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Abstract

The 1982 resource amendment to the Constitution, section 92A, has been analysed primarily from the perspective of its impact on intergovernmental relations in the formation of resource policies. Yet the fundamental, constitutional 'rules of the game' may also affect the ongoing relationship between governments and private-sector resource participants. In this article, the authors discuss how section 92A might affect that relationship in terms both of the policy-making process and of the substance of the resultant policies.

CONSTITUTIONAL CHANGE AND THE PRIVATE SECTOR: THE CASE OF THE RESOURCE AMENDMENT

BY ROBERT D. CAIRNS,* MARSHA A. CHANDLER,** WILLIAM D. MOULL***

The 1982 resource amendment to the Constitution, section 92A, has been analysed primarily from the perspective of its impact on intergovernmental relations in the formation of resource policies. Yet the fundamental, constitutional 'rules of the game' may also affect the ongoing relationship between governments and private-sector resource participants. In this article, the authors discuss how section 92A might affect that relationship in terms both of the policy-making process and of the substance of the resultant policies.

I. INTRODUCTION

The recent changes in Canada's *Constitution*¹ have been extensively analysed from both legal and political perspectives. So far, most of the commentary has focused on the implications of constitutional change for intergovernmental relations and on the limitations on government powers that flow from entrenchment of individual rights under the *Charter*.² This has been particularly so in the case of the resource amendment contained in section 92A of the *Constitution*,³ where the bulk of the analysis has centred on relationships in the public sector. Indeed, in an earlier paper⁴ we ourselves explored the impact of section 92A on Canadian federalism. However, there is little question that the prevailing constitutional arrangements also form the fundamental rules

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¹ *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *ibid.*

³ *Supra*, note 1, Part VI, ss 50, 51.

⁴ R.D. Cairns, M.A. Chandler & W.D. Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23 *Osgoode Hall L.J.* 253.

of the game for the private sector. Thus, any major change in the intergovernmental dynamic will have consequences for the public-private nexus. The purpose of this paper is to consider the effects of the constitutional revisions contained in section 92A on the relationship between governments and the resource industry.

To do this it is first necessary for us to spell out the formal changes in the *Constitution* and to indicate the likely legal implications of the new constitutional arrangements for the private sector. The focus of the paper then shifts to the possible policy impact of section 92A. The first element in examining its direct consequences for industry is the effect it may have on the *process* of policy making. Will the constitutional changes lead to alterations in the modes of consultation and negotiation between government and business? Operating under section 92A, will the resource industry be more removed from the policy process, or will the new arrangements portend greater access for industry? The second question here is the possible effect on policy *substance*. Does section 92A suggest that there may be greater government intervention in the resource sector? Are the instruments of resource policy used by governments likely to change? In conclusion, we will offer some thoughts on how the ongoing relationships between governments and the resource industry may develop under section 92A.

II. THE LEGAL PERSPECTIVE

The resource amendment, contained in section 92A of the *Constitution*, has altered the face of provincial legislative powers in relation to natural resources. In a formal sense, in the context of the division of the complete range of legislative powers in Canada between the federal and provincial orders of government, section 92A has shifted the balance more toward the provincial side by augmenting provincial powers to raise revenues from resources and to regulate their development and production. At the same time, however, the pre-existing legislative powers of Parliament have not been diminished by section 92A. Overall, section 92A has strengthened the role of the producing provinces as resource administrators, but not at the expense of the prior role of the federal government.

In so doing, section 92A has gone a long way toward overcoming the legislative incapacities of the provinces that resulted from the decisions of the Supreme Court of Canada in *CIGOL*⁵ and *Central Canada Potash*⁶

⁵ *Canadian Industrial Gas & Oil Ltd v. Government of Saskatchewan* (1978), [1979] 1 S.C.R. 37, 80 D.L.R. (3d) 449 [hereinafter *CIGOL*].

