIES

ROWLAND J. HARRISON*

This paper reviews recent developments with respect to constitutional jurisdiction over natural resources. Particular reference is made to discussions between the federal and provincial governments directed towards a reallocation of authority. It also examines potential implications of the constitutional reform movement for the future regulation of the petroleum industry.

The meek shall inherit the earth,
but not its mineral resources.
J. Paul Getty

I. INTRODUCTION

This paper has two purposes. The first is to review recent developments with respect to constitutional jurisdiction over natural resources, with particular reference to the discussions between the federal and provincial governments concerning a redefinition of authority. The second is to examine some of the implications of these developments for the future regulation of the resource industries, particularly the petroleum industry.

The paper suggests that the dispute over the control of resources is not so much a dispute about the limits of existing constitutional authority as it is a thrust by some of the provinces for a reassignment of authority. As would be expected, this thrust is resisted by the federal government. The motivations behind the respective positions go beyond the immediate question of the sharing of revenues to the more fundamental question of the general balance of power in the federal system. As a result, constitutional reform with respect to natural resources is quite independent of any general movement towards constitutional reform that might derive its impetus from the threat of Quebec separatism. The issue involves a struggle for basic power.

This suggests two things. First, the question of constitutional reform with respect to resources will persist until a new accommodation is struck (if it ever can be), either by redefining constitutional authority or by rearranging *de facto* control within the existing assignment of authority. Secondly, in the meantime, the competing jurisdictions might be expected to assert their authority so as to narrow the scope for *de facto* control being extended by the other side. Indeed, it is argued that this strategy has emerged already. The conclusion is that this will be a persistent strategy that will continue to cast the resource industries as pawns in a federal-provincial chess game.

The paper examines the emergence of the dispute over the past few years and discusses the most recent "best effort" draft proposals for amendment of the British North America Act.[1] Attention is then turned to why the dispute assumed such importance and magnitude. This discussion suggests the inevitability of the strategy previously referred to. Three "case studies" are analyzed as illustrations of that strategy. Finally, some observations are of-

* Executive Director, The Canadian Institute of Resources Law. Professor of Law, The University of Calgary.

1. R.S.C. 1970, Appendices.

fered on the prospects, or lack thereof, for resolving the issue within the existing constitutional framework.

II. THE EMERGENCE OF THE DISPUTE

Disputes about constitutional jurisdiction with respect to natural resources are not new to the Canadian scene. Dr. Gerard V. La Forest notes that, from the beginning, conflicts arose between British Columbia and the Dominion regarding the Railway Belt and the Peace River Block.[2] Many of these disputes found their way into the courts where some of the arguments that still persist were defined. For example, much of the argument in *In re Natural Resources (Saskatchewan)*[3] turned on whether natural resources held by the Crown in right of Canada were held for the benefit of the settlers of the areas where those resources were located.[4] As early as 1883, the Privy Council noted rather prophetically that s.109 of the B.N.A. Act was of "a high political nature".[5] Later, in 1923, it observed that "as between the Dominion and the Provinces, the partition of venerable rights, such as the jura regalia of the Crown must always be, is necessarily important far beyond their current pecuniary value".[6]

However, it is only over the past few years that the issue has assumed a more general magnitude. The subject was not even mentioned in the Victoria Constitutional Charter of 1971. Yet, by the Federal-Provincial Conferences on the Constitution in October-November, 1978, and February, 1979, the issue had become one of the most critical to the discussions of the First Ministers. Indeed, it had become one of the major obstacles to agreement on a package of constitutional reform, even rivalling the Quebec issue as a problem in national unity, in the opinion of many. How this development came about, and why, is examined below.

A. *The Victoria Constitutional Charter, 1971*

As already stated, the Victoria Constitutional Charter of 1971 did not refer to the subject of natural resources. The Charter was primarily concerned with securing Canadian sovereignty over the Constitution and did not directly address the division of powers. But even among the various legislative powers discussed by the federal and provincial governments prior to the Charter, natural resources was conspicuously absent as a subject of separate concern. The inability of the provinces to levy indirect taxes had been the subject of discussion prior to the Victoria Conference; and, in 1969, the federal government had proposed that the provincial Legislatures be allowed, within certain limits, to levy such taxes as well as direct taxes. But these discussions were not explicitly aimed at taxing powers with respect to natural resources.

B. *The Special Joint Committee Report, 1972*

Similarly, the Final Report of the Special Joint Committee of the Senate and the House of Commons in 1972 did not deal specifically with the ques-

2. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (1969) 43.
3. [1932] A.C. 28.
4. *Id.* at 37-38.
5. *Attorney-General of Ontario* v. *Mercer* (1883). 8 A.C. 767, at 778.
6. *R.* v. *Attorney-General of B.C.* [1924] A.C. 213, at 221.

tion of jurisdiction over natural resources. However, it did address the issue of offshore mineral rights, recommending that the federal government should have proprietary rights over the seabed offshore and that Parliament should have full legislative jurisdiction over this subject matter.[7]

The Committee recommended that the provincial Legislatures should have the right to impose indirect taxes.[8] Again, this recommendation was not made explicitly in the context of taxation of natural resources. However, natural resources may have been in the Committee's contemplation when it added the proviso that provincial indirect taxes should be limited so as not to impede interprovincial or international trade or fall on persons resident in other provinces.

Nor did the Committee deal explicitly with natural resources when it recommended that Parliament should have exclusive jurisdiction over international and interprovincial trade and commerce.[9] Nevertheless, the Committee recommended that this federal power should include the instrumentalities of interprovincial and international trade, citing as an example of the present limitation of federal power the fact that Parliament had had to declare grain elevators, mills and feed warehouses as "Works. . . for the general Advantage of Canada" under ss.91(29) and 92(10)(c) of the B.N.A. Act "in order to gain a satisfactory measure of control over the grain trade".[10] There is an interesting analogy to be drawn between this example and certain "instrumentalities of trade and commerce" in the interprovincial and international movement of other natural resources.

The only other part of the Committee's Report touching on jurisdiction over natural resources was its recommendation that control over the pollution of air and water should be a matter of explicit concurrent jurisdiction between the provincial Legislatures and the federal Parliament, with provision for federal paramountcy.[11]

C. *The Federal-Provincial Energy Conference, 1974*

The "resources issue" first emerged as a general and serious constitutional problem at the Federal-Provincial Energy Conference in January, 1974. By the time the First Ministers convened in Ottawa on January 22 and 23, there had been a flurry of legislative activity by Parliament and by the Legislatures of the main three producing provinces, precipitated by events in the international oil market in the later part of 1973. The setting for the Conference is apparent from the following table of the dates when certain Acts received assent. It is noteworthy that all received assent within the three month period immediately preceding the Conference:

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7. Special Joint Committee of the Senate and the House of Commons. *The Constitution of Canada* (Final Report, 1972) 66-67. The Committee recommended that, while there should be no constitutional provision as to the sharing of the profits from the exploitation of seabed resources, nevertheless those profits should be shared equally with the adjacent coastal province.
8. *Id.* at 48-49.
9. *Id.* at 84-85.
10. *Id.* at 85.
11. *Id.* at 91-92.

