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On Shore Natural Resource Ownership: Atlantic Canada Perspective

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I. *Introduction*

Disputes over the ownership of resources off both the east and west coasts of Canada have recently been determined by the Supreme Court in favour of collective ownership by all Canadians, through federal Canada, rather than separate collective ownership by the adjacent citizens through their respective provinces.¹ These offshore disputes have involved state-province constitutional conflict and represent a higher plane application of common law concepts favouring individual ownership.

Ownership of the natural endowment of Canada has developed from native concepts of common ownership, to common law private ownership, to the current position of collective state ownership. Modern state ownership must be recognized as being equivalent to state-private ownership and not confused with collective ownership necessarily for the common good. States act as any private owner to capture economic rents available from natural resources. That this is not always done in the best interests of the citizenry does not lack ample illustrations.

This paper will examine the onshore natural resource property regimes as they have been developed and made applicable to Atlantic Canada. In so doing, it is hoped to dispel a common misconception that private resource ownership decreases as one moves east to west in Canada. The historic position of the Hudson's Bay Company purchase and the CPR reservations of mineral interests are often cited as reasons for the large provincial as opposed to private ownership of resources in Western Canada. In the east, it is presumed that private ownership dominates. It will be seen, however, that both regions mirror one another in provincial ownership.

1. *Beginnings*

A review of natural resource ownership history in Canada should begin with native property concepts. While it is recognized that no uniform

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1. *Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Newfoundland Reference Re Continental Shelf* (1984), 51 N.R. 362 (S.C.C.).

system existed among the native groups,² fundamental principles of tribal property institutions can be generalized as follows:³

- (1) the property relation was that of physical possession as expressed by "ours" and "yours";
- (2) title was based upon use and uninterrupted possession;
- (3) the property relation with regard to land was collective, rather than individual;
- (4) the group was viewed so as to include the dead, the living and the yet to be born;
- (5) the property institutions reflected the patriarchal or matriarchal social ordering of the tribe.

The most pertinent features for present purposes are illustrated in the following extract of a submission to the *Berger Commission* in relation to native title:⁴

Indian property concepts are wholistic (sic). Ownership does not rest in any individual, but belongs to the tribe as a whole, as an entity. The land belongs not only to people presently living, but it belongs to past generations, and to future generations. Past and future generations are as much a part of the tribal entity as the living generation. Not only that, but the land belongs not only to human beings but also to other living things; they, too, have an interest.

Further, Hall J. in *Calder v. Attorney-General of British Columbia*⁵ referred to the following trial evidence quoting from P. Drucker, *Cultures of the North Pacific Coast*.⁶

The localized groups of kin defined who lived together, worked together and who jointly considered themselves exclusive owners of the tracts from which food and other prime materials were obtained.

The whole group owned not only lands and their produce but all other forms of wealth⁷

Each group regarded the areas utilized as the exclusive property of the group. Group members used habitation sites, fishing grounds, clam beaches, hunting and burying grounds, forest areas where timber and bark were obtained through right. Outsiders entered by invitation or in trespass.⁸

It may then be accepted that the natural resources within a tribal area

2. *Native Rights in Canada* (Toronto: Indian Eskimo Association of Canada, 1970) at 7-11; "Generally speaking, land was held communally in pre-discovery Canada. Family ownership of specific resources existed within certain tribes." *Id.* at 9.

3. J. C. Smith, *The Concept of Native Title* (1974), 24 U. of T. L. J. 1 at 7.

4. L. Little Bear, *Submission to the Berger Commission* at 11.

5. [1973] S.C.R. 313; 34 D.L.R. (3d) 145.

6. (San Francisco: Chander Publishing Co., 1965).

7. *Supra*, note 5, S.C.R. 370; D.L.R. 186; Drucker, *supra*, note 6 at 47.

8. *Supra*, note 5, S.C.R. 371; D.L.R. 187; Drucker, *supra*, note 6 at 49.

were considered as part of the group heritage to be used by the group for its benefit to the exclusion of others — in other words, a common interest.

The arrival of European settlers meant the imposition of European concepts and values in North America. Mineral resources, which under aboriginal organization had been held as communal property, became subject to the system of exclusive private property interests. The legal position has been judicially summarized as follows:

[O]n the discovery of the American continent the principle was asserted or acknowledged by all European nations, that discovery followed by actual possession gave title to the soil to the [crown] by whose subjects, or by whose authority, it was made, not only against other European Governments but against the natives themselves.⁹

Rights recognized by Europeans through discovery and settlement were transferred *in toto* from one European power to another by conquest.¹⁰ Thus in Canada, the French King had been “vested with the ownership of all the ungranted lands in the colony as part of the Crown domain”¹¹ and

when by the treaty of 1763, France ceded to Great Britain all her rights of sovereignty, property and possession over Canada . . . [I]t is unquestionable that the full title to the territory ceded became vested in the new sovereign, and that he thereafter owned it in *allodium* as part of the crown domain.¹²

2. Common Law Concepts

Blackstone argues that it is a legal misconception that the victory of William, at the Battle of Hastings, imposed upon the realm of England a system of tenure by which all land was held by individuals from Crown ownership; a view based on the fact of conquest. Blackstone is clear that it was the crown of Harold which was conquered, not England itself.¹³ In addition to the *terra regis* of the crown, William gained the forfeited lands of the vanquished nobles and was thus able to parcel out to his supporters tracts of land to be held of his crown in return for its defence.¹⁴ However, the actual general introduction of the feudal tenure system appears to have been occasioned in 1085 in the wake of an apprehended

9. *Breaux et al. v. Johns et al.* (1849), 4 La. An. R. 141, 142; see also *Doe d. Hanington v. McFadden* (1836), 2 N.B.R. 260 at 277 (per Parker, J.)

10. *Campbell v. Hall* (1774), 1 Cowp. 204; 98 E.R. 1045 (K.B.).

11. *St. Catherine's Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577 at 644 (per Taschereau, J.).

12. *Id.* at 645.

13. W. Blackstone, *Commentaries on the Laws of England*, Book 1 at 199.

14. K. E. Digby, *An Introduction to the History of the Law of Real Property* (3rd ed. Oxford: Clarendon Press, 1884) at 33; Blackstone, Book 2 at 48.