⁶ *Central Canada Potash Co. Ltd v. Government of Saskatchewan* (1979), [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609 [hereinafter *Central Canada Potash*].

in the late 1970s. Both of those decisions resulted from private sector challenges to legislative initiatives of the province of Saskatchewan — to its regime for capturing windfall oil profits in *CIGOL*, and to its potash prorationing scheme in *Central Canada Potash*. In both instances, the legal result turned upon the Supreme Court's perceptions of the pre-92A balance of formal federal-provincial legislative powers. At the same time, however, in both cases the protagonists were a provincial government on the one side and a private sector challenger on the other.⁷ The battleground in each case was the scope of a province's legislative powers in relation to natural resources; but the battles were waged between the province and the private sector.

However, in strengthening the formal role of the provinces as resource managers through the removal of some of the barriers to the exercise of legislative power erected by *CIGOL* and *Central Canada Potash*, section 92A does not really give any clear indication of whether the new legislative powers it confers on the provinces will be used by them or of the manner in which they will be used. It may be that possession of legislative power tempts its use; but other considerations, such as prevailing economic conditions and the political philosophies of provincial governments over time, will likely be the key factors in determining the extent to which provincial legislatures resort to their powers under section 92A. As well, several of the provisions of section 92A contain sufficient interpretive uncertainties to make it difficult to predict just how far the boundaries of provincial legislative authority have been extended and thus how far a province may be able to move if it feels inclined to do so. This is particularly so in the case of the resource-management powers set out in subsections 92A(1) and (2).

Subsection 92A(1) deals with provincial legislative powers in relation to resources within the province. It provides as follows:

- (1) In each province, the legislature may exclusively make laws in relation to
 - (a) exploration for non-renewable natural resources in the province;
 - (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
 - (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

The list of legislative powers set out in subsection 92A(1) seems comprehensive with respect to the resource-related activities it mentions.

⁷ The federal government did join in the *Central Canada Potash* litigation as a co-plaintiff after the action had been commenced. See, however, W.D. Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980) 18 Osgoode Hall L.J. 1 at 29.

All phases of resource development seem to be covered, from preliminary exploration stages through the placement of development facilities to the production stage itself. In respect of forestry resources and non-renewable natural resources, such as minerals and hydrocarbons, provincial jurisdiction specifically encompasses laws in relation to their rate of primary production. It is hard to see any material aspect of the development of resources within a province that is absent from the listing in subsection 92A(1).

Before section 92A, of course, the producing provinces exercised resource-management powers under section 92(5) of the *Constitution* in respect of provincially owned Crown lands, which are the property of the provinces under section 109 of the *Constitution*.⁸ As well, most — if not all — of the resource-related activities mentioned in subsection 92A(1) likely fell within the general legislative powers of the provinces under section 92; but section 92 does not specifically refer to resources (except for section 92(5), which is confined to Crown-owned resources), so those prior provincial powers arose by implication under other, less explicit, heads of provincial jurisdiction (such as that in section 92(13) in relation to “property and civil rights” within the province). Subsection 92A(1) has, at the very least, confirmed provincial resource-management powers within the province — powers that can be exercised as a matter of *general* legislative authority and not as a subspecies of the rights flowing from provincial Crown ownership — by expressly entrenching those powers in the *Constitution*.

The principal difficulty in interpreting the effect of subsection 92A(1) lies not so much in the scope of the resource-related activities it mentions, as those seem reasonably clear. Rather, the difficulty lies in the scope of the powers conferred in relation to those activities and especially in the purposes and objectives for which they may be used. In the *Central Canada Potash* decision, for example, the Supreme Court struck down Saskatchewan’s potash prorationing scheme on the ground that it was really intended by the province to affect the extraprovincial market in Saskatchewan potash. As an extraprovincial marketing scheme, it infringed upon the exclusive authority of Parliament in relation to inter-provincial and international trade and commerce under section 91(2) of the *Constitution*. The Court reached this conclusion despite the fact that the principal mechanism through which the scheme operated was

⁸ Those powers are expressly preserved by subsection 92A(6), as are all other prior provincial powers and rights.

a closely regulated regime of controls on the rate of production of potash within Saskatchewan.⁹

Under subsection 92A(1), and despite the fact that provincial legislative jurisdiction now expressly includes laws in relation to resource production rates, it seems likely that precisely the same result would be reached if the courts were to conclude that the principal provincial objective underlying a legislated scheme is extraterritorial. The powers conferred by subsection 92A(1) are expressly confined to resource-related activities "in the province," so that those powers must be exercised only through mechanisms and for purposes that are restricted to the boundaries of the province in question. They cannot be used to infringe upon the extraprovincial legislative powers, particularly those in respect of extraprovincial trade and commerce, which are retained by Parliament.