JURISDICTION	ACT	DATE OF ASSENT
Federal	Energy Supplies Emergency Act, S.C. 1973-74 (1st Sess.), c. 52.	January 14, 1974
	Oil Export Tax Act, S.C. 1973-74 (1st Sess.), c. 53 (retroactive to October 1, 1973).	January 14, 1974
Alberta	Mines and Minerals Act Amendments, S.A. 1973, c. 94.	December 14, 1973
	Petroleum Marketing Act, S.A. 1973, c. 96.	December 14, 1973
Saskatchewan	Mineral Resources Act Amendments, S.S. 1973-74, c. 64.	May 10, 1974, but, by section 3 thereof, deemed to have been in force from January 1, 1974
	Oil and Gas Conservation, Stabilization and Development Act, S.S. 1973-74, c. 72.	December 19, 1973
British Columbia	Petroleum Corporation Act, S.B.C. 1973 (2nd Sess.), c. 140.	November 7, 1973

The January, 1974, Conference was not convened to discuss this legislation or the broader question of the respective powers of the provinces and the federal government. The First Ministers were, of course, preoccupied with what would happen to the price of Canadian-produced oil and gas. But in view of the implications of the above legislation, it was inevitable that the constitutional issue would find its way into the debate.

In his opening statement to the Conference, the Prime Minister said:[12]

> It is because the consequences of this sudden crisis are so great that this Conference must not be solely about oil or even about energy. It must also concern the nature of our Canadian community, and the purposes which join us in our Confederation. . .. While the federal government recognizes the legitimate interests of both provincial governments and private companies, we are determined to safeguard the interests of the consumers of Canada.

The Premier of Ontario said:[13]

> [A]t this Conference, we must reconcile the reality of provincial ownership of resources with the interests of all regions of the country.

In the opening paragraph of his statement, the Premier of Alberta said:[14]

> As the major supplier of energy for Canada, we obviously have a substantial stake in the development of sound and fair national energy policies. They must be national policies though — national in the sense they are developed by agreement between the Federal Government and the Provinces, and with full recognition that natural resources located within the Provinces, under our constitution, are owned by the Provinces.

Thus was notice served and the issue joined.

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12. Opening Statement by the Prime Minister of Canada at the First Ministers' Conference on Energy, Ottawa, January 22, 1974, Conference Document No. FP-4127.
13. Opening Statement by the Honourable William Davis, Premier of Ontario at the First Ministers' Conference on Energy, Ottawa, January 22, 1974, Conference Document No. FP-4127.
14. Opening Statement by the Honourable Peter Lougheed at the First Ministers' Conference on Energy, Ottawa, January 22, 1974, Conference Document No. FP-4122.

The matter dominated the Premier's Conferences in 1976 when unanimous agreement was reached that provincial jurisdiction to tax primary production from lands, mines, minerals and forests should be strengthened.[15] By this time the cases of *Canadian Industrial Gas & Oil Ltd.* v. *The Government of Saskatchewan*[16] and *Central Canada Potash Co. Ltd.* v. *The Government of Saskatchewan*[17] had been litigated, focusing the constitutional issues. By the First Report of the Western Premiers' Task Force on Constitutional Trends in May, 1977, a number of federal initiatives with respect to resources were alleged to be "intrusions" into provincial constitutional responsibilties.[18]

The specific constitutional issues were identified more precisely by the decision of the Supreme Court of Canada in the *CIGOL* case, handed down on November 23, 1977.[19] Within a week of the judgment, the Premier of Saskatchewan sent a telex to the Prime Minister reiterating the need to "face squarely the difficulties which the provinces have encountered in the area of resource taxation". He added:[20]

> In view of the Court's reasoning in the CIGOL case, it may be necessary to consider, also, ways in which we could clearly delineate the boundary between the provinces' rights to tax resources and the federal government's jurisdiction over interprovincial and international trade and commerce.

This view was supported at the Regina Premiers' Conference in August, 1978, when the Premiers agreed unanimously to advance again their 1976 consensus with respect to resource taxation. They further agreed on the need to confirm and strengthen "provincial powers with respect to natural resources".[21]

Added urgency was provided by the decision of the Supreme Court of Canada in the *Central Canada Potash* case on October 3, 1978.[22] This prompted a further communication from the Premier of Saskatchewan to the Prime Minister, specifically addressing the question of the trade and commerce power:[23]

> On the second point above, namely the need to clarify the federal trade and commerce power, it is clear to me that the courts have in recent years greatly expanded this power as a means of restricting a province's control over the production, marketing and pricing of its resources. The Central Canada Potash case is the most recent manifestation of that expansion. The implications for proper management and regulation of provincial resources are grave and are incompatible with the effective control of resource development. It is time for action to limit the meaning of this power. . ..

15. Letter from the Premier of Alberta to the Prime Minister of Canada, October 14, 1976, reproduced in "Proposals on the Constitution 1971-1978", a Collation by the Canadian Intergovernmental Conference Secretariat, December, 1978, at 229-230.
16. The judgment of the Saskatchewan Court of Appeal was handed down on December 18, 1975. *See* [1976] 2 W..W.R. 356. Argument on appeal to the Supreme Court of Canada was heard November 8-10, 1976. *See* [1977] 18 N.R. 107; [1977] 6 W.W.R. 607.
17. The judgment of the Saskatchewan Court of Appeal was handed down on January 7, 1977. *See* [1977] 1 W.W.R. 489. The Supreme Court of Canada judgment, handed down on October 3, 1978, is reported in (1978) 23 N.R. 481; [1978] 6 W.W.R. 400.
18. Report of the Western Premiers' Task Force on Constitutional Trends, May, 1977, at 25-28. *See* further *infra* at n. 51.
19. *Supra* n. 16.
20. Telex from the Premier of Saskatchewan to the Prime Minister of Canada, November 29, 1977, reproduced in "Proposals on the Constitution 1971-78", *supra* n. 15 at 231-233.
21. Communique, Regina Premiers' Conference, August, 1978, *id.* at 241-243. The significance of this development in terms of indicating a shift in the position of Ontario should not pass unnoticed.
22. *Supra* n. 17.
23. Letter from the Premier of Saskatchewan to the Prime Minister of Canada, October 10, 1978, reproduced in "Proposals on the Constitution 1971-1978", *supra* n. 15 at 244-249.

Thus, by the time the Federal-Provincial Conference of First Ministers on the Constitution convened in Ottawa on October 30 and 31 and November 1, 1978, and on February 5 and 6, 1979, the issues of resource taxation and the scope of the federal trade and commerce power had been delineated.

D. *The Canadian Bar Association Committee Report, August, 1978*

Reference should be made to two reports published outside the federal-provincial negotiating framework.

In August, 1978, the Canadian Bar Association Committee on the Constitution published its report *Towards a New Canada.*[24] The Committee recommended that Parliament and the provincial Legislatures should each have power to levy taxes by any means of taxation but that neither should have power to levy taxes creating barriers to interprovincial trade. Nor should a province have power to impose a tax that has a tendency to be automatically passed on by the taxpayer to a person outside the province. However, these proposals would not involve as much of a change as might appear at first glance. The Committee itself noted that "these objectives are largely achieved by the existing Constitution".[25]

The Committee also recommended that the Constitution should expressly grant the provinces exclusive legislative power "respecting the exploration, exploitation, conservation and management of all natural resources in the province" and that the "natural resources of the public domain in the provinces should continue to belong to the provinces".[26] The Committee addressed the relationship between provincial jurisdiction over resources and the federal trade and commerce power in these terms:[27]

> Our general approach to the interrelationship of resource management and interprovincial and international trade is that the provinces should be free to control the use of a resource, including requiring that it be processed in the province and restricting its exportation outside the province. Once, however, a resource moves into interprovincial or international commerce, it should be subject to the paramount power of the federal Parliament over trade and commerce. For example, we would have no restriction on a province's power to establish quotas on the quantity of resources that would be permitted to leave the province, or to require that resources be processed in the province. However, as is now the case, we would not agree to the imposition of an export tax on resources and other goods shipped from the provinces.
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> We agree, of course, that Parliament must have power to regulate interprovincial and international commerce. Thus it should, as now, have power to prevent the unrestricted exportation of goods outside the country, and thereby promote processing in Canada. But it would be another thing to permit the federal Parliament to compel the export of certain quantities of resources without provincial consent in the absence of an emergency situation. . . In our view, the power to define the rhythm of exploitation of resources in the province, whether by establishing annual quotas of production, fixing their base price, or otherwise, should reside with the province. So long as resources remain within the province, they should not be capable of regulation under the federal power respecting interprovincial and international trade.

