Osgoode Hall Law Journal

Volume 23, Number 2 (Summer 1985)

Article 2

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THE RESOURCE AMENDMENT (SECTION 92A) AND THE POLITICAL ECONOMY OF CANADIAN FEDERALISM

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The 1982 resource amendment to the Constitution, section 92A, purports to alter the balance of federal-provincial legislative powers in relation to natural resources. Section 92A was enacted into the Constitution largely as a result of the federal-provincial resource conflicts of the 1970's and early 1980's; conflicts in which the chief antagonists were the federal government and the governments of the Western provinces. In this article, the authors discuss the development of section 92A from its roots in the conflicts of the 1970's, and explore section 92A's possible legal, political and economic effects on the inter-governmental framework for managing Canadian resources and on the resolution of any future federal-provincial conflicts over resources.

In the last decade, natural resource policy, especially in relation to energy, has been one of the major issues confronting Canada. Much of the conflict can be explained by the interweaving of resource policy and Canadian federalism. Resource policies have generated disputes among governments and across regions.[1] Constitutional considerations have, in turn, created conflict in resource policy-making. All of these conflicts centred on the power to control and manage resource development and the inter-governmental allocation of resource revenues.

Section 92A, the resource amendment to the *Constitution Act, 1867*, came into force on April 17, 1982. It was the only element of the constitutional patriation package that directly altered the balance of federal-provincial legislative powers.[2] The objective of this paper is to examine the impact of this constitutional amendment on Canadian fed-

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The authors would like to acknowledge support received from the Institute for Research on Public Policy during earlier research conducted on section 92A.

[1] Moreover these intergovernmental disputes have exacerbated differences between the public and private sectors. The impact of section 92A on these conflicts between the state and industry is considered in a companion paper, titled "Constitutional Change and the Private Sector: The Case of the Resource Amendment (Section 92A)."

[2] P. Hogg, *Canada Act 1982 Annotated* (1982) at 102.

eralism. In particular, how does the altered legal framework affect the political and economic forces that shape the Canadian federal system?

For this exploration of the connections between Canada's legal structure and its political economy, the paper is divided into three parts. The first examines the conflicts that have dominated Canadian resource politics and the ways in which these conflicts have been managed. The second part focuses on the legal effects of section 92A, concentrating on the changes that seem to result in the respective powers of the federal and provincial governments and in the areas in which scope for federal-provincial conflict remains despite — or even because of — its changes in the formal distribution of legislative powers. The final part considers section 92A as part of a framework within which Canadians will manage their natural resources and examines a number of related issues. For instance, how will this change bear on the intergovernmental conflicts that constitute resource politics? What gains have been realized by the West, the region that sought the amendment? What are the implications of this section for federal resource policy-making? And what issues have been left unresolved?

I. RESOURCE POLITICS

For much of Canada's post-war history, resource politics was an area in which sporadic disputes between governments or between industry and government punctuated a relatively placid sphere of public policy.[3] However, following the OPEC oil embargo in 1973 and the Iranian revolution in 1979, disputes over the management of revenues from energy resources tested the internal strength of Canadian federalism.[4]

A. *Traditional Resource Politics*

After the Leduc find in the 1940s and the general expansion of the Canadian oil and gas industry, resource politics continued in the tradition that had existed since Confederation. Provincial proprietary powers over oil and gas and federal powers over trade and commerce were exercised to benefit the industry. Governments stimulated private activ-

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[3] For a description of the early phases of energy policy see, e.g., I. McDougall, *Fuels and the National Policy* (1982). For mineral policy, see W. MacDonald, *Constitutional Change and the Mining Industry* (1980) and D. Patton, "The Evolution of Canadian Federal Mineral Policies" in C. Beigie & A. Hero, eds. *Natural Resources in U.S.-Canadian Relations* (1979) at 203.

[4] See K. Norrie, "Energy, Canadian Federalism and the West" (1984) 14 Publius 79 and R. Simeon, "Natural Resource Revenues and Canadian Federalism: A Survey of Issues" (1980) 6 *Cdn. Pub. Pol.* 182.

ity by offering tax incentives and direct subsidies, as well as by implementing the necessary infrastructure and ancillary services.

Resources have been viewed as levers to growth in two ways. In the first place, resources themselves are a means of providing employment and development — both directly, in the resource sector of the local economy, and indirectly, through linkages to other sectors. Secondly, resources provide revenue to government. Stevenson contends that the inclusion of section 109 (which provides for provincial Crown ownership of natural resources) in the part of the *Constitution Act, 1867* on "Revenues; Debts; Assets; Taxation" was intended mainly as a means of insuring revenues to the provincial governments. Stevenson suggests, however, that the real significance of section 109 has become its use as a means of promoting provincial industrialization and economic diversification.[5]

Historically, however, the second lever has had limited applicability. Provincial ownership of resources meant that Crown resources were a potential source of revenue. Although the provinces guarded this source of revenue against possible federal incursions, sole reliance upon it to meet provincial needs was insufficient. This changed after the dramatic increases in the world price of oil in 1973 when large economic rents were created. Until that time, the private sector retained most of the revenue generated by resource development.[6] In fact, under federal and provincial tax systems, the resource industries were treated more favourably than other sectors of the economy.[7]

Development was pursued, historically, by attempting to work the first lever. To the extent that they were explicitly formulated, resource policies were best described as localized and narrow. They were based on a symbiotic relationship between federal and provincial governments and producer interests, and upon the geographically localized distribution of resources within Canada. In fact, the drawing of Canada's national and provincial boundaries largely reflected this distribution of the resource endowment.