Danish invasion. Blackstone relates that the kingdom was defenceless in the absence of a military structure thus requiring William to import an army of Normans and Bretons. With the passing of danger, a council was held to reorganize the country into a defensive posture:

[T]he king was attended by all his nobility at Sarum; where all the principal land owners submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person. This seems to have been the era of formally introducing the feudal tenures by law

This new policy therefore seems not to have been *imposed* by the conqueror but nationally and freely *adopted* by the general assembly of the whole realm . . . upon the same principle of self-security.¹⁵

With this historical clarification in mind (and the warning of Maitland not to accept theory as historical fact¹⁶), the theory of common law land holding is that all land is held of the Crown. According to this doctrine, an individual does not own land *per se* but rather enjoys an estate or beneficial interest in the land while ownership rests with the Crown. The most complete estate, a fee simple absolute, enables the proprietor thereof to beneficially exercise all rights of property subject to what is, in effect, the residual crown eminent domain. *Cujus est solum, ejus est usque ad coelum et ad infernos*. At common law, the common interest of the tenant-in-fee extends to include not only the surface, or superficies, but also “everything attached to or lying below the surface”¹⁷ and that which is above it.¹⁸ The only exception to this omnipotent interest was the common law crown reservation of the royal metals — gold and silver.¹⁹ The report of *The Case of Mines*²⁰ enumerates the four primary reasons in justification of the Crown’s right to the “mines and ores of gold or silver within the realm”:²¹

(a) “the common law, which is founded upon reason, appropriates every

15. Blackstone, *supra*, note 13, Book 2 at 49-50.

16. F. W. Maitland, *The Constitutional History of England* (Cambridge: The University Press, 1911) at 24-25; H. W. Challis, *The Law of Real Property* (Philadelphia: The Blackstone Publishing Co., 1887) at 4; H.W. Elphinstone and F. T. Maw (ed.), *Goodeve's The Modern Law of Real Property* (5th Ed. London: Sweet & Maxwell Ltd., 1906) at 19.

17. E.H. Burn, *Cheshire's Modern Law of Real Property* (11th ed. London: Butterworths, 1972) at 129; R. E. Megarry and H. R. Wade, *The Law of Real Property* (3rd ed. London: Stevens & Sons Ltd., 1966) at 70; A. B. Morine, *The Mining Law of Canada* (Toronto: Canada Law Book Co. Ltd., 1909) at 57 et seq; *Curtis v. Daniel* (1808), 10 East. at 273, 274; 103 E.R. 779 per Bayley J.: “the presumption at law was that all mines under freehold belonged to the freeholder.” *Barnes v. Mawson* (1813), 1 M & S 77 at 84; 105 E.R. 30 at 32 (K.B.).

18. H. Broom, *Legal Maxims* (10th ed. London: Sweet & Maxwell Ltd., 1939) at 257.

19. Morine, *supra*, note 17 at 57; Burn, *supra*, note 17 at 129; Megarry and Wade, *supra*, note 17 at 72.

20. (1567), 1 Plowd. 310; 75 E.R. 472 (Exch.)

21. *Id.* at E.R. 479.

thing to the persons to whom it best suits, as common and trivial things to the common people, things of more worth to persons of a higher and superior class, and things most excellent to those persons who excel all others; and because gold and silver are the most excellent things which the soil contains, the law has appointed them (as in reason it ought) to the person who is most excellent, and that is the King;²²

(b) for offensive purposes in the public interest since “an army cannot be had and maintained without treasure;”²³

(c) to control coinage in the interest of commerce; and

(d) to ensure that no subject could rival the King’s authority due to the power inherent in possessing treasure and substance.²⁴

Prima facie the right to exclusive use and benefit of other minerals and resources is, at common law, included in the private property interests of the tenant-in-fee.²⁵ The caveat *prima facie* is necessary because it is possible in the estate system to divide property interests, such that “one person may have in him a freehold title to land, whilst another has an exclusive right to the mines under it.”²⁶

By the extension of British rule, this common law system of exclusive private property interests was established in Canada. The Crown in making grants of tracts of land did not always adhere to the norm in England, where royal mines were the sole substantially retained, interest, but rather reserved to itself an ever increasing absolute mineral interest. For example, the Royal Instructions issued in August 1784 to the first Lieutenant-Governor of New Brunswick contained the following clause:²⁷

61. And whereas it hath been represented to us that several parts of our Government of New Brunswick have been found to abound with coals, it is our will and pleasure that in all grants of land to be made by you, a clause be inserted reserving to us, our heirs and successors, all coals and also all mines of gold, silver, copper and lead which shall be discovered upon such lands.

In consequence, during the periods 1784 to 1805, crown grants reserved “all mines of gold, silver, copper, lead and coals.”²⁸ In crown grants made prior to the establishment of New Brunswick as a separate colony, the reservation had read “all mines of gold and silver, precious stones, lapis

22. *Id.*

23. *Id.* at 480.

24. *Id.* at 480-81.

25. Megarry and Wade, *supra*, note 17 at 72; Burn, *supra*, note 17 at 129.

26. *Barnes v. Mawson*, *supra*, note 17 at E.R. 32.

27. *Gesner v. Cairnes* (1853), 7 N.B.R. 595 at 603-4 (in argument).

28. E. C. Hodgson, *Digest of Mineral Laws of Canada* (Ottawa: the Queen’s Printer, 1967) at 137.

lazuli, lead, copper and coals.”²⁹ However, from 1805 all minerals with few exceptions were reserved to the Crown as illustrated by this 1813 clause: “Except and reserved to us, our heirs and successors, all coals, and also all gold and silver and other mines and minerals.”³⁰

In order to properly appreciate the magnitude of state property in terms of the reserved crown mineral interests, it is necessary to define the terms “mines” and “minerals”.

“Mines” is susceptible to two meanings. Standing alone, the primary meaning refers to “the underground workings”³¹ or “underground excavation made for the purpose of getting minerals.”³² The secondary meaning refers to the stratum of minerals *in situ*; in other words, the mineral substances which are excavated.³³ Quite obviously in view of the virgin land, it is this latter meaning which was intended in the reservation of crown mineral interests.