The Committee thereby proposed one version of a strengthening of provincial jurisdiction over resources but did not suggest any specific constitutional formula for implementing its views.[28]

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24. *Towards a New Canada*, a research study prepared for the Canadian Bar Foundation by the Committee on the Constitution, the Canadian Bar Association (1978).
25. *Id.* at 71.
26. *Id.* at 107.
27. *Id.* at 108-109.
28. See further, *infra* n. 50.

E. *The Task Force on Canadian Unity Report, January, 1979*

The other significant extra-governmental report is the Pepin-Robarts Report entitled *A Future Together*, published in January, 1979.[29] This Report, too, recommended that both the central and provincial governments should be granted equal access to tax sources, with the exception that customs and excise taxes should be an exclusive central power and that the provincial power of indirect taxation should be qualified to ensure that the impact of such taxes would not fall upon persons outside the taxing province.[30]

On the question of the relationship between provincial jurisdiction over resources and federal powers, the Report was couched in general terms. It recommended simply that the principal roles and responsibilities of the provincial governments should include "provincial economic development, including the exploitation of their natural resources".[31] The Report observed that the present distribution of powers under the B.N.A. Act is not very helpful in resolving conflicts over jurisdiction in several areas, citing specifically "the field of oil policy".[32] Resolution of the clash between provincial ownership of resources and the central government's control over international and interprovincial trade and commerce would, in the Committee's view, require two steps, as would any attempt to "reduce the friction and resulting frustration and conflict" over other contentious areas:[33]

> The first is a careful review of the aspects of that policy area with a view to delineating by agreement the aspects which might appropriately be placed under the exclusive jurisdiction of one government or the other, or under concurrent jurisdiction. . . The second step which is required, in each field. . . is the development of effective councils or other standing intergovernmental bodies.

The Report clearly contemplated a rearrangement of existing powers with respect to resources and, by implication, probably a restriction of federal powers.

III. THE "BEST EFFORT" DRAFT PROPOSALS

By the time the Federal-Provincial Conference of First Ministers on the Constitution convened in February, 1979, the specific issues with respect to resources had emerged fairly clearly. There was substantial agreement that the provinces should be empowered to levy indirect as well as direct taxes. But it remained an open question what, if any, limitations should be imposed on that expanded power. There also seemed to be a large measure of agreement, at least among the provinces and non-governmental bodies, that the federal trade and commerce power should be limited in some way as it related to provincial jurisdiction over resources. Where the proper balance lay between federal and provincial responsibilities in this area was still to be resolved.

The February, 1979, Conference discussed "best effort" draft proposals on both these questions. These are set out in full in Appendix A.

The draft proposal with respect to taxation would permit the provinces to levy taxes by any mode or system of taxation, subject to two significant ex-

29. The Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (January, 1979).
30. *Id.* at 92, 127.
31. *Id.* at 125.
32. *Id.* at 91.
33. *Id.* at 91-92.

ceptions. The provinces would not be permitted to levy indirect taxes that constitute a tax on entry into or export from the province "or otherwise has effect as a barrier or impediment on interprovincial or international trade.". Nor would they be empowered to levy any tax that "is so imposed that the burden of the tax is passed outside the province".

In light of the reasons for judgment by the Supreme Court in the *CIGOL* case, *supra*, it seems clear that this proposed new power alone would not accomplish very much for the provinces. The legislation struck down in that case would almost certainly have suffered the same fate even if the B.N.A. Act had contained a provision in the form of the draft proposal. Martland J., for the majority, found that the tax under consideration was "essentially an export tax";[34] on this view, it would be within the first exception to the draft proposal. His further conclusion that the legislation was "directly aimed at the production of oil destined for export and has the effect of regulating the export price"[35] would probably also bring the legislation within the second part of the first exception as "a barrier or impediment on interprovincial or international trade". Finally, the majority conclusion that "the purchaser pays the amount of the tax as a part of the purchase price"[36] would bring the legislation within the second exception as a tax "so imposed that the burden of the tax is passed outside the province".

The best effort draft proposal on resource ownership and interprovincial trade dealt separately with the taxation of resources. It would specifically empower the provinces to levy both direct and indirect taxes with respect to non-renewable natural resources and forestry resources and production therefrom, and with respect to sites and facilities in the province for the generation of electrical energy and the primary production therefrom, "whether or not such production is exported in whole or in part from the province. . ." The only limitation would be that such taxation laws might not authorize taxation that differentiated between production exported to another part of Canada and production not exported from the province.

This provision would almost certainly have empowered the legislation considered in the *CIGOL* case *as taxing legislation*. But the Supreme Court would then have been forced to choose between classifying it as legislation imposing an indirect tax and legislation in relation to interprovincial trade and commerce. It will be recalled that the Supreme Court struck down the legislation on the grounds both that it imposed an indirect tax and that it was legislation in relation to interprovincial trade and commerce.

Thus, the real problem is to determine the limits of the federal trade and commerce power, and not to redefine taxing powers alone. Most (if not all) parties to negotiations on the Constitution, and commentators thereon, agree that interprovincial trade and commerce is properly the responsibility of the federal Parliament. The divergence of views emerges in the search for the point of balance between that power, on the one hand, and provincial ownership of natural resources and certain provincial legislative powers, on the other. From the provincial view, that point should be considerably further towards the provincial side than it is under the present Constitution, particularly as interpreted in *CIGOL* and *Saskatchewan Potash* cases. It

34. (1977) 18 N.R. 107 at 126; [1977] 6 W.W.R. 607 at 622.
35. (1977) 18 N.R. 107 at 129; [1977] 6 W.W.R. 607 at 626.
36. (1977) 18 N.R. 107 at 127; [1977] 6 W.W.R. 607 at 624.

seems that it is also the federal view that the present balance may be too far towards the federal side.

The proposal discussed at the February, 1979, Conference would empower the provinces exclusively to make laws in relation to exploration for non-renewable natural resources and the development, exploitation, extraction, conservation and management of those resources, including the rate of primary production therefrom. In addition, the provinces would be empowered expressly to make laws in relation to export from the province of primary production from non-renewable resources, provided such laws did not authorize prices for exported production different from prices for production not for export. Primary production would include production resulting from processing or refining resources, but not manufactured products.

These provisions alone would go a considerable way towards accommodating provincial aspirations and would almost certainly empower the legislation struck down in both the *CIGOL* and *Saskatchewan Potash* cases, as well as most other provincial resources legislation; but there are other complications.

The draft proposals provide that laws enacted in relation to export from a province would prevail:[37]

> . . . over a law enacted by Parliament in relation to the regulation of trade and commerce except to the extent that the law so enacted by Parliament,
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> (a) in the case of a law in relation to the regulation of trade and commerce within Canada, is necessary to serve a compelling national interest that is not merely an aggregate of local interests; or
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> (b) is a law in relation to the regulation of international trade and commerce.

The proposal really amounts to a restriction of federal power over inter-provincial trade and commerce to circumstances amounting to "a compelling national interest". Thus, it does not exclude the exercise of federal power with respect to resources, but shifts the point of balance between that power and provincial power to wherever it is determined to fall according to a new criterion. There is still difficulty in finding where that point is in particular cases.

It is not the intention to predict how the Supreme Court of Canada might interpret such a provision. However the explanatory note is revealing:

> This trigger mechanism may apply to circumstances other than an emergency as established under the peace, order and good government power.