The differences in resource endowment have meant that provincial or regional interests have always been diverse, but have not necessarily been conflicting. Indeed, provincial interests have been broadly comparable due to the role of natural resources as levers of growth. The di-

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[5] G. Stevenson, "The Process of Making Mineral Policy in Canada" in Beigie & Hero, *supra* note 3, at 167.

[6] Royal Commission on Canada's Economic Prospects, *Canadian Energy Prospects* (J. Davis: Special Study No. 13) (1957).

[7] See Statistics Canada, 61-208, 1966.

versity has usually meant that the federal government could participate in resource policies aimed at fostering development, without creating regional tension.

One important reason for the coincidence of regional interest in natural resource policy has been that Canadian natural resource products have usually been destined for export rather than domestic markets. Regional development goals respecting the use of resources have simply not often conflicted. As a result, the division of jurisdiction over resources between federal and provincial governments was not a source of dispute. The problem of separating provincial powers over property and federal powers to interfere with that property seldom came before the courts.[8]

There has been one important exception to the observation that most Canadian resource products were exported. Following the recommendations of the Borden Royal Commission on Energy, the federal government in 1961 created the National Oil Policy. This policy encouraged the development of the western Canadian oil industry by expanding exports to the United States and by creating a protected domestic market west of the Ottawa River Valley. As part of the policy, Ontario consumers paid a premium for oil of about twenty-seven cents per barrel over the world price. The successful implementation of this policy illustrates that the federal government could offset regional differences in interest that may have previously existed in federal resource policies, by balancing those interests politically over time.

To summarize, before the 1970s, the management and control of the resource industries, including petroleum, produced little conflict as there was a shared objective among private producers, the provincial governments and the federal government to encourage exploitation of resources through private exploration and development.[9] Both levels of government were willing to forego revenues from the industry in order to foster the growth of this strategically important sector.

B. *Resource Politics After 1973*

The 1970s saw the transformation of resource politics. Rising economic rents and increased perceptions of the importance of energy as an industrial input led to conflicts between Ottawa and the governments of the western oil-and-gas producing provinces and between the

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[8] See D. Thring, "Alberta, Oil and the Constitution" (1979) *Alta. L. Rev.* 69 at 70.

[9] See A. Lucas & I. McDougall, "Petroleum and Natural Gas and Constitutional Change" in S.M. Beck & I. Bernier, ed., *Canada and the New Constitution* (1983) vol. II, 21 at 27 and Stevenson, *supra* note 5.

western provinces and Ontario (which, with Quebec, accounted for sixty per cent of Canadian oil and gas consumption). Much of Canadian resource politics of the late 1970s and 1980s can be viewed as the interplay of these two highly related cleavages.

Although cracks had begun to appear early in the 1970s, the suddenness of the large increases in world prices in 1973 and 1979, and the resulting sharp changes in world supply patterns, widened the differences to rifts. What have come to be known as the first two oil price "shocks" resulted in great uncertainty and a groping for a reconciliation that would address two major economic issues.

The first issue was availability. At a time of mounting fears of the "de-industrialization" of Canada, security of supply at an advantageous price was vital both to protecting the existing industrialized region of Central Canada and to promoting economic development in the West. Secondly, the price increases created a massive transfer of wealth in a relatively short period of time. These two issues led to the intervention of more actors in the resource policy-making process, including other regions. For the first time, interests besides those of the producers sought representation and accommodation. As a result, the political process faced a far more difficult task of balancing various interests.

The heightened conflict caused by the presence of non-producer interests was not unique to Canada.[10] What was unique was the extent to which the conflict emerged as a regional clash. In other federal systems in which natural resources are concentrated in one region, such as Australia, the national government has greater control of resources. In Canada, however, the provincial governments, through their proprietary rights, have long had extensive powers to control the exploitation of natural resources and to capture resource revenues.

Since Confederation, different patterns of economic development have emerged across Canada. In effect, during the 1970s Canada had an economy that was a microcosm of the world economy. The Canadian economy consisted of an industrialized region (in central Canada) whose dependance on exterior sources of resources, and in particular on energy, was exposed; an oil-and-gas-rich region (in the West), ambitious to utilize its energy as a springboard to economic development; and a non-industrialized, resource-poor region (in the Atlantic provinces), lagging in its development. In parallel with developments in the larger world, resource politics in Canada became an inter-regional

[10] See, for example, Lindberg, ed., *The Energy Syndrome* (1978) at ch. 9.

issue.

To the industrialized region, as to the industrialized regions of the rest of the world, oil was a crucial input into the economy. Its availability was critical. Availability at a low price was of key importance to maintaining competitiveness at a time of energy-price-induced "stagflation". To the producing provinces, on the other hand, as to the producing regions of the rest of the world, oil and gas were viewed as scarce, non-renewable, depleting economic assets. The producing provinces sought to maximize their revenues in order to help prepare for a future in which their economies could no longer rely on the income generated from oil and gas. For example, the Alberta and Saskatchewan Heritage Funds explicitly set aside a portion of current revenues for future purposes. Lower taxes and other benefits made possible by its resources revenue were an important part of Alberta's attempt to attract industry into that province. The producing provinces also looked upon oil and gas as inputs. They saw its availability, at preferential prices, *within* the producing provinces as a means of attracting and building an industrial base. The non-industrialized, resource-poor region, as did similar regions in the rest of the world, became more dependant on external sources of funds to aid its development and to help maintain its standard of living.

