Natural Resources and Canadian Federalism: Reflections on a Turbulent Decade

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Some years ago, the Osgoode Hall Law Journal published an article of mine called "Natural Resources: The Other Crisis in Canadian Federalism." As its title suggests, that article was an attempt to depict the crisis for Canadian federalism that I saw in the apparent recent harmony between federal and provincial governments on natural environment issues may only represent a temporary hiatus in persistent conflicts. Despite regional agreements and constitutional reform, areas of potential conflict remain. The "resource amendment" in s. 92A of the 1982 Constitution strengthens provincial legislative authority over indirect taxation on resources and resource production and marketing. The provinces can also continue to rely on the Crown proprietary rights of the provincial governments under s.109. Federal authority in the natural resource area continues to be found under the general aspect of the "trade and commerce" power in s.91(2)A although the scope of that power is not fully defined. This paper discusses some areas of likely conflict in the future and the scope of the authorities which may be relied upon by the federal or provincial governments as well as the implications of cooperative federalism and judicial review in the natural resources area. The author concludes that while conflict is probable, it also provides an opportunity for Canada to strengthen methods of intergovernmental dispute resolution.


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persistent intergovernmental resource disputes of the 1970s. It dealt at some length with the decisions of the Supreme Court of Canada in *CIGOL*\(^2\) and *Central Canada Potash*,\(^3\) which seemed to have struck twin body blows to provincial legislative powers to raise revenues from resources and to regulate resource development, production and marketing. Its conclusions offered some suggestions for change in a federal system that seemed to have become unbalanced as a result of those decisions, as well as some comments on the broader implications of the resource disputes for the process of resolving intergovernmental conflict in a federal state.

Much has happened since then, of course. For one thing, the resource disputes continued unabated into the 1980s. Not long after my article appeared, the federal government launched a frontal assault on provincial powers in relation to resources under its National Energy Program of October 1980. The NEP sparked a predictably hostile response from the Western producing provinces, especially Alberta, and led to a year's worth of open federal–provincial warfare including provincial cutbacks in oil production and a Supreme Court challenge to some of the taxation proposals of the NEP.\(^4\) Shortly thereafter, the primary focus of dispute shifted to the East as Newfoundland's long-simmering disagreements with the federal government over offshore resources and with Quebec over Churchill Falls hydro both broke wide open. The Supreme Court was once again called upon to adjudicate these


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battles, ultimately holding against Newfoundland's view of its own powers in both cases.\(^5\)

Not all was contention, however. In the fall of 1981, a series of agreements between the federal government and the Western provinces called a truce in the post-NEP warfare. Further agreements since then, culminating in the "Western Accord" of early 1985, have managed to keep the lid on most potential sources of conflict between Ottawa and the West. In the East, Nova Scotia was able to negotiate an arrangement with the federal government on offshore resource development without resorting to the courts for determination of ownership and jurisdictional issues. The dispute over the Newfoundland offshore was eventually settled, at least in principle, in early 1985 under the "Atlantic Accord" that Newfoundland was offered by a new and much more compliant federal government. (So far, however, it seems that Quebec is not nearly as willing to relinquish its Churchill Falls victory through further negotiated concessions to Newfoundland.)

In 1982, the Constitution was amended to incorporate the "resource amendment" in section 92A.\(^6\) Almost unnoticed in the fanfare over the Canadian Charter of Rights and Freedoms, section 92A tried to address some of the contentious federal–provincial resource issues that had kindled the 1970's crisis in the first place. It was the only component of the 1982 constitutional patriation package that purported to alter the division of federal–provincial legislative powers, and it represents the first amendment to the Constitution since Confederation that has had the effect of enhancing the legislative authority of the provinces.\(^7\)

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So now, after more than a decade of turbulence, we seem to have reached a period of relative intergovernmental tranquility in relation to natural resources. In fact, some seem tempted to believe that the disputes of the recent past are but a messy bit of ancient history, forever banished in a new state of federal-provincial harmony. For instance, in mid-1986 the then newly-appointed federal Minister of Energy, Marcel Massé, was asked to comment on reports that Alberta Premier Don Getty had threatened to reduce the flow of Alberta natural gas to Eastern Canada unless the federal government did something more to support the ailing petroleum industry in the province. Mr. Massé is reported to have said: "This is not a re-run of history. This is a new script where governments should not fight."  