In view of the difficulty that the courts have experienced in putting substantive content into the peace, order and good government power in other than emergency situations, one can only conjecture that the judicial interpretation of a phrase such as "necessary to serve a compelling national interest" would be fraught with problems.

But these "best effort" draft proposals are that and no more at this time. At the February Conference, the federal government and all the provinces except Alberta and Quebec accepted the proposals. Even if adopted unanimously, they would not amend the present Constitution. Nevertheless, such an adoption would have eased the present tension over resource control and might have paved the way for mutually acceptable arrangements within the

37. *See* Appendix A.

existing constitutional framework. This point will be elaborated upon later.[38]

There is one other aspect of constitutional reform that should be noted. Some premiers have drawn a distinction between "federal" interests and "national" interests as an aggregate of provincial interests. The distinction began to emerge by implication in the May, 1977, Report of the Western Premiers' Task Force on Constitutional Trends.[39] It was made explicit in the Task Force's Second Report in April, 1978:[40]

> The Western provinces continued to identify the National Energy Board's control of the supply and distribution of natural resources as a direct federal intrusion challenging the basic principle of provincial resource ownership and management. They maintained that the NEB's suggestion that the provinces intervene during NEB hearings does not recognize the province's legitimate role in the resources area and reduces the provinces to the level of an interest group. The provinces suggested that modifications be made to the NEB Act to ensure that the provinces had greater input into the NEB's decisions.

The premier of Alberta elaborated at the First Ministers Conference in January, 1979, arguing that the federal government should play only *a part* in the determination of national policy. Regulatory agencies such as the National Energy Board were federal agencies as distinct from national agencies, in his view, and should be restructured to make them more truly national by permitting provincial as well as federal appointments.[41] The argument can be viewed as implying that at least Alberta wants not only limitations on existing federal powers that touch on resources, but also a measure of provincial say in the exercise of whatever power might remain with the federal government after it is limited.

IV. THE REAL NATURE OF THE DISPUTE

The foregoing has described the events leading to the constitutional conflict over resources. Why did the issue emerge so dramatically and why has it assumed its present proportions?

The simple answer is obvious from a review of the subject matter of the legislation cited in the table above: because there was a contest for the dollars that became available to government by the sudden quadrupling of the international price of oil in the latter part of 1973.

But the answer is not that simple. The competition for the control of resources has really been precipitated by governments' realization of the fundamental pervasiveness of energy in our industrialized society. Power with respect to energy resources is increasingly perceived as a key to general economic well-being. Most industrialized nations have also realized that the world's natural resources are depletable. In the case of renewable resources, such as fisheries, forests and water, improper exploitation of any particular resource will at the least cause fluctuations in the economic and actual availability of the resource. At worst, the resource may be totally destroyed

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38. *See* further, *infra* at n. 71 *et seq*.
39. *Supra* n. 18.
40. Second Report of the Western Premiers' Task Force on Constitutional Trends, April, 1978, at 13-14.
41. Inasmuch as this view reflects an almost total lack of faith in the ability of the federal government, or its agencies, to perform the task of representing common provincial interest, it is a sad reflection on the state of the federation. It is at least the theory of a federal system that the federal government should represent the national interest. Commenting in the Toronto *Globe and Mail*, February 8, 1979, William Johnson wrote at 8: "The Western provinces are redefining national to mean federal with provincial concurrence".

in terms of its economic viability or availability. In the case of non-renewable resources, such as hard minerals and hydrocarbons, supplies are finite. This may seem obvious; but it is only in the past two decades or so that there has been any general awareness of the fact.

As would be expected, these developments have led to greatly increased concern about public policy on the management of natural resources. In a federal system, this means increased concern for public policy at both levels of government and the emergence of the conflicting interests inherent in any such system. In times of abundance, these conflicts are not so apparent. But the prospect of scarcity, and an appreciation of its implications for the economy, inevitably lead to competition for control of natural resources, and competition between the policies of different governments. The special circumstances of 1973 perhaps precipitated the present constitutional conflict; but it was only a matter of time before other events would have forced the same issue.

Thus, the dispute about resources should be seen as a fundamental dispute about public power and not simply as a squabble over money. The control of resources, particularly energy resources, has profound implications for the balance of power generally in a federal system. In other words, the point at which the balance of power on that issue rests determines where the general balance of power lies as between the federal and provincial governments.[42]

Two pieces of evidence support this view. The first is direct, the second perhaps circumstantial. In his opening statement to the January, 1974, Conference of First Ministers on Energy, the Prime Minister said, with reference to the question of fixing prices for oil:[43]

> It seems to me that questions of this kind go to the very heart of our federal system and the answers we arrive at will have great power, for good or for ill, to influence the economic structure of our country and our capacity to provide a good life for all our citizens.

The Premier of Ontario took a similarly broad view of the issue:[44]

> Let us remember that what we decide here could have profound implications for the maintenance of an appropriate balance between federal-provincial responsibilities. . ..

These two First Ministers were under no misapprehension as to the real nature of the emerging dispute.

The second piece of evidence is the provincial reaction to the judgments of the Supreme Court of Canada in the *CIGOL* and the *Saskatchewan Potash* cases. While the reasoning of the Supreme Court of Canada may be open to criticism,[45] in neither case was the result beyond the range of

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42. It is interesting to observe in this context the recent emergence of demands by coastal provinces for a redefinition of constitutional authority with respect to fisheries.

43. *Supra* n. 12.

44. *Supra* n. 13.

45. *See*, e.g. A. Paus-Jenssen, "Resource Taxation and the Supreme Court of Canada: The Cigol Case" (1979) 1 *Can. Publ. Policy 45*. For other comments on the *CIGOL* case, *see*: G. Morrison-Gray, "The Oil Well Income Tax Act: 1978" (1978-79) 43 *Sask. L. Rev.* 125; W. Elliott, "Jurisdictional Dilemmas in Resource Industries" (1979) 17 *Alta. L. Rev.* 91. The *Saskatchewan Potash* case has not yet been the subject of analysis in the law reviews. Without embarking here on any detailed review of the Court's reasons, it is interesting to note that the Court nowhere in its judgment referred to its own previous decision on the validity of provincial conservation legislation in *Spooner Oils Ltd.* v. *Turner Valley Conservation Board* [1933] S.C.R. 629, thereby adding another illustration of the Court's inclination to distinguish its own previous decisions by simply ignoring them. *See* P. Hogg, "The Supreme Court of Canada and Administrative Law, 1949-1971" (1973) 11 *O.H.L.J.* 187 at 217-218, 221.

predictability.[46] In fact, the results had been predicted by inference by several writers addressing themselves generally to the Constitution and provincial resource legislation.[47] Indeed, the Government of Saskatchewan seemed to acknowledge implicitly in one statement that the decisions were not necessarily wrong as interpretations of the existing provisions of the B.N.A. Act. In a document distributed at the October-November, 1978, Constitutional Conference, it concluded:[48]

> This analysis of decisions of the Supreme Court of Canada supports the conclusion reached by Mr. Gilbert L'Ecuyer in his study of Supreme Court decisions since 1949. The decisions of the Court *do* favour the federal government. But this is not because the Court is biased but because "it must interpret a text which lends itself essentially by its wording and the intent of its authors to a centralizing vision".

The provincial position should be seen for what it really is. It is not so much that the recent decisions of the Supreme Court have misinterpreted the B.N.A. Act. Rather, it is a complaint that the existing distribution of legislative authority with respect to resources is out of step with their aspirations and with what, in their view, should be the appropriate balance between federal and provincial interests. It advocates constitutional reform and not merely constitutional clarification. The motivation is the one already suggested, namely, that the provinces have realized the profound implications of the control of resources for the general balance of power. Hence at least some of them seek to tip that balance in their favour.