The term “minerals” according to Mellish L.J., in *Hext v. Gill*,³⁴ “includes every substance which can be got from underneath the surface of the earth for the purpose of profit.”³⁵ To the same effect, Lord Romilly, M.R., in *Midland Railway Co. v. Checkley*³⁶ stated “in fact everything except the mere surface, which is useful for agricultural purposes; anything beyond that which is useful for any purpose whatever whether it is gravel, marble, fire-clay, or the like, comes within the word mineral” However, this all encompassing meaning may be limited by the context, as for example, in *Western Minerals Ltd. et al. v. Gaumont et al.*,³⁷ where the Supreme Court of Canada held that a reservation enumerating “all mines, minerals, petroleum, gas, coal and valuable stone” did not include sand and gravel. Kellock J. referred to earlier authority to support his conclusion that by the enumeration of particular minerals, the phrase “mines, minerals” was not intended in the widest sense.³⁸ Further, the precise construction to be placed on the

29. *Id.*

30. *Supra*, note 27 at 596.

31. *Bell v. Wilson* (1866), L.R. 1 Ch. App. 303.

32. *Midland Railway Co. v. Haunchwood Brick and Tile Co.* (1882), 20 Ch. D. 552 at 555.

33. *Lord Provost and Magistrates of Glasgow v. Farie* (1888), 13 App. Cas. 657 at 677 (per Lord Watson), 684 (per Lord Herschell) (H. of L. Scotland); see also *Raysay et al. v. Blair* (1876), 1 App. Cas. 701 at 703 (H. of L. Scotland); *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358 at 369 (per Sir. G. Jessel, M.R.); N.J. Stewart, *The Reservation or Exception of Mines and Minerals* (1962), 40 C.B.R. 329 at 332.

34. (1872), L.R. 7 Ch. App. 699.

35. *Id.* at 712; see also *Earl of Jersey v. The Guardian of the Poor of the North Poor Union* (1889), 22 Q.B.D. 555.

36. (1867), L.R. 4 Eq. 19 at 25; see also *Midland Railway Co.*, *supra*, note 32 at 555.

37. [1953] 1 S.C.R. 345.

38. *Id.* at 355, citing Lord Gorell in *Budhill's Case*, [1910] A.C. 116 at 134; see also *Lord Provost v. Farie*, *supra*, note 33 at 690 (per Lord MacNaughton).

phrase “mines and minerals” is a question of fact to be determined in accordance with “the vernacular of the mining world and commercial world and land owners”³⁹ contemporaneous with the reservation.

From the preceding definitions, it should be apparent that crown mineral reservations severely curtailed the significance of the maxim, *cujus est solum, ejus est usque ad coelum et ad infernos*, to the individual colonial tenant-in-fee. As well, crown reservations are definitionally neither individual-private nor common property interests but rather are state property. The acquisition and development of historical Canada provided a real opportunity for the state to enhance its power position relative to its citizens. Through the reservation of “minerals” and the inherent power of recovery,⁴⁰ the state retained the use and benefit of that property to the exclusion of all others as it may determine. The manner of the exercise of this state power is also the story of the economic development of Canada and the source of much inter-governmental and state-citizen conflict.

3. *New Brunswick: A Model*

The transition from crown-administered state property to Parliament-administered state property came with the accession of George III in 1760. In that year, the King surrendered to the Imperial Parliament for his life the “hereditary revenues of the crown, including the crown lands, many of the minor prerogatives and the hereditary excise” in exchange for an annual settlement or civil list.⁴¹ In 1831, on the accession of William IV the surrender was broadened by express inclusion of colonial revenues.⁴² Turning our focus to New Brunswick, it was not until the year 1837 that control of such colonial revenues passed from the Imperial Parliament to the Legislature, as illustrated by the following enactment:⁴³

39. *Hext v. Gill*, *supra*, note 34 at 719 (per James, L.J.) see also *Lord Provost v. Farie*, *supra*, note 33 at 669 (per Lord Halsbury, L.C.); *Borys v. C.P.R. Co.*, [1953] A.C. 217 at 223,227; *The Crow's Nest Pass Coal-Co. Ltd. v. The Queen et al.*, [1961] S.C.R. 750: whether petroleum and natural gas included in a reservation of “any mineral, precious or base (other than coal)”; *Stewart*, *supra*, note 33 at 346.

40. *Borys v. C.P.R.*, *supra*, note 39 at 227-28.

41. Maitland, *supra*, note 16 at 436-37; G. V. LaForest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto: Univ. of Toronto Press, 1969) at 11-12.

42. *An Act for the Support of His Majesty's Household, and of the Honour and Dignity of the Crown of the United Kingdom of Great Britain and Ireland*, 1 Wm 4, c. 25 (U.K.); LaForest, *supra*, note 41 at 11.

43. *An Act for the Support of the Civil Government in this Province*, S.N.B. 1837, c. 1; La Forest, *supra*, note 41 at 12; W.H. Clement, *The Law of the Canadian Constitution* (3rd ed. Toronto: the Carswell Co. Ltd., 1916), 331. This Act was originally to be effective for ten years (per s. 8) but was made perpetual by 1854. R.S.N.B. 1854, c. 5; LaForest, *supra*, note 41 at 12; during the interval 1847-54, it would appear that the Act was continued, with the surplus revenues held at the disposal of the Crown: Journal of the House of Assembly of New

Whereas His Most Gracious Majesty has been pleased to signify to His Faithful Commons of New Brunswick, that His Majesty will surrender up to their control and disposal the proceeds of all His Majesty's Hereditary Territorial and Casual Revenues, and of all His Majesty's woods, mines, and royalties, now in hand, or which hereafter during the continuance of this Act be collected in this Province on a sufficient sum being secured to His Majesty, His Heirs and Successors for the support of the Civil Government in this Province

1. Be it therefore enacted by His Excellency the Lieutenant-Governor, Legislative Council and Assembly and by the authority of the same, That the proceeds of all and every the said Hereditary Territorial and Casual Revenues, and the proceeds of all sales and leases of Crown lands, woods, mines and royalties, which have been collected and are now in hand or which shall be collected hereafter during the continuance of the Act . . . shall immediately be payable and paid to the Provincial Treasurer, who is hereby authorized to receive the same for the use of this Province