That is not the end of the matter, however, for subsection 92A(2) now does confer some authority on the producing provinces in relation to the extraprovincial marketing of resource production. It provides as follows:

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

The new provincial jurisdiction under subsection 92A(2) is not open-ended, as is evident from its terms. In the first place, it can be exercised only in respect of the export of resource production "to another part of Canada" — it cannot be used when resource production is also to be exported *from* Canada (as was the case in *Central Canada Potash*). Second, the proviso at the end of the subsection will prevent provincial "export" laws from operating in a discriminatory fashion. The language of that proviso is hardly a model of clarity. When read at its broadest, it may mean that a producing province cannot adopt a regime that would have the effect of favouring local use and consumption of locally produced resources by discriminating either in prices (a lower price, or price rebate, for local use or consumption) or in supplies (requiring that local needs be satisfied before allowing any exports). A narrower reading of the proviso would permit a producing province to discriminate, either in prices

⁹ The scheme also included a price-fixing element, which, while not the heart of the regime, certainly helped the Court in characterizing it as a marketing scheme with its principal effect outside Saskatchewan. However, given its view of the provincial motivation in imposing the scheme, it seems likely that the Court would have reached the same conclusion even in the absence of that price-fixing element. See Moull, *supra*, note 7 at 27-39. See also W.D. Moull, "Section 92A of the Constitution Act, 1867" (1983) 61 Can. B. Rev. 715 at 730-31.

or in supplies, as between itself and the rest of Canada so long as it did not attempt to pick and choose among the other components of the Canadian federation. When the courts come to consider its meaning, it may even be that the proper interpretation of the proviso will fall somewhere between these two extremes, perhaps with self-favouring price discrimination being prohibited but self-favouring supply discrimination being allowed.¹⁰

The third constraint upon provincial legislative powers under subsection 92A(2) arises from the express preservation of federal paramountcy in subsection 92A(3), which reads as follows:

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

Traditional judicially developed theories of federal legislative paramountcy probably would have reached the same conclusion as that made express in subsection 92A(3). Since subsection 92A(2) does not purport to confer any 'exclusive' legislative powers on the provinces, it is unlikely that the courts would have seen those powers as derogating from any pre-existing authority of Parliament (notably the trade and commerce power but including any others as well); and when otherwise valid federal and provincial legislative measures conflict, to the extent that the subject cannot comply with one without violating the other, the judicial theories of federal paramountcy always render the provincial enactment inoperative to the extent of the conflict.¹¹

While federal jurisdiction and paramountcy are expressly preserved by subsection 92A(3), it is equally clear that subsection 92A(2) represents an expansion of provincial legislative jurisdiction into a formerly forbidden field — the regulation of interprovincial marketing of resource production. For the first time, the producing provinces will be able to exercise a legislative jurisdiction to control exports of resource production from the province so long as the legislation is not discriminatory (in whatever sense of the non-discrimination proviso the courts eventually settle upon), is confined in its principal impact to exports to other parts of Canada, and does not run afoul of any overriding federal legislation. That

¹⁰ A reading along these lines is supported by the French version of the subsection (which is equally authoritative). There, the language of the proviso is divided somewhat more clearly into two types of discrimination: "discrimination in prices" ("*des disparités de prix*") and "discrimination in supplies exported to another part of Canada" ("*des disparités dans les exportations destinées à une autre partie du Canada*").

