Natural Resources: The Other Crisis in Canadian Federalism

William D. Moull

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NATURAL RESOURCES: THE OTHER CRISIS IN CANADIAN FEDERALISM

By WILLIAM D. MOULL*

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* Associate Professor, Osgoode Hall Law School, York University, Toronto.
In Saskatchewan, we have grown accustomed to the assumption by pundits in Ontario and Quebec that these two provinces constitute Canada. It does not surprise us to discover participants in the current debate making the same assumptions.

—Allan Blakeney

I. INTRODUCTION

In the Canadian constitutional debates and negotiations of the past two decades, the question of the place of Quebec within Confederation and the concomitant issues of linguistic and cultural diversity have played the paramount role. That this should be so is not really that surprising—the sustained threat of Quebec secession in the 1960's and 1970's, punctuated at intervals by violent episodes and now seemingly brought closer to fruition under the Parti Québécois government elected in November 1976, has created a climate of concern throughout Canada over the possibility and consequences of its social, political, economic and physical dismemberment. As a result, the prevention of Quebec separation (or at least the softening of its effects, for instance through some form of "sovereignty-association") has received by far the greatest emphasis.

In a sense, this is unfortunate. There can be no denying the gravity of the "Quebec problem" and the need for some solution to it; at the same time, however, there has been a marked tendency to allow that one constitutional dilemma to obscure the others that we are still facing. As the Pepin-Robarts Report has stated:

We believe that the heart of the present crisis is to be discovered in the intersecting conflicts created by two kinds of cleavages in Canadian society and by the political agencies which express and mediate them. The first and more pressing cleavage is that old Canadian division between "the French" and "the English" .... The second cleavage is that which divides the various regions of Canada and their populations from one another. Regionalism, like duality, also has an extended lineage in Canadian social, economic and political life ....

In our judgement, the first and foremost challenge facing the country is to create an environment in which duality might flourish; the second is to provide a fresher and fuller expression of the forces of regionalism in Canada's constitutional system and power structure. We wish to emphasize that it is in the context of the present crisis that we assign priority to these two, and we do so for a very simple reason. Each, if ignored or left unsatisfied, has the power to break the country, and each must accept the other if a new period of harmony is to be achieved.2

Meeting only the first challenge will not usher in the constitutional millennium in Canada—the other will still remain.

Today, the pull of regionalism is perhaps most strongly felt in Western Canada. The reasons for this are partly geographic and demographic: being farther removed from the physical centre of the controversy over dualism, and with a larger proportion of its population coming from non-British and non-French backgrounds, the West perceives itself as less intimately involved

in the problems of “Eastern Canada.” Past economic domination of the Western “hinterland” by the Eastern “heartland”\(^3\) has also left a residue of regional emphasis, especially in the face of the gradual maturing of the local economies of the Western provinces. On the other side of the coin, of course, there is the belief that the peculiar problems of Western Canada and the attempted solutions to them have not infrequently received less attention in the Eastern regions than they rightly deserved. The theme of “Western alienation” is an old one, and in its current manifestation it tends toward a remoteness from the “duality” crisis—seen as the creation and, therefore, the concern of others—and, in like measure, toward a concentration on matters, especially economic ones, that are of particular interest to the Western “region.”

The issues of natural resource revenues and control have largely supplanted those of earlier eras—agricultural policies and “freight rates” among them—as the central foci of Western regionalism. Since the Second World War, natural resources have played an increasing role in the economies of the Western provinces, and the international resource crisis of the past few years has served to highlight not only their significance for national economic security but also their importance as an independent economic base for the Western region. At the same time, the Western provincial governments have taken steps to attempt to manage and control the pace and patterns of resource development within their boundaries, as well as to secure to themselves a larger share of the revenues accruing to their resource industries as a result of international economic forces. Predictably, perhaps, legal challenges to some of these measures were launched, and in the last two years these challenges have resulted in two decisions of the Supreme Court of Canada that have brought into serious question the ability, under our federal system, of provincial governments to control and raise revenue from their local resource industries. Ironically, it has been the “glamour” resource province, Alberta, and its oil and gas that have attracted the bulk of the national attention, yet it has been its less well-endowed neighbour, Saskatchewan, that has faced these constitutional attacks. In *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*\(^4\) the Supreme Court held *ultra vires* that province’s system of petroleum royalties and taxation, and in *Central Canada Potash Co. Ltd. v. Government of Saskatchewan*\(^5\) the Court struck down Saskatchewan’s prorationing programme for potash.

This article will examine the question of provincial natural resource revenues and control in the wake of these two decisions. The clash of regional aspirations with notions of centralized national authority (whether or not actually asserted by the national government) is the other crisis in Canadian federalism, and at the present time the economic aspects of it are most vividly illustrated in the frustration of provincial revenue and regulatory measures


that these two cases represent. An examination of the circumstances in which they arose and of their immediate and long-term effects may suggest some ways of restoring a degree of balance to the federal arrangements that are supposed to be reflected in our constitutional system.

II. NATURAL RESOURCES—THE CONSTITUTIONAL BACKGROUND

Professor Weiler has said, in relation to the issues of the pricing, sale and taxation of oil and gas (and there is no reason to regard other minerals any differently) that, "Neither the language nor the established principles of the British North America Act offer any firm guidance to a legal solution to the conflict. Consequently, "A court which is required to dispose of a concrete lawsuit will have to fashion constitutional policy from its own resources." As will be discussed below, the CIGOL and Central Canada decisions in the Supreme Court of Canada bear out these contentions to a remarkable degree. This results largely from the novelty, in constitutional terms, of the problems faced by the provincial government in each case and of the solutions that were attempted, which compare only in the most general way with those in earlier precedents. For this reason, and because exhaustive treatments of the subject can be found elsewhere, it is not proposed here to embark upon a detailed analysis of the various heads of legislative power that bear upon the natural resource problem under our federal system. However, since the courts still discuss the issues in the terminology of The British North America Act, 1867 and the earlier precedents, a thumbnail sketch of the constitutional background is required to set the scene.

The basic departure point here, as in any other area involving our federal distribution of powers, is the scheme of The British North America Act, 1867 allocating legislative and other authority between the federal and provincial governments.

With respect to the raising of revenues from natural resources, the provinces are confined by section 92(2) to the power to levy "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes" (the Parliament of Canada, under section 91(3), being permitted authority for "the raising of Money by any Mode or System of Taxation"). Very early on, the courts settled upon a definition of what constitutes "direct" taxation in economic terms; thus, in Bank of Toronto v. Lambe, the Privy Council adopted as a guideline the description of John Stuart Mill:

Taxes are either direct or indirect. A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that

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6 Weiler, Of Judges and Scholars: Reflections in a Centennial Year (1975), 53 Can. B. Rev. 563 at 573.
7 Crommelin, Jurisdiction over Onshore Oil and Gas in Canada (1975-76), 10 U.B.C. L. Rev. 86.
8 30 & 31 Vict., c. 3 (U.K.), as am.
he shall indemnify himself at the expense of another; such are the excise or customs.\(^{10}\)

The Privy Council also noted that it was not the “actual results in particular cases” that mattered, but rather “the general tendencies of the tax and the common understanding of men as to those tendencies.”\(^{11}\) Moreover, it has also been held that a tax will remain direct even though there may be some possibility of its being “passed on” by the taxpayer in a different form; what is denied to the provinces is taxation that is intended or expected, in its general tendencies, to be passed on in some recognizable form.\(^{12}\)

Over the years, Mill’s “guideline” has become firmly fixed as the basic test of direct or indirect taxation in Canada. At the same time, however, the courts have also recognized that there exist certain categories of taxation long sanctioned as being one or the other. If a court considering a particular taxing statute is prepared to fit the tax within one of these categories, it will not then have to examine the tax afresh under Mill’s definition. Thus, income and profit taxes\(^{13}\) and real property taxes\(^{14}\) are historical categories that the courts will accept as direct. Conversely, import and export taxes,\(^{15}\) commodity taxes\(^{16}\) and taxes on gross revenue\(^{17}\) are established categories of indirect taxation.

A further limitation on the provincial taxing power under section 92(2) is that taxation can only be levied “within the Province.” In other words, the provinces are prohibited from attempting to tax persons or things beyond their respective provincial jurisdictions. However, this restriction has been held not to prevent a provincial tax levy upon a person within the province from being calculated with reference to an extra-provincial standard, such as a company’s total paid-up capital.\(^{18}\) In many instances, the precise application of section 92(2) comes down to the interpretive gloss placed by a court on

\(^{10}\) Id. at 582 (App. Cas.), 774 (All E.R. Rep.) per Lord Hobhouse.

\(^{11}\) Id.


\(^{16}\) A.G. B.C. v. C.P.R., [1927] A.C. 934, [1927] 4 D.L.R. 113 (P.C.). However, “consumption” taxes, such as the present provincial retail sales taxes, are direct taxation since it is the consumer from whom the tax is demanded and who it is intended should bear it; the retail seller acts only as the agent of the Crown to collect the tax from the consumer: Atlantic Smoke Shops Ltd. v. Conlon, [1943] A.C. 550, [1943] 2 All E.R. 393, [1943] 4 O.L.R. 81 (P.C.); Cairns Construction Ltd. v. Gov’t of Sask., [1960] S.C.R. 619, 24 D.L.R. (2d) 1.


\(^{18}\) Bank of Toronto v. Lambe, supra note 9.
the charging language of the taxing legislation before it.\textsuperscript{10} For example, a tax on land situate in the province that is measured by the value of the timber upon the land is a tax levied “within the Province;” however, a tax levied upon the timber itself (which might leave the province in the course of interprovincial or international trade) may not be valid.\textsuperscript{20} Similarly, an income tax levied on a provincial resident in respect of extra-provincial income is valid, although a tax on the extra-provincial income itself is not.\textsuperscript{21}

The final restriction in section 92(2) of consequence here is that the levy in question must be “Taxation . . . in order to the raising of a Revenue.” The courts have, under this provision, struck down several provincial attempts to enact, under the guise of taxing measures, colourable legislation that in “pith and substance” was aimed at some other matter, often the exclusive federal authority over interprovincial and international trade and commerce under section 91(2). For instance, in two cases\textsuperscript{22} British Columbia levied stiff taxes on primary resources—timber and iron ore—but at the same time granted a rebate of tax in respect of the processing of the resource within the province. When looked at as a whole, neither scheme could be supported as taxation for revenue-raising purposes, but could only be characterized as a colourable attempt, in the form of an export tax, to prevent the export of the resource from the province unless it was also processed there.

The other potential source of revenues from natural resources available to the provinces are the royalties that they may levy in their capacity as owner of the public lands within their boundaries. Section 109 of The British North America Act, 1867 states:

> 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.