In similar fashion, full control over their respective Hereditary Territorial and Casual Revenues was extended to the provinces of Canada and Nova Scotia, the former in 1847 and the latter in 1849.⁴⁴

In an era of individualism and in a province founded by colonists raised in the Anglo-legal tradition, the new expanse of state property could not long go unchallenged in favour of private interests. The New Brunswick legislative session of 1854 produced two unsuccessful attempts to remove the crown mineral reservation and vest proprietorship, in the surface tenant-in-fee. The first attempt, Bill No. 5, *A Bill to Vest All Mines and Minerals in the Owner of the Soil*, succeeded in being passed by the House of Assembly, with an amendment imposing a licencing requirement on mining operations,⁴⁵ but was returned by the Legislative Council with further amendments. In the House, this altered version of the Bill was defeated on second reading.⁴⁶ The second attempt came in the form of Bill No. 113, *A Bill Relating to Mines and Minerals*, which passed the Committee stage with a preamble in the following form:⁴⁷

Whereas it is deemed expedient to abolish and render null and void all reservations of Mines and Minerals, except Royal Mines, contained in any Grant or Letters Patent from the Crown, heretofore made, of any lands within the Province

An attempt to curtail the effectiveness of the Bill by the moving of an amendment, which would have imposed the licencing requirements

Brunswick 1846 at 303, direction from Lord Stanley (Secretary of State for the Colonies) for payment from the Surplus Civil List Fund to the Disputed Territory Fund under the Fifth Article of the Treaty of Washington.

44. Clement, *supra*, note 43 at 331; LaForest, *supra*, note 41 at 12-13.

45. Journal of the House of Assembly of New Brunswick, 1854 at 135-136.

46. *Id.* at 281.

47. *Id.* at 397.

included in the earlier version, was defeated by a vote of 17-15. This second attempt to divest the Crown of the reserve mineral interest was, nevertheless, defeated on the third reading when two members who had supported the Bill in Committee abandoned it, with the result that the measure was lost by two votes.

Though twice defeated, the attempt to divest the state of its reserved mineral interests was renewed during the ensuing session of the Assembly held in 1855. Bill No. 37, *A Bill to Vest All Mines and Minerals in the Owner of the Soil* was introduced by the same persistent author of the two previous endeavours. Once again, the measure failed to pass the Committee of the Whole House unscathed.⁴⁸ The proceedings resulted in the passage of *An Act Relating to Mines and Minerals*⁴⁹ which represented a curious compromise by both factions, as a comparison of the preamble and substantive provisions demonstrates:⁵⁰

Whereas it is only just and proper that all Mines and Minerals of every description should pass with the soil to the grantee of the Crown, and be vested in him: —

Be it therefore enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows: —

(1) The exclusive right of digging and raising Coal or other Mineral, shall be vested in the owner of the land wherein such Coal or Mineral is found to exist; but before he shall dig or raise such Coal or Mineral he shall obtain a Licence therefore from the Governor in Council.

(2) The Governor in Council may issue a Licence to the owner of any land, or his assignee, for that purpose, to dig and raise Coal and other Minerals therefrom, upon such terms and on payment of such rent or royalty, and subject to such rules and regulations, as the Governor in Council may prescribe.

(3) This Act shall not affect, impair, or interfere with the rights or duties of any Licencee acquired under any Licence granted before it comes into operation, nor with any grant in which the Minerals are not reserved.

(4) This Act shall not come into operation until Her Majesty's Royal approbation be thereunto had and declared.

Supporters of private property interests achieved a statement of principle in the preamble while those favoring state property asserted state control through licencing and rental requirements.

The 1876 consolidation of New Brunswick statutes produced the first comprehensive *Mines and Minerals Act*⁵¹ for the province. Consolidated

48. *Id.* at 1855, 236-237.

49. S.N.B. 1855, c. 76 (found at end of 1856 S.N.B.).

50. Passed 12 April 1855; specially confirmed ratified and enacted by Order in Council dated 24 September 1855.

51. C.S.N.B. 1876, c. 18.

were (a) an 1849 statute providing remuneration for the discovery of salt deposits,⁵² (b) an 1862 enactment authorizing the Governor-in-Council to make rules and regulations in reference to gold mining on un-granted Crown lands,⁵³ (c) the 1855 Act which granted surface owners the exclusive mining rights within their property subject to the licensing and rental requirements,⁵⁴ (d) an 1870 provision allowing free mining of surface coal and granted lands,⁵⁵ and (e) an 1873 Act requiring the maintenance of accurate mining company records and providing for inspection thereof by government officials.⁵⁶ Separate legislation in the Consolidated Statutes made provision for the forfeiture of mining leases or licences for breach of conditions⁵⁷ and for dealing with trespass to crown lands or property, such as non-licenced lumbering and mining.⁵⁸

The legislation in force to this time reflected an unease in the exercise by the state of its exclusive mineral interests. Any qualms felt by legislators were apparently overcome by 1891 when the Legislature enacted *The General Mining Act*⁵⁹ which introduced the now familiar licensing-leasing pattern of contemporary statutes. The cornerstone of the legislative scheme was the expression of state ownership rights in section 4 of that Act:

It is hereby declared to be the law that in all grants in which mines and minerals have been excepted and reserved to the Crown, such mining rights are property separate from the soil covering such mines and minerals, and constitute a property under the soil which is public property independent from that of the soil which is above it.

Though this was merely declaratory of what the legal regime had been,⁶⁰ its promulgation by the Legislature settled the controversy of private versus state ownership and initiated a more aggressive exercise of reserved mineral rights on granted land. The earlier compromise, vesting in the surface owner an exclusive mining right, was swept away and replaced by the right of the state to licence or lease mineral interests “upon any lands in [the] Province”⁶¹, except⁶²

52. S.N.B. 1849, c. 5.

53. S.N.B. 1862, c. 36.

54. *Supra*, note 49.

55. S.N.B. 1870, c. 18.

56. S.N.B. 1873, c. 24.

57. *The Escheat of Mining Leases and Mill Reserves Act*, C.S.N.B. 1876, c. 19.

58. *Trespasses to Lands and other Property of the Crown Act*, C.S.N.B. 1876, c. 13.