¹¹ See, for instance, the decision of the Supreme Court of Canada in *Multiple Access Ltd v. McCutcheon* (1982), [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1.

jurisdiction can be exercised in respect of the production of electrical energy in the province and in respect of the "primary production" from forestry and non-renewable natural resources in the province.¹²

However, whether — and how — that jurisdiction will be exercised by the provinces is far from clear at the moment. The resource-management powers in subsections 92A(1) and (2) have not been used as yet — at least, no new legislation has appeared that is ostensibly grounded in either provision. Current economic conditions do not seem to favour close regulation of the resource sector, and the prevailing political philosophies in the western provinces (such as the Saskatchewan Conservatives' 'open-for-business' theme since their election in April 1982) seem inimical to the pro-active style of resource management that was more common in the 1970s. It seems more likely that the powers set out in subsections 92A(1) and (2) will be reserved for reactive use in some future time of perceived crisis, either in some further conflict over resources with the federal government (as, for example, when the current federal-provincial energy agreements expire at the end of 1986) or when a provincial government believes that the private sector is unable or unwilling to respond to market conditions in the desired way (as in the prelude to Saskatchewan's imposition of potash prorationing in 1969).

The revenue-raising aspect of section 92A promises a greater degree of provincial legislative activity. In *CIGOL*, the Supreme Court of Canada struck down a measure enacted by Saskatchewan in an attempt to capture for itself the windfall profits it saw accruing to the private sector as a result of the 1973 Arab oil crisis. The Supreme Court concluded that the measure was an indirect tax borne primarily by purchasers of Saskatchewan oil outside the province and thus violated section 92(2) of the *Constitution*, which limits the provinces to "direct taxation" levied "within the province." Moreover, the Court said that Saskatchewan's measure intruded upon the federal trade and commerce power under section 91(2) because it was an "export" tax intended, at least in part, to affect the price of Saskatchewan oil in extraprovincial markets.

Subsection 92A(4) has reduced most of the fetters on provincial resource taxation powers flowing from *CIGOL*. It reads as follows:

¹² In the new Sixth Schedule to the *Constitution*, which was added by subsection 92A(5), the "primary" production from forestry and non-renewable natural resources is defined in such a way as to include, not only raw resource products, but also any processed or refined products short of the manufacturing stage (except in the case of crude oil and certain of its equivalents, where the product ceases to be "primary" as soon as it is refined). However, this extended definition of "primary" production is not likely to carry great significance for the western producing provinces, for, at the moment, most processing and refining activities to which it might apply take place elsewhere.

- (4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
- (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
 - (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,
- whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

The time-honoured distinction between direct and indirect taxation is clearly gone from the resource field. As is the case with the federal taxation power under section 91(3) of the *Constitution*, the producing provinces will now be able to impose "any mode or system of taxation" upon resources and resource production within the province. Since they may do so whether or not the taxed production "is exported in whole or in part from the province," it will no longer be of concern that someone outside the province might ultimately bear the burden of the tax in the form of higher prices.

The provincial inability to impose an "export" tax, however, remains under subsection 92A(4).¹³ That is clearly the case under the subsection itself in respect to production exported to another part of Canada, since a provincial tax regime is expressly prohibited from differentiating between that production and production not exported from the province. It is also likely the case in respect of any production exported from Canada as well as from the producing province. If a provincial measure that was in form "taxation" purported to differentiate in any material respect in relation to production destined for international markets (such as by taxing that production alone, or taxing it at higher rates than applied to other production used or consumed in Canada), then the courts probably would see the scheme as being, in substance, something other than true "taxation." In all likelihood, it would then be categorized as "export" legislation beyond the bounds even of subsection 92A(2); but in any case it would not be "taxation" legislation authorized by subsection 92A(4).

Aside from this qualification, however, subsection 92A(4) will now give the producing provinces added flexibility in designing resource revenue-raising measures. They will now be able to choose from among a full range of both direct and indirect tax regimes, including combinations

¹³ In addition to *CIGOL*, provincial "export" taxes (including combined tax-plus-rebate schemes) were struck down by the courts in *Attorney General for British Columbia v. McDonald Murphy Lumber Co.* (1930), [1930] A.C. 357, [1930] 2 D.L.R. 721 (P.C.) and in *Texada Mines Ltd v. Attorney General for British Columbia* (1960), [1960] S.C.R. 713, 24 D.L.R. (2d) 81.