In the world economy, the conflicts among these interests have not yet been resolved. In the Canadian federal political process, too, the differences were too great and too contradictory to be worked out in the short time frame that was demanded. Rather, the clear differences manifested themselves in a federal government in which the producing interests were not effectively represented. As a result, the political balancing was done primarily between the governments of the producing provinces, relying on their ownership prerogatives, and the federal government, which was viewed as representing the interests of the industrialized and poor regions.

Balancing the interests of even these two regions was a difficult task for the federal government. The major existing programme for dealing with regional inequality, the equalization system, exacerbated the regional disparities created by the concentration of resource revenues.[11] The equalization programme was not based on direct transfers among provinces; rather, the provinces' revenues generate obligations that are funded out of the federal treasury. The skewed resource rents meant that virtually every province fell behind Alberta and thus

[11] See T. Courchene & J. Melvin, "Energy Revenues Consequences for the Rest of Canada" (1980) 6 *Cdn. Pub. Pol.* 192.

presented the federal government with a continuing imbalance in provincial fiscal capacity. But when resource revenues and equalization payments were tallied against contributions to the federal treasury, the peculiarities of the formula made Ontario the net loser. Ontario accounted for some forty per cent of the funds that went to compensate the "have-not" provinces for their low level of resource revenues.[12]

Although regional interests were the basis for most of the disputes, much of the conflict over natural resources was drawn along federal-provincial lines.[13] Its fiscal responsibilities and its general responsibility for the macroeconomic matters of inflation and unemployment led the federal government to seek a greater share of resource revenues and a greater say in energy management. Although the federal government, through federally owned Petro-Canada and through its control of resources outside the ten provinces, functioned as a producer-owner as well as a regulator, it was often seen by the western producing region as a champion of the interests of eastern energy consumers. Federal pricing policies of the 1970s were interpreted by the West as responses to the needs of Central Canadian consumers. The Liberals' energy platform for the 1980 election was a direct appeal to Central Canadian voters. The Western provinces also took issue with the Oil Export Tax levied in October 1973, arguing that not only did it impinge on provincial property, but also that other resources such as Central Canadian hydro did not bear an export tax.[14] The regional dimensions of Ottawa's battles with the provinces were underscored as Ontario, the main provincial spokesman for consumer interests, actively supported the federal resource policies. For example, throughout the 1970s the Ontario government urged federal pricing restraints and was a strong supporter of Petro-Canada from its inception in 1975.

The inter-regional differences of interest and the mechanisms of political negotiation that developed to deal with them showed up in political and jurisdictional conflict over the aims of policy. The long-standing joint policy of providing direct encouragement to resource development became overshadowed by the particular interests of each level of government. There were at least three areas in which the interests of the federal government differed from those of the governments of the producing provinces, namely, pricing, revenues, and the control

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[12] See T. Courchene, "Energy and Equalization" in *Energy Policies for the 1980s* (1980) at 118-20.

[13] G.B. Doern & G. Toner, *The Politics of Energy* (1985).

[14] It is to be noted, however, that hydro exports did bear a tax from 1925 to 1963. One also observes that the Oil Export Tax was first levied at a time of rising oil prices, but was introduced before the 1973 price "shock".

of production and distribution.

The *Petroleum Administration Act* gave Ottawa the power to set the price of oil in the absence of federal-provincial agreement. The federal government also unilaterally set the price of oil in Canada under the National Energy Program in 1980. Charging the world oil price and thereby following the market, rather than restraining the price at a lower level, would have favoured the interests of the producing provinces. Two factors, however, argued against charging Canadians the world price for Canadian oil: (i) the advantage of lower prices would be lost to industries and consumers in Central Canada; and (ii) a large share of the rents from the resources would leave the country, expatriated in the guise of dividends to foreign shareholders in the Canadian oil industry.

Revenues had very different purposes to the two levels of government. The producing provinces began to look upon large economic rents from resources as providing a basis for provincial industrialization and economic diversity. On the other hand, the federal government sought increased income from the petroleum industry to increase its general revenues and, in keeping with its objective of security of supply, to stimulate exploration for and development of new sources.

New sources of supply were sought mainly on the federally-owned and controlled Canada Lands. The exploration activities of Petro-Canada, resource incentives such as super-depletion, and the petroeum incentives payments ("PIPs") of the National Energy Program (NEP), were all designed to shift the focus of the oil and gas industry away from the Western producing provinces. These programs were all costly, and it was evident that security of supply could have been obtained more cheaply by encouraging exploration in the producing provinces. The thrust toward Canadianization in the National Energy Program may also be viewed in part as an attempt by the federal government to gain greater control over the petroleum industry. Through its control of pipelines, as well as the *Petroleum Administration Act*, Ottawa had the authority to direct the distribution of energy supplies across Canada. In addition, through the National Energy Board, the export of energy was under federal control.

By all these means, the federal government sought to ensure security of supply to Canadian industry, in the medium term, and to carry out its other responsibilities (including the funding of its equalization obligations). The producing provinces, in what they perceived to be a temporary situation of advantage as owners of a depleting resource, considered the federal measures to be broad-based threats to their long-term development as well as to their short-term interests.

