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NATURAL RESOURCES

A. R. Lucas*

NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION. By G. V. La Forest. Toronto: University of Toronto Press. 1969. Pp. xiv, 230. $11.50.

Portions of this book are a reproduction and expansion of a series of lectures given by Dean La Forest, at the *Faculté de droit* of the Université de Montréal in 1962. The presentation is pithy, well-organized according to area and topic, with helpful subheadings and carefully drawn conclusions. There is little discussion of the social or political problems raised by the legal principles expounded; nor is there much "creative speculation." But these are things that the author simply did not intend to do. His work is confined, as he says in his introduction, to the "constitutional framework," in an area that was clearly in need of a basic study of this kind.[1]

The book is an excellent general survey and provides a valuable basis for further inquiry into the hitherto relatively uncharted area of public property division between Dominion and provinces. Its publication comes at a time when it is apparent that the Canadian public domain will soon be the scene of a great deal of legal (not to mention political) activity. Highly complex and often conflicting issues must be dealt with. Development of offshore petroleum resources set against the significant and increasing public concern for protection of the physical environment is but one perplexing example.

The book begins with an admirably concise historical sketch tracing the gradual loss of Royal power over the public lands in England which culminated with the surrender of the bulk of these lands to Parliament in return for a civil list.

This same development occurred in the Canadian colonies before confederation. Revenues from public lands in the colonies were first

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1. Previous writing in this area is extremely limited. *See* CLEMENT, THE CANADIAN CONSTITUTION (1900); Laskin, *Jurisdictional Framework for Water Management*, 1 RESOURCES FOR TOMORROW CONFERENCE PAPERS (1961); AGASSIZ CENTRE FOR WATER STUDIES RESEARCH, REPORTS Nos. 2 and 3, CONSTITUTIONAL ASPECTS OF WATER MANAGEMENT (1968 and 1969).

appropriated by the English Parliament, then subsequently surrendered to the legislatures of the colonies. The problem of the position of Quebec public lands after the conquest is then raised. In the territory ceded to England by the French king, did the prerogatives previously exercised by the French king continue, or did the English law of prerogative become applicable? Dean La Forest concludes that the English law of prerogative came into force even in the conquered colonies,[2] subject to certain modifications necessary to adapt it to the existing Civil law system.[3] This result not only yields substantial uniformity but avoids possible problems concerning the rights of the French king at the Conquest and as to which areas were in fact French territory before the cession.[4]

Chapters 2 and 3 carry the chronology past confederation. The revenues from most public property continued to be subject to appropriation by the provincial legislatures. In 1867 the provinces retained ownership of the whole of their territorial resource bases, except certain classes of public property that were expressly vested in the federal Crown.[5] This constitutional division of public property, and particularly the effects of subsequent Dominion-Provincial agreements, is carefully and thoroughly examined in these chapters.

The next four chapters confront the problems related to the jurisdictional division of particular classes of public property—Public Harbours; Lands, Mines, Minerals and Royalties; Offshore Minerals, and Indian Lands.

The offshore minerals problem is treated quite extensively. The discussion here underlines clearly the range of questions remaining in Canada as to ownership and legislative jurisdiction of offshore minerals. In *Re: Offshore Mineral Rights of British Columbia*,[6] the Supreme Court answered the questions of both ownership and legislative jurisdiction of the territorial sea and continental shelf lying off British Columbia in favor of the Dominion. But the very limited range of this decision is apparent. Dean La Forest asks: What of inland waters

2. G. La Forest, Natural Resources and Public Property Under the Canadian Constitution 9 (1969) [Hereinafter cited as La Forest].
3. La Forest at 10.
4. La Forest at 9.
5. Such as public harbours under the British North America Act of 1867, 30 & 31 Vict., c. 3 (Imp.), § 108.
6. Re: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792.

(expressly excluded in the terms of the reference)? What of the other provinces? Even in the case of British Columbia, he notes, the court conceded that an historical claim might still be established under pre-confederation statutes or orders-in-council, or other early executive action.[7]

In the last two chapters a thread carried through the previous four is woven into an examination of federal and provincial legislative and executive powers with respect to public property. The thread is the very fundamental distinction made by the courts between proprietary rights and legislative jurisdiction.[8] Here discussion focuses on several areas in which courts have been forced to define the limits of the legislative and executive power of the Dominion and the provinces with respect to the public property of the other. Thus, expropriation, tidal fisheries, Indian lands, and incidental obligations respecting property are examined in relation to the Dominion, and then the provincial ambit of power.

Upon reading these two last chapters, the writer's initial reaction was one of concern. Dean La Forest's analysis of the case law seems to suggest a fairly consistent centralist position on the question of conflicting provincial proprietary interests and federal legislative jurisdiction.[9] This approach may cause some consternation, especially at a time when the winds of constitutional change are blowing decidedly away from rigidly centralistic views as to a preferred constitutional balance.

But upon reflection, is there really a great deal to commend an interpretive approach that has the effect of stifling legitimate federal undertakings? For example, the words used in the proposed Canada Water Bill are, "a matter of urgent national concern."[10] Short of demonstrating that this legislation involves a clearly colorable attempt by the Dominion to carve out a significant piece of provincial public property and accruing revenue, should not the federal power prevail?

7. La Forest at 100.
8. Brooks-Bidlake and Whittall Ltd. v. Attorney-General for British Columbia, [1923] A.C. 450; Attorney-General for Canada v. Attorney-General for Ontario, [1898] A.C. 700.
9. La Forest at 154-5 (Federal Power to expropriate provincial property in aid of implementing a legitimate federal project); *Id.* at 156 (right to fish in tidal waters); *Id.* at 176-82 (Provincial legislation relating to Indians or Indian lands).
10. 1969-70, Bill C.-144, § 11, subsection 1.

Should the Dominion, for example, be precluded from expropriating provincial public property to fully implement and carry out this vital legislation? Should this urgent national concern with respect to water quality management be barred from finding expression in otherwise competent federal legislation?

The investigation of these and other problems relating to the Canadian public domain will be enormously aided by this book. It must be read by students of the Constitution, and particularly by those interested in the rapidly developing area of natural resources law.