Perhaps. But sometimes memory is short. The disputes of the 1970s and early 1980s were preceded by several decades of generally harmonious relations both between the federal and provincial governments and between governments and the resource industries, engendered largely by substantial identities of interest among all concerned. Indeed, in the Introduction to his 1969 book on the subject, Professor Gerard V. LaForest (now LaForest, J. of the Supreme Court of Canada) could suggest with justifiable confidence that "...today all major problems of ownership of the public domain have been settled...." Little could he have known that the settled state of placid equilibrium that he then perceived would be dramatically upset, barely four years later, in the wake of the 1973 Arab oil embargo. Nor could anyone have then anticipated the ensuing decade of often-bitter intergovernmental resource disputes, both legal and extra-legal, stretching to and beyond the introduction of the resource amendment in 1982.

So there is no real historical reason to assume that our present state of relative intergovernmental harmony will be any more

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8 D. Francis, "No gas moves east at 'fire sale' price, Getty vows," The Toronto Star (10 July 1986) E-1.

9 R. D. Cairns, M. A. Chandler & W. D. Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23 Osgoode Hall L. J. 253 at 254-56.

10 G. V. LaForest, Natural Resources and Public Property under the Canadian Constitution (Toronto: University of Toronto Press, 1969) at xi.
permanence than that which subsisted before late 1973. And there are some very good reasons to believe that further clashes may erupt at any time. Professor John Whyte, for one, has identified several factors which he believes may lead to renewed federal ambitions with respect to provincial resources.\(^\text{11}\) These include: increased domestic expectations for an enhanced role for the federal government in economic regulation matters generally (for instance, as a result of proddings from the Macdonald Commission); the potential for a revived "general" trade and commerce power flowing from the decision of the Supreme Court in the \textit{C. N. Transportation} case;\(^\text{12}\) and the ever-present risk of further sudden and substantial dislocations in the international economic order.

This last factor may be the most significant of all. Even a federal government that typically tends to relative quiescence in matters of general economic regulation will be forced to respond to the domestic impact of dramatic changes in international resource markets. After all, it was the first OPEC oil price "shock" in late 1973, following the Yom Kippur War, that touched off our decade of disputes, and it was the second OPEC oil price "shock" in 1979, following the Iranian Revolution, that fuelled the disputes and led directly to the National Energy Program and its aftermath. It would seem foolhardy to pretend that similar external events cannot or will not again upset our domestic arrangements. The fact that the dramatic fall in world oil prices in the first half of 1986 has not yet generated the same degree of intergovernmental conflict may attest only to the current willingness of the governments concerned to cooperate in the search for some acceptable policy solution. It does not, in and of itself, indicate that the current cooperative spirit will be permanent or that a different type of external stimulus (such as a sudden re-emergence of OPEC as an effective cartel) will not cause a renewal of domestic friction.

But even in the absence of external "shocks" to our domestic arrangements, or even assuming speedy and non-contentious


federal–provincial accommodation to all future external events, the pursuit of certain domestic policies by the federal government may well lead to renewed intergovernmental conflict over natural resources. Notable here is the current "free trade" initiative of the federal government, backed by the urgings of the Macdonald Commission for a "leap of faith" in the direction of the United States. It is impossible to say where the free trade negotiations with the United States may take us, if indeed they go anywhere at all. But given the degree to which the Canadian economy remains heavily resource-reliant, and given past American interest in cheap and easy access to Canadian resources (though only when desirable from their point of view, of course), it seems hard to imagine that Canadian resources will disappear from the free trade bargaining table. Any move towards free trade will thus have significant potential to affect not only our domestically-formulated resource development policies, but also the relationships between the two orders of government constitutionally charged with formulating those policies.

It is also important to remember that the resource disputes of the last decade were as much inter-regional conflicts as they were federal–provincial battles. Spiralling world energy prices in the 1970s caused a significant divergence of interests between the predominant energy-producing region in the West and the predominant energy-consuming regions of the East. The resulting inter-regional conflict quickly became superimposed upon the sources of dispute already apparent as between the producing provinces and the federal government in pursuit of its own policy objectives, as Ottawa attempted to resolve both the inter-regional cleavages and its own quarrels with the West in what it saw as the best interests of the country as a whole.13 Similarly, and no matter whether the initial impetus was external or domestic, it would be very difficult for the federal government to ignore any future inter-regional conflict over resource development policies even in the unlikely event that Ottawa believed it had no particular policy position of its own to advance in the circumstances.