C. *Conflict Management*

In 1973-74, and later in 1979-80, when rents and control of resource development assumed a magnified importance, resource conflicts dominated federal-provincial relations. The constitutional division of powers became more problematic. The traditional and shared policy objective of encouraging rapid resource exploitation had become supplanted by inter-governmental conflict. The two vehicles in place for attempting to reconcile the divergent interests were the political process, in which a federal-provincial agreement was sought through negotiation, and the judicial process, in which a third party would impose a decision upon the political players.

The political bargaining process regarding energy in the 1970s has often been compared to a zero-sum game, and the continual bickering between levels of government has been considered by some to be a failure of federalism. The initial responses of both levels of government to the two price shocks of 1973 and 1979 were, to be sure, the taking of short-term non-co-operative threat positions. But then the two levels of government did turn to discuss their resource differences and to achieve a grudging accommodation. In 1980, however, the unilateral introduction of NEP brought that *modus operandi* to an end. The NEP, through regulation, subsidies, taxation and public ownership, greatly expanded the federal government's presence in the resource field. It was developed without consultation with either industry or with the provincial governments. Alberta protested such aspects of the NEP as the regulated price levels and gas export tax by dramatically cutting its oil production in stages, by holding up approval of oil sands projects and by challenging federal legislation in the courts. This impasse, very costly to both sides,[15] was finally resolved by an energy agreement in September 1981 between Ottawa and Alberta. Subsequently, the implementation of the NEP was covered by this agreement and modifications were achieved by later federal-provincial negotiations.

In the 1970s, the courts became a major site for dealing with resource disputes. In the context of the political negotiating process, a reference to the Supreme Court may be viewed as comparable to going to war. It is essentially a bargaining chip to be played only in exceptional circumstances, when co-operation or negotiation appears impossible or the case seems so clear-cut in one's own favour that negotiation of the issue is unnesessary. Otherwise, the all-or-nothing type of deci-

[15] For a discussion of the costs to them and to others, see J. Helliwell & R. McRae, "Resolving the Energy Conflict: From National Energy Program to the Energy Agreements" (1982) 8 *Cdn. Pub. Pol.* 14.

sion to be expected from the judicial process is inimical to co-operation and will be eschewed by all players. It is significant that, in the major resource cases where the judicial process was used, proceedings were initiated by the private sector, outsiders to the political negotiations.[16]

In the two leading cases, *CIGOL*[17] in 1977 and *Central Canada Potash*[18] in 1978, the Supreme Court of Canada struck down provincial legislative initiatives aimed at raising greater resource revenues and at exerting a greater measure of provincial control over resource development. In *CIGOL*, the Supreme Court upheld a challenge to Saskatchewan's regime for collecting the economic rent accruing to its oil producers after the 1973 oil price shock. The decision was made primarily on the ground that the regime was a indirect tax which went beyond the permissible bounds of section 92(2) of the Constitution (which authorizes only direct taxation by a province). In *Central Canada Potash*, the Court held that Saskatchewan's potash pro-rationing scheme was, in essence, directed at the marketing of Saskatchewan potash beyond the borders of the province. This scheme was therefore an infringement upon the exclusive federal legislative power in relation to interprovincial and international trade and commerce under section 91(2) of the Constitution.

While Saskatchewan was the defendant province in both cases, the descisions of the Supreme Court had potentially serious implications for all the Western resource-producing provinces. Besides their immediate effect in confining provincial legislative powers in relation to the taxation and regulation of resources, they appeared to represent a continued expansion of federal jurisdiction. In particular, the trade and commerce power was expanded at the expense of provincial legislative powers and possibly provincial Crown proprietary rights.[19] The Court's perception of the balance of federal-provincial powers in relation to resources determined the outcome of both cases despite the fact that both were initiated by the private sector and that the political negotiating process had earlier reached some degree of compromise on the specific issues raised.[20]

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[16] After the privately initiated proceedings, however, the federal government *did* join in the suits against measures taken by Saskatchewan.

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

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

[19] See S.I. Bushnell, "The Control of Natural Resources through the Trade and Commerce Power and Proprietary Rights" (1980) 6 *Cdn. Pub. Pol.* 313.

[20] The *CIGOL* and *Central Canada Potash* decisions and their aftermath are discussed in more detail in W.D. Moull, "Natural Resources: The Other Crisis in Canadian Federalism"

Legal resolution did not always prove to be a satisfactory way to resolve resource issues. The questions brought before the Supreme Court were essentially broad political questions that required negotiation and compromise. The court necessarily focused on the particular case rather than on the broad policy issue, selecting a winner on the basis of jurisdiction when in fact the conflict was over objectives. The judicial process, by its very nature, is unable to deal with these thoroughly political questions. Although the Court's decisions resolved the disputes in the most literal sense, in a broader sense they exacerbated the conflicts to the point that, by the late 1970s, natural resources management was seen as one of the major sources of tension in the Canadian federal system. Resource policy-making has produced a bitter legacy and has often been quite costly for the participants.[21] By the mid-1970s the western provinces were actively seeking to change the division of powers over natural resources. Led by Alberta, the provinces wanted to strengthen their proprietary rights and to limit Parliament's jurisdiction over provincial resources. At the Annual Premier's Conference in Regina in 1978, all ten provinces agreed that constitutional change must include a confirmation and strengthening of provincial powers with respect to resources.