Coupled with this provision is section 92(5), which gives exclusively to the provinces “the Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.” When Alberta and Saskatchewan were admitted to Confederation as provinces in 1905, the interests of the Crown in the public lands, including all mineral rights, were retained by the Dominion. It was not until 1930 that Alberta and Saskatchewan were transferred these interests.\textsuperscript{23} Since then, both have stood in the same position as regards their public lands and resources, as did the four original provinces.

\textsuperscript{10} Laskin, \textit{Canadian Constitutional Law} (Revised 3d ed. Toronto: Carswell, 1979) at 728-29.
\textsuperscript{22} \textit{A.G. B.C. v. McDonald Murphy Lumber Co. and Texada Mines Ltd. v. A.G. B.C.}, supra note 15.
\textsuperscript{23} \textit{British North America Act, 1930}, 20 & 21 Geo. 5, c. 26 (U.K.).
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under sections 92(5) and 109 (subject to certain possible exceptions regarding lands held since before 1869 by the Hudson's Bay Company). 24

Unlike taxes, which are imposed ex lege by the sovereign power of the provincial legislature, 25 royalties are exacted by the provincial Crown ex contractu, by virtue of its position as the owner and lessor of the provincial lands and minerals. As a contractual matter between itself and its lessees and licensees, the Crown in right of the province may theoretically bargain for any form of compensation that it can obtain, without regard to the legislative strictures imposed upon the taxing powers of the provincial legislature under section 92(2), in much the same way as could a private landowner (although still subject to any valid federal legislation under section 91). 26 This would include both the consideration to the provincial Crown upon its disposition of an interest in public lands—for example, a drilling licence or permit—as well as the more traditional form of royalty, the consideration that the lessee or licencsee agrees to pay to the Crown out of, or as a share of, his production. This latter form of consideration may be varied by the Crown almost at will if the agreement calling for its payment so provides (for example, a clause providing for the payment of “such royalty, if any, from time to time prescribed by regulations,” as was the case in Attorney General of Alberta v. Huggard Assets Ltd.). 27 One qualification with respect to royalties as revenue-raising devices must be noted, however; by their very nature, arising as an incident of Crown land and resource ownership, they cannot be exacted or contracted for once those lands and resources have been alienated by the Crown in fee simple. Taxation is then the only method available to the province.

The issue of the control of natural resource development is more clouded than that of revenue-raising due to the different aspects that the problem can take and the variety of constitutional provisions and interpretations that come into play. As mentioned above, section 92(5) gives to the provinces “the Management and Sale of the Public Lands” belonging to them. However, it is unlikely that provincial legislative authority under this provision can extend to the management of resources that have been fully alienated by the Crown; instead, it seems that it is confined to resources the underlying title to which is still vested in the Crown. 28 On the other hand, within that limited sphere the provinces appear to have broader powers than the legislative authority conferred on them by section 92, arising (as with royalties) as an incident of provincial Crown ownership. Thus, it has been suggested that the provincial Crown may validly require, as a condition of granting a licence to cut timber from Crown lands, that all such timber cut must be processed in Canada,
even though that same condition would trench upon the federal trade and commerce power under section 91(2) if it were imposed solely as a legislative matter. Furthermore, the Privy Council has held that a prohibition against a licensee employing Chinese or Japanese labour, again inserted as a condition in a Crown timber licence, may be valid notwithstanding the exclusive federal power over "Aliens" in section 91(25).

More often the issue on the provincial side is framed in terms of the provincial power, under section 92(10), to legislate respecting "Local Works and Undertakings" (subject to certain classes thereof assigned to Parliament); the authority under section 92(13) to legislate in relation to "Property and Civil Rights in the Province;" and the provincial residual power, in section 92(16), regarding "Generally all Matters of a merely local or private Nature in the Province." In counterpoint are found the federal powers to legislate with respect to "The Regulation of Trade and Commerce," in section 91(2), and "to make Laws for the Peace, Order and good Government of Canada"—the federal residual or general power contained in the introductory language of section 91. Hovering in the background is also the prohibition of section 121, which states: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

In Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, the Supreme Court of Canada upheld Alberta legislation that severely restricted the output of natural gas in the Turner Valley field. It found that the substance of the legislation was directed to the prevention of waste (large quantities of natural gas were being burned off, after liquid naphtha had been separated from it), and held this to be a valid provincial purpose under sections 92(10) and 92(13). The argument that the legislation interfered with the federal trade and commerce power failed on the basis that there was no attempt to deal with "trade in general" or "trade in any matter of interprovincial concern." This was despite the fact that some of the liquid naphtha that could not be produced (because the natural gas with which it was associated could not be produced) would have been exported to Saskatchewan and Montana.

It has been suggested, however, that the Spooner Oils decision "would be of very limited and doubtful applicability" in the context of more recent developments in natural resource legislation since the circumstances that gave rise to it no longer exist. In the absence of other decisions dealing specifi-
cally with natural resources, it is also necessary to look to other areas in which the relevant federal and provincial legislative powers have come into conflict. The analogy offered by some is that of the agricultural marketing cases.34

A vast array of marketing cases extends throughout our constitutional jurisprudence, and a brief reference to but a few of them should highlight the contours of the general interrelationship of the federal and provincial powers. In broad terms, the issue resolves itself into a consideration of whether a provincial regulatory scheme is aimed primarily at interprovincial or international matters, and is therefore "in relation to" the current or flow of trade and commerce, or whether it is only directed at intra-provincial matters, even though it may "incidentally affect" that current or flow. In the former case, the province has entered the field of regulating trade and commerce, a field reserved to the federal Parliament under section 91(2); in the latter case, however, if it has confined the main thrust of its scheme to subjects within its own jurisdiction, any extra-provincial "side effects" will not nullify it.

Several recent cases have tried to state these propositions more particularly. Thus, in Carnation Co. v. Quebec Agricultural Marketing Board, Martland J. said:

It is not the possibility that these orders might "affect" the appellant's interprovincial trade which should determine their validity, but, rather, whether they were made "in relation to" the regulation of trade and commerce .... I am not prepared to agree that, in determining that aim, the fact that these orders may have some impact upon the appellant's interprovincial trade necessarily means that they constitute a regulation of trade and commerce within s. 91(2) and thus renders them invalid. The fact of such impact is a matter which may be relevant in determining their true aim and purpose, but it is not conclusive.35

Furthermore, as Abbott J. noted in the Ontario Farm Products Reference, in the same vein:

The power to regulate the sale within a Province, of specific products, is not, in my opinion, affected by reason of the fact that some, or all, of such products may subsequently, in the same or in an altered form, be exported from that Province, unless it be shown of course, that such regulation is merely a colourable device for assuming control of extra-provincial trade .... It is the immediate effect, object or purpose, not possible consequential effects, that are relevant.36

However, as Kerwin C.J.C. stated in the same decision:

Once a statute aims at "regulation of trade in matters of inter-provincial concern" ... it is beyond the competence of a Provincial Legislature .... The concept of trade and commerce, the regulation of which is confined to Parliament, is entirely separate and distinct from the regulation of mere sale and purchase agreements. Once an article enters into the flow of inter-provincial or external trade, the subject-matter and all its attendant circumstances cease to be a mere matter of local concern.37

34 Id. at 212; McLaws, The Constitutional Validity of Provincial Prorationing Legislation (1966), 2 U.B.C. L. Rev. 522 at 529.
37 Id. at 204 (S.C.R.), 264-65 (D.L.R.).
Under these principles, it has become fairly clear that a province cannot interfere with the interprovincial flow of goods by preventing or unduly restricting the importation of goods into the province or their support from it. For example, in two recent decisions—Manitoba Egg and Manitoba Hog\(^{38}\)—a province attempted to stabilize the market for its local producers by subjecting products imported into the province to a regulatory scheme involving such measures as quota restrictions and compulsory marketing through a provincial board. In both instances, the provincial legislation was held to interfere with the free movement of goods between the provinces. And in the Ontario Farm Products Reference,\(^{39}\) the Supreme Court suggested (in the face of a direction that the challenged legislation should be considered as applying only to intra-provincial transactions) that an attempt to prevent the export of a product from the province except through a provincial marketing board would also be held invalid. A similar result had been reached in the earlier cases of Lawson v. Interior Tree, Fruit and Vegetable Committee of Direction\(^{40}\) and In re The Grain Marketing Act,\(^{41}\) both cases in which such a substantial part of the local produce subject to the compulsory marketing scheme was destined for export from the province that the scheme could only be characterized as having been aimed at that export trade.

Not all provincial marketing schemes have failed, however. Most recently, in the Ontario Egg Reference,\(^{42}\) the Supreme Court of Canada sanctioned a provincial scheme that included the imposition of production controls even where the product was destined for export (though this was in the context of co-operative federal and provincial legislation). Earlier, in Shannon v. Lower Mainland Dairy Products Board,\(^{43}\) the Privy Council upheld provincial legislation purporting to apply only to marketing and transportation of goods within the province on the basis that it did, in fact, have only this effect. In Carnation, despite the fact that most of the product was shipped out of the province after processing, and that the prices to be paid to the local producers by Carnation had been fixed at a higher level than those otherwise paid in the area, the Supreme Court of Canada found the scheme to be \textit{intra vires} on the basis that:

the orders under question were not . . . directed at the regulation of interprovincial trade. They did not purport directly to control or restrict such trade. There was no evidence that in fact, they did control or restrict it. The most that can be said of them is that they had some effect upon the cost of doing business in Quebec of a company engaged in interprovincial trade, and that, by itself, is not sufficient to make them invalid.\(^{44}\)


\(^{39}\) \textit{Supra} note 36.

\(^{40}\) \textit{Supra} note 25.

\(^{41}\) [1931] 2 W.W.R. 146 (Sask. C.A.).


\(^{44}\) \textit{Supra} note 35, at 254 (S.C.R.), 15 (D.L.R.) \textit{per} Martland J.
The conceptual difficulties in reconciling *Carnation* with the other decisions involving marketing board control and price-setting for products to be exported from a province or imported into it have been noted.\(^ {45}\) Perhaps this is just symptomatic of the broader problem of predicting in each case just how the courts will apply the general principles mentioned above, for, as Abbott J. said in the *Ontario Farm Products Reference*:

> In my opinion it would be equally impracticable and undesirable, to attempt an abstract logical definition of what constitutes interprovincial or export trade. Each transaction must be looked at, in order to ascertain whether or not, in fact, it involves such trade.\(^ {46}\)

Accordingly, except in the most blatant cases, the courts in the agricultural marketing area have found themselves hemmed in by very few precise factual or legal guidelines as to the course that they should follow, and so have been largely free to "fashion constitutional policy" *ab initio* in each instance. Therefore, there is some difficulty in transferring this wealth of jurisprudence to a different field—that of natural resources—in which the overall factual similarities may not necessarily correspond as closely as they might at first glance. However, as an expression of the general principles underlying the interaction of the provincial legislative powers under section 92 with those reserved for Parliament under section 91, the marketing cases form the most demonstrative body of legal thought that we have so far accumulated.