13 Cairns, Chandler & Moull, supra, note 9 at 256-60.
So the seeds of future federal-provincial conflict over resources remain in the 1980s despite the present appearance of tranquility. And whenever they sprout, and for whatever reason, the division of constitutional powers with respect to resources is likely once again to become a principal battlefield. As John Whyte has put it:

In short, the recent withdrawal from Canadianization, nationalization and redistributive policies with respect to oil and gas does not represent a long-term vacuum of federal policy in the energy sector. The ownership interests of provinces, as well as their jurisdiction over exploration, development, conservation and management of non-renewable resources [under section 92A], are increasingly likely to come in conflict with federal economic regulatory objectives. The demand for a creative reconciliation of these competing interests is going to be as acute in the future as it was in the 1970s.\(^{14}\)

But if it is a relatively safe bet to predict that there is every prospect of renewed intergovernmental conflict over natural resources, it is much harder to say with assurance just where that conflict might erupt within the heads of federal and provincial legislative power available under the Constitution. Since late 1973, the constitutional position in relation to natural resources has rather resembled a prolonged chess game in which not only the strategies of the players but also the rules of play — and even some of the pieces on the board — have changed with the passage of time. Forecasting the future progress of such a game, let alone its eventual outcome, is a difficult proposition at best.

On the provincial side of the board, of course, the major new piece is section 92A. While the section was designed specifically to respond to certain of the concerns of the Western resource-producing provinces following the CIGOL and Central Canada Potash decisions in the late 1970s, it seems destined to play an important role in any future dispute over the scope of provincial legislative powers in relation to natural resources.\(^{15}\)

\(^{14}\) Whyte, supra, note 11 at 332.

For instance, subsection 92A(4) now enshrines provincial powers to levy indirect taxation on resources and resource production. So long as a provincial legislative measure can be truly characterized as "taxation" in the sense that it is primarily revenue-raising and not regulatory in nature, and so long as that measure does not purport to tax differentially in respect of resource production that is exported from the province for consumption elsewhere in Canada, subsection 92A(4) now provides a safe haven for provincial resource taxation regimes that could have been called into question under the much more restrictive "direct" taxation power in section 92(2). In any future fight over the scope of its powers to raise revenues from resources, and whether its actual antagonist is the federal government or a member of the private sector, a provincial government acting within the ambit of subsection 92A(4) will find itself in a far stronger position than did Saskatchewan in the wake of its CIGOL defeat.

Similarly, subsections 92A(1) and (2) now furnish the producing provinces with additional legislative authority in relation to the regulation of resource development, production, and marketing. Under subsection 92A(1), it is now reasonably clear that a producing province is to have exclusive legislative jurisdiction in relation to all phases of the resource development process within the province, at least up to and including any legislated determination of the rate at which a particular resource is to be produced within the province. Under subsection 92A(2), a producing province may also regulate the marketing of its resource production beyond its own boundaries, so long as its legislation is confined to resource exports to other parts of Canada and does not purport to discriminate in prices or in supplies exported to other parts of Canada. While subsection 92A(3) expressly preserves federal concurrency and paramountcy in respect of any provincial export marketing legislation enacted under subsection 92A(2), when taken in combination subsections 92A(1) and (2) represent a stronger legislative base for a producing province in the implementation of its chosen resource-regulation policies than would the pre-existing (and continuing) powers available under section 92 (such as those under section

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92(10) in relation to "local works and undertakings," under section 92(13) in relation to "property and civil rights in the province," and under section 92(16) in relation to "generally all matters of a merely local or private nature in the province").