of the two that were not possible in days before section 92A when an element of indirectness could taint an otherwise valid direct tax. As a result, provincial resource taxation measures can now be designed in ways that parallel the Crown royalty regimes that have been adopted for production from provincially-owned Crown lands (and for which the direct-indirect distinction was never relevant because of the different source of their constitutional authority — provincial Crown proprietary rights under section 109). In fact, the formerly crucial distinction between Crown royalties and taxation may ultimately wither away in practical terms if the flexibility of subsection 92A(4) is exploited to the fullest. At the very least, even if the provinces wish to maintain the distinction for legal and symbolic purposes, parallel royalty and taxation systems can be designed by the provinces in such a way that they are virtually indistinguishable from each other and thus, for administrative purposes, can operate essentially as one system.

Saskatchewan has already taken some steps in this regard. Effective 1 January 1983, the government replaced the complex tax regime adopted for freehold oil production after the *CIGOL* decision¹⁴ with a new statute imposing an indirect commodity tax on freehold oil production¹⁵ that is identical, in its essentials, with the pre-existing Crown oil royalty system.¹⁶ Effective 1 January 1984, it also enacted a new mineral taxation regime¹⁷ that, when compared with its predecessor,¹⁸ promises at least the opportunity for further simplification of the province's revenue-raising system. No other province has followed Saskatchewan's lead as yet. Given that a move from direct to indirect resource taxation can enhance the conceptual and administrative simplicity of a provincial revenue-raising system for any particular resource and that such a move entails far fewer elements of political philosophy than might a move towards greater use of the resource-management powers in subsections 92A(1) and (2), it is probable that other provincial governments will follow suit in the future.

Subsection 92A(4) seems likely to engender more provincial legislative initiatives than will subsections 92A(1) and (2). There is still nothing, however, in subsection 92A(4) that indicates what, if any, effect its

¹⁴ *The Oil Well Income Tax Act*, R.S.S. 1978, c. O-3.1 (Supp.).

¹⁵ *The Freehold Oil and Gas Production Tax Act*, S.S. 1982-83, c. F-22.1.

¹⁶ Compare *The Freehold Oil and Gas Production Tax Regulations*, 1983, R.R.S. c. F-19, Reg. 142, ss 201-203, with *The Petroleum and Natural Gas Regulations*, 1969, Sask. Reg. 8/69, s. 58. For further elaboration on this point, see W.D. Moull, "Mineral Taxation in Saskatchewan under the New Constitution" in R.H. Bartlett, ed., *Mining Law in Canada* (Saskatoon: Law Society of Saskatchewan, 1984) 221 at 229-30.

¹⁷ *The Mineral Taxation Act*, 1983, S.S. 1983-84, c. M-17.1.

¹⁸ *The Mineral Taxation Act*, 1978, R.S.S. c. M-17.

provisions may have on overall resource tax burdens in a province or on the level of the provincial share of resource revenues. Direct taxes can be set at low levels, indirect taxes at high levels — and *vice versa*. Provincial political philosophies and responses to economic conditions from time to time — not section 92A — will determine the future course of provincial resource tax policies. What section 92A has done is to remove a legal barrier formerly imposed by the *Constitution* on the implementation of these policies.

In the end, then, section 92A furnishes the producing provinces with additional legal shelter for their resource policies, whether in relation to resource revenue raising or resource management. Even if the new powers conferred on the provinces by section 92A are not used extensively and expressly, their enactment has reduced the chance of a successful private sector challenge to a given policy initiative to the same extent that section 92A has enhanced provincial legislative powers. Provincial government-private sector resource litigation is not likely to disappear entirely, since section 92A has many rough edges that may require judicial smoothing in the future. The scope for successful challenge, however, has been reduced considerably from what it was in the days of *CIGOL* and *Central Canada Potash*, and so has the opportunity for the private sector to play the litigation bargaining chip in its future dealings with provincial governments.