### III. CIGOL—A CASE OF MISTAKEN IDENTITY?

#### A. Bill 42

The *CIGOL* decision of the Supreme Court of Canada in November 1977 was born out of the Arab oil crisis of October 1973.

Prior to that time, the world (and Saskatchewan) price of a barrel of crude oil hovered around the $3.00 to $3.50 range (depending largely upon the type and grade of crude produced). The cost of finding, developing and producing that barrel of oil was about half that,\(^ {47}\) the remaining half representing the producer's profit from his producing operations (as distinct, in the case of integrated companies, from additional profits that might be realized in refining and marketing operations after the crude left the well-head). Due to the physical set-up of the oil industry in the West, almost all of Saskatchewan's oil is exported; the bulk of its fields producing lighter grades of crude that could be refined and used in the province are in its eastern regions, and the pipelines flow only to the east. Saskatchewan itself receives much of its fuel from Alberta. The oil industry in the province was subject to various forms of taxation: the ordinary federal and provincial corporate and personal income taxes, of course, plus provincial taxes comprising an acreage tax in non-producing areas and a "producing tract" tax in producing fields (both being in the form of real property taxes). The provincial Crown also re-


\(^{46}\) *Supra* note 36.

\(^{47}\) Milen and Savino, *supra* note 24, at 83, Table 9.
ceived, in respect of oil produced from Crown lands, a royalty on a sliding scale applied to the price of the oil so produced.

In October 1973, in the face of the threat of an Arab oil embargo, the world price of oil skyrocketed (with little or no corresponding increase in costs). Both Saskatchewan and Alberta moved quickly to capture for their provincial treasuries a large part of the "windfall" profits that were seen as about to accrue to the oil producers; the system adopted in Saskatchewan consisted of a complex of legislation, regulations and ministerial orders that became known colloquially as "Bill 42."

Bill 42 itself was The Oil and Gas Conservation, Stabilization and Development Act, 1973,\textsuperscript{48} which was passed on December 19, 1973 and came into force on January 1, 1974. Significant amendments were made in May 1974 and came into force retroactive to January 1, 1974;\textsuperscript{49} the version of Bill 42 that eventually came before the Supreme Court included these. As will be discussed below, additional changes of substance were made in the system in late 1976; however, these were not before the Supreme Court of Canada which was hearing oral argument in the CIGOL case at about the same time.

The Bill 42 system comprised three major elements: the expropriation of the underlying freehold rights in approximately half of the forty percent of the province's producing tracts not already held as Crown lands; the imposition of a "royalty surcharge" upon oil produced from Crown lands (whether previously so held or newly expropriated); and the levying of a "mineral income tax" upon oil producers whose production was not subject to the royalty surcharge.

Prior to the enactment of Bill 42, about sixty percent of Saskatchewan's oil-producing lands were held under mineral leases from the provincial Crown; the remaining forty percent were held in freehold, usually in the form of mineral leases given to producing companies by private landowners who had received the grant of mineral rights from the Crown along with the grant of surface rights. Section 28 of Bill 42 transferred to and vested in the Crown in right of the province all oil and gas rights in these freehold producing tracts except those owned by a person whose total holdings did not exceed 1,280 acres. (This latter exemption, derived by reference to section 27(2), has been called the "farmer's exemption" in that those holding 1,280 acres or less were generally farmers and not corporations or non-farming individuals.) Those freehold owners who had been expropriated were entitled to compensation under section 34; in essence, the former owner continued to receive the same royalty that he had before the expropriation. Section 33(1) expressly preserved the status of leases previously granted to producers by the expropriated freehold owners—only the underlying fee simple rights were expropriated—and section 33(2) expressly made those leases subject to the payment of the royalty surcharge. Where an expropriated owner had been

\textsuperscript{48} S.S. 1973-74, c. 72.

\textsuperscript{49} S.S. 1973-74, c. 73.
producing oil himself from his own land, section 35 required the Minister of
Mineral Resources to issue a Crown lease to him so that he could continue
production. As an anti-avoidance measure, to prevent the cessation of pro-
duction from these “Crown-acquired” lands, section 42 made it an offence
to cease production from these lands without the consent of the Minister,
except for necessary repairs and maintenance.

The government's purpose in this measure was evidently to convert as
much oil production as was politically feasible from freehold to Crown own-
ership and thus render it subject to royalties rather than taxation. A new cate-
gory of land-holding was thus created—the “Crown-acquired” lands—which,
together with the original Crown lands, totalled about eighty percent of the
producing tracts in the province. The next step in the Bill 42 system was to
impose the “royalty surcharge” on the oil produced from both types of
Crown land.

The royalty surcharge was imposed by section 18 and Schedule I of Bill
42 (and later confirmed by an amendment to The Mineral Resources Act).60
As its name implies, it was intended to be an additional royalty payment to
the Crown over and above the basic Crown royalty that had been traditional-
ly collected. The formula for calculating the royalty surcharge (after the May
1974 amendments), for each barrel of Crown or Crown-acquired oil, was:

(oil produced less Crown royalty oil less Road Allowance Crown levy) times
(well-head value, as established by the minister, less basic well-head price).51

The portion of a barrel subject to royalty surcharge was thus determined by
deducting the basic Crown royalty and the one percent Road Allowance
Crown levy (exacte from all producers, Crown and freehold, as compensa-
tion for oil taken from beneath provincial road allowances). This portion was
then multiplied by a value in dollars determined by subtracting “basic well-
head price” from “well-head value.” The concept of “basic well-head price”
was intended to represent the pre-crisis selling price of oil, and was to be
fixed by regulation. A slightly higher amount, the “premium well-head price,”
could effectively be used as the lower figure in the subtraction if research,
exploration, development or similar expenditures were made and approved
by the minister; in addition, a deduction from royalty surcharge was per-
mitted for increased production and transportation costs.62 The upper figure
in the calculation, the “well-head value,” was originally called the “inter-
national well-head price” and as such was to be determined by the minister,
having regard to certain specific factors including the international price of
oil on the Chicago market.63 When the term was changed to “well-head
value” in May 1974,64 however, reference to these factors was dropped. By

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50 S.S. 1973-74, c. 64.
51 The Petroleum and Natural Gas Regulations, 1969, Sask. Reg. 8/69, s. 63(1), as
52 The Petroleum and Natural Gas Regulations, 1969, Sask. Reg. 8/69, ss. 57(n),
63(5), 63(7), as am. by Sask. Reg. 26/74.
53 The Petroleum and Natural Gas Regulations, 1969, Sask. Reg. 8/69, s. 57(f).
54 Sask. Reg. 222/74, s. 2(a).
a series of ministerial orders issued from time to time, the minister fixed this “well-head value” at the higher of either the price per barrel actually received at the well-head or a stipulated value per barrel set out in the order (varying with the quality and type of oil and the area within the province from which it was produced). 55

In essence, then, the royalty surcharge was aimed at appropriating to Saskatchewan the whole of the windfall price increase resulting from the 1973 crisis and its after-effects. What was left to the producer (taking into account the adjustments to be made for increased costs) was the same net revenue and profit that he had realized prior to the oil price explosion.

In November and December 1976, just as the Supreme Court of Canada was hearing the appeal in *CIGOL*, two significant changes were made in the Crown royalty structure. First, the basic Crown royalty and the royalty surcharge were replaced with a new “combined” royalty that exacted a graduated percentage of Crown oil production. 56 Mathematically, the Crown was no longer taking 100 percent of any particular portion of a barrel of Crown oil, as it had been in the case of royalty surcharge. Secondly, the minister abandoned the fixing of well-head value—still relevant as the amount to which the graduated royalty percentage would be applied—as the higher of the price received or a stipulated value; instead, the well-head value would be the price actually received unless it was determined that such price was not the “fair value” of the oil, in which case the minister could substitute that fair value. 57

Under Bill 42, royalty surcharge was payable by Crown lessees only; theoretically, all oil producers were subject to payment of mineral income tax. However, because of the way in which mineral income tax was to be calculated, and since, under section 13, mineral income tax was only to be paid to the extent that royalty surcharge was not payable, the operation of the mineral income tax was effectively confined to those producing from (but not those owning) the twenty percent of producing tracts that had not been expropriated under section 28.

Under section 3, mineral income tax was to be paid monthly “by every person having an interest in the oil produced from a well in a producing tract.” The remaining freehold owners, those with less than 1,280 acres in the aggregate, were exempted by section 5. The tax was calculated, under section 4(1), by subtracting the “basic well-head price”—the same as that established for royalty surcharge purposes—from the “well-head price received” for each barrel of oil produced, and then multiplying the difference by the number of barrels constituting the taxpayer’s share of production from the well for the month. The “well-head price received” was the actual price by virtue of section 2(1), but was subject to an *ex post facto* reassessment by the minister, under section 4A, if he determined that any oil had been

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55 See, for instance, Ministerial order WOV-02/76, Nov. 15, 1976.
56 Sask. Reg. 281/76, s. 2.
57 Ministerial order WOV-01/77, clause (b).
disposed of for less than its "fair value." As with the royalty surcharge, section 6 permitted a deduction from mineral income tax for increased costs of production and transportation and section 14 gave a deduction of the difference between "basic well-head price" and "premium well-head price" for research, exploration, development and like costs approved by the minister. Again, then, the function of mineral income tax—like royalty surcharge—was to leave the producer in his pre-crisis net profit position and to direct the windfall profits that would otherwise accrue to him to the province.

At this juncture, it is convenient to digress somewhat and consider briefly the response of Alberta to the same dramatic oil price rise. Like Saskatchewan, Alberta had a sliding-scale royalty prior to the oil crisis. With the onslaught of the crisis, Alberta moved to abolish the former maximum limit in Crown oil leases upon the amount of royalty that could be exacted, and by regulation introduced a supplementary rate of royalty, under a complex formula, upon the enhanced portion of the sale price. This royalty was deliverable in kind, unlike the Saskatchewan royalty surcharge which was payable in money, and moreover took less than 100 percent of the windfall increase (sixty-five percent in the case of "old oil"—that produced from wells existing at the time—and thirty-five percent for "new oil"—that produced from wells subsequently drilled). The highest combined average royalty rate was approximately forty percent. In addition, the Alberta Petroleum Marketing Commission was established by The Petroleum Marketing Act, and was given the power to sell not only the Crown's royalty share of oil production but also the remaining share of the Crown lessee as his exclusive agent. The sale in each instance was directed to be within Alberta; the price in the former case was to be in the public interest of Alberta, and in the latter was to be negotiated with regard to prevailing market conditions.