D. *Changing the Constitution*

The changes sought by the producing provinces in resource jurisdiction were framed as part of a general movement to strengthen the provinces as well as a vehicle for the West to assert greater control over its own economic development. The drive for change consisted of two elements. In the first instance, there was unanimous provincial support for strengthened provincial powers over natural resources. The second part, which consisted of efforts to limit the resource jurisdiction of the federal government, did not draw the same unanimity. Not all the provinces wanted to see federal energy powers constrained.

The interests of the various provinces became more apparent during the process of constitutional negotiation.[22] The western producing provinces sought increased sovereignty and power over their resources. Alberta was the province most interested in clarifying the rights of

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(1980) 18 *Osgoode Hall L.J.* 1.

[21] See Helliwell & McRae, *supra* note 15.

[22] It is not intended to recreate the detailed constitutional negotiations; they are mentioned only insofar as they bear on the larger issues. For a participant's picture of the process, see. R. Romanow, J. Whyte & Leeson, *Canada Notwithstanding: The Making of the Constitution 1976-1982* (1984).

ownership (over 80 per cent of Alberta's resources are Crown owned) and in dispelling the limits imposed on its proprietary rights by Parliament's control over international and interprovincial trade. Alberta sought to remove these limits by blocking the routes of federal intervention. Saskatchewan, also concerned by the restrictive effect of the trade and commerce clause, was interested in provincial concurrency in regulatory jurisdiction and in the right to indirect taxation. British Columbia was perhaps most concerned with a broader definition of resources and primary production to encompass its products. Newfoundland shared the Western concern but also wanted section 109 expanded to include off-shore resources under the provincial Crown. Ontario, a province long associated with strong provincial powers, recognized Ottawa's ties to consumer interests and, therefore, consistently sought to counter any reduction in federal energy powers. Quebec sought greater provincial powers. The *Best Effort* draft of February 1979 proposed a shift in the balance between federal and provincial powers with respect to resources. Provincial powers were to be expanded and a restriction was to be imposed on federal power over interprovincial trade in resources.

Under the *Best Effort* draft proposals, the producing provinces were to be allowed access to indirect resource taxation powers, so long as those powers were not used to differentiate between production consumed within the producing province and production exported for use in other parts of Canada. An extended definition of primary production was proposed, which would have included refined or processed production as well as the raw product itself. While provincial Crown proprietary rights were not to be extended, they would have been expressly preserved and would have been supplemented by comprehensive and exclusive legislative powers to regulate resources within the producing provinces. Furthermore, provincial legislative powers to regulate the export of resource production would have been conferred for the first time, both interprovincially and internationally, provided that those powers were not used to discriminate in prices as against other parts of Canada. Concurrency for federal legislative jurisdiction, particularly under the trade and commerce power, would have been preserved. In a reversal of the usual position, however, the automatic paramountcy of federal legislation over provincial "export" legislation would have applied *only* to international trade and commerce. With respect to interprovincial trade in resource production, *provincial* legislation would have been paramount over conflicting federal legislation unless Ottawa could demonstrate that its legislation was necessary to serve "a compelling national interest that is not merely an aggregate of local

interests."[23]

When the federal government initially accepted the *Best Effort* draft in February 1979, it was in a weak political position and was looking for ways to shore up support for more sweeping changes to the Constitution. The resource proposals were expected to gain support from Saskatchewan and to make the constitutional package more attractive to Alberta. By late 1979, however, the Iranian Revolution initiated the second world oil price shock. Suddenly, in the federal-provincial game, the pay-off set changed. The federal election results of February 1980, and the resulting return to power of the Liberals, reflected the changed nature of the game: once again the poor and industrialized regions were strongly represented in the federal goverment, and this time the producing region was not represented at all. The uncertainly of world energy markets and its new position of strength led the federal government to renounce the results of its earlier co-operation with the provinces and to try to impose an equilibrum reflective of its increased bargaining power. Federal support for the *Best Effort* draft was withdrawn.

The constitutional patriation proposal put forth by the federal government in 1980, which reflected its resolve in this area, was unacceptable to the provinces. Federal-provincial negotiations over a resource amendment came to a close when the federal government acted unilaterally and placed before Parliament a Resolution on the Constitution that omitted the resource amendment altogether. It is possible that the excluded resource amendment was seen by the federal government as a potential bargaining chip, which was something of importance to the West that might be relatively easy to re-instate if circumstances so dictated.

In any event, the federal New Democratic Party moved quickly to re-instate the resource amendment in the constitutional package. The amendment was significant to an important sector of NDP support — the western provinces. Also, putting the amendment back in the resolution demonstrated that the NDP was able to extract changes in the resolution in return for its support. Before the Special Joint Committee on the Constitution, it was the federal NDP, rather than the provincial governments, that carried on the negotiations over the amendment. When the resolution returned to the House, it contained section 56, an

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[23] The *Best Effort* draft proposals are discussed at some length in R. Harrison, "Natural Resources and the Constitution: Some Recent Developments and Their Implications for the Future Regulation of the Resource Industries" (1980) 18 *Alta. L. Rev.* 1. See also Lucas & McDougall, *supra* note 9 at 33-35.

amendment to the *British North America Act, 1867* on "non-renewable natural resources, forestry resources and electrical energy."

Much of the constitutional negotiations over natural resources came down to the question of which constituencies and interests should be the relevant ones in the development of Canadian resources. The forces shaping constitutional change, therefore, go back to the underlying conflicts between governments and regions.[24] These forces, in turn, are reflected in the shape of section 92A itself.