III. DIRECT POLICY CONSEQUENCES

On its face, section 92A neither specifies the nature of the policy-making process that will prevail thereunder, nor mandates any particular policy outcomes. The direct implications of the resource amendment for the private sector may thus appear uncertain. However, it is still possible to discern several consequences concerning natural resources that are of significance to the industry in its relationship with governments.

Section 92A does not purport to resolve many crucial areas of policy disagreement. Thus, the amendment leaves the management of these conflicts to other mechanisms, particularly ongoing 'nothing is forever' intergovernmental agreements rather than the more permanent, less flexible, and more difficult to achieve 'once and for all settlements' represented by constitutional amendments.¹⁹ The *Western Accord* (1985) and the *Atlantic Accord* (1985) are examples of policy-making instruments of this kind, which go beyond previous intergovernmental agreements.

¹⁹ On the differences between these two modes, see J.S. Dupré, "Reflections on the Workability of Executive Federalism" in R. Simeon, ed., *Intergovernmental Relations*, vol. 63 (Toronto: University of Toronto Press, 1985) 1.

These accords provide a *modus operandi* that is at once more flexible than a constitutional amendment and yet, at the same time, more stable and indeed more binding than a simple administrative agreement.²⁰ What has emerged since the passage of section 92A has been greater federal-provincial cooperation. These accords, as well as the ongoing natural gas pricing agreements, are reflective of a mutual acceptance of the existence of legitimate, if not always coincident, concerns on both federal and provincial sides.

This arrangement of negotiating stable federal-provincial agreements seems important on two counts for the private sector. First, it provides a long sought-after degree of certainty for industry.²¹ It commits both levels of government to a particular set of arrangements for a finite period of time and makes unilaterally determined surprises by one government or the other less likely. Second, it provides a clear point of access for the industry, which will now be able to make its preferences known to both orders of government as they make their way to the bargaining table.

The apparent enhancement of concurrent provincial powers over resources under section 92A cannot, however, be translated automatically into policy gains for the industry. Greater concurrency still means that, as in the past, producers must be ready to press their influence upon the level of government where they will get the more sympathetic hearing.²² The strengthening of provincial legislative powers and the resultant greater concurrency of resource jurisdiction makes either level of government a potential focus for industry influence.

Increased provincial powers over interprovincial trade and all forms of resource taxation have, at the same time, reduced the opportunity for private interests to challenge provincial legislation in the courts (as occurred in the *Central Canada Potash* and *CIGOL* cases).²³ Finding it more difficult to use the judicial route to counter provincial regulation and taxation, the industry will be found to depend even more on the

²⁰ For a discussion of the place of "Accords" in Canada's division of powers, see *Report of The Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 3 (Ottawa: Minister of Supply and Services, 1985) (Chair: D.S. Macdonald) at 256-58.

²¹ In his analysis of the submission of the mining industry to the Macdonald Commission, David Yudelman argues that uncertainty with regard to government intervention was deemed a crucial problem by the industry. See D. Yudelman, *Mining and the Macdonald Commission: The State of the Industry in the Mid-1980s* (Kingston: Centre for Resource Studies, Queen's University, 1985).

²² See G. Stevenson, *Unfulfilled Union* (Toronto: MacMillan, 1979).

²³ This is not to suggest that there are not ambiguities in section 92A or that there are not constitutional limits on provincial powers thereunder. Both exist, of course, and the courts may have to address them in the future; but the overall scope for judicial review of provincial resource legislation has clearly been reduced.

political process in order to pursue its interests. The conflicts at the political bargaining table are less likely to be focused on jurisdictional issues as they were in the past. The likelihood of policy being determined by political bargaining rather than by the courts is reinforced by recent experiences in which, even with apparent legal authority, the federal government was unwilling to proceed without the cooperation of the producing provinces. The management of offshore resources and natural gas pricing are two important examples of Ottawa seeking provincial agreement in areas for which there was clear federal legislative jurisdiction.²⁴ In sum, the constitutional changes in provincial powers over non-renewable natural resources make it less likely that private interests can reach for the judicial lever in attempting to influence policy outcomes.