Nor was the federal government idle. First, an export tax on oil leaving the country was imposed, by the Oil Export Tax Act as part of a programme to protect Canadian consumers (largely in the East and reliant upon imported oil) against the immediate impact of a drastic rise in fuel costs. Also intended to absorb the windfall increase in crude oil prices, this tax was set at a rate per barrel calculated to be the difference between the previously prevailing well-head prices in Canada and the new market price in the United States. By February 1974, the export tax had reached $6.40 per barrel. The producing provinces objected strenuously to this tax since it implied a freez-

68 See generally Crommelin, supra note 7; Government Management of Oil and Gas in Alberta (1975), 13 Alta. L. Rev. 146; Beare, "Current Royalty Treatment of the Petroleum Industry in the Four Western Provinces," Canadian Tax Foundation Panel (unpublished, Nov. 20, 1978); and Thring, supra note 30.
60 Alta. Reg. 93/74.
61 S.A. 1973, c. 96.
62 S.A. 1973, c. 96, s. 15.
63 S.A. 1973, c. 96, s. 21.
64 S.C. 1973-74, c. 53.
65 See generally Crommelin, supra note 7, at 130-34.
ing of domestic well-head prices at their pre-crisis levels and the directing of the post-crisis price increase solely to the federal treasury. In effect, since the new world market price less the federal export tax approximated the old market price at the well-head, the producers were actually receiving about what they had before the crisis and the new provincial taxes and royalties, being based on increased receipts to the producers, were unable to operate for exported oil. As the result of federal-provincial negotiations, a new arrangement was agreed upon by April 1974 under which the export tax was gradually withdrawn as domestic fuel prices were allowed to rise towards world levels, so that the new provincial revenue systems could actually begin to raise revenue from the portion of the windfall increase vacated by the export tax. For instance, on April 1, 1974 the export tax was reduced by $2.70 per-barrel; at the same time, the stipulated well-head value for Saskatchewan royalty surcharge purposes was raised accordingly.66 A functional sharing of the increased revenue source was thus worked out between the two levels of government (although it should also be noted that the federal government effectively increased its share in May 1974 by amending the Income Tax Act to deny to taxpayers any deduction in computing income on account of any provincial resource taxes or royalties).67

B. CIGOL v. Saskatchewan

The challenge to the constitutionality of Bill 42 by Canadian Industrial Gas & Oil Ltd. was not long in coming. In the Saskatchewan Court of Queen's Bench, however, after an exhaustive review of the evidence, Hughes J. upheld the legislation as intra vires the province: the royalty surcharge was found to be a true royalty, even with respect to the Crown-acquired lands; the mineral income tax was held to be direct and levied within the province; and no interference was perceived with the federal trade and commerce power.68

In the Saskatchewan Court of Appeal, the decision of Hughes J. was upheld by a unanimous five-man bench. After noting the traditional presumption—that legislation should be presumed to be intra vires when subject to constitutional attack—Culliton C.J.S., speaking for the Court, concluded that the mineral income tax was direct, however it might be entitled, since it was "demanded from the very persons whom it is intended and desired should pay it" under Mill's formulation.69 The mechanics of the tax demonstrated this:

If there were any doubt as to this view, I think that doubt would be resolved by an appreciation of the situation that would result if the persons taxed attempted to indemnify themselves at the expense of the purchasers of the oil. If the tax paid pursuant to Bill 42 was added to the sale price of the crude at the well-head, then to the extent it was so passed on, it would increase the well-head price. The effect therefore, would simply be to increase the tax by the amount which the well-head price was so increased. In other words, such action by the taxpayers would result

66 Supra note 55.
in no benefit to themselves, but could, if the selling price were increased by the total amount of the tax, substantially increase the tax collected by the Government. Surely such a result following from an attempt to pass on the tax clearly indicates that the Legislature intended the tax to be paid by those upon whom it was imposed and from whom payment was demanded.\(^{70}\)

The royalty surcharge was held to be "exactly what the words convey in their ordinary meaning; that is, an increase in the royalty payable by the lessee"\(^{71}\) and thus fell within the ambit of the *Huggard Assets* case.\(^{72}\) Even if the royalty surcharge were not a true royalty, but was rather a tax, it too would be direct due to its similarities to the mineral income tax. Moreover, since neither royalty surcharge nor mineral income tax affected the price of Saskatchewan oil, there could be no argument that either would restrict or inhibit interprovincial or international trade in Saskatchewan oil. Culliton C.J.S. concluded that:

> Neither of the charges have [sic] any effect on price. As a matter of fact, the true situation is that the tax does not influence the price but rather, the price determines the tax.\(^{73}\)

The fact that the levies had succeeded in their one and only purpose—that of draining off the substantial benefits that the producers would otherwise have received—did not alter this conclusion but rather reinforced it.

However, the decision of the Supreme Court of Canada was a different story. By a 7-2 majority, the Court struck down all of the significant features of Bill 42 except the barest bones of the expropriation under section 28—both the royalty surcharge and the mineral income tax were held to be *ultra vires* not only as indirect taxation but also because they infringed upon the federal trade and commerce power.\(^{74}\)

An articulate dissent was entered by Dickson J. (de Grandpré J. concurring). After referring to the 1930 legislation\(^{75}\) that had placed Saskatchewan in the same position as regards its mineral resources as the original provinces, he began his analysis with the proposition that: "Subject to the limits imposed by the Canadian Constitution, the power of the Province to tax, control and manage its natural resources is plenary and absolute."\(^{76}\) What had to be determined, in effect, was what those limits were.

Having set out the legislative history of Bill 42, Dickson J. first turned to the question of whether the mineral income tax was direct or indirect. He proceeded along two lines. First, he examined the tax in relation to the various established categories of direct and indirect taxation. For instance, CIGOL had argued that the mineral income tax was a commodity tax, one whose general incidence was to "attach" itself to the commodity being taxed

\(^{70}\) *Id.* at 92-93 (D.L.R.), 370-71 (W.W.R.).

\(^{71}\) *Id.* at 94 (D.L.R.), 373 (W.W.R.).

\(^{72}\) *Supra* note 27.

\(^{73}\) *Supra* note 69, at 98 (D.L.R.), 376 (W.W.R.).

\(^{74}\) *Supra* note 4.

\(^{75}\) *Supra* note 23.

\(^{76}\) *Supra* note 4, at 574 (S.C.R.), 468 (D.L.R.), 630 (W.W.R.).
and therefore tending to be “passed on” in the increased price of that commodity. Dickson J. disposed of this argument fairly quickly by noting that the mineral income tax was not imposed as a fixed percentage, as a true commodity tax would be; rather, the deduction for increased costs under section 6 meant that the Province’s percentage share could vary. Moreover, the tax did not fall on the commodity itself but on certain persons in respect of their interests in the commodity; those exempted under the “farmer’s exemption” were not taxed at all. Thus, he found, “the tax is not an ‘add-to-the-price’ impost but rather a ‘take-from-the-owner’ levy.”

On the other side, the Province had argued that the mineral income tax was, as its name implied, an income tax and therefore direct. This argument, too, was dispatched in short order. A true income tax, he concluded, was:

> according to generally accepted accounting principles and business practice, a tax imposed on net income and in determining such net income any expenses incurred in earning that income are inherently deductible.

While some expenses were allowed to be deducted, the tax was “in essence a flat sum which will vary according to the sale price of oil but is not necessarily reflective of actual expense experience.”

Having thus ruled out the two categories into which the mineral income tax might have fallen, Dickson J. concluded that the tax was a “hybrid” and thus fell to be examined under Mill’s “general tendencies” test as adopted in Bank of Toronto v. Lambe. Three factors influenced his decision on this point. First, he noted, as had Culliton C.J.S. in the Saskatchewan Court of Appeal, that the producer could not recoup the tax for which he was liable by increasing the price of his oil—the international or “world” price of oil placed a ceiling on that price and was beyond the control of the producer. Thus:

> If Saskatchewan oil is sold in the market at prevailing market prices, as I understand to be the case, then I do not think it can properly be said that the Eastern Canadian consumer pays more by reason of the imposition of the tax. There is no added “burden” to “cling” to the commodity unit . . . .

Secondly, the “farmer’s exemption” would have been unnecessary, in his view, if it were, in fact, possible and intended that taxpayers reimburse themselves at the expense of oil purchasers; otherwise, no special provision would have been required to protect the smaller taxpayers. No matter whose oil it was, in either case “the ultimate position of the final consumer is unaffected.”

Thirdly, Dickson J. considered the effect of section 4A, which CIGOL had argued would require a producer to sell his oil at a price at least as high as that set by the minister in order to avoid a loss on the sale. He charac-

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77 Id. at 486 (S.C.R.), 477 (D.L.R.), 640 (W.W.R.).
78 Id.
79 Id. at 587 (S.C.R.), 477 (D.L.R.), 641 (W.W.R.).
80 Supra note 9.
81 Supra note 69.
82 Supra note 4, at 491 (S.C.R.), 481 (D.L.R.), 645 (W.W.R.).
83 Id. at 489 (S.C.R.), 479 (D.L.R.), 643 (W.W.R.).
terized this provision as an anti-avoidance measure (a not-uncommon feature of taxing statutes), noting that the minister’s powers could be exercised only after a sale had taken place at less than “fair value”\(^8\) and that these powers were not “unrestrained and unrestricted”\(^85\) but subject to “world and national forces”\(^86\) that would determine the level at which the minister might set a well-head value. The minister’s powers could only be used if a producer “seeks to evade tax by undercutting the price his product would command at fair market value;” until then, “The tax does not set the price. Price sets the tax.”\(^87\) No credence would be given to the “inchoate fear” that the minister’s powers would be used improperly to set arbitrary and punitive well-head values in excess of fair market value. He concluded:

I cannot stress too strongly the point that purchasers would be paying the same price whether the tax existed or not. This fact, to my mind, conclusively prevents the levy from being in the nature of an indirect tax or an export tax. It is not passed on to purchasers to augment the price they would otherwise pay. Instead, they pay exactly the price they would pay in the absence of the tax and the producers are taxed on the profits they would otherwise receive.\(^88\)

The next matter to be considered was the status of the royalty surcharge. First, was it really a royalty or a tax instead?

In other words, was the relationship of the Legislature vis-a-vis the oil producer that of lessor-lessee or was the true character of the relationship that of sovereign taxing authority-taxpayer.\(^89\)

On the one hand, a royalty was to be characterized as “a share, as provided in the lease, of the oil or gas produced, or the proceeds thereof, for the privilege of exploring for and recovering oil and gas.”\(^90\) On the other, citing Duff J. in *Lawson v. Interior Tree, Fruit and Vegetable Committee of Direction*,\(^91\) a tax is “a compulsory contribution, imposed by the sovereign authority for public purposes or objects.”