II. LEGAL ARRANGEMENTS UNDER SECTION 92A

Section 92A represents a re-drawing of the boundaries of federal-provincial legislative authority in relation to natural resources. Unlike the 1979 *Best Effort* draft proposals, however, section 92A does not confine federal powers in any way although it does confirm and enhance provincial powers.[25]

A. *Revenue-Raising Powers*

In the context of provincial legislative powers to raise revenues from natural resources and resource production, subsection 92A(4) does away with the hoary distinction between direct and indirect taxation that tripped up Saskatchewan in the *CIGOL* decision. Subsection 92A(4) provides as follows:

> (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.

A resource-producing province will now have access to indirect taxation measures in respect of natural resources produced within the province (including electrical energy production as well as the primary production from forestry resources and hydrocarbons, minerals, and other non-renewable natural resources).[26] Direct taxation powers are still

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[24] See Romanow, Whyte & Leeson, *supra* note 22.

[25] For more detail regarding the differences between section 92A and the *Best Effort* draft proposals, see W.D. Moull, "Section 92A of the Constitution Act, 1867" (1983) 61 *Cdn. Bar Rev.* 715.

[26] The definition of "primary" production is set out in the new Sixth Schedule to the Consti-

available to a producing province, of course. Thus, a provincial legislature will now have a complete range of choices available in selecting and designing the taxation regime it considers appropriate for each resource produced within the province (a range comparable to that enjoyed in the past in designing provincial royalty systems for resource production from Crown lands owned by the province). Saskatchewan, for example, has already chosen to replace two key pre-92A direct tax measures[27] with indirect tax regimes designed specifically to take advantage of the new powers conferred by subsection 92A(4).[28]

The powers conferred by subsection 92A(4), however, are not completely unfettered. First, the indirect resource taxation field now occupied by the producing provinces must be shared with the federal government, which has always had powers of indirect taxation by virtue of section 91(3) of the Constitution. There is nothing in subsection 92A(4) that would restrict the pre-existing powers of Parliament to impose indirect taxes[29] — or direct taxes, for that matter[30] — in relation to resources and resource production. Indirect resource taxation, therefore, will now be a field of concurrent, and potentially overlapping, federal-provincial jurisdiction.

Second, and in contrast with the federal indirect taxation power, the new provincial power under subsection 92A(4) cannot be used to levy an "export" tax at the boundaries of the producing province. Although subsection 92A(4) states quite clearly that provincial tax measures can be imposed whether or not taxed resource production is ex-

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tution, which was added by subsection 92A(5). In some instances, like the *Best Effort* draft proposal, the definition is extended beyond mere raw products. The Sixth Schedule reads as follows:

> For the purposes of section 92a of this Act,
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> (a) production from a non-renewable natural 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 is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal 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.

[27] *The Oil Well Income Tax Act*, R.S.S. 1978, c. 0-3.1 (Supp.); *The Mineral Taxation Act*, R.S.S. 1978, c. M-17.

[28] *The Freehold Oil and Gas Production Tax Act*, S.S. 1982-83, c. F-22.1; *The Mineral Taxation Act*, 1983, S.S. 1983-84, C. M-17.1.

[29] Such as the new taxes imposed as part of the National Energy Program: see *An Act to amend the Excise Tax Act and the Excise Act and to provide for a revenue tax in respect of petroleum and gas*, S.C. 1980-81-82-83, c. 68.

[30] Such as the provisions of the *Income Tax Act*, S.C. 1970-71-72, c. 63, applicable to income earned from resource production and processing.

ported in whole or in part from the province, it prohibits differential taxation as between production exported from the producing province "to another part of Canada" and production that is not exported from the province. Moreover, it seems implicit in subsection 92A(4) that a province also cannot differentiate taxation measures with regard to production that is exported from Canada as well as from the province.[31] Consequently, a producing province cannot impose what amounts to an export tax at its boundaries. Examples of this would be taxing only production that is exported from the province; or taxing that production at rates higher than those imposed on local production consumed or used within the province; or taxing all production equally but coupling the tax measures with some scheme (such as a rebate program) that favours consumption or use within the province.[32] In this respect, the taxation powers of the producing province still cannot be used as an indirect means of interfering with extra-provincial trade in resource production.

B. *Resource Management Powers*

In its provisions relating to resource-management powers, section 92A does confer some new authority on the producing provinces in relation to the entry of resource production into extra-provincial markets. Subsection 92A(2) 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.

Before section 92A was enacted, as *Central Canada Potash* exemplifies, a producing province had no legislative authority to regulate the marketing of its resource production beyond its boundaries. Regulation of interprovincial and international marketing was the exclusive preserve of Parliament under its trade and commerce power in section

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[31] Because any measure that purported to so differentiate, at least in any substantial respect, would likely be categorized by the courts as something other than a true "taxation" measure and thus beyond the permitted bounds of subsection 92A(4). For elaboration on this point, see W.D. Moull, "Section 92A of the Constitution Act, 1867," *supra* note 25 at 719 and W.D. Moull, "Mineral Taxation in Saskatchewan under the New Constitution" in Bartlett ed., *Mining Law in Canada* (1984) at 221-31.

[32] Provincial "export" taxes, including combined tax-plus-rebate schemes, were struck down by the courts before section 92A: see *Attorney General for British Columbia* v. *McDonald Murphy Lumber Co.* [1930] A.C. 357, [1930] 2 D.L.R. 721 (P.C.), and *Texada Mines Ltd.* v. *Attorney General for British Columbia*, [1960] S.C.R. 713, 24 D.L.R. (2d) 81.