The extent of the eventual exercise of provincial powers over natural resources is not determined by section 92A itself, or indeed by any other part of the *Constitution*. As Peter Russell has pointed out, "[T]he level of a government's activity in a given field of policy depends less on its constitutional resources than on its will to use the resources it has."²⁵ Political will and subsequent policy making are conditioned by a variety of factors, including current ideology and prevailing economic conditions as well as forces outside the particular policy field.²⁶

However, section 92A has furnished provincial governments with a wider range of policy instruments. The provinces will now be better able to tailor their regulatory, tax, and incentive schemes to their own perceived needs. The availability of indirect resource taxation measures under subsection 92A(4) is an important advance for the provinces in this respect. This increased opportunity for precision may also help the provinces to avoid inadvertent secondary effects that may be to the disadvantage of private firms or individuals.

One of the important changes in this regard, particularly in the western provinces, is that, for purposes of resource management and resource taxation, the constitutional distinction between Crown and freehold lands has been blurred. Formerly, the provinces had substantially fewer constitutional powers in respect of freehold lands. Fiscal and regulatory regimes had to be established to reflect this fact. By treating the two

²⁴ M.A. Chandler, "Constitutional Change and Public Policy" (1986) 19 Can. J. Pol. Sci. 103.

²⁵ P.H. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources" (1985) 11 Can. Pub. Pol. 161 at 165.

²⁶ There are several excellent analyses of political will in the resource sector. See, for example, G.B. Doern & G. Toner, *The Politics of Energy: the Development and Implementation of the NEP* (Toronto: Methuen, 1985), and J. MacDougall, "Natural Resources and National Politics: A Look at Three Canadian Resource Industries" in G.B. Doern, ed., *The Politics of Economic Policy*, vol. 40 (Toronto: University of Toronto Press, 1985) 103.

more symmetrically, section 92A permits the provinces to have a more consistent policy for the two types of land holding. This consistency could be achieved either by a total merger of the regimes for the two types of lands or by designing parallel regimes for the two, thereby retaining the separate identity of a province's Crown lands for symbolic or other reasons. The resulting opportunity for simplification of the provincial tax and regulatory regimes, if pursued, should have the beneficial effect on the private sector of reducing the costs of compliance with often complex tax and regulatory measures.

Because the provinces have greater fiscal and regulatory authority grounded in legislative powers, there may be a somewhat diminished incentive to use the Crown corporation as a means of effecting policy objectives. For example, the creation of the Potash Corporation of Saskatchewan was partly a response to the provincial government's inability to control the development of the potash industry under the old constitutional provisions. This, however, is a difficult incentive to evaluate because of the many motives, ideology among them, involved in the establishment of Crown corporations.²⁷ Once again, other, more concrete considerations may outweigh constitutional abstractions in the choice of policy instruments.

IV. THE RESOURCE INDUSTRY AND GOVERNMENT IN THE EIGHTIES

In our earlier paper, we concluded that section 92A was part of a new stage in federal-provincial resource relations. We said that: "The amendment provides a revised framework for the management of conflict that acknowledges the legitimate interests of both federal and provincial governments in resource development."²⁸ In the immediately preceding section of this paper, we examined the prospects for direct policy consequences under section 92A for the resource sector. Beyond that, however, does the change in federal-provincial relationships under section 92A indirectly imply changes in the industry-government relationship as well?

Historically, both levels of government maintained a relatively minor role in natural resource management, confined to encouraging private sector development. There were, typically, few major differences of opinion between government departments and the private sector regarding

²⁷ See M.J. Trebilcock & J.R.S. Prichard, "Crown Corporation: The Calculus of Instrument Choice" in J.R.S. Prichard, ed., *Crown Corporations in Canada* (Toronto: Butterworths, 1983) 1, and Chandler, *supra*, note 24.

²⁸ Cairns, Chandler & Moull, *supra*, note 4 at 274.

the proper objectives of governments in relation to resource exploitation or the appropriate means of reaching those objectives.²⁹ The industry was the prime agent for developing resources while the role of the state was largely facilitative of this private sector activity.