Dickson J. concluded that the latter characterization applied. Particularly with respect to the lessees of the expropriated or “Crown-acquired” lands, there could not be said to have been any consensual arrangements for the imposition of royalty surcharge since the leases under which those lessees produced had been expressly preserved in section 28. The expropriation itself was valid, but Bill 42 had not purported to amend those leases in any way. Original Crown lessees might, on the other hand, be subject to a form of lease that permitted the Crown by regulation to vary the royalty rate from time to time. However, even with respect to this class, the royalty surcharge lacked the “distinguishing feature” of a conventional royalty as a percentage of production; instead, it was the whole of an amount calculated with reference to

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\(^8\) *Id.* at 592 (S.C.R.), 481 (D.L.R.), 645 (W.W.R.).

\(^85\) *Id.*

\(^86\) *Id.*

\(^87\) *Id.*

\(^88\) *Id.* at 593 (S.C.R.), 482 (D.L.R.), 646 (W.W.R.).

\(^89\) *Id.*

\(^90\) *Id.* at 594 (S.C.R.), 483 (D.L.R.), 647 (W.W.R.).

\(^91\) *Supra* note 25.
a statutory figure. The “royalty surcharge” was therefore a tax but, because of its congruence with the mineral income tax, it too was held to be direct.\(^{92}\)

The final question to be determined was the argument of CIGOL that the whole Bill 42 system interfered with trade and commerce. As Dickson J. noted, the trade and commerce power under section 91(2) “has undergone a jurisprudential renaissance during the past fifty years,” but CIGOL was asking the Supreme Court “to extend that revivification to an unprecedented degree.”\(^{93}\) The basic argument of CIGOL involved two assumptions:

Implicit in the argument of the appellant is the assumption that federal regulatory power pursuant to s. 91(2) follows the flow of oil backward across provincial boundaries, back through provincial gathering systems and finally to the well-head. A secondary assumption is that sale at the well-head marks the start of the process of exportation. In the view I take of the case it is unnecessary to reach any conclusion as to the validity of either of these assumptions. It is, however, worth noting that neither American nor Canadian jurisprudence has ever gone that far.\(^{94}\)

There was nothing in Bill 42 that could convince Dickson J. that it was merely a colourable attempt by Saskatchewan to intervene in extra-provincial trade. Neither the aim nor the effect of the legislation could be impugned in this way. All of the key elements of the taxation system were confined to intra-provincial matters—only oil produced in Saskatchewan was subject to tax, and the amounts involved in the calculation of the tax, such as “well-head price,” were amounts that derived their meaning only from factors present in the Province.\(^{95}\)

Nor could the minister’s powers under section 4A be interpreted as placing a “floor price”\(^{96}\) on Saskatchewan oil, since it was an “after-the-event”\(^{97}\) determination that became operative only if a sale at less than fair value had already taken place. If there were any extra-provincial effects, they were incidental only and thus permissible under Carnation.\(^{98}\) The mere existence of the “farmer’s exemption” again reinforced his conclusions: the price of oil crossing the Saskatchewan boundary was the same no matter from whose land it came and whether or not it was subject to tax, and “the ultimate position of consumers is unaffected.”\(^{99}\) In sum:

The Province of Saskatchewan had a bona fide legitimate and reasonable interest of its own to advance in enacting the legislation in question, as related to taxation and natural resources, out of all proportion to the burden, if there can be said to be a burden, imposed on the Canadian free trade economic unit through the legislation. The effect, if any, on the extra-provincial trade in oil is merely indirectly and remotely incidental to the manifest revenue-producing object of the legislation under attack.\(^{100}\)

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\(^{92}\) Supra note 4, at 595-96 (S.C.R.), 483-84 (D.L.R.), 648-49 (W.W.R.).

\(^{93}\) Id. at 597 (S.C.R.), 484 (D.L.R.), 649 (W.W.R.).

\(^{94}\) Id. at 601 (S.C.R.), 487 (D.L.R.), 652 (W.W.R.).

\(^{95}\) Id. at 601-02 (S.C.R.), 487-88 (D.L.R.), 652-53 (W.W.R.).

\(^{96}\) Id. at 601 (S.C.R.), 488 (D.L.R.), 653 (W.W.R.).

\(^{97}\) Id.

\(^{98}\) Supra note 35.


\(^{100}\) Id. at 603 (S.C.R.), 489 (D.L.R.), 654-55 (W.W.R.).
To Martland J. writing for the majority, the logic of Dickson J. was not fully persuasive. To be sure, the majority opinion is patterned, to a great extent, after that of the dissent, and even incorporates large parts of it by reference, but the majority's conclusions from what is largely the same line of reasoning veer sharply from those of Dickson J. because of a different view of the intent of Saskatchewan in enacting Bill 42.

Martland J. began by referring briefly to Dickson J.'s rejection of the established categories of direct and indirect taxation as a determinative point in assessing the mineral income tax. He agreed that it was not, in fact, an income tax; however, he left open the possibility (which Dickson J. had quickly foreclosed) that it might be a commodity or "sales" tax. He then turned to the royalty surcharge, and reached the same conclusions as had Dickson J. as to its being in essence a tax and not a royalty. There was, first, the question of the lessees on the "Crown-acquired" lands: since their leases had not been expropriated under section 28 (again, the expropriation itself was valid, as far as it went), the "royalty" payable to the Crown, as the new owner, was still that shown in the original freehold lease. Anything beyond that could only be taxation. Secondly, with respect to the original Crown lessees, the term "royalty" as used in their leases could have only its customary meaning as "a share of the production obtained by the lessee" which must, as Martland J. read the terms of the standard Saskatchewan Crown lease, be levied at a "rate" which is, by definition, something less than 100 percent of production above a certain level fixed by the government. The royalty surcharge did not meet this description.

Both royalty surcharge and mineral income tax were thus to be judged on their "general tendencies" as forms of taxation. This question was answered by Martland J. with reference to two features. First, almost all of Saskatchewan's oil was exported from the province. Second, with respect to both, the government had itself set the lower figure in the tax calculation (the basic well-head price) and the minister established the upper figure (the well-head value); the government then took away the difference between these two. On this basis, Martland J. stated:

These taxing provisions, i.e., both mineral income tax and royalty surcharge, have the following impact upon the Saskatchewan oil producer. In the first place he is effectively precluded from recovering in respect of the oil which he produces any return greater than the basic well-head price per barrel. He is subjected to an income freeze at that figure and can obtain no more than that. In the second place, he is compelled to sell his product at a price which will equal what the Minister determines to be the fair value of the oil which he produces. He must do this, because his production of oil is subject to a tax per barrel representing the difference between fair value and basic well-head price. The levies were thus held to be "an export tax imposed upon oil production." They were summarized as follows:

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101 Id. at 559-60 (S.C.R.), 458 (D.L.R.), 617 (W.W.R.).
103 Id. at 564 (S.C.R.), 461 (D.L.R.), 622 (W.W.R.).
104 Id.
The mineral income tax and the royalty surcharge are taxes imposed in a somewhat unusual manner. The mineral income tax purports to be a direct tax upon income imposed upon the taxpayer, which he cannot pass on to his purchaser. The royalty surcharge, while carrying a different title, is the same in nature. What differentiates this legislation from other legislation imposing export taxes is that the true effect of the legislation is to impose a freeze upon the actual income which the producer exporter can derive from the sale of his product. All that he is permitted to retain on the sale of each barrel of oil is the basic well-head price. In addition to being subjected to an income freeze, he is compelled to sell his product at a price equivalent to what the Minister considers to be its fair value in order to obtain the funds necessary to meet the tax. This amount per barrel over and above the basic well-head price he must obtain from his purchaser as a part of the purchase price. In essence the producer is a conduit through which the increased value of each barrel of oil above the basic well-head price is channeled into the hands of the Crown by way of tax. The increase in value is itself the tax and it is paid by the purchaser of the oil.\footnote{105}

As for the conclusion of Dickson J. that the price of Saskatchewan oil would not be altered by Bill 42, Martland J. had this to say:

It is contended that the imposition of these taxes will not result in an increase in the price paid by oil purchasers, who would have been required to pay the same market price even if the taxes had not been imposed, and so there could be no passing on of the tax by the Saskatchewan producer to his purchaser. On this premise it is argued that the tax is not indirect. This, however, overlooks the all important fact that the scheme of the legislation under consideration involves the fixing of the maximum return of the Saskatchewan producers at the basic well-head price per barrel, while at the same time compelling him to sell at a higher price. There are two components in the sale price, first the basic well-head price and second the tax imposed. Both are intended by the legislation to be incorporated into the price payable by the purchaser. The purchaser pays the amount of the tax as a part of the purchase price.\footnote{106}

Accordingly, for Martland J., the levies could only be indirect taxation.

On this reasoning, it was a foregone conclusion that Martland J. would also hold Bill 42 to have interfered with interprovincial and international trade and commerce. He said:

In considering this issue the important fact is, of course, that practically all of the oil to which the mineral income tax or the royalty surcharge becomes applicable is destined for interprovincial or international trade. Some of this oil is sold by producers at the well-head and thereafter transported from the Province by pipeline. Some of the oil is not sold at the well-head, but is produced by companies for their own purposes, and is likewise transported out of the Province by pipeline. In either case the levy becomes applicable. The producer in the first case must, if he is to avoid pecuniary loss, sell at the well-head at the well-head value established. The company which has its own oil production transported from the Province must, if it is to avoid pecuniary loss, ultimately dispose of the refined product at a price which will recoup the amount of the levy. Thus, the effect of the legislation is to set a floor price for Saskatchewan oil purchased for export by the appropriation of its potential incremental value in interprovincial and international markets, or to ensure that the incremental value is not appropriated by persons outside the province.\footnote{107}

\footnote{105 Id. at 565-66 (S.C.R.), 462 (D.L.R.), 623-24 (W.W.R.).}
\footnote{106 Id. at 566 (S.C.R.), 463 (D.L.R.), 624 (W.W.R.).}
\footnote{107 Id. at 566 (S.C.R.), 463 (D.L.R.), 624-25 (W.W.R.).}
After referring to the *dicta* of Kerwin C.J.C. in the *Ontario Farm Products Reference*\(^{108}\) and the characterization of the intent of Bill 42 offered by Culliton C.J.S. in the Saskatchewan Court of Appeal,\(^{109}\) he continued:

In an effort to obtain for the provincial treasury the increases in the value of oil exported from Saskatchewan which began in 1973, in the form of a tax upon the producers of oil in Saskatchewan, the legislation gave power to the Minister to fix the price receivable by Saskatchewan oil producers on their export sales of a commodity that has almost no local market in Saskatchewan. Provincial legislative authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market. It involves the regulation of interprovincial trade and trenches upon s-s. 91(2) of the *British North America Act, 1867*.\(^{110}\)

*Carnation* was found to be of no assistance to the Province; Bill 42 was “directly aimed” at the export price of oil; it did not merely “incidentally affect” it.\(^{111}\)

What is one to make of all this? Both Martland J. and Dickson J. were probably correct in characterizing the royalty surcharge as a tax. This is especially so with regard to the “Crown-acquired” lessees, whose freehold leases in all likelihood contained no provision for the unilateral variation of the royalty rate by the lessor. Moreover, while one might quibble over the grammatical possibilities of a “rate” of royalty or a “share” of production encompassing a 100 percent “rate” or “share” (one might question, for instance, whether 99.9 percent would have been permissible under this logic), the Court’s interpretation is probably closer to what the lessees—Crown or Crown-acquired—contemplated when they took out their leases. This issue, however, is really beside the point, as it turns out. The real crux of the decision—the basis for it on both the indirect taxation and the trade and commerce grounds—is the issue of price-fixing by Saskatchewan in the international oil market.