But section 92A is not the only string in the provincial bow. Depending upon the pattern of ownership rights in a given resource-producing province, the Crown proprietary rights of the provincial government under section 109 of the Constitution, coupled with the power to exercise those rights by legislation under section 92(5), may carry equal or even greater weight in any future confrontation with Ottawa. In Alberta, for example, the proportion of Crown-owned oil and gas producing lands is so high (something in excess of 80 per cent) that there may be little need for the provincial government to resort to its new legislative powers under section 92A if it can continue to rely on the tremendous scope that the courts traditionally have given to section 109 for both revenue-raising and regulatory purposes. In the past, for instance, Alberta has relied upon its position as Crown proprietor in varying oil and gas royalty rates virtually at will and, in its heated response to the National Energy Program, in imposing progressive cutbacks in production from Crown-owned oil pools. It is noteworthy that, at least partially in recognition of the potency ascribed to provincial Crown proprietary rights, subsection 92A(6) expressly preserves not only all pre-existing provincial legislative powers but also all pre-existing provincial government "rights" as well. It is also of some significance that any claim that Newfoundland may have had to legislative authority in the offshore area vanished as soon as the Supreme Court found that the provincial government had no proprietary rights in the offshore akin to those held by the provinces in their onshore resources under section 109.

In contrast to the provincial side of things, what with the addition of section 92A to the provincial arsenal, there has been no corresponding formal change in the heads of federal legislative power that might be brought to bear upon any future resource-

\[17\] For further discussion of the nature and scope of provincial Crown proprietary rights and their relationship to section 92A, see W.D. Moull, "Natural Resources: Provincial Proprietary Rights, the Supreme Court of Canada, and the Resource Amendment to the Constitution" (1983) 21 Alberta L. Rev. 472.
related dispute. The principal basis for the exercise of federal legislative authority in respect of provincially-produced resources continues to be the "trade and commerce" power under section 91(2), especially in its application to interprovincial and international trade in resource production. While the producing provinces now have some legislative entree into the regulation of interprovincial resource marketing by virtue of subsection 92A(2), as was noted above subsection 92A(3) provides expressly for the preservation of federal jurisdiction and legislative paramountcy in relation to the same subject matter. And, unlike earlier proposals, section 92A does nothing to enhance provincial legislative authority in relation to international trade.\textsuperscript{18} As a matter of legislative jurisdiction, the regulation of extra-provincial trade in resource production remains primarily a federal affair.

The major potential development in the heads of federal legislative authority in relation to natural resources pertains as well to section 91(2), but in respect of what is commonly called its "general" aspect. As was noted above,\textsuperscript{19} John Whyte has suggested that the prospect of a revived "general" trade and commerce power as a result of the Supreme Court's decision in the \textit{C. N. Transportation} case may act as one of the significant spurs to renewed federal ambitions towards provincial resources, on the basis that the possession of such a power tempts its use. But whatever the impetus for its use may be, a further revivified "general" trade and commerce power would almost certainly give the federal government a new lever in any future dispute with the producing provinces on jurisdictional grounds. The ability to treat the resource industries, and particularly the energy sector, as an aspect of "general" trade throughout the country, affecting the nation as a whole, might well give the federal government previously uncontemplated authority to regulate provincial resources and resource production under section 91(2) well before any provincial boundaries are crossed. However, just what scope the "general"

\textsuperscript{18} For further discussion of the interplay of federal and provincial heads of power in relation to the interprovincial and international marketing of provincial resource production, see W.D. Moull, "Pricing Alberta's Gas - Cooperative Federalism and the Resource Amendment" (1984) 22 Alberta L. Rev. 348.

\textsuperscript{19} See supra, note 11.
trade and commerce power will have in the future — if, indeed, its revival continues at all — must remain to be seen.

Aside from the trade and commerce power, the federal government may still have resort to other heads of power under section 91 as sources of legislative jurisdiction over provincial resources. There remains, for example, the seldom-used but still-potent authority of Parliament under section 92(10)(c) to declare a "work" situate within a province (a mine, well or refinery, for instance) to be "for the general advantage of Canada" and thus, under section 91(29), unilaterally to oust provincial jurisdiction and bring the work with its attendant undertaking under exclusive federal legislative authority. Resort might be had to the "emergency" aspect of the "peace, order and good government" power to deal with temporary emergency situations, such as a sudden and severe energy shortage, or to the "residual" aspect of "POGG" in circumstances (such as those of the Newfoundland offshore) in which neither order of government could point squarely to any other recognized head of jurisdiction. Section 91(24) gives Parliament legislative authority over natural resources found on or under any "lands reserved for the Indians," even when those lands are situate within the boundaries of a province and even though they may otherwise be provincial Crown lands under section 109. And, for general revenue-raising purposes, section 91(3) continues to give the federal government ample authority to impose "any mode or system of taxation" it may choose upon resources, upon resource production, and upon the persons engaged in resource production, processing, and marketing.