Changes to the symbiotic relationship among federal government, provincial governments, and private resource developers were already beginning to become apparent in the 1960s, particularly in the tax reform debates of that era. Both the Carter Royal Commission on Taxation and Ontario's Smith Committee on Taxation brought forward proposals to increase taxation of the exhaustible resource industries. In the 1970s there was a continuing challenge to the favoured position of the extractive industries. More generally, no longer was resource policy left as the exclusive function of clientele-oriented mines and resources departments comprised largely of technical officials. Resources became matters for finance ministries and premiers' offices as well. In short, resource matters became highly politicized.

Conflicts between federal and provincial governments, between regions, and between the public and private sectors dominated the decade.³⁰ Increasingly, new interest groups entered the political process in the 1970s.³¹ These interest groups were not only public, but private as well. No longer was there just the triad of private producers, the producing provinces, and the federal government seeking a common goal; consumers, non-producing provincial governments, environmentalists, banks, *et cetera*, all began to exert their influence directly or through new government departments and agencies. As well, the homogeneity of private producer interests was ruptured. Central Canada Potash, for instance, acted as a renegade in its legal challenge of potash prorationing. Its interests differed markedly from those of the other producers (all of whom, at the time, were private), and it pursued those interests by attacking a regulatory scheme designed to protect the industry as a whole. The differences in interest between the major petroleum producers and the small independent exploration and production firms were also becoming more readily apparent. Capture of the taxation and regulatory processes by a single interest group composed of major private-sector producers was now far less likely than it had been historically. Instead,

²⁹ G. Stevenson, "The Process of Making Mineral Policy in Canada" in C. Beigie & A. Hero, eds., *Natural Resources in U.S.-Canadian Relations* (Boulder, Col.: Westview Press, 1980) 167 c. 14.

³⁰ We have described these conflicts at more length in *supra*, note 4 at 254-263.

³¹ As a general phenomenon, see A.P. Pross, "Canadian Pressure Groups in the 1970s: Their Role and their Relations with the Public Service" (1975) 18 *Can. Pub. Admin.* 121. More specific to the resource sector, see M. Chandler and W.M. Chandler, "The Path of Resource Development" in D.C. MacDonald, ed., *The Government and Politics of Ontario* (Toronto: Nelson, 1985) 362.

pressures continued for industry to internalize such costs as pollution and to spread the benefits of development far more widely in society.³² The resource amendment was, in part, the result of the emergence of these new interests, and it correspondingly affirms the political influence they will continue to exert. In future, one may expect that private producers will have continuing but diminished influence in the political process compared to the practically exclusive access they once had.

The expanded role of government under section 92A would seem to imply an increase in intervention. This may, or may not, be inescapable; but the more important change is that the character of intervention has altered, from protecting the interests of the private producers in a simple, isolated system to a political and bureaucratic balancing of interests in a far more interdependent system. There will be a greater sophistication in the analysis of policy as it affects the natural resource sector of the economy by the numerous departments and agencies of the provincial and federal governments. The private producers will have to pursue their interests in a more competitive (but not necessarily hostile) political process as the system continues to grope to an equilibrium in the context of fundamental concerns such as budget deficits and technological change. To maintain what influence they do have, resource producers may well have to respond to a range of concerns that they may previously have considered to be peripheral or even irrelevant.

It is impossible, as yet, to quantify the gains and losses that the private sector will realize under the resource amendment. What is already apparent, however, is that section 92A confirms the legitimacy of multiple interests in the resource policy-making arena. It thus provides an altered political framework for the development of resource policy. The resource politics of the eighties will be characterized neither by the industry dominance of earlier times nor by the pernicious inter-governmental bickering that spanned the seventies. By providing a stronger legislative base for resource management by the provinces and by entrenching policy perspectives beyond those of the industry and the producer provinces, section 92A makes it very clear that in the eighties governments will have a greater hand in developing Canada's resources and that the interests of the industry are not the only ones that will drive policy. A healthy resource sector is understood to be an important objective of all parties, but benefits to industry are not the only policy objectives worth pursuing.

³² See D. Yudelman, *Canadian Mineral Policy Past and Present: The Ambiguous Legacy* (Kingston: Centre for Resource Studies, Queen's University, 1985).