V. SOME IMPLICATIONS

These observations may seem obvious after reflecting on developments since 1973, but there are three particular implications that should be addressed.

A. *The Federal Position Reexamined*

First, the federal government probably cannot move much further on the issue; for to do so would almost completely emasculate its powers over interprovincial trade and commerce in provincial resources.[49] Furthermore, notwithstanding the vagueness of the phrase "a compelling national interest" discussed earlier, the "best effort" draft proposals discussed by the First

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46. J. Ballem, "Oil and Gas and the Canadian Constitution on Land and Under the Sea" (1978) L.S.U.C. Special Lectures, at 251, comments on the *CIGOL* case: "Regardless of the indignation professed by the politicians, the court was doing nothing more than performing its function of interpreting our Constitution, and there is little in its ruling that would come as a surprise to any lawyer who practices in the constitutional field."

47. *See* generally, J. Ballem, "Constitutional Validity of Provincial Oil and Gas Legislation" (1963) 41 *Can. B. Rev.* 199; G. Acorn, Constitutional Law Problems in Canadian Oil and Gas Legislation: The Background" (1964) 3 *Alta. L. Rev.* 367; G. Holland, "Constitutional Law Problems in Canadian Oil and Gas Legislation: The Federal Case" (1964) 3 *Alta. L. Rev.* 393; A. Thompson, "Implications of Constitutional Change for the Oil and Gas Industry" (1969) 7 *Alta. L. Rev.* 369; W. Ready, "The Saskatchewan Potash Prorationing Scheme" (1971) 9 *Alta. L. Rev.* 592; M. Crommelin, "Jurisdiction over Onshore Oil and Gas in Canada" (1975) 10 *U.B.C. L. Rev.* 86; J. Lowery, "The Oil and Gas Conservation, Stabilization and Development Act, 1973" (1975) 13 *Alta. L. Rev.* 100; D. Thring, "Alberta, Oil, and the Constitution" (1979) 17 *Alta. L. Rev.* 69.

48. Recent Decisions of the Supreme Court of Canada: A Saskatchewan View (1978), Conference Document No. 800-8/035.

49. Except perhaps for emergencies in the sense in which that word is defined by the jurisprudence on the existing "peace, order, and good government" clause of the B.N.A. Act.

Ministers in February, 1979, represent a significant shift from the *status quo*. Those proposals would empower the legislation struck down in both the *CIGOL* and *Saskatchewan Potash* cases, if not on the basis of exclusive provincial authority, then at least in the absence of federal legislation enacted by Parliament as being "necessary to serve a compelling national interest". Indeed, considering the implications for the general balance of power discussed above the draft proposals reveal that the federal government is prepared to move a surprising distance.[50]

B. *The Persistence of the Issue*

The second implication is perhaps more significant: constitutional reform with respect to natural resources is not a passing matter. The issue may have taken only six or seven years to attain its current proportions, but it would be a mistake to think that it might disappear as quickly as it appeared. It is independent of any general movement towards reform that derives its impetus from the threat posed by Quebec separatism. It is purely coincidental that the issue has arisen at the same time as the Quebec issue. Because of its profundity, the question of constitutional reform with respect to resources will persist until a new accommodation is struck, either by redefining constitutional authority or by rearranging *de facto* control within the existing assignment of authority.

This is not likely to happen in the immediate future for two reasons. First, the difficulty inherent in balancing provincial and federal interests with respect to resources militates against quick solutions. Secondly, even if a formula for determining the point of this balance were agreed upon by the federal government and all provincial governments, the B.N.A. Act would remain unamended. Formal entrenchment of such a formula would almost certainly have to await general agreement with respect to the division of other legislative powers; and that agreement is not likely to be forthcoming in the present political environment nor in the immediately foreseeable future. However, agreement on the particular issue might avoid a repetition of the competition for jurisdiction that has characterized the past few years.

C. *Pawns in a Federal-Provincial Chess Game*

The likely persistence of the issue leads to the third implication: until a new accommodation is struck, the competing jurisdictions might be expected to assert their authority so as to narrow the scope for extension of *de facto* control by the other side. In other words, the power struggle is likely to involve a strategy of asserting *de facto* jurisdiction independently of the management of resources *qua* resources. As a result, the resource industries, particularly the petroleum industry, may increasingly find themselves as pawns in a federal-provincial chess game.

This strategy has already emerged. In the May, 1977, Report of the Western Premiers' Task Force on Constitutional Trends, a number of federal initiatives with respect to non-renewable resources were cited as "intrusions"[51] upon provincial jurisdiction. Later, on October 10, 1978, the

50. In one communication, *supra* n. 23, the Premier of Saskatchewan indicated he would propose a provision "along the lines of that proposed by the Canadian Bar Association's Committee on the Constitution". The "best effort" draft proposals, in some respects, go even further than that proposal. If this view is correct, it indicates how much the federal government seems to have conceded.

51. *Supru* n. 18.

Premier of Saskatchewan wrote to the Prime Minister as follows:[52]

> In addition to its interventions in court cases, the federal government has taken other steps to lessen provincial powers to manage and tax resources. These affect all the Western provinces. Examples that come readily to mind include the unilateral changes to the Income Tax Act that disallowed the deduction from corporate income of provincial taxes and royalties for federal tax purposes; the Petroleum Administration Act, under which the federal government assumed the power to set oil prices; the export tax on oil; certain provisions of the Nuclear Control and Administration Act (Bill C-14); and, most recently, the declared intention of the federal government to abrogate the oil pricing agreement with the producing provinces.
>
> Taken together, *these actions seem to indicate a deliberate strategy to expand federal jurisdiction* at the expense of provincial powers to manage and tax natural resources. (Emphasis added).

Notably, most, if not all of the examples cited, are probably within federal legislative compentence.[53]

1. *The Royalty and Taxing Measures of 1973-74*

It is more interesting to note the order of events in relation to the specific question of oil pricing and taxation. The federal government first moved with its September 4, 1973, announcement of a freeze on the average wellhead price of Alberta crude oil at $3.80 a barrel, followed by the imposition of its oil export tax in October, 1973. The implications of these moves precipitated the provincial moves with respect to royalties and taxation that followed almost immediately. It has been observed that the primary objectives of the December, 1973, "Energy Session" of the Alberta Legislature were, first, to recover the revenues lost to the federal treasury by virtue of the federal export tax on oil and, secondly, "*to assert the province's control* over the pricing and marketing of its petroleum resources".[54] The speed of the provincial response is what is of interest here. Another commentator has pointed out that the Saskatchewan legislation struck down in the *CIGOL* case had been unwisely rushed into "without careful study and consideration".[55] Then, in May, 1974, the federal government proposed its Budget disallowing the deduction of royalties and taxes paid to provincial governments in the computation of income for federal income tax purposes.[56]

The strategy at play here on both sides was one of matching each move with a move designed to counteract the preceding move, rather than a balancing of legitimate government interests with legitimate industry interests.

The worst consequences of that chapter are now history. But it would be well to remember that the regulation of resources *qua* resources, for a time, was an almost irrelevant consideration in the federal-provincial conflict. Moreover, as in most strained marriages, the blame was not all on one side.[57]

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52. *Supra* n. 23.
53. Crommelin, *U.B.C. L. Rev. supra* n. 47, at 141, argues that the provisions of the Income Tax Act, S.C. 1970-81-72, c. 63 as am., making provincial royalties non-deductible in the calculation of taxable income from oil and gas production, may be *ultra vires* the federal Parliament as being in relation to a matter coming within "the management and sale of public lands belonging to the province" under section 92 (5) of the B.N.A. Act. But it is difficult to accept this view. It may be true, as he argues, that to make the major element of the consideration paid to the provinces for Crown oil and gas rights non-deductible is to discriminate against the development of these resources. But the discriminatory nature of a taxing measure is not the test of its constitutional validity.
54. P. Tyerman, "Pricing of Alberta's Oil" (1976) 14 *Alta. L. Rev.* 427 at 430, 433. Emphasis added.
55. W. Elliott, *supra* n. 45 at 100.
56. *See generally*, P. Tyerman, *Alta. L. Rev. supra* n. 54 at 431-433.
57. *See* the comments of W. Elliott, *supra* n. 45 at 101.