As I suggested above, it is not an easy task to predict with precision just where any future federal-provincial dispute over resources might break out within the heads of power available to both sides. However, the most likely flashpoint of conflict over resource regulation policies would seem to lie in the divided authority to regulate the domestic marketing of provincial resource production. In the initial stages of the resource development process, from the exploration phase through the placement of extraction facilities to the commencement of production, the primacy of provincial jurisdiction seems assured by the grant of exclusive legislative authority under subsection 92A(1) and the continuance of the rights conferred on the provincial Crown proprietor under section 109. It would likely require some extraordinary circumstance,
and an extraordinary exercise of political will, for the federal
government to attempt to invade the provincial sphere at such an
early stage in the process. At the other extreme, in the context of
the international marketing of provincial resource production, the
exclusive position of the federal government remains unassailable
(subject only to any arguments that a provincial government may
wish to press as to the extended scope of its powers under section
109). It is in the middle ground, as provincial resources are
produced and marketed in other parts of the Canadian economic
unit, that the greatest potential for future conflict lies. It is here
that the producing provinces have gained some measure of authority
under subsections 92A(1) and (2), to supplement their powers
flowing from section 109. But it is also here, by virtue of subsection
92A(3), that the federal government has retained all of its authority
in relation to extra-provincial trade under section 91(2). And it is
here that, in the past decade, the federal government has shown
itself the most willing to exercise its powers in an effort to balance
both its own interests and those of the consuming regions of the
country against the asserted interests of the producing provinces.

In relation to revenue-raising matters, however, the battlefield
seems to have shifted away from the limitations on the scope of
provincial authority because subsection 92A(4) has expanded
provincial taxation powers to the point where they are now virtually
indistinguishable from provincial powers to exact royalties under
section 109. Instead, future contention will more likely revolve
around the appropriate sharing of the revenue-raising jurisdiction
that is now concurrent to the two orders of government, since
neither can expect to fully exert its jurisdiction without impinging
unduly upon the revenue base of the other. The proper scope to
be accorded to the guarantee of intergovernmental immunity from
taxation under section 125 of the Constitution may also prove to be
a continuing source of conflict, particularly in a political climate in
which the drive to privatize Crown resource corporations, both
federal and provincial, seems more rhetorical than real. And our
system of intergovernmental equalization payments, now enshrined
in principle in subsection 36(2) of the Constitution Act, 1982, may
again suffer the kinds of strains placed upon it by the distortions in
provincial revenue-raising capacities that were evident throughout
our turbulent decade.
And it may even be that the kinds of resources that will be the subject of any future federal–provincial dispute will not be those that occupied centre stage in the past decade. Despite the current state of oversupply in world markets, it seems hard to imagine that oil and natural gas will not again play an important role in federal–provincial relations if and when we face another situation of shortage, whether real or artificial. But resources like fresh water may instead become the focal point if, for example, our own supplies continue to diminish in both quantity and quality and we are subjected to ongoing pressures to share what we have with an even more-parched United States. In such a scenario, it is easy to see the potential for substantial divergence of interests between, say, a federal government quite prepared to encourage water exports (perhaps as part of a broader trade package) and equally reluctant governments of water-rich provinces, and also between provincial governments in the water-rich and water-poor regions of the country. Constitutional conflict would not be far behind (although here the battle lines sketched above might have to be re-drawn significantly in view of the fact that section 92A, with its retrospective focus on the disputes of the 1970s, has no application to water as such).

But, however the resource disputes of the future arise and for whatever reason, one thing that remains clear is that our federal system will have to provide the processes by which those disputes can be managed and ultimately resolved. As John Whyte has suggested,\(^2\) competing federal and provincial interests in relation to resources will continue to demand "creative reconciliation" in the future as much as they did in the 1970s, then it is not at all unreasonable to expect the federal system which generates those conflicts in the first place to also furnish the techniques for resolving them.