91(2) of the Constitution. Now, the producing provinces have concurrent legislative powers in relation to the export of production to other parts of Canada — but not, it should be noted, in relation to the export of production *from* Canada. Unlike the *Best Effort* draft, section 92A gives the producing provinces no entry into the regulation of international resource marketing.

Within Canada, this new legislative jurisdiction cannot be used in a discriminatory fashion. The interpretation of the non-discrimination proviso at the end of subsection 92A(2) is a difficult matter, at least until addressed by the courts. In contrast with the *Best Effort* draft proposal, it applies to "supply" discrimination as well as "price" discrimination. At the very least, it will prevent a producing province from playing favourites as among consuming provinces — for instance, by favouring one consuming province or region with lower prices or greater supplies than are offered to others within Canada but outside the producing province. It may even be that the proviso will prevent a producing province from favouring itself over all others in Canada, particularly with respect to prices charged for local production that is consumed or used locally.

The new provincial "export" jurisdiction under subsection 92A(2) is concurrent with that of Parliament under its trade and commerce power (which to that extent can no longer be said to be exclusive). The paramountcy of all federal legislation over any provincial enactments under subsection 92A(2), however, is expressly preserved by 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.

This provision was probably unnecessary. The powers conferred by subsection 92A(2) are not made "exclusive" to the provinces, so all prior federal powers — notably the trade and commerce power — would have been preserved by implication. That being so, in the event of a direct conflict between federal and provincial measures, traditional theories of federal paramountcy developed by the courts would have required that the provincial measure yield to the federal measure. Subsection 92A(3) simply puts that result beyond any doubt. It also represents, however, a marked reversal of the position under the *Best Effort* draft, which would have allowed for provincial paramountcy in inter-provincial resource trade in the absence of a compelling national interest.

Overall, subsection 92A(2) has, for the first time, given the producing provinces legislative jurisdiction in relation to the "export" marketing of their resource production within Canada. Subsection 92A(1), on the other hand, speaks to the pre-marketing aspects of natural resource management within a producing province, particularly in relation to the development and production of resources. 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.

Subsection 92A(1) is the most difficult provision in the resource amendment to assess in terms of its legal impact. In one sense, it may have changed very little since each of the resource-related activities it mentions — exploration, development, conservation and management — were probably within provincial legislative jurisdiction before section 92A was enacted. For example, the power to restrict rates of resource production for conservation purposes has long been recognized as a valid provincial objective, for example, even if the conservation measure might incidentally restrict exports of production from the province.[33] But a provincial jurisdiction in respect of each of these activities, as a matter of *general* legislative authority, arose inferentially under the pre-1982 Constitution. Before the enactment of section 92A, the only provisions to even mention resources were section 109, which vests all "Lands, Mines, Minerals, and Royalties" in the Crown in right of the provinces, and section 92(5) which confers on the provinces legislative authority in relation to the management of these provincially-owned Crown lands.[34] So in another sense, subsection 92A(1) may have changed a great deal because it has now entrenched in the Constitution, in express terms, a comprehensive list of provincial resource-related legislative powers that do not depend for their vitality and application upon provincial Crown ownership of resources.

As a result, provincial resource-management measures need no longer be concerned with the distinction between Crown-owned and freehold resources within the province. The powers set out in subsection

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[33] *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, [1933] 4 D.L.R. 545.

[34] By subsection 92A(6), those powers — along with all other pre-existing provincial rights and powers — are expressly preserved, as was the case under the *Best Effort* draft proposals.

92A(1) can be exercised in relation to the whole of a particular resource within the province, without regard to what proportions of that resource are owned by the Crown or by others. In a general sense, then, the effect of subsection 92A(1) is to confer on the producing provinces resource-management powers in relation to *all* resources in the provinces. These powers closely approximate the resource-management powers that they previously enjoyed in respect of Crown-owned resources.

There is a catch, however. The powers conferred by subsection 92A(1) can only be used in respect of resources "in the province." They cannot be used as a tool to affect matters beyond provincial borders. Incidental effects beyond the province still seem permissible. For instance, a provincial scheme which restricts the rate of production of a resource should still be upheld if it has the incidental effect of reducing exports of the resource from the province. But a provincial scheme that is found by the courts to be "aimed" at reducing exports, even if its operative mechanism is a restriction on rates of production (as was the case in *Central Canada Potash*), will probably not be categorized by the courts as falling within any of the heads of resource-management power in subsection 92A(1). That scheme may be saved by subsection 92A(2), if it is aimed at exports to other parts of Canada, but it will likely fall beyond the bounds of provincial authority under subsection 92A(1) as an intra-province resource-regulation measure.

III. A NEW PHASE OF RESOURCE POLITICS?

What are the implications of section 92A for the political economy of Canadian federalism? The answer to this question may first be understood in terms of its effects on the provinces' ability to make natural resource policy. Under the new arrangements at least two of the significant bases for legal action against the provinces have been removed: concurrence in interprovincial trade in resources has been created and provincial taxing powers have been broadened. This does not mean that conflict is at an end or that provincial actions will go unchallenged by Ottawa or by the private sector. There are still specific limitations on the provinces' new authority as well as a number of ambiguities likely to be taken to the courts for clarification. Future rulings may well significantly shape the powers of both levels of government. But the overlapping jurisdiction that arises from the new constitutional framework more accurately reflects the complex competing interests that make resource politics.