2. *The Newfoundland Offshore Regulations*

A second, although perhaps less obvious, illustration of the chess game strategy is the dispute between the federal government and Newfoundland over offshore jurisdiction. The federal government and the three Maritime Provinces reached a political settlement of the offshore question in February, 1977,[58] but Newfoundland found that agreement unacceptable and has continued to claim exclusive jurisdiction over the offshore area adjacent to the province, in relation to the exploitation of mineral resources. Despite negotiations towards a political settlement, the province is preparing for a reference of the issue to the Supreme Court of Canada.[59] In the meantime, it has promulgated its own Regulations,[60] which differ significantly from the proposed Canada Oil and Gas Act.[61]

No doubt the province prepared these Regulations primarily to implement its own provincial policy objectives. But it seems that their timing, and to some extent their substance, were influenced by the jurisdictional dispute. It seems more than coincidental that the White Paper leading up to the Regulations was issued in May, 1977, just three months after the agreement between the federal government and the Maritime Provinces. In relation to the substance of the Regulations, reference should be made to the reasons why the Maritime Provinces Agreement was unacceptable to Newfoundland. In its White Paper, the Province referred to a forthcoming comprehensive document that would set forth those reasons. It continued:[62]

> The paper will also analyze a condition of the Maritime Provinces Agreement that the current draft Federal regulations be adopted. Applied to Newfoundland, this would mean that unlike the Province's draft regulations, there would be no provisions relating to such matters as:
>
> (1) preference for Newfoundland labour, goods and services;
> (2) compulsory training and research and development programs in the Province;
> (3) the landing in the Province of any oil or gas produced offshore;
> (4) minimum expenditures within the Province;
> (5) preference for the local refining, processing and consumption of any oil or gas found;
> (6) provincial control of the rate of development.

In light of this statement, the province had to ensure that its own Regulations would deal adequately with these matters and then gamble that such Regulations would be acceptable to the exploration industry. This would demonstrate to Ottawa that Newfoundland's demands were both reasonable and capable of implementation by provincial initiative.

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58. *See* the "Federal-Provincial Memorandum of Understanding in respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces," February 1, 1977. The Memorandum is discussed in R. Harrison, "The Offshore Mineral Resources Agreement in the Maritime Provinces" (1978) 4 *Dal. L. J.* 245.

59. *See*, "A White Paper and Draft Regulations respecting the Administration and Disposition of Petroleum belonging to Her Majesty in the Right of the Province of Newfoundland", issued under the authority of A. Brian Peckford, Minister of Mines and Energy, May, 1977, at 5-6. In view of the recent undertakings by the Prime Minister to concede provincial jurisdiction over offshore areas, it is not now likely that the proposed reference to the Supreme Court of Canada will proceed.

60. The Newfoundland and Labrador Petroleum Regulations, Nfld. Reg. 233/77, as am.

61. *See*, An Act to regulate the disposition and development of oil and gas rights, 3rd Sess. 30th Parl., 1977, Bill C-20 (H. of C.)

62. *Supra* n. 59 at 4-5. It is debatable that there would be no provisions relating to all these matters under the proposed federal regulations, as the White Paper alleges. The "comprehensive document" referred to has not in fact been published.

The Regulations were promulgated on October 24, 1977. On March 1, 1978, the Minister of Mines and Energy announced the issue of the first permits under the new Regulations to Shell Canada Resources Ltd. Perhaps still feeling a little nervous about the situation, the Minister's statement was restrained on the political significance of the event:[63]

> It is vital. . . to recognize the significance of the issuance of these permits. This is. . . an illustration of the simple fact that we can protect our interests by adopting a firm yet reasonable position and back that position up with courage and perseverance.

But as the number of permits increased, the rhetoric expanded. In his statement on May 4, 1978, announcing the next issue of permits, to Mobil Oil Canada, the Minister was a little bolder:[64]

> The issuance of these permits to Mobil Canada is yet a further indication that the Province's firm yet reasonable Regulations do form the basis upon which exploration can go forward on terms which are both acceptable to the oil companies and yet truly protective of the interests of the people of this Province.
>
> For instance, one of our main concerns has been the vast amount of acreage under federal Permit. . .. In light of this, it is important to note that Mobil's new Permits cover only about 56% of the area held under federal Permit. . ..
>
> Mr. Speaker, the issuance of these permits to Mobil Oil Canada is yet another step on our way to the full victory in our offshore minerals struggle with Ottawa which I am sure will be ours. By such acts, we demonstrate not only the high regard in which the oil industry holds our chances in court but more importantly our vision to be able to set a policy which is firm yet reasonable.

By May 18, 1978, when he announced the issue of Permits to the Total Eastcan Group, the Minister was almost waxing lyrical:[65]

> The issuance of these Permits represents a major milestone in the long struggle by this Government to protect the ownership rights of the people of this Province to their offshore mineral resources against Ottawa's unfounded and unwarranted claim to them.
>
> * * *
>
> I hasten to add, Mr. Speaker, that while we have won a great battle, the war is not yet over — next comes an epic clash with Ottawa before the Supreme Court of Canada.
>
> Mr. Speaker, a major part of our legal case will rest on the struggle of the Newfoundland people to protect their natural resources against seemingly overwhelming odds. We will be citing such great victories as the resolution of the French shore problem in 1904, which secured our West Coast, the North Atlantic Fisheries Arbitration of 1910 which forced American fishermen from our bays and the Labrador Boundary Case of 1927 which confirmed our right to Labrador. Not only will the basic legal and political principles which are at the core of these great victories be dissected and examined but in doing so the tremendous achievements that those victories represent will once again become a source of pride and strength to all Newfoundlanders.
>
> Mr.Speaker, perhaps today's announcement does not rank with those great victories. However, it should now be apparent to all concerned, whether in Ottawa, Calgary, Houston or Paris, that the tide of events in the question of offshore oil and gas has changed and that it is now flowing, relentlessly and with increasing momentum, in favour of the Newfoundland people.

It is doubtful that any previous oil and gas permits have been issued with such a fanfare. The strategy, it is suggested, is self-evident.

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63. Press Release by the Honourable A. Brian Peckford, Minister of Mines and Energy, Province of Newfoundland and Labrador, March 1, 1978.
64. Ministerial Statement of the Honourable A. Brian Peckford, Province of Newfoundland and Labrador, May 4, 1978.
65. Ministerial Statement by the Honourable A. Brian Peckford, Minister of Mines and Energy, Province of Newfoundland and Labrador, May 18, 1978.

3. *The Energy Supplies Emergency Act, 1979*

The third illustration of the chess game strategy may be found in the Energy Supplies Emergency Act, 1979[66] and the circumstances leading to its enactment.

As a member of the International Energy Agency, Canada is required to restrain Canadian demand for oil when the Agency's emergency oil sharing system is triggered. Until the enactment of the Energy Supplies Emergency Act, 1979, it had no legislative framework by which to meet its international responsibilities directly should it be required to do so. Thus, some such federal legislation was called for. But the context and manner in which the particular Act was introduced are of interest here.