Like many, John Whyte places great weight on the tools of cooperative federalism in this regard. Indeed, the recent past has witnessed a distinct revival of cooperative federalism as a means of

\(^{2}\)See supra, note 14.
resolving potentially contentious federal–provincial resource issues.\textsuperscript{21} For example, even with total judicial victory in its pocket, the federal government was prepared to offer Newfoundland the 1985 "Atlantic Accord" as a means of resolving the continuing antagonism that threatened to hamper development of the Newfoundland offshore area. Whatever one may think of the substance of the federal–Newfoundland deal, or of its earlier counterpart with Nova Scotia (achieved without resort to the courts, it should be noted), or even of other members of the species such as the "Western Accord" that was also concluded in 1985 with the Western producing provinces, still the process of intergovernmental negotiation and compromise has managed to produce a framework within which development of a resource can proceed on a basis that is at least minimally satisfactory to both of the governments involved. In fact, John Whyte has concluded that the ongoing dispute-resolution regime adopted in the "Atlantic Accord" (especially the system of "shifting trumping regulatory power" by which the final say on an issue falls to either Ottawa or Newfoundland, on a basis specified in the Accord, depending upon the nature and gravity of the issue involved) represents a "modern and responsive innovation" in Canadian constitutional law, one that is worthy of exploration and perhaps even emulation in other resource-related contexts if Canada is "to make its federal structure a source of innovation and strength rather than a source of conflict and confusion."\textsuperscript{22}

But sometimes the litigious alternative is unavoidable. The role of the Supreme Court in resolving the resource issues presented to it in the past decade has not always been a happy one, certainly not for the litigant governments and perhaps not for the Court itself. Dissatisfaction with some of the Court’s decisions in this area has led to calls for reform of the Court (for instance, through changes in the process for appointing its members) and even for its entire removal from the adjudicatory field in relation to intergovernmental disputes that carry as much political and emotional baggage as do those over

\textsuperscript{21} Although it would be wrong to believe that cooperative federalism vanished entirely during the 1970s and early 1980s, even during the most heated periods of conflict: see Moull, supra, note 18.

\textsuperscript{22} See Whyte, supra, note 11 at 334-36.
resources. Perhaps it is possible to design a new institution that will do the job in a way that the governments concerned find more to their liking, although one wonders just how different such an institution would really be when faced with the same kinds of invidious choices as the Court has had to make in the past few years. In the meantime, of course, the Court will have to continue as the referee in any future intergovernmental resource disputes that come before it.

But even those who may generally disapprove of the Court's past performance in this area should not be completely dismayed by the prospect of its continuing intervention. If further federal-provincial conflict over resource policy-making powers seems almost inevitable, it may simply be asking too much of our federal system to always give us an entirely cooperative resolution to the conflict through intergovernmental negotiation and accommodation. Sometimes deeply-held convictions on policy issues will be too divergent for ready compromise, and political considerations and personality clashes may likewise hinder amicable settlement. Someone must then break the impasse, as the Supreme Court did in relation to the Newfoundland offshore dispute. Given the seemingly intractable positions of the parties and the heated atmosphere of their attempts at negotiation, would the federal and Newfoundland governments ever have reached anything like the "Atlantic Accord" had the Supreme Court not "resolved" the offshore ownership issue? Resort to the Court as the occasional "tie-breaker" of Canadian federalism may thus be a necessary adjunct to the process of dispute resolution through federal-provincial cooperation. Perhaps it is as Peter Russell has suggested:

> In federal disputes as in family affairs negotiations in which the two parties work out mutually acceptable solutions is the preferable way of settling conflicts. But the negotiation process may be enhanced rather than impeded when it takes place in the shadow of a creditable and balanced adjudicator. The availability of such an adjudicator may in itself moderate extravagant claims of the protagonists.  