The mere fact that a product may be destined for export from a province is not, of itself, sufficient to remove it from provincial regulatory control; *Carnation* establishes that quite clearly. Nor is it an argument for denying provincial revenue-raising authority—unless, of course, some colourable feature is also present, such as the rebate of tax if the product is processed in the province.\(^{112}\) Furthermore, intra-provincial price-fixing is permitted, as the *Ontario Farm Products Reference* and *Shannon* decisions show. It takes a combination of the two elements to render a scheme *ultra vires*—a conclusion that should not be too surprising in view of the earlier jurisprudence. However, the basic question still remains: was extra-provincial price-fixing either the intent or the effect of Bill 42? From reading the majority and dissenting opinions on this point, despite their earlier similarities, one might well surmise that they had suddenly turned to different pieces of legislation.

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108 *Supra* note 37.
109 *Supra* note 73.
111 *Id.* at 569 (S.C.R.), 464-65 (D.L.R.), 626 (W.W.R.).
112 *Supra* note 22.
Assertions that an “income freeze” would result from Bill 42, or that purchasers would be paying the tax through the “conduit” of the producer, are not really germane. Even if a producer’s net return were frozen, the price that he would charge would still vary according to external forces, such as world price influences and federal-provincial price negotiations; moreover, since allowance was made for cost increases, his revenue was not frozen, even though his profit might be. Furthermore, to say that part of the price that a purchaser pays goes to taxes really begs the question; in the ordinary course of the flow of currency, a part of every dollar spent ends up going to taxes of some kind or another. To put these questions properly, it must be asked whether the freezing of a producer’s income—or profit, if that is the case—or the attribution of a tax destination to some unsegregated portion of a purchase price would result in an increased price being charged. In the circumstances, the answer to each question is “no.”

The heart of the matter comes down to the differing interpretations put on section 4A. It seems to be in the nature of taxpayers to avoid taxation wherever possible, and for that reason governments insert anti-avoidance provisions in virtually every taxation statute enacted. Section 4A was of this nature, a necessary revenue-protecting measure. It could operate only after the fact and only if a disposition had taken place at less than fair value. Only that fair value—an objective determination not dependent upon the minister’s whim—could be substituted. As Dickson J. pointed out, the extraneous evidence led by CIGOL failed to demonstrate any use of this power to set a well-head value at anything other than market price. As for the intent of section 4A:

The purpose of this important provision was twofold. First, it enabled the Minister to prevent a reduction in the tax payable by reason of a sale at less than what he considered to be the fair value of the oil. Second, it provided a basis for the computation of tax where oil produced from a Saskatchewan well had not been sold at the well-head but had been shipped out by the producer to be refined and sold.

Ironically, these are not the words of Dickson J. but those of Martland J., who then went on to read far more into the provision than was reasonably there. From this devolved his comments about an “income freeze” and producers being compelled to raise their prices to cover the minister’s “fair value.” These comments in turn are the foundation for his conclusions on both the indirect taxation and the trade and commerce points. It seems, unfortunately, as though Martland J. was seized by the same “inchoate fear” that Dickson J. noted (and refused to accept both in principle and on the evidence) of the minister using his powers under section 4A in an arbitrary and punitive manner. As one commentator has noted: “[T]he Minister of

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114 Supra note 4, at 592 and 602 (S.C.R.), 481 and 488 (D.L.R.), 645 and 654 (W.W.R.).
115 Id. at 563 (S.C.R.), 461 (D.L.R.), 621 (W.W.R.).
116 Supra notes 103 and 104.
Mineral Resources of Saskatchewan must indeed have been very surprised to discover the immense power to set prices in export markets which was attributed to him by the Supreme Court of Canada, power which in fact he does not possess and never did possess."\textsuperscript{118} 

\textit{CIGOL}, it must be submitted, is quite simply bad law.

C. \textit{The CIGOL Aftermath}

The immediate effect of the \textit{CIGOL} decision, of course, was to obligate the Province of Saskatchewan to refund to the company the mineral income tax and royalty surcharge that it had paid. After a further reference to the Supreme Court of Canada on the point of the amount of interest that the Province was required to pay on this refund,\textsuperscript{119} the judgment has now been satisfied in the amount of $3.7 million.\textsuperscript{120}

Its broader consequence, however, was to place in jeopardy the over $500 million collected in total mineral income tax and royalty surcharge since 1973.\textsuperscript{121} In a sense, protective measures had already been taken, at least in part. As was mentioned above, in late 1976 the Crown royalty system had been restructured.\textsuperscript{122} First, the basic Crown royalty that pre-dated Bill 42 and the royalty surcharge were combined into a new graduated royalty, the maximum rate of which is approximately fifty-five percent of production. Second, the power of the minister to determine a "fair value" was clearly restated as being available only after the fact of a sale having taken place at less than that fair value. Accordingly, under the \textit{dicta} in \textit{CIGOL}, this "combined" royalty should be seen as a true royalty, at least as regards the original Crown lessees whose "rate" of royalty, under their leases, could be varied by the Crown by regulation. However, there remained vulnerable the amounts of royalty surcharge paid up until that time, plus the whole of the amounts collected (however described) since 1973 from freehold and Crown-acquired lessees.

The response of Saskatchewan was Bill 47, \textit{The Oil Well Income Tax Act, 1978}.\textsuperscript{123} Its intent was clear: to enact an income tax on the profits received from oil well production since January 1974, and so to fit within the income tax "category" of direct taxation. Thus, by section 3 every person must pay a tax on his "oil well income" for each taxation year ending after December 31, 1973. Under section 4, a taxpayer's "oil well income" is the aggregate of his revenues from oil production less the aggregate of the expenses that he incurred to earn those revenues. Section 5 sets out how revenues are to be calculated: the actual sale price is to be used where crude oil


\textsuperscript{119} [1979] 1 S.C.R. 36.

\textsuperscript{120} \textit{Globe & Mail}, Feb. 15, 1979, at B-1, col. 2.

\textsuperscript{121} \textit{Globe & Mail}, Dec. 3, 1977 at B-14, col. 1.

\textsuperscript{122} \textit{Supra} notes 55 and 56.

\textsuperscript{123} Bill 47, 1977-78 (18th Leg. 4th Sess.).
has been sold at the well-head, and its “fair market value” at the well-head (an objective determination, and one not made by the minister) is the standard if it is refined before sale (as in the case of an integrated company). The anti-avoidance provision, section 31, provides that the fair market value is deemed to have been received where oil has been disposed of in fact for less than that amount; but again, neither the minister nor anyone else (except a court) can determine what this fair market value should be.

Limitations on the deductibility of expenses are provided for in section 7, but, on the whole, the net amount remaining after the deduction of permissible expenses will approximate the accounting concept of “profit” referred to by Dickson J. in \textit{CIGOL}.\textsuperscript{124} Amounts validly paid as Crown royalties (in other words, those paid after November 1976 under the combined royalty structure by original Crown lessees) are to be deducted from tax otherwise payable under section 12, so that a measure of integration of the tax and royalty systems will remain. As with Bill 42, the owners of 1,280 acres or less are also exempt from oil well income tax.

Interestingly enough, though, this new tax system was not proclaimed in force until September 1978, and was not functioning effectively until well into 1979.\textsuperscript{125} The underlying difficulty seems to have been the problem of “fine-tuning” an income tax to raise the share of oil revenue that the Province wished to exact as a policy matter. Having been denied the comparatively simple and incisive instrument of Bill 42, the Province must fall back on the constitutionally safer but notoriously clumsy device of an income tax.

The immediate implications, then, of the \textit{CIGOL} case have been mitigated somewhat. Its broader ramifications remain, however. For instance, there has been as yet no constitutional challenge to Alberta’s royalty legislation passed at the same time as Bill 42;\textsuperscript{126} nor is there likely to be in the near future as long as its royalty rates remain comparatively low and its production and profit levels high. But what would happen if such an attack were launched? Would the Supreme Court see a similarity between Saskatchewan’s imposition of a royalty surcharge and Alberta’s regulations abolishing the maximum contractual limit on royalty rates and imposing a new rate of royalty? Would the power of the Alberta Petroleum Marketing Commission to sell all of the oil produced from Crown lands also be seen as interference with the price of a product largely destined for the export market? The answers to these questions would be as complex as the Alberta legislation itself, and are beyond the scope of this paper—but still, it is interesting to speculate.\textsuperscript{127}

Since the immediate damage in Saskatchewan has been patched up, and with the Alberta system seemingly immune from attack for all practical purposes, \textit{CIGOL} would not pose that much of a problem for the provinces if it were put on the shelf by the Supreme Court of Canada and treated as a

\textsuperscript{124} \textit{Supra} note 77.

\textsuperscript{125} \textit{Globe and Mail}, Feb. 15, 1979, at B-I, col. 3.

\textsuperscript{126} \textit{Supra} notes 58 to 62.

\textsuperscript{127} For further comments on this issue, see Thring, \textit{supra} note 30.
case of peculiar facts to be cited narrowly, if at all. However, in *Central Canada*, the Court has already expressly relied on *CIGOL* in its trade and commerce aspects. Hard cases may make bad law, as the old saying goes, but to compound the error makes it even worse.

IV. **CENTRAL CANADA—OUT OF “CONTROL”?**

A. **The Potash Prorationing Scheme**

Like *CIGOL*, the decision in *Central Canada* arose from a resource supply crisis. In this case, however, it was an oversupply of the product—potash—rather than a shortage that was the source of the problem.