59. S.N.B. 1891, c. 16.

60. “But it is of universal experience that one person may have in him a freehold title to land, whilst another have an exclusive right to the mines under it . . .” *Barnes v. Mawson*, *supra*, note 17 at E.R. 32 (per Lord Ellenborough, C.J.).

61. *Supra*, note 51 at s. 81

62. *Id.* at s. 41.

any buildings or the curtilage appertaining to any house, store, barn or building or upon any garden, orchard, or ground reserved for ornaments or under a cultivation for growing crops or enclosed, except with the consent of the occupier or by license of the Governor-in-Council

The surface owner retained merely the right to compensation for damage sustained.

In 1901, the 1855 privilege relating to the free mining of surface coal was finally repealed, but the payment of royalty was made discretionary.⁶³

Bearing in mind the possibly all inclusive legal definition of the reserved "mineral" interest, statutory exceptions to that definition began to appear in 1888 when the phrase "mines and minerals" was declared, retroactively and prospectively, not to include carbonate of lime, sulphite of lime and gypsum.⁶⁴ Proving the fickleness of the Legislature, these same substances were declared in 1906 to be within the reservation of "mines and minerals" but not subject to the payment of any crown royalty.⁶⁵ The present statutory definition of "mineral" is as follows:⁶⁶

any natural, solid, inorganic or fossilized organic substance and such other substances as are prescribed by regulation to be minerals, but does not include

- (a) sand, gravel, clay or soil unless it is to be used for its chemical or special physical properties, or both, or where it is taken for contained minerals,
- (b) ordinary stone used for building or construction,
- (c) peat or peat moss,
- (d) bituminous shale, oil shale, albertite or intimately associated substances or products derived therefrom,
- (e) oil or natural gas, or
- (f) such other substances as are prescribed by regulation not to be minerals;

According to the legislative scheme, subsections (a), (b) and (c) of the above definition are labeled quarriable substances which "are vested in the owner of the land in or on which they lie" by virtue of the *Quarriable Substances Act*.⁶⁷ Subsection (d) had been statutorily included within the definition of "minerals" in 1912;⁶⁸ however, in 1967 specific legislation, the *Bituminous Shale Act*,⁶⁹ was approved which

63. *An Act to Amend the General Mining Act*, S.N.B. 1901, c. 32, s. 1.

64. *An Act Further Relating to Mines and Mining Leases*, S.N.B. 1888, c. 51, s. 1.

65. *An Act in Addition to and in Amendment of "The General Mining Act,"* S.N.B. 1906, c. 17, s. 2; now see S.N.B. 1985, c. M-14.1, s. 23.

66. *Mining Act*, S.N.B. 1985, c. M-14.1, s.1.

67. R.S.N.B. 1973, c. Q-1, ss. 1, 4(1); as amended by S.N.B. 1980, c. 45, s.1.

68. S.N.B. 1912, c. 35, s. 2.

69. S.N.B. 1967, c. 3.

included a declaration that such substances were always “property separate from the soil and vested in the Crown in right of the Province.”⁷⁰ Subsection (e) is provided for by the *Oil and Natural Gas Act*⁷¹ which states, in section 3, that oil and natural gas are “declared to be, and to have been at all times prior hereto, property separate from the soil and vested in the Crown in the right of the Province” a provision almost *ipsis verbis* to the original declaration in 1948.⁷² Prior to that date, oil and natural gas had been included in the statutory definition of “mines and minerals” or “minerals”⁷³ so as to be within the Crown reserved interest.

It is important to note that while the general mining legislation has reference only to crown reserved minerals,⁷⁴ the declarations as to oil and natural gas, bituminous shale, salts and radioactive minerals,⁷⁵ and the aforementioned ‘carbonate of lime, sulphate of lime and gypsum’ effectively and retroactively expropriated these materials from the surface owner of unreserved mineral interests. Further, the remaining freehold mineral interests in the province are not secure from swift expropriation. The *Ownership of Minerals Act*,⁷⁶ enacted in 1953, enables the Lieutenant-Governor in Council to expropriate either specific or all freehold minerals as defined in the *Mining Act*,⁷⁷ by the simple expediency of an order declaring either that any designated minerals are property separate from the soil and vested in the Crown or that the Crown grant shall be construed to have reserved all minerals.⁷⁸

70. *Id.* at s. 3; now, R.S.N.B. 1973, c. B-4.1, s. 3(1).

71. R.S.N.B. 1973, c. 0-2.1.

72. S.N.B. 1948, c. 13, s.1

73. See *Discovery and Development of Oil and Natural Gas Act*, S.N.B. 1899, c.9.

74. *Supra*, note 66 at s. 2(1): “This Act and the regulations apply to minerals the ownership of which is vested in the Crown”

75. S.N.B. 1961-62, c. 45, s. 8(3); now *supra*, note 66 at s. 21:

- (a) salt, common salt, rock salt and halite,
- (b) sylvite, carnallite, langbeinite, kainite, kieserite and glauberite,
- (c) salts of sodium, potassium and magnesium,
- (d) sulphates, carbonates, nitrates, borates, borosilicates, fluorides and phosphates intimately associated with any mineral specified in paragraph (a), (b) or (c), and
- (e) radioactive minerals,

existing or that may be found in a natural state within the Province, are hereby declared to be and to have been at all times prior hereto, property separate from the soil and ownership thereof is vested in the Crown.

76. S.N.B. 1953, c. 10; now, R.S.N.B. 1973, c. 0-6.

77. *Id.* at s. 1.

78. *Id.* at s. 1(a), (b), (d). The expropriated mineral freeholder may receive compensation for loss or damage sustained by reason of any order [s. 1(e)]; the exclusive right to prospect for a period of not less than one year [s. 1(g)]; and where substantial development expenditures have been incurred, a mining license or lease [s. 5]. This power has been exercised twice: Orders in Council 71-271 (Albert, Kings & Westmorland Counties) and 73-57 (Northern York County).