Nor is cooperative federalism necessarily a panacea, as Michael Crommelin has observed in the context of Australian

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attempts at intergovernmental cooperation in the management of natural resources.\textsuperscript{24} In fact, Crommelin's analysis of the long-term effects of cooperative federalism on the structure and dynamic of the federal state could lead one to believe that the concept may, in practice, amount to a Trojan horse for provincial governments. As the basis for his argument, Crommelin draws upon the following passage from a 1977 book by his compatriot, Professor Geoffrey Sawer:

Crommelin then asks whether, in Sawer's terms, "a period of cooperative federalism necessarily results in a shift away from the coordinate towards the organic." His reasoning is that the measure of autonomy which Sawer sees as a prerequisite of cooperative federalism may in fact be diminished by consistent reliance upon cooperative action. If so, he concludes, "organic federalism may then


\textsuperscript{25}G. Sawer, \textit{Federation under Strain} (Melbourne: Melbourne University Press, 1977) at 6.
be a natural outcome of a lengthy period of cooperative federalism.\textsuperscript{26}

Crommelin goes on to suggest that the Australian experience in relation to natural resources evidences a trend towards organic federalism given the expansion of the legislative powers of the Commonwealth government and its overwhelming financial supremacy. The Canadian experience is somewhat different, so far at least, in that the only clear expansion in legislative powers in respect of natural resources has been at the provincial level, in the form of section 92A, and the federal government has not yet managed to wrest from the producing provinces full financial supremacy over resources in terms either of revenue-raising capacity or of spending choices (the National Energy Program notwithstanding). But the future is foreboding, especially if the "general" trade and commerce power continues its resurgence and comes to be applied in the resource area, and if the federal government shows itself to be as willing to use its vast spending power in respect of provincial resources to the same degree as it has done in recent times in relation to other areas of provincial jurisdiction, notably health care and post-secondary education. Perhaps, then, our recent re-commitment to cooperative federalism in the resource field signals a start to our own movement towards the organic stage of federalism that Crommelin sees on the horizon in Australia.

But even if Crommelin's analysis is correct, and even if we are moving along the same trend-line as the Australians, the outlook is not entirely bleak for the governments of the producing provinces. Sawer's own depiction of his three stages of federalism does not lead him to believe that a unitary state is necessarily the eventual outcome of the process. As he says, immediately following the passage quoted by Crommelin, the "organic" stage of federalism is still nonetheless "federalism" because there is inherent in it "the continued existence of some guarantee that the regions in their reduced role will continue to exist and be able to fight any attempt by the centre to abolish them altogether or to reduce their functions

\textsuperscript{26}Supra, note 24 at 321.
beyond some minimum level." In the Australian context, Sawer sees judicial review as the most reliable method of guaranteeing the necessary degree of "unit autonomy" — a method which, if and when applied in the Canadian context, may come as something of a surprise to those provincial governments that have in the past been most critical of the interventions of the Supreme Court of Canada in resource-related issues.

Canada may or may not be moving towards organic federalism in relation to natural resources; it is simply too early to tell whether our recent return to cooperative federalism in the area will lead us inevitably in that direction. But if that is where we end up, we may well lose something important in the process. In concluding his comments, Crommelin asks: "What point can there be in a federal system of government if intergovernmental cooperation smothers its federal features?" Canada has often been described, with more or less accuracy, as one of the most decentralized federations in the world, and we are certainly that in comparison to our neighbour to the south (which may, in fact, represent in some respects the classic form of organic federalism as defined by Sawer). But are there not some good reasons for our brand of federalism, subconscious though they may be?

As we have practiced it, federalism has allowed us a large measure of regional diversity that would have been impossible had the bonds of the federation been drawn more tightly towards the centre. That diversity has in turn allowed for the expression of views and the assertion of interests by the regional communities, which together make up the larger national community, in a way that likewise would have been impossible had the regions been entirely submerged in the whole. The centrifugal forces of regionalism operating within our federal structure thus have served as a useful counter-weight to over-centralization by giving our regions, through their provincial governments, a voice in policy-making that could have been strangled in a tighter federation. And perhaps, just perhaps, the prospects for our national survival have been enhanced in the bargain. For what would the chances have been for the

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27 Supra, note 25.

28 Supra, note 24 at 321.
continued existence of Canada as a national community, separate and apart from the United States, if our component regions had not had an outlet for their aspirations within their own federation and had decided instead to seek expression in another?

So perhaps no dismay should be caused by the virtual certainty of future intergovernmental conflict over natural resources, or even by the likelihood that the techniques of cooperative federalism will not always resolve the conflict. Too much conflict, and conflict that remains unresolved for too long, can be dangerous to be sure. But perhaps a little turbulence every once in a while is not only inevitable, but good for us too. Perhaps it helps to demonstrate, in case we forget, just what our federal system is all about.