Potash is a mineral salt whose prime use is in the production of fertilizer compounds. Although discovered and developed only in relatively recent years, the resources of potash in Saskatchewan are immense: the proven reserves alone have been estimated to be sufficient to supply the total world requirements, at present rates of consumption, for as much as 3,000 years, and further large but unproven reserves are believed to exist. The bulk of the Province’s potash is exported from it, primarily to the American mid-west, in a raw or minimally-processed state, since potash must be mixed with other fertilizer components at a mixing plant near the locale of its use to obtain the proper fertilizer mixture for the particular area. Potash production is commonly measured in “short tons of $\text{K}_2\text{O}$ equivalent,” each containing a minimum of sixty percent “muriate of potash.” A “unit” of production of $\text{K}_2\text{O}$ equivalent is twenty pounds of the same minimum muriate content.

By 1969, Saskatchewan potash had captured forty-eight percent of the total American market, and sixty-four percent of Saskatchewan production was being sold there. Due to depressed world prices and overproduction, however, the Saskatchewan industry was in difficult economic straits and was being forced to sell its potash at prices below cost. So too was the only local American potash industry, in New Mexico (which had supplied the bulk of the American market until Saskatchewan potash came along in the 1960’s), and its concerns about the rising tide of potash imports from Saskatchewan had led to a dumping inquiry by the United States Tariff Commission to determine whether the American industry should be protected by the imposition of several dumping tariffs and import quotas.

Representatives of the Saskatchewan and New Mexico governments met in late 1969 to try to find some resolution to the problems of excess supply that were plaguing both their industries. Out of these meetings emerged Saskatchewan’s proposal to prorate its potash production to market demand, a system originally supported by all of the province’s producers. The prorationing scheme was “adopted for the purpose of conserving and maintaining the industry in Saskatchewan as a viable industry through a programme of controlled production and price stabilization.”

128 Zwarun, supra note 1, at 26.

The concept of prorating the production of a mineral to the current market demand for it is not new. In fact, it has existed in the oil and gas industry in most jurisdictions for some time. For example, Alberta maintains a scheme for prorating oil that is representative in its general outlines. Each month, "nominations" for the purchase of Alberta crude oil are submitted to the provincial Energy Resources Conservation Board; the total of these nominations constitutes the market demand for Alberta crude for the month. This Board, under the \textit{Oil and Gas Conservation Act},\footnote{R.S.A. 1970, c. 7 as am.} then allocates the monthly market demand, both among the pools in the province and among the individual wells in each pool, by applying a formula that takes into account the maximum physical rate at which the oil may be produced efficiently without damage to the reservoir as well as the economic feasibility of the well or pool producing at various rates below that maximum physical level. No production above the allocated amount is permitted.

The original rationale of oil prorating was conservation of the physical resource:

Oil and gas, besides being fugacious in nature, are limited resources. Thus, if an owner of the mines and minerals wishes to recover the oil and gas below the surface, it is incumbent upon him to drill and produce as quickly as possible to prevent his oil from being drained by his neighbour. The result is a feverish race to recover the black gold from the earth's treasury. Memories of gas wells burning unrestrained on the distant horizon, of great pools of oil seeping into the ground, never to be recovered again, are still vividly fresh in the minds of people in oil-producing countries, and serve dramatically to remind them how harsh the consequences of this wild and frenzied pursuit of oil can be.\footnote{Another method of accomplishing the same end is unitization, in which all wells in a pool are operated as a unit and the production shared \textit{pro rata} according to an agreed formula.}

Prorating within each pool is clearly aimed at the prevention of the physical waste of the pool's resources by limiting the amount that each well may draw from the pool;\footnote{Supra note 31.} this is analogous to the type of scheme upheld by the Supreme Court of Canada in the \textit{Spooner Oils} decision.\footnote{Supra note 31.} However, in the context of allocating permissible production among separate pools, the aspect of physical conservation is absent, since the rate of production of one geologically distinct pool cannot affect that of another. An economic rationale must thus be offered:

The conservation aspects of inter-pool restrictions are not so easily seen but they are no less real and just as important. Prorating among pools effectively maintains the price of petroleum products at a level which makes it economically desirable for an oil producer to continue wildcatting and exploration in order to assure a continued source of oil. The same reasonably high price discourages the prema-
nature abandonment of wells as well as providing an incentive to achieve maximum ultimate recovery by employing secondary recovery methods.\textsuperscript{135}

The Saskatchewan potash prorationing scheme was instituted by the Potash Conservation Regulations, 1969,\textsuperscript{136} adopted pursuant to the Mineral Resources Act.\textsuperscript{137} Section 3(a) of this Act states that one of its purposes is "to promote and encourage the discovery, development, management, utilization and conservation of the mineral resources of Saskatchewan." Section 9 permits the Minister of Mineral Resources a wide range of powers in order to "discover, develop, manage, utilize and conserve the mineral resources of Saskatchewan." In May, 1976 (after the decision in Central Canada by the Saskatchewan Court of Queen's Bench\textsuperscript{138} but before the hearing in the Saskatchewan Court of Appeal),\textsuperscript{139} amendments were made to the Mineral Resources Act,\textsuperscript{140} in part to add definitions of "conservation" and "utilization," in identical terms, as including:

the prevention of waste or improvident or uneconomic production or disposition of minerals and the prohibition or limitation of the production of minerals in excess of transportation or market facilities, or reasonable market demand for any mineral produced, and includes the control in Saskatchewan of the production, transportation, distribution, sale, disposal and consumption of all minerals produced in Saskatchewan.\textsuperscript{141}

These amendments were made expressly retroactive and deemed to have always been part of the Act.

As originally adopted, the Potash Conservation Regulations, 1969 implemented what became known as the "ABC" prorationing scheme. At first, this scheme required the issuance of both a producing licence and a disposal licence; by section 2 of the Regulations, production of potash was prohibited unless a producing licence was obtained, and under section 3 the disposal of potash was also prohibited unless a disposal licence was obtained. Very soon, however, the disposal licence requirement was dropped as a result of negotiations with the federal Department of Justice, which apparently was of the view that the disposal licence was an infringement of the federal trade and commerce power. Less than four years later, in November 1973, the Department of Justice would take the highly unusual step of seeking to be joined in the action of a private citizen, Central Canada, as a co-plaintiff, rather than merely as an intervenant.\textsuperscript{142}

The original version of the Regulations was therefore amended\textsuperscript{143} to

\begin{itemize}
\item \textsuperscript{135} McLaws, supra note 130, at 525-26.
\item \textsuperscript{136} Sask. Reg. 287/69, as am.
\item \textsuperscript{137} R.S.S. 1965, c. 50, as am.
\item \textsuperscript{139} Supra note 129.
\item \textsuperscript{140} S.S. 1976, c. 36.
\item \textsuperscript{141} S.S. 1976, c. 36, ss. 2(1), 2(3).
\item \textsuperscript{143} Sask. Reg. 64/70.
\end{itemize}
dispense with the disposal licence. As the Regulations came before the courts, the basic requirements were:

2(1) The production of potash is prohibited unless a producing licence authorizing the production is granted by the minister ....

(2) Where the minister is satisfied that the production proposed by the applicant for a licence to produce is consistent with sound utilization and conservation principles relating to the potash resources of the province he may issue a producing licence, and where not so satisfied he may refuse to issue such licence.144

The "ABC" scheme of prorationing implemented by the minister pursuant to these Regulations comprised three elements: (A) the productive capacity of each mine; (B) the market demand for Saskatchewan potash; and (C) working stock and reserve requirements. As described by Disbery J., the trial judge:

The ingredients of the formula for prorationing production among the producers were: (1) the productive capacity of each mining property; (2) the estimated demand for Saskatchewan potash or potash products for reasonable current requirements and consumption or use within and outside the Province; and (3) the amounts of potash and potash products each producer reasonably required to keep in storage for working stock and reserves. The ABC scheme allowed each producer to produce and sell 40% of its productive capacity and no more until every mine had produced and sold this basic quota. Producers holding orders in excess of this amount could purchase potash from mines that had not yet reached their 40% quota. After every producer in Saskatchewan had produced and sold its quota, then and only then, producers that still had unfilled orders could apply to the Minister for supplementary licences to produce and sell additional amounts.145

At the same time, the minister issued a directive declaring that a price of not less than 33.75¢ per unit of K₂O equivalent was a fair and responsible price for potash free on board at the Saskatchewan plant. This minimum selling price was inserted as a condition in all producing licences that the minister issued, and a further ministerial directive was issued in early 1970 to emphasize that no discount or deduction from the minimum price was permissible.

As of July 1, 1972, the "ABC" scheme was replaced by the "FP" or "flat prorationing" system. This was a much stricter scheme. Rather than assuring each producer only the minimal forty percent of productive capacity and then, when all had reached that level, permitting those producers with additional orders to produce under supplementary licenses, the "FP" method allocated to each producer a share of production based on ninety-five percent of the total estimated market demand. This "basic production allowable" also had to be met by all producers before any additional production would be permitted, but additional production allocations would be made to all producers, in the same proportions as their original allocations, rather than by way of supplementary licences only to those producers with unfilled orders. Producers were expected to purchase stock from each other, or share their markets, if they individually had used up their basic allocation before filling

144 Sask. Reg. 287/69, s. 2, as am. by Sask. Reg. 64/70.
all of their orders. The minimum price of 33.75¢ per unit was still to be maintained.

B. Central Canada Potash v. Saskatchewan

Central Canada Potash Co. Ltd. is a corporate partnership between Noranda Mines Limited (fifty-one percent) and C. F. Industries Ltd., formerly called Central Farmers Fertilizer Company, a large Chicago-based farmers’ co-operative (forty-nine percent). Its mining properties, purchased in 1970 from Noranda, were held partly under Crown leases and partly as freehold. As part of the arrangements between the two “partners,” C. F. Industries had entered into a long-term contract with Central Canada to purchase large quantities of potash, escalating yearly, at a price of fifteen percent less than the prevailing market rate.

Under the “ABC” scheme, Central Canada had little cause for complaint, since its basic producing licences and supplementary licences permitted it sufficient production (almost its full productive capacity at the time) to fulfill its contractual obligations to C. F. Industries. However, the introduction of the “FP” scheme on July 1, 1972 meant that Central Canada’s allocation, under the new method of calculation, would probably not be enough to supply C. F. Industries (at least from its own production, since the surplus stock of other producers could still have been purchased for resale to C. F. Industries). Central Canada’s producing licence for 1972-73, the first full “fertilizer year” under the new system, permitted it to produce only 442,647 short tons of K₂O equivalent instead of the 744,500 required for that year under the contract with C. F. Industries. Mandamus proceedings against the Minister of Mineral Resources, seeking an order compelling the variation of the terms of the licence, failed in the Supreme Court of Canada, whereupon Central Canada launched its action requesting that the whole potash prorationing scheme be declared ultra vires. Because of its “captive market” in the United States, in the person of C. F. Industries, Central Canada was the only producer to do so; all of the others continued to support the prorationing scheme.