It seems that the federal Minister of Energy, Mines and Resources learned sometime in January, 1979, that Exxon planned to divert some shipments of Venezuelan crude oil destined for Imperial Oil Ltd. for Eastern Canadian markets. Yet it was not until the second week of February that the news surfaced publicly. The intervening event was the Federal-Provincial Conference of First Ministers on the Constitution, on February 5 and 6, where the proposal to limit the federal trade and commerce power to circumstances of "compelling national interest" was discussed. Did the federal government see the curtailment of supplies issue as one that would demonstrate to the public, and possibly to some provinces, the necessity for it to continue to have strong powers to deal with energy resources? Did it hope to win support for the reasonableness of the position that had just been rejected by Alberta and Quebec by making such a flourish of the issue hot on the heels of the failure to reach agreement at the federal-provincial conference? We can only speculate about the answers so far as the timing is concerned.

But the substance of the Bill introduced in the House of Commons on February 16, 1979 for the Energy Supplies Emergency Act, 1979 lends greater support to the thesis that the government seized the opportunity to further expand its *de facto* control of the energy industry. Two things in particular should be noted about the Act in this context. First, it does nothing to deal directly with the problem of the diversion of offshore supplies in circumstances such as those that arose from Exxon's announced intention. Although the Act was not enacted solely in response to that problem, the need for the federal government to be able to act directly should the same situation arise again was given as one of the reasons for the Act. The Act might be used indirectly by way of threat to exercise some of the powers it confers unless diverted offshore supplies were "recaptured". But there are several other existing federal levers that could be used in that indirect way, such as the import compensation program. Secondly, and more importantly, the Act contains extraordinarily sweeping powers. The Toronto *Globe and Mail* commented in an editorial at page 6 on March 15, 1979:

> It is an arbitrary act which would give the Government powers to set up an arbitrary board to take control of all petroleum products and their alternatives and everything that could happen to them, overriding all acts and agencies now dealing with these matters, and obliterating civil rights of hundreds of thousands of Canadians. It is an act not needed.

66. An Act to provide a means to conserve the supplies of energy within Canada during periods of national emergency caused by shortages or market disturbances affecting the national security and welfare and the economic stability of Canada, 4th Sess. 30th Parl., 1979, Bill C-42(H. of C.).

On May 9, 1979, an editorial at page 6 in the same paper observed:

> The Government of Pierre Trudeau. . . has had the habit of writing legislation apparently intended to meet a perceived need, but including in it arbitrary powers that are not necessary in the existing situation and that provide strong potential for abuse of individual liberties.
>
> The most recent example of this is the Energy Supplies Emergency Act. It was brought in under cover of the public excitement caused by Exxon Corporation's diversion of Venezuelan oil intended for Canada; but it had little to do with this. Instead it gave the Cabinet the power to name a board to take authoritarian control of practically everything remotely connected with energy, whether it was pipelines or your kitchen stove.
>
> A measure not necessary, and most threatening to essential freedoms.

So what was the purpose of the Act? Possibly the answer is found in the *Globe and Mail's* earlier report that many Albertans saw the Act as "a thinly veiled threat to provincial control of. . . petroleum resources".[67]

4. *The Wider Significance of the Case Studies*

These three different plays of the federal-provincial chess game have been chosen for two reasons. First, they support the view that the tactic of asserting authority so as to narrow the scope for *de facto* control being extended by the other side is employed by both federal and provincial governments. Secondly, they demonstrate that the strategy is persistent and that actions and responses in individual situations are only particular manifestations of that strategy[68] which relates to the broader question of the general balance of power in the federal system.

D. *Some More Specific Implications*

What are the implications of all this for the future regulation of the resource industries and in particular the petroleum industry?

The first is that the ever present uncertainty in speculating about government response to particular developments is compounded by an additional consideration. Similarly, the inherent uncertainty in any federal system as to who has jurisdiction to deal with a particular matter is also further compounded. To the questions of who has jurisdiction and how that jurisdiction might be exercised to deal with this particular problem, a further question is added: how might that jurisdiction be exercised to preserve — or, *de facto*, even expand — the jurisdiction itself against countervailing measures by the other level of government? It has already been suggested that there is a distinct risk that the measures taken will not necessarily be measures proper for the management of resources *qua* resources.

The second implication is that this strategy will likely result in more legislative and regulatory intrusions upon the industry than might otherwise be the case. The strategy, by definition, involves the actual assertion of authority and precipitates government action when the possibility of action by the other level of government arises. It is necessary to not only claim jurisdiction at the political level but to actually exercise it.

The prospect of more regulation might be present even if there were agreement between the federal government and the provinces on a reallocation of authority with respect to resources and that agreement was entrenched in

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67. The Toronto *Globe and Mail*, April 19, 1979, at 9.

68. J. Ballem, "Oil and Gas and the Canadian Constitution on Land and Under the Sea", *supra* n. 46 at 251, in noting that "things have been relatively quiet on the federal-provincial front since the head to toe confrontation that raged over oil and gas between late 1973 and mid-1974," observes further: "However, the truce is fragile and can be shattered by events over which the governments themselves, whether provincial or federal, have no control."

the Constitution. The pressures to jealously guard the new territory so staked out by actual assertion of authority would still be present. Perhaps the only change would be a shifting of the defined point of balance between federal and provincial interests. The difficulties inherent in determining the precise location of that point in particular circumstances would remain, as would the motivation on each side to attempt to shift the point of balance in its favour.

The specific prospect of reforming federal agencies so as to make them "national", as distinguished from "federal" agencies should also be elaborated upon. As discussed earlier,[69] some of the provinces have advocated that federal energy and resource agencies, particularly the National Energy Board, should be restructured to permit direct provincial membership. This could further complicate the regulatory scene, as it would limit the federal government's present ability to resolve competing provincial interests. Not only would the process of arriving at a resolution of particular issues be complicated, but the prospect of such issues being settled on the basis of a count of provincial votes would arise. Instead, in many cases, an "arbitrated" solution based on a balancing of interests is necessary, rather than acceptance or rejection of a "final position" adopted by one of those interests. The balancing of competing provincial interests by the federal government is, after all, largely what a federal system is about.[70]

VI. THE PROSPECTS FOR "JOINT" JURISDICTION

The view that formal constitutional amendment is unlikely to be brought about in the immediately foreseeable future has already been stated.[71] What might be done in the meantime to cope with the jurisdictional problems with respect to natural resources?

"Where there is a will, there is a way" is, in many respects, as true of constitutional matters as of other matters. *Given agreement at the political level*, the techniques available for implementation of that agreement are quite varied and flexible, even within the existing constitutional framework.

The B.N.A. Act in its present form does not permit the outright delegation of legislative power from one level of the federal system to the other. It does permit the delegation of the administration of legislation to a subordinate agency of the other level of government. It also permits the adoption of the legislation of one level as the legislation of the other level.[72] The authorities make it clear that these techniques combined can, from a practical viewpoint, permit almost anything that could be achieved by the outright delegation of legislative authority itself.

There are already examples of this technique in the resources field. The most obvious is the "Federal-Provincial Memorandum of Understanding in respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces", executed on February 1, 1977.[73] A second

69. *Supra* at n. 39 *et seq*.
70. This should not be read as necessarily implying that the federal government has performed its balancing role properly in the past.
71. *Supra*.
72. *See generally*, E. Driedger, "The Interaction of Federal and Provincial Laws" (1976) 54 *Can. B. Rev.* 695. *See also*, J. Ballem, *supra* n. 47 at 230-233, for a discussion of the potential use of these techniques in the specific context of the petroleum industry.
73. *See*, R. Harrison, *supra* n. 58.

example is the present means by which the domestic price of Canadian oil is determined. In many respects the technique amounts, *de facto*, to joint federal-provincial jurisdiction.[74] More recently, indications of a limited willingness on the part of the federal government to agree to joint jurisdiction with respect to fisheries have suggested this possible solution for another natural resource.