4. *Nova Scotia*

In contrast to the cumbersome legislative scheme in New Brunswick, the parent province of Nova Scotia has evolved a simpler regime of state mineral ownership. In 1826, George IV leased to his brother, the Duke of York and Albany, all mines and minerals within the province for a term of sixty years.⁷⁹ Consequently, when in 1849 Nova Scotia gained beneficial control of the casual and territorial revenues,⁸⁰ these mineral interests were not included. However, following the death of the Duke, a surrender of the leased mineral interest was made with the result that the province finally acquired beneficial control in 1858. Legislation of that year⁸¹ conferred upon surface owners full mineral interests reserving only “gold, silver, tin, lead, copper, coal, iron and precious stones.”⁸² Thus, at the same period that private interests were being denied in New Brunswick, partial satisfaction was accorded in Nova Scotia.

In 1892, state interests were once again asserted in Nova Scotia by legislation which amended the 1858 mineral reservation by adding the phrase “all other minerals, excepting limestone, plaster and building materials.”⁸³ Consequently, the extent of any particular private mineral interest depended upon whether the grant was made prior or subsequent to 1892, with the latter being restricted to the exceptions listed in the legislation of that year. This dichotomous situation continued⁸⁴ until 1918 when the Legislature retrospectively expropriated private mineral interests by declaring that grants made between 1858 and 1892 be construed consistent with the legislation of the latter date, such that all mines were deemed reserved except limestone, plaster and building materials.⁸⁵

The final stage in extending state ownership in Nova Scotia occurred two years later when the Legislature provided that every crown grant made prior to April 22, 1910 was to be “construed and held to have reserved to the Crown all the minerals in the land so granted excepting only limestone, gypsum and building materials.”⁸⁶ The date of April 22, 1910 was made pivotal since, by legislation which came into force on that day, all grants made thereafter were to be construed and held to reserve all minerals excepting the same three classifications of materials.⁸⁷

79. See: R.S.N.S. 1859, c.11, s.3; S.N.S. 1858, c. 2 the preamble.

80. *Supra*, note 44.

81. *An Act to Extend the Operation of Certain Grants of Land*, S.N.S. 1858, c.2.

82. *Id.* at s. 3.

83. S.N.S. 1892, c. 16, s. 1.

84. *The Crown Lands Act*, R.S.N.S. 1900, c. 24, ss. 27-29; S.N.S. 1910, c. 4, ss. 21-24.

85. S.N.S. 1918, c. 34, s. 1.

86. S.N.S. 1920, c. 32, s. 1.

87. *Supra*, note 84 at S.N.S. 1910, c. 4, s. 21.

Therefore, whether the crown grant was made prior to or after the 1910 date, the result was the same as to ownership of minerals by the state. This situation remained unaltered⁸⁸ until 1975 when the Legislature enacted⁸⁹ a definition of mineral which expressly did not include:⁹⁰

- (i) ordinary stone, building or construction stone,
- (ii) sand, gravel, peat, peatmoss or ordinary soil,
- (iii) gypsum or limestone,
- (iv) oil or natural gas, or
- (v) bituminous shale, oil shale or intimately associated products or substances derived therefrom.

However, to provide flexible protection for state interests the Governor in Council was empowered to declare as a mineral:⁹¹

any non-living substance formed by the processes of nature that occurs on or under the surface of the earth [and]

- (a) has a higher economic value or use than that to which it had formerly been put; or
- (b) which had formerly been classified as gypsum, limestone or building material, has a higher economic value or use than has gypsum, limestone or building material; or
- (c) should in the public interest be treated as a mineral.

In addition, as in New Brunswick, certain of the exceptions from the definition of mineral are specifically provided for in separate legislation. The exception as to oil or natural gas was particularly declared state property by the *Petroleum and Natural Gas Act* of 1942,⁹² and bituminous shale and similar substances provided for by the as yet unproclaimed *Bituminous Shale Conservation Act*.⁹³

5. *Prince Edward Island*

Land issues permeate the very fibre of Prince Edward Island history and politics. In 1767, the land territory of the then colony was divided into surveyed lots of roughly 20,000 acres each and distributed to interested purchasers by means of a lottery.⁹⁴ Lot number 66 of the 67 so surveyed

88. *The Lands and Forests Act*, S.N.S. 1926, c. 4, ss. 20-21; S.N.S. 1935, c. 4, ss. 18-19; R.S.N.S. 1967, c. 163, ss. 18-19

89. *Mineral Resources Act*, S.N.S. 1975, c. 12, s. 2(k).

90. *Id.* now, C.S.N.S. 1979, c. M-16, s. 2(k).

91. *Supra*, note 89 at s. 5(1).

92. S.N.S. 1942, c. 2, s. 4; see, *Petroleum Resources Act*, S.N.S. 1980, c. 12, s. 9 (not proclaimed).

93. S.N.S. 1974, c. 2, s. 4 (not proclaimed).

94. Public Archives of Canada, (1906), 40 Sessional Papers No. 7, part 1, #18, at 3-22. See,

comprised only 6000 acres and was reserved to the Crown. Included in the various reservations, setting forth such requirements as payment of quitrent and settlement by Protestant settlers, was a mineral reservation clause reserving mines of gold, silver and coals.⁹⁵ This limited reservation remained intact until 1920 when the Legislature passed an expanded definition of minerals, coupled with a declaration that such minerals “are property separate from the soil . . . and constitute a property under the soil which is public property and vested in the Crown”⁹⁶ As defined, the minerals so expropriated were

all deposits and accumulations of gold, silver, platinum, iridium, or any of the platinum group of metals, mercury, lead, copper, iron, tin, zinc, nickel (or any combinations of the aforementioned elements with themselves or with any other elements) and also coal, and salt and shall include oil and natural gas⁹⁷

What is interesting to note is that this 1920 legislative sleight of land is found in a statute, *An Act to Encourage the Discovery and Development of Oil and Natural Gas*, the title of which does not betray the full extent of its provisions.

The specific substance mineral definition of 1920 was further expanded in 1957 to a more all-inclusive claim:⁹⁸

all naturally occurring minerals or any combination of them with themselves or with any other element and without derogating from the generality of the foregoing includes coal, salt, sulphur, potash and shall include oil and gas

The current resource ownership regime in Prince Edward Island results from the division in 1978 of the then omnibus *Oil, Natural Gas and Minerals Act*⁹⁹ into the *Oil and Natural Gas Act*¹⁰⁰ and the *Mineral Resources Act*.¹⁰¹ The latter *Act* continues the vesting provision of earlier legislation¹⁰² but gives exemptions from the all-inclusive definition of mineral as to exclude:¹⁰³

J.M. Bumsted, *The Origins of the Land Question on Prince Edward Island, 1767-1805* (1981), 11 *Acadiensis* 43.

95. *Id.* Sessional Paper, at 8

96. *An Act to Encourage The Discovery and Development of Oil and Natural Gas*, S.P.E.I. 1920, c.20, s.28.

97. *Id.* at s. 1(c).

98. *The Oil, Natural Gas and Minerals Act*, S.P.E.I. 1957, c. 24, s. 1(A). The legislative history of the 1920 legislation to 1957 is S.P.E.I. 1940, c. 43; S.P.E.I. 1943, c. 8; R.S.P.E.I. 1951, c. 103.

99. R.S.P.E.I. 1974, c. 0-3.

100. *Id.* (renamed and amended).

101. S.P.E.I. 1978, c. 15.

102. *Id.* at s. 2.

103. *Id.* at s. 1(k).

- (i) ordinary stone, building or construction stone;
- (ii) sand, gravel, peat, peat moss or ordinary soil;
- (iii) gypsum or limestone;
- (iv) oil or natural gas, or;
- (v) bituminous shale, oil shale, or intimately associated products or substances derived therefrom.

As with schemes legislation in the other provinces, one would expect these exceptions to be covered by other legislation. So it is with oil and natural gas, noted above, which statute defines the substances and vests such property "under the lands and territorial waters of the province . . . in Her Majesty."¹⁰⁴ Surprisingly, Prince Edward Island has neither a Quarriable Substances Act nor a Bituminous Shale Act to encompass the other exceptions. The *Mineral Resources Act* also includes provision for the Lieutenant-Governor in Council to declare a natural substance to be a mineral and allows a one year period for any person injuriously affected by the declaration to make a claim for compensation.¹⁰⁵

At present, the situation as a result of the legislative schemes of the three provinces is that all minerals, as statutorily defined, are state property in Nova Scotia and Prince Edward Island and all but between three and five percent in New Brunswick.¹⁰⁶

6. *Constitutional Regime*

In framing the constitutional relationship of the uniting provinces, the *Constitution Act, 1867*¹⁰⁷ had to provide for the distribution of state property between the pre-existing and beneficially entitled colonies and the new federal state. In contradistinction to the distribution of legislative jurisdiction whereby residual power was assigned to the federal Parliament, the distribution of property was accomplished by appropriating only exceptional items to the federal state with the residue remaining vested in the respective provinces. The following sections of the *Constitution Act, 1867* particularly provide for the distribution of natural resource property:

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the property of Canada.

104. *Supra*, note 101 at s. 5.

105. *Supra*, note 101 at s. 3 (no such declaration by the Lieutenant-Governor in Council has been made).

106. Approximation of Dept. of Natural Resources, New Brunswick, 23 June 1980. For provincial ownership of wildlife see: *Fish and Wildlife Act*, S.N.B. 1980 c.F-14.1, s.3(1); *Fish and Game Protection Act*, R.S.P.E.I. 1974, c.F-8 s. 36.

107. 30 & 31 Vict., c. 3 (U.K.).

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such Lands, Mines, Minerals or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any interest other than that of the Province in the same.

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

Whether or not the phrase “Public Property” in section 117 is to be restricted by the ensuing expression “Lands or Public Property” so as not to include lands is not of great moment, because section 109 expressly states that such interests “shall belong to the several provinces . . . in which the same are situate.”¹⁰⁸ Therefore, by a combined reading of sections 109 and 117, the Confederating Provinces retained their respective natural resource endowment subject to exceptions included in the Third Schedule, per section 108. As stated by the Judicial Committee of the Privy Council:¹⁰⁹

Whatever proprietary rights were at the time of the passing of [*the Constitution Act, 1867*] possessed by the provinces remain vested in them except such as by any of its express enactments transferred to the Dominion of Canada.

The enumeration of the public works and property transferred to Canada by the Third Schedule¹¹⁰ is not such as to require extensive examination, beyond that of “Public Harbours”, for illustrative purposes.

The issue of the extent of interest transferred in a “Public Harbour” was adjudicated upon by the Supreme Court of Canada in the 1881 case

108. Clement, *supra*, note 43 at 602.

109. *Attorney General for Canada v. Attorneys General for Ontario, Quebec and Nova Scotia* (the Ontario Fisheries Case), [1898] A.C. 700 at 709-10 (J.C.P.C.).

110. *The Third Schedule* Provincial Public Works and Property to be Property of Canada.

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and Public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages and other Debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices and all other Public Buildings except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and Known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

of *Holman v. Green*.¹¹¹ Prince Edward Island had been admitted to the Union in 1873 on terms¹¹² which generally provided for application of the provisions of *The Constitution Act, 1867*, including section 108 and the Third Schedule. As such, “Public Harbours” the property of Prince Edward Island had been transferred to Canada. However, by letters patent, dated 30 August 1877, the Lieutenant-Governor in Council purported to convey to Holman in fee simple part of the foreshore in the harbour at Summerside. In dismissing an action for ejectment brought by the plaintiff Holman to recover possession of the property, the Supreme Court had to decide the narrow question as to whether section 108 of the *Constitution Act* transferred the property in the soil or bed of the harbour or merely the public works and improvements. Strong J. answered “that it was intended to transfer the harbors in the widest sense of the word including all proprietary as well as prerogative rights, to the Crown as representing the Dominion.”¹¹³ By this view, a province was divested of its mineral interests in realty included in the Third Schedule. This position may be subject to one qualification.

In the *Precious Metals* case,¹¹⁴ the Privy Council held that the precious metals, gold and silver, not being regarded as *partes soli* or as incidents of the soil but as a prerogative right of the Crown, were not included in the transfer of “public land” provided by the 11th Article of Union approved by British Columbia and Canada to secure the completion of the railway.¹¹⁵ Rather, precious metals were held to be included in the term “‘royalties’ connected with mines and minerals under sect. 109 of the [Constitution] Act.”¹¹⁶ Accordingly, one author¹¹⁷ is of the opinion that precious metals belong to the province as a result of this decision. Alternatively, it should be noted that the phrase “public property” as used in section 108 is much broader than the term “public lands” before the Privy Council and therefore such royalties may not “[belong] to the several provinces . . .” within the meaning of section 109 if associated with the “Public Property” enumerated in the Third Schedule. This result is consistent with the general view of Strong J. quoted above.

Though perhaps unnecessary in light of the generality of section 117,

111. (1881), 6 S.C.R. 707; LaForest, *supra*, note 41 at 57-60.

112. R.S.C. 1970, Appendix 2, No. 12.

113. *Supra*, note 111 at 718-19; affirmed as to bed of harbour, *Ontario Fisheries Case*, *supra*, note 108 at 711.

114. *Attorney General for British Columbia v. Attorney General for Canada* (1889), 14 App. Cas. 295 (J.C.P.C.).

115. Terms of Union with British Columbia, Article 11; R.S.C. 1970, Appendix 2, No. 10.

116. *Supra*, note 114 at 305.

117. LaForest, *supra*, note 41 at 59.

section 109 does serve the direct function of satisfying the exception in favour of the provinces provided in section 102.¹¹⁸

102. All Duties and Revenue over which the respective Legislatures of Canada, Nova Scotia and New Brunswick before and at the Union had and have power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

In *St. Catherine's Milling & Lumber Co. v. The Queen*,¹¹⁹ Lord Watson for the Privy Council, in discussing the interrelationship of these sections, noted:¹²⁰

It hardly admits of doubt that the interest in land, mines, minerals, and royalties, which by sect. 109 are declared to belong to the Provinces, include, if they are not identical with, the "Duties and revenues" first excepted in sect. 102.

As regards section 109, his Lordship stated that it was:¹²¹

sufficient to give each province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sect. 108, or might assume for the purposes specified in sect. 117.

The enumeration of "Lands, Mines, Minerals, and Royalties" in section 109 includes a redundancy since the word "Lands" has been held to carry with it the ordinary incidents of land: the mines and minerals.¹²² As we have seen, the word "Royalties" includes the prerogative right to precious metals. Taken together section 109 specifically reserves to the province the benefits of its respective casual and territorial revenues.¹²³

What is the nature of this interest that we earlier described as state property but is referred to as provincial "Public Property" in section 117 and "belonging to the several provinces" in section 109?

By traditional legal analysis "state" or "public" property does not "belong" to Canada or the provinces but rather is vested in the Crown.¹²⁴

118. *The Constitution Act, 1867*, *supra*, note 106.

119. (1888), 14 App. Cas. 46 (J.C.P.C.).

120. *Id.* at 57.

121. *Id.*

122. *Precious Metals Case*, *supra*, note 114, 304; *LaForest*, *supra*, note 41, ch. 5; *Attorney General for Ontario v. Mercer* (1883), 8 App. Cas. 767 (J.C.P.C.).

123. *St. Catherine's Milling*, *supra*, note 119, 58.

124. *Id.* 55-56; *LaForest*, *supra*, note 41 at 17; *Clement*, *supra*, note 43 at 601.

Thus, while the beneficial interest may have been appropriated to provincial purposes prior to Confederation by the surrender of the casual and territorial revenues, as discussed earlier,¹²⁵ the legal interests remained vested in the Crown. As prior to Confederation the Crown, being one and indivisible, acted in each territory through local ministers or advisors, so after Confederation the Crown acts through federal or provincial ministers depending upon whether the former or latter political entity is beneficially entitled to the property. It is the right to administration and control which is regarded as federal and provincial ownership and in this sense property “belongs” to one or the other. Lord Watson succinctly stated the position as follows:¹²⁶

Wherever public land with its incidents is described as “the property of” or as “belonging to” the Dominion or a Province, these expressions merely import that the right to its beneficial use or to its proceeds has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

Newcombe, J. phrased the same proposition *Re Saskatchewan Natural Resources*¹²⁷ as follows:

There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.

In consequence, a transfer of property from a Province to the Dominion involves:¹²⁸

No real conveyance of property, since His Majesty the King remains the owner in either case and therefore, it is only the administration of the property which passes from the control of the Executive of the Province to the Executive of the Dominion.

As such, this transfer may be effected by mere order in council without the necessity of a deed.¹²⁹

It may be redundant to point out that “public” property remains such only as long as it is not alienated from crown title. Hence, lands held

125. *Supra*, text at note 41.

126. *St. Catherine's Milling*, *supra*, note 119 at 56; *LaForest*, *supra*, note 41 at 17-18; *Clement*, *supra*, note 43 at 601-2.

127. [1931] S.C.R. 263 at 275; affirmed, [1932] A.C. 28 at 40 (J.C.P.C.); see also, *Attorney General of Canada v. Higbie et al.*, [1945] S.C.R. 385 at 432 (per Rand J.).

128. *Id.* 404 (per Rinfret C.J.).

129. *Re Saskatchewan Natural Resources*, *supra*, note 120; *LaForest*, *supra*, note 41 at 19; *Mercer v. Attorney General for Ontario* (1881), 5 S.C.R. 538 at 633 (per Ritchie C.J.).

privately in fee simple cease to be “public” property of either the Dominion or a Province.¹³⁰

II. *Conclusion*

The natural resource endowment is but one element of the common heritage of a given population. It is, however, a vital component for it shapes the cultural and economic development of the occupying people. Traditions, customs, folklore, art and even perspectives are influenced, if not shaped, by the exploitation of the natural resource endowment.

In Atlantic Canada, this resource endowment has passed through successive stages of interests from the common property concepts of the native population to the present regime of state ownership. It is the provinces which are the owners of the subsurface mineral wealth, most timber resources, fish and wildlife. Management and control jurisdiction is constitutionally vested in the province-owner by the *Constitution Act, 1867*. Individual interests in natural resources are at the sufferance of the state. That the interests of the state, as an entity distinct from its citizens, may not always be consistent with the longer term community interests results from the independent status of the state as owner and its separate need for financial resources. Recognition of these factors amply justifies strict scrutiny by citizens of provincial management of their resource heritage.

130. *Spooner Oils Ltd. et al. v. The Turner Valley Gas Conservation Board et al.*, [1933] S.C.R. 629 at 644; LaForest, *supra*, note 45 at 75-76, 135, 167.