Central Canada and its co-plaintiff, the Attorney General of Canada, were successful at trial before Disbery J. in the Saskatchewan Court of Queen’s Bench. The result turned largely upon the mass of extrinsic evidence admitted as to the intent of the government in promulgating the Regulations in 1969 and subsequently bringing in the “ABC” and “FP” schemes. From this

146 Supra note 5, at 61 (S.C.R.), 497 (N.R.), 621 (D.L.R.).
148 Supra note 121, at 221 (D.L.R.), 508 (W.W.R.); Globe & Mail, supra note 133, col. 6.
149 Supra note 129.
evidence, Disbery J. concluded that the “real aims and purposes” of the government had been:

Firstly: to restrict and limit the export of Saskatchewan potash into the United States.
Secondly: to control and impede the flow of trade in potash between Saskatchewan producers and the residents of other Provinces of Canada unless they paid such price and obeyed such conditions as the Minister of Mineral Resources saw fit to demand and impose from time to time. Thus the Regulations and the ABC scheme were, in fact, designed to interfere with and to impede the free flow of trade in potash within Canada and to curtail the right of Canadians in other Provinces to make their own contracts with Saskatchewan producers.
Thirdly: to control and impede the export trade in potash between Canada and other foreign nations in like manner.150

He rejected the argument of the Province that the prorationing scheme was a conservation measure, in the sense that it was aimed at the prevention of economic waste occurring through overproduction. The concept of conservation, he held, was limited to its traditional sense of the prevention of physical waste, and this could have no bearing upon the potash industry in Saskatchewan because of the vast reserves available.151 Accordingly, not only were the prorationing schemes ultra vires the province as an interference with trade and commerce; they were also ultra vires the Mineral Resources Act, as they did not fall within its purposes as then stated.

In the Saskatchewan Court of Appeal,152 the decision of Disbery J. was unanimously reversed. Speaking for the Court, Culliton C.J.S. rejected the extensive use of extrinsic evidence by the trial judge on the basis that there was no real dispute as to the factual situation that could not be determined from the face of the prorationing system itself. Moreover, the underlying intention of the government was not really the point. Rather:

The simple question is, is the true nature and character of the prorationing and price stabilization plans, as evolved and implemented, such as to bring them within the competence of the provincial Legislature and within the authority of the Mineral Resources Act, or such that it may be said they invade the field of trade and commerce, a matter within the exclusive jurisdiction of the Parliament of Canada?153

He then set out the basic facts, as shown by that portion of the evidence that he viewed as admissible, upon which he was prepared to proceed in his analysis of the “true nature and character” of the schemes.

First, he disapproved of the very narrow interpretation that Disbery J. had placed on the conservation purposes of the Mineral Resources Act. By this time, of course, the 1976 amendments to the Act defining “conservation” and “utilization” had been passed,154 and Culliton C.J.S. took due note of these.155 In his view, however, these were not really necessary because, even in their absence:

150 Supra note 136, at 95 (D.L.R.), 281 (W.W.R).
151 Id. at 105 (D.L.R.), 292 (W.W.R).
152 Supra note 121.
154 Supra note 140.
155 Supra note 129, at 231-33 (D.L.R.), 521-23 (W.W.R).
the words "manage, utilize and conserve", as used in the Mineral Resources Act, cannot be given the limited meaning attributed to them by the learned trial Judge. I am satisfied that one of the purposes of the Act as set out in the words "manage, utilize and conserve" must mean to do so in the public interest, an end which could not be obtained if such words do not encompass the promotion and adoption of economic policies to assure a healthy and sound industry. 

Thus, "conservation" and "utilization" could not be restricted to any physical sense; they must also be given a broader meaning "so as to encompass actions to conserve the economic welfare of the industry." Accordingly, the "ABC" and "FP" schemes (between which he saw no purpose in distinguishing, as both rested upon control of production and the setting of a minimum price and both would have the same effect, if any, on potash marketing) were both authorized by the terms of the Mineral Resources Act since their purpose was, "in pith and substance, for the management, utilization and conservation of the potash industry."

Moreover, for the same reasons, the schemes were both intra vires the legislative authority of the Province. In this conclusion, the decision of Culliton C.J.S. was reinforced by the dicta of Martland J. in Carnation, regarding the incidental effect of the orders in question there as not being determinative on the trade and commerce issue; rather, the real point was whether they were aimed at that trade. Here, Culliton C.J.S. noted, Central Canada may have been restricted in the amount of potash that it could produce. On the other side of the coin, however, C. F. Industries was in no way restricted in obtaining all the potash that it wished to purchase from any other Saskatchewan producer. In fact, there was no evidence—nor was it the intention of the prorationing scheme—that any demand for potash should go unsatisfied, its only purpose and effect being to shrink the oversupply to the same level as the current demand. He concluded:

Applying the same reasoning in determining the validity of the ABC and FP plans, I think it can properly be said that they were not directed to the regulation of trade and commerce. They did not purport directly to control or restrict trade in potash. There was no evidence that, in fact, the plans did control and restrict the potash. There was no evidence that the international demand for Saskatchewan potash was not fully met. The most that can be said is that the plans may have had some incidental effect on the international market but that was a result and not a purpose. The true purpose of the schemes was in the attainment of objects of the Mineral Resources Act to manage, utilize and conserve the mineral so as to protect and maintain the potash industry as a viable economic industry within the Province. That, in my opinion, was the true subject-matter of the schemes and consequently within the legislative competence of the Province within the powers assigned to a provincial Legislature under s. 92(10), (13) and (16) of the British North America Act, 1867. While the schemes may have had some ultimate eco-

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156 Id. at 223 (D.L.R.), 511 (W.W.R.).
157 Id.
158 Id. at 222 (D.L.R.), 510 (W.W.R.).
159 Id. at 223 (D.L.R.), 511 (W.W.R.).
160 Supra notes 35 and 44.
161 Supra note 129, at 228-29 (D.L.R.), 518 (W.W.R.).
162 Id. at 220-21 (D.L.R.), 508 (W.W.R.).
nomic results in the market of potash, it is the subject-matter of the schemes, and not their results, which determine their true nature and character.\textsuperscript{103}

Finally, Culliton C.J.S. offered some general comments on the approach that he believed a court ought to take when faced with a problem involving the allocation of legislative powers between Parliament and the provincial Legislatures. He said:

While I recognize these problems exist in the constitutional field, I also recognize that the constitution must be made to work and that the responsibility of assuring it does work, rests in substantial measure upon the Courts. In the discharge of their duty, Courts must approach constitutional problems with a sense of realism and practicality, they must strive to attain that end which the legislation intended, viewed in the overall intent and purpose of the \textit{British North America Act, 1867}.\textsuperscript{104}

In my view, the Courts have met their duty in a realistic and practical means with adoption of the “pith and substance” theory, and “true nature and character” doctrine. In other words, Courts have determined validity from the real intent and purpose of the legislation and not by its ultimate effect. It is evident that, with Canada becoming a great industrial nation—with increasing interprovincial and international trade—with the exploitation of natural resources, all under provincial jurisdiction—it is virtually impossible for a provincial Legislature to legislate in respect of natural resources or of any commercial problem, without having some ultimate effect on matters which, \textit{per se}, are exclusively within federal jurisdiction. It follows, therefore, that over-emphasis on the effect of provincial legislation, in the determination of its validity, may lead to a denuding of provincial powers—a result which defeats the purposes intended by the \textit{British North America Act, 1867}.\textsuperscript{105}

He also reiterated the view that the distribution of legislative powers was total, leaving no jurisdictional gaps. Thus, when the potash industry faced serious problems that it could not solve itself and that, if left untended, could have resulted in its ruination, the provincial government of Saskatchewan was the logical place to turn because it had the legislative jurisdiction to take the necessary steps. These steps were successful in their object of protecting and conserving one of the Province's important long-term industries, and the effect on areas within exclusive federal jurisdiction, though undeniable, was necessary as an incident to that object. To test this view, he suggested:

If I am not right in this conclusion, then it must be said the right to control production of potash within the Province and to establish a minimum price at the mine, rests with the Parliament of Canada, for the right to do so must rest somewhere. Clearly, in my opinion, the Parliament of Canada does not have the power to control the production of potash within the Province, or to set a minimum price at the mine. Thus, in my opinion, to hold that the prorationing and price stabilization programmes are \textit{ultra vires} the Province, is to determine their validity by the ultimate effects of such programmes and not by their true nature and character.\textsuperscript{106}

The decision of the unanimous Supreme Court of Canada, on the constitutional issues, was given by Laskin C.J.C.\textsuperscript{107} To him, the question came down to whether the characterization of the schemes by Culliton C.J.S. as a

\textsuperscript{103} \textit{Id.} at 228 (D.L.R.), 518 (W.W.R.).

\textsuperscript{104} \textit{Id.} at 233-34 (D.L.R.), 524 (W.W.R.).

\textsuperscript{105} \textit{Id.} at 234-35 (D.L.R.), 525 (W.W.R.).

\textsuperscript{106} \textit{Supra} note 5.
conservation measure was correct, or whether in fact the province had attempted to impose a marketing scheme with price-fixing as its central element. He opted—in very short order—for the latter description, and accordingly held the schemes to be *ultra vires* Saskatchewan.

Without passing upon the merits of the matter, Laskin C.J.C. was content to disregard the extrinsic evidence upon which the trial judge had relied and, instead, to proceed solely on the summary of significant facts set out in the reasons of Culliton C.J.S. However, the inferences drawn from these facts were quite different:

What is evident from the circumstances under which the *Potash Conservation Regulations, 1969* were promulgated, and from the terms of the directives and licences through which the ABC and FP schemes were instituted and administered, is that the Government of Saskatchewan had in view the regulation of the marketing of potash through the fixing of a minimum selling price applicable to the permitted production quotas. The only market for which the schemes had any significance was the export market. There could be no suggestion that the schemes had any relation to the marketing of potash within the Province of Saskatchewan when there was hardly any Saskatchewan market for the mineral. There was no question here of any concluded transactions of sale and purchase in the Province, as was the situation in the *Carnation* case. Out of province and offshore sales were the principal objects of the licences and directives.167

He agreed with the broader economic approach taken by Culliton C.J.S. to the interpretation of the purposes of the *Mineral Resources Act*,268 and accepted the proposition that “production controls and conservation measures with respect to natural resources in a Province are, ordinarily, matters within provincial legislative authority,”169 citing the recent *Ontario Egg Reference*270 as support for this view. On the other hand, where “a Province establishes a marketing scheme with price fixing as its central feature,”171 the scheme is beyond provincial competence, as