However, there is an important distinction between the employment of these techniques and formal constitutional amendment. No agreement between governments in the Canadian federal system can change the constitutional distribution of legislative power. Thus, employment of any of the techniques would be subject to the constraint that ultimate authority would continue to rest where it does now. Any attempt to assign or "delegate" that ultimate authority would not be permissible.

The first consequence is that any permissible scheme for provincial involvement in resources management (outside of those matters that are already within provincial competence) would depend upon the ongoing agreement of the governments involved for its continued effectiveness. Ultimate authority would remain unchanged.

The second consequence is that the recognition of that ultimate authority is itself used to some extent as a bargaining tool in the process of trying to reach agreement on how extensive the provincial role should be. The existing ultimate authority would continue in the absence of constitutional amendment; and, not surprisingly, the level of government having that authority would point to its authority as a *responsibility*. Thus the federal government might say: "Yes, we agree that perhaps there should be a greater provincial role in some aspects of resources that are now under federal jurisdiction, but you have to recognize that in giving us the authority and power to deal with those aspects, the Constitution is also imposing upon us the responsibility of dealing with the matter ourselves. We would be failing that responsibility if we were to give up the ship to you". In other words, there is an inherent limitation upon how far provincial aspirations, not can be, but will be accommodated within the existing framework.[75]

Therefore, while the means exist to implement any political agreement on a redefinition of constitutional authority with respect to resources, the prospects for a resolution of the problem along these lines are not encouraging. Even if an agreement were reached and implemented within the existing framework, its dependence upon the continuing acquiescence of all the governments involved would add another element of uncertainty to the jurisdictional scene.

VII. CONCLUSION

The profound implications of public policy on natural resources for general economic well-being motivate governments to defend (and even attempt to

74. *See*, Petroleum Administration Act, S.C. 1974-75-76, c.47.

75. J. Ballem, *supra* n. 47 at 232, comments: "There is no reason to believe, however, that the Dominion will abdicate its powers of control over this particular industry. It is one thing to permit a provincial board to regulate the trade in potatoes, or to regulate certain local aspects of an international motor carrier. It is an altogether different thing to turn over control of an industry which has become a vitally important part of Canada's economic life".

expand) their jurisdictional ability to determine and implement that policy. In a federal system, this will inevitably cause disputes about the proper balance between national and local interests. Even if agreement is reached on where that point of balance should be at any particular time, such agreement may not be enduring. The federal-provincial dispute over jurisdiction with respect to resources will likely persist.

This is a pessimistic conclusion insofar as it suggests that the management of resources, *qua* resources, may from time to time be sacrificed to the grasp for power. But that is a price for a federal system.[76]

76. D. Smiley, "The Political Context of Resource Development in Canada" in Scott, *Natural Resource Revenues: A Test of Federalism* (1969) 61 at 71, writes: "Faced with intractabilities of decision within the context of joint action by two or more autonomous yet interdependent political actors, there is a characteristic retreat towards incantations for improved methods of co-ordination. Yet in many circumstances, certainly so in federal-provincial affairs, these actors are determined not to be co-ordinated, and a contemporary student of American government has written what is equally true of Canada: 'The quest for coordination is in many respects the twentieth-century equivalent of the philospher's stone. If only we can find the right formula for coordination we can reconcile the irreconcilable, harmonize competing and wholly divergent interests, overcome irrationalities in our government structures and make hard policy choices to which no one will dissent.' " Citing Harold Seidman, *Politics, Position and Power: The Dynamics of Federal Organization* (1970), 164.

APPENDIX A

DRAFT PROPOSAL DISCUSSED BY FIRST MINISTERS AT THE FEDERAL-PROVINCIAL CONFERENCE ON THE CONSITUTION, OTTAWA, FEBRUARY 5-6, 1979

RESOURCE OWNERSHIP AND INTERPROVINCIAL TRADE

(1) (present Section 92)	(1) Carries forward existing Section 92.
Resources (2) In each province, the legislature may exclusively make laws in relation to a) exploration for non-renewable natural resources in the province; b) development, exploitation, extraction, conservation and management of non-renewable natural resources in the province, including laws in relation to the rate of primary production therefrom; and c) development, exploitation, conservation and management in the province and of sites and facilities in the province for the generation of electrical energy, including laws in relation to the rate of primary production therefrom.	(2) The draft outlines exclusive provincial legislative jurisdiction over certain natural resources and electric energy within the province. These resources have been defined as non-renewable (e.g. crude oil, copper, iron and nickel), forests and electric energy. This section pertains to *legislative* jurisdiction and in no way impairs established *proprietary* rights of provinces over resources whether these resources are renewable or non-renewable.
Export from the province of resource (3) In each province, the legislature may make laws in relation to the export from the province of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for prices for production sold for export to another part of Canada that are different from prices authorized or pro-	(3) Provincial governments are given concurrent legislative authority to pass laws governing the export of the resources referred to above from the province. This legislative capacity is in the sphere of both interprovincial and international trade and commerce. Provincial governments are prohibited from price discrimination between resources consumed in the province and those destined for consumption in other provinces. This new provincial

vided for production not sold for export from the province.

legislative capacity applies to these resources in their raw state and to them in their processed state but does not apply to materials manufactured from them.

Relationship to certain laws of Parliament

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

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

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

(4) The effect of this provincial legislative responsibility over trade and commerce diminishes the scope but does not eliminate the federal government's exclusive authority over trade and commerce. The exercise of the provincial power is subject to two limitations. First, the federal government may legislate for interprovincial trade if there is "compelling national interest". This trigger mechanism may apply to circumstances other than an emergency as established under the peace, order and good government power. Second, federal laws governing international trade prevail over provincial laws in international trade, in effect establishing a concurrent power similar to that for agriculture.

Taxation of resources

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

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

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

whether or not such production is exported in whole or in part

(5) Provincial powers of taxation are increased to include indirect taxes over the resources outlined in this section — whether these resources are destined in part for export outside the province. These taxes are to apply with equal force both in the province and across the rest of the country.

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.

Production from resources

(6) For purposes of this section,

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

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

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

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

(6) In determining the scope of provincial legislative powers over resources exported from the province, it became necessary to define the degree to which the resource was processed. It is not intended to extend provincial authority to manufacturing but it is intended to extend it to something beyond its extraction from its natural state. Given the varying resources covered by this section, the wording of this sub-section is thought to place the appropriate limitations on provincial powers.

Existing Powers

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

(7) This clause ensures that any existing provincial legislative powers found in s. 92 are not impaired by the new section.

LIST OF ALTERNATIVES COVERING THE DISPOSITION OF SECTION 109

Option 1 Maintain the status quo, do not carry forward Section 109.

Option 2 (a) Property in lands, mines, etc. *"123.1 All lands, mines, minerals and royalties belonging to any province immediately before this section comes into effect, and all sums then due or payable in respect of any such lands, mines, minerals and royalties, belong immediately after this section comes into effect to the province or are then due and payable, subject to any trusts existing in respect thereof and to any interest other than that of the province therein."

Option 2 (b) Ownership of property *"123.1 All property belonging to any province immediately before this section comes into effect, belongs immediately after this section comes into effect to the province, subject to any trusts existing in respect thereof and to any interest other than that of the province therein."

Option 3 Ownership of property "127.1 Nothing in this Act changes the ownership in any property owned by Canada or a province immediately before the coming into force of this Act."

*Note: Numbering is tied in to numbering found in Bill C-60.

INDIRECT TAXATION

Taxation within the province by any mode or system of taxation for provincial purposes, except indirect taxation that a) constitutes a tax on the entry into or export from the province or otherwise has effect as a barrier or impediment on interprovincial or international trade, or b) is so imposed that the burden of the tax is passed outside the province.