Since Confederation, natural resources have been viewed as provincial matters, reflecting the ownership perogatives conferred by sec-

tion 109. Resentment in Alberta lingers over the waste of resources in the Turner Valley before 1930, when full provincial rights were received by the three prairie provinces. Since the Leduc discovery in 1947, the modern oil and gas industry in Alberta has been very much a provincial concern. Yet, oil and gas have been considered national issues in Canada since at least the late 1950s, when the (gas) Pipeline Debate brought down a federal government, and when the Borden Royal Commission was established. These issues led to the establishment of the National Energy Board in 1959 and the National Oil Policy in 1961.

The acceptance of section 92A by both the federal and provincial governments means that we can now view resource politics from an alternative perspective. During the 1970's, the debates revolved around centralization and decentralization. Now, both levels of government explicitly recognize that provincial and national objectives may be both different and legitimate, and that this duality must be accommodated. Of course, recognizing that there may be legitimate but competing interests does not make their accommodation easier. The determination of where provincial interests leave off and national interests prevail remains the persistent question to be resolved. Resource-related issues may again make their way to the Supreme Court, at least until some of the interpretive problems in section 92A have been settled judicially. Subsequently, intergovernmental conflicts are more likely to end up at the political bargaining table than in the courts.

Section 92A relaxes some of the former legal constraints on the provincial governments and thereby broadens the set of political options available to them, without narrowing those available to the federal government. Are the producing provinces mollified by the amendment? Certainly the West wanted more. Western provincial governments of various ideological complexions saw resource management as crucial to their economic development. Unconstrained powers over resource exploitation, development, marketing and taxation were viewed as fundamental to those objectives. Alberta sought far greater restrictions on federal powers and Saskatchewan considered concurrence in international trade with respect to resource exports to be fundamental to any meaningful constitutional reform. Section 92A did not grant these changes, but there is no doubt that it did address some of the West's concerns. The provincial governments under section 92A can now control the rate of development of resource industries within their borders. They can have an influence on trade within Canada, and so may have an influence on the location of activity related to a particular resource. Most importantly, they can tailor their tax, royalty and regulatory pro-

grams to their needs, in a consistent manner, without having to be concerned with the distinction between freehold and Crown resources.

The federal government, on the other hand, has retained the power to ensure the preservation of a Canadian common market. With regard to natural resources in particular, these concerns are reflected in the parts of section 92A that prohibit provincial discrimination in prices, supplies and taxation within Canada. The small cost to the federal pursuit of this objective is that the extention of provincial powers under subsection 92A(2) into the now-concurrent field of interprovincial trade and commerce means that Parliament must now take the active and politically visible step of enacting legislation in order to achieve its objectives.

The amendment, however, does not address all of the federal-provincial questions that arose in the 1970s with respect to natural resources. Indeed, a number of the current issues in Canadian energy politics, including foreign ownership, the equalization formula, the division of revenues and the role of Crown corporations, seem to be left aside by section 92A. One of the federal government's bargaining strengths during the post-1973 period has been its control of Canada Lands. Wasteful direct and tax expenditures were incurred in order to encourage development of the Canada Lands. The purpose was to shift the focus of the oil and gas industry away from the western provinces. It is not unreasonable to suppose that the Canada Lands will ultimately become provinces that will obtain proprietary rights to these lands. One may, therefore, view the federal government as a steward of these resources. The federal government's stewardship of the Canada Lands has been compromised in the past ten years. There is a clear analogy to the federal government's control of petroleum development in Alberta's Turner Valley before 1930. The incentive remains for the federal government to continue to use the resources of the Canada Lands as a lever in negotiations with the provinces.

This may well be important in the future, as Canada has not returned to the coincidence of federal and provincial goals of the pre-1973 era. Indeed, this is why the new arrangements, which recognize the interests of both parties as legitimate, is of such great importance: the potential for conflict still exists. For example, the existence of section 92A in 1973 would not have altered the potential for the types of tax disputes that ensued immediately after the two oil price shocks of the 1970s. There has been no agreement on revenue sharing in the new Constitution, despite the fact that the principle of equalization, one of the important aspects of revenue sharing, has become enshrined in the Constitution [*Constitution Act, 1982,* s. 36]. Indeed, the incentive to

provincial governments to establish Crown corporations in the resource industries in order to escape the federal income tax remains under the new Constitution. There has been no measure to counteract the principle, contained in section 125 of the *Constitution Act, 1867*, that one level of government shall not be taxed by the other. In this connection, however, it should be noted that *other* rationales to establish Crown corporations, such as to circumvent restrictions on provincial legislative capacities in relation to natural resources, have been reduced.

There may yet be recurrences of the historical conundrum of the roles of the two levels of government in resource development. However, by increasing the scope of concurrence in the resource sector, section 92A sets the stage for more negotiation. The question of whether there will be more or less conflict in those negotiations cannot be readily determined. Given the interests of the players, conflict at the political bargaining table is a function of many factors including the personalities of the decision-makers, the ideologies and the public stances of the governments, as well as the international economy. Section 92A spells out the powers held by each level but like any formal constitutional provision, it does not determine the way those powers will be exercised. The amendment provides a revised framework for the management of conflict that acknowledges the interests of both federal and provincial governments in resource development.