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Natural Resources and the New Constitution

by A.R. Lucas

During the 1980-81 negotiations between the federal government and the producer provinces on oil and gas pricing and revenue sharing, many lawyers dusted off their constitutional law books to advise private or government clients on the constitutional law strength of the respective federal and provincial positions. Now, however, the dust has largely settled. New federal-provincial pricing and revenue sharing agreements are in place, and the National Energy Program is substantially implemented. Canada also has a new constitution. The new constitution contains a "resources amendment" that was the subject of federal-provincial negotiations at First Ministers' conferences, beginning in the late 1970s. There is also an entrenched Canadian Charter of Rights and Freedoms. The Charter's impact is likely to be primarily on traditional civil rights and civil liberties, but in the longer term, as precedent accumulates and material for analogies grows, its effects are likely to be felt by the resources sector.

The resources amendment, added as s.92A of the Constitution Act, 1867 (30-31 Vict., c.3 [U.K.] as am.), introduces three major changes to the federal-provincial division of legislative powers related to resources. First, provincial legislative power based on ownership of public resources, hinted at in cases such as *Canadian Industrial Gas and Oil Ltd.* v. *Government of Saskatchewan (CIGOL)* ([1978] 2 S.C.R. 545), is confirmed. Each province is given exclusive power to make laws in relation to exploration, development, conservation, and management of non-renewable natural resources and forestry resources, including the rate of primary natural resource production. "Primary production" is defined in the Sixth Schedule as natural resources in the form they are recovered from their natural state or which are products resulting from processing or refining, but not manufactured products resulting from refining of crude oil, synthetic crude oil, natural gas, or liquids derived from coal.

There have been suggestions that this subsection actually derogates from provincial resource ownership rights by bringing them into the ss.91-92 division of powers that is subject to federal paramountcy in the event of conflicting but otherwise validly enacted federal and provincial laws. This is unlikely. Rather, s.92A(1) appears to function like s.92(5) in clarifying provincial resource legislation powers without weakening the provincial ownership power established by Part VIII of the Constitution Act, which distributes public property between Dominion and provinces.

The second major change is s.92A(2), which authorizes provinces to make laws in relation to export of primary natural resource production from the provinces. *Prima facie,* this empowers provinces to enter previously exclusive federal areas such as pricing and regulation of removal of resources from provinces.

However, there are two qualifications. One is a prohibition on provincial "discrimination in prices or in supplies exported to another part of Canada". "Discrimination" is not defined, and is new to the Canadian constitution. It appears to prohibit producer provinces making special natural resource export arrangements with other provinces. It may also be construed to prohibit a province from discriminating by offering more favourable prices to its residents or even by requiring that provincial resources be dedicated to projects within the province. This latter point was raised in a recent British Columbia natural gas supply inquiry. Does this mean that projects such as the proposed Pacific Coast liquid natural gas terminal cannot be given firm provincial approval because such a commitment of B.C. resources discriminates against developers or consumers in other parts of Canada? This is unlikely, since the subsection deals with resource supplies exported to another part of Canada and there is a saving clause that precludes derogation from existing provincial powers including resource ownership powers. It is also possible that the interpretation given to the term "discrimination" in the public utility regulation context will permit distinctions between "just" and "unjust" discrimination, or discrimination that is or is not appropriate from a Canadian energy policy standpoint.

The second qualification on provincial pricing and export powers is s.92A(3), which clearly establishes federal legislative paramountcy. Thus, the Dominion retains the whip hand and the prospect of bold new provincial marketing, pricing, and export initiatives vanishes. Even when the existing federal-provincial agreements expire, this Dominion paramountcy provision ensures a stronger federal hand in negotiations on such matters as pricing and marketing outside the province of production.

Perhaps the most important change from a provincial

standpoint is s.92A(4), which empowers provinces to levy both direct and indirect taxes with respect to non-renewable natural resources, forest resources, and the primary production from these resources. This effectively reverses the *CIGOL* reference case to the extent that the Supreme Court of Canada held that the provincial taxes in question were indirect taxes, a matter exclusively within federal legislative power. However, the practical effect of this provincial power to impose indirect resource taxes is likely to be limited by the size of the natural resource revenue pie, and the large slices already claimed under aggressive federal taxation policies.

The new Canadian Charter of Rights and Freedoms is of primary interest with respect to criminal law and human rights. However, one category of new rights - mobility rights - does appear to affect the natural resources industries directly in circumstances where provinces have either enacted provincial benefits and preferences legislation, or have entered into agreements with the federal government on this matter. There are also less obvious Charter impacts. Perhaps the most important is the apparent extension of procedural due process rights by the Charter's basic legal rights guarantee. Also potentially important, particularly for northern areas where native land claims negotiations are advanced, are two sections that guarantee that aboriginal rights are not adversely affected by the Charter (s.25) and that "existing" aboriginal rights and treaty rights are "recognized and affirmed" (s.35). Included is an express provision that the Charter shall not be construed to abrogate or derogate from any rights or freedoms acquired by aboriginal peoples by way of land claims settlement.

Unlike the statutory Canadian Bill of Rights (S.C. 1960, c.44 as am.), the application of the Charter is not limited to the interpretation of legislation. Because it applies to subject matters of legislation, it extends to executive acts such as the making of federal-provincial agreements and to administrative actions, such as orders or decisions of the National Energy Board or other natural resource regulatory bodies. It applies to provincial as well as federal action, except to the extent that provincial legislatures pass laws to expressly opt out of Charter requirements. But this opting out is limited to the fundamental freedoms and legal rights categories. It does not, for example, extend to the mobility rights provision.

The extent to which the various provisions of the Charter apply to corporations is not clear. Various terms are used, including "everyone" (s.7), "every individual" (s.15), and "every citizen of Canada and every person who has the status of a permanent resident of Canada" (s.6). The two former terms appear to exclude corporate citizens. However, the latter wording in the mobility rights provision can be construed to include corporations. "Person" is defined in the federal and provincial Interpretation Acts to include corporation, and if the intention had been to limit this protection to individuals, presumably the term "individual" would have been used as in s.15, the equality rights provision.

Mobility rights are defined as the right to take up residence in any province and to pursue the gaining of a livelihood in any province. However, this is qualified to authorize laws and practices of general application that do not discriminate primarily on the basis of province of residence, and provision for "reasonable" residency requirements. There is also an exception for any law, program, or activity that has as its object "the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged, if the rate of employment in that province is below the rate of employment in Canada". Thus, laws such as the provincial residents employment preference provisions of the Newfoundland and Labrador Petroleum Regulations, 1977 (Nfld. Reg. 139/78) are not likely to be affected. However, it must be clear that such a law is "ameliorating", and that the provincial employment rate is below the national rate. Difficult interpretive and evidentiary problems may eventually arise, since, for example, the term "employment" is used rather than "unemployment". The latter is the most common statistical basis currently used.

Extension of judicial review based on the Charter has implications for federal and provincial natural resource regulatory decisions. It appears, for example, that express statutory limitations on common law natural justice or procedural fairness requirements may be struck down as not "in accordance with the principles of fundamental justice" under s.7 of the Charter. This may include provisions limiting or excluding rights to hearing or notice, or denying status to certain classes of persons or organizations to participate in regulatory proceedings. It is also possible that "fundamental justice" in s.7 will be interpreted more broadly than common law natural justice and fairness principles. The result may be constraints on the possibility of rationalizing and speeding regulatory processes and in particular, on the viability of "fast track" and "single window" approaches to regulatory review and approval of major natural resource projects.

Reference re the Natural Gas and Gas Liquids Tax, (S.C.C.) unreported, June 23, 1982; [1981] 3 W.W.R. 408 (Alta. C.A.)

This *Reference* concerned the Natural Gas and Gas Liquids Tax (NGGLT) which the federal government proposed to exact as part of the redistribution of resource revenues envisaged in the National Energy Program. The tax was to be levied on marketable pipeline gas received by a distributor. "Distributor" was, for the purposes of the tax, deemed to include an exporter. The courts were asked to assume an unusual set of facts for the purpose of the *Reference,* which entailed the Province retaining ownership of the gas until the time of export. This was accomplished by contracting for the services of a drilling company and having the gas produced, processed, and transported to the border. The *Reference,* therefore, only applied to gas exported from, and owned by, the Province of Alberta.

The Supreme Court of Canada upheld by a 6:3 majority (Laskin, C.J., Lamer, McIntyre, J.J., dissenting) the unanimous decision of the Alberta Court of Appeal, that the tax could not be levied on the particular gas in question. Alberta, as owner, could claim the provincial immunity from taxation conferred by s.125 of the Constitution Act, 1867 (30-31 Vict., c.3 [U.K.] as am.). The court held that the specific immunity conferred by

s.125 prevailed over the wording of s.91 of the Constitution Act which provides for the exclusive legislative authority of the federal government for the enumerated subjects "notwithstanding anything in this Act".

The unusual fact pattern posed for the courts limits the significance of the decision, since the Province does not ordinarily retain ownership of the gas to such an advanced downstream stage. In fact, the usual method of disposing of Crown minerals in the Province of Alberta pursuant to the Mines and Minerals Act (R.S.A. 1980, c.M-15), has the consequence that ownership of the minerals will normally pass, at the latest, at such time as they are separated from the ground. At this point the Province therefore loses both the protection of s.125 and the right to legislate with respect to the management and sale of public *lands* pursuant to s.92(5) of the Constitution Act. Furthermore, it is arguable that even the Province's royalty share loses the immunity from taxation of s.125 at the time of production for the following reasons. First, both the producer's share and the Province's royalty share are inextricably mixed on production. Second, the standard form Crown lease does not express the royalty to be *reserved* to the Crown, but instead simply provides that the royalty is to be in consideration for the rights granted to the lessee. This argument is not defeated by the fact that petroleum produced under Crown leases has to be marketed by the Alberta Petroleum Marketing Commission (APMC) under the terms of the Mines and Minerals Act (ss.118 to 121). However, since the APMC is also an agent of the Crown, transfer of the Crown's royalty share to the APMC revests title in the Crown, thus permitting the Crown once again to claim the immunity of s.125 in respect of the royalty. But, until the share revests, it may still be subject to federal taxation.

The *Natural Gas and Gas Liquids Reference,* therefore, extends little protection to the provincial oil and gas industry as currently structured, since at the point of production, provincial ownership of the resource is non-existent. To maximize the immunity confirmed by the *Reference,* the Province would have to restructure the relationship between the Crown as lessor and the producer as lessee. In effect, existing leases would have to be amended to reflect the service type of arrangement which was posed in the facts submitted to the courts. This would have the result that ownership would not pass at the time of production but only when the products were finally marketed by the APMC. Producers would be reimbursed by reference to the value of production marketed by the APMC from the particular producing tract. The industry itself would remain relatively intact and there would be no reason to amend netbacks to the producer. All that would be altered would be the relationship between the Crown and the producer. A more radical strategy would call for the wholesale provincialization of the industry.

One constitutional restraint in restructuring the relationship between the Crown and producers would be the necessity to avoid the allegation that the arrangement was "colourable". That is, insofar as statutory mechanisms might be required to implement such a scheme, they should have a substantive, rather than a merely formal, basis in the Province's legislative jurisdiction. Nevertheless, if such a scheme could be implemented simply by contract, it is difficult to see any way in which it might be attacked by the federal government.

To some extent, the *Reference* has been rendered moot by the Pricing Agreement signed between the federal government and the Province of Alberta in September 1981. Section 7 of the Agreement provides that the NGGLT will be reduced to zero, for the term of the Agreement, on *all* gas exported from an agreeing Province. It is apparent that this concession is far wider than that called for by the *Reference* decision since it is not restricted to gas owned by the Province.

In the light of the Pricing Agreement there would be little point in embarking upon such a restructuring of the industry, as discussed above, at this time. However, come the renegotiation of the Agreement in 1986, this particular strategy may be of some benefit to the Province. Equally beneficial to the Province are likely to be the *dicta* of both the Court of Appeal and the Supreme Court that an export/excise tax does not *automatically* avoid the provincial immunity of s.125 as being an exercise of the federal trade and commerce power as well as the taxing power. To attain this status, such a levy would have to incorporate an important element of regulation as well as revenue raising. Clearly the federal government will have to be able to establish that any future export tax on provincial property such as gas is also designed to have a regulatory effect on the industry. In light of the existing plethora of federal energy regulatory statutes such as the National Energy Board Act and the Energy Administration Act, it may be difficult to prove that an export tax would add anything to the overall scheme of regulation.

N.D. Bankes

Banff Conference on Natural Resources Law

In the spring of 1983 the Institute will be convening the first major conference on natural resources law in Canada. While numerous seminars have been devoted to selected aspects of resources law, there has been to date no regular national forum in Canada devoted to the examination of broad legal issues affecting natural resources generally. This conference is intended to be the first of a regular series of meetings fulfilling that role.

The conference will have as its theme *The Public Disposition of Natural Resources.* The programme will include sessions on such topics as resource disposition systems, rights and remedies of Crown interest holders, public and special interest participation, Crown corporations, resource use conflicts, and the negotiation of major resource development agreements. Speakers will include Donald Macdonald, former federal Minister of Energy, Mines and Resources; Roy Romanow, former Minister of Justice for Saskatchewan; Dr. Andrew Thompson, Professor of Law at The University of British Columbia and Director of the Westwater Research Centre; as well as other leading academics and practitioners.

While dealing with a range of legal issues, the conference will be of interest to a wider audience than natural resources lawyers. Academics, and personnel from both

industry and government, will also find the conference a useful discussion of legal problems associated with natural resources policy. Simultaneous sessions in selected areas will allow participants to focus on subjects of special interest.

The conference will be held at the Banff Centre, April 12 through April 15, 1983. More details will be forthcoming in future issues of *Resources*. Further information on the conference may be obtained from Enid Marion, at the Institute.

Energy Security Seminar

The Institute held a Seminar on the recent energy security legislation and related topics on the 9th and 10th of September at The University of Calgary. Some fifty participants, including lawyers, landmen, and tax specialists, attended.

The Seminar was divided into five separate sessions conducted by members of the Institute's professional staff and legal practitioners working in the field. The topics covered included the organization and responsibilities of the Canada Oil and Gas Lands Administration and the Canada-Nova Scotia Offshore Resources Agreement; the federal and Alberta Petroleum Incentives Programs; the Canadian Ownership and Control Determination Program; the structuring of exploration and operating agreements under the Canada Oil and Gas Act; the maximization of federal PIP grants; recent amendments to the National Energy Board Act, the Petroleum Administration Act, and recent developments in constitutional law. An extensive package of materials - the legislation, regulations, and related documentation - was distributed to the participants.

Natural Resources Law Essay Prize

To encourage the participation of student research, the Institute is pleased to announce the creation of an annual essay prize in the amount of $1,000.00. The prize will be awarded for the best paper on any aspect of natural resources law and is open to all law students at Canadian universities. The award will be presented only if a paper merits it. The selected essay will normally be published by the Institute.

Papers should be submitted to the Selection Committee, Canadian Institute of Resources Law, by June 30 of the year of application.

Publications

A Guide to Appearing before the Surface Rights Board of Alberta, by Laureen D. Ridsdel and Richard J. Bennett. Working Paper 1. 1982. ISBN 0-919269-04-4. 70 p. $5.00.

This booklet is designed primarily as a "how to" guide for the preparation and presentation of a case to the Surface Rights Board of Alberta. It has been written for landowners and occupants, companies, lawyers, landmen and other professionals involved with surface rights.

The work is divided into two sections. The first section describes a Board hearing and the best way to present one's case at a hearing. It also clearly explains the factors the Board normally uses to determine compensation. The second section examines the jurisdiction of the Board and the current status of legal issues which commonly arise in argument before the Board.

Also included in the last section is a summary of the principal recommendations of the Select Committee to Review Surface Rights. The Report of the Select Committee was tabled in the Legislative Assembly in November 1981. As yet, no legislation has been introduced to give effect to any of its recommendations. It is hoped this work will provide a background for useful debate on the proposed recommendations.

Introduction to Oil and Gas Law, by Canadian Association of Petroleum Landmen and Canadian Institute of Resources Law. 1981. 300 p. $30.00.

These materials were written to meet the specific requirements of the oil and gas law seminars presented by the Canadian Association of Petroleum Landmen for junior land personnel with a non-legal background. However, they should also meet the much greater need within the Canadian oil and gas industry of a practical and useful, up to date reference work designed for landmen and lawyers. The materials are also being used by Mount Royal College and The University of Calgary in their Continuing Education programs.

The initiative for this project originated with the Continuing Education Committee of the Canadian Association of Petroleum Landmen. The Canadian Institute of Resources Law provided editing and technical services. The actual writing of the material was done by lawyers and landmen who are actively working in this field.

Resources Law Bibliography.
1980. ISBN 0-919269-01-X. 537 p. $19.95

Environmental Regulation - Its Impact on Major Oil and Gas Projects: Oil Sands and Arctic, by C.D. Hunt and A.R. Lucas. 1980. ISBN 0-919269-001. 168 p. $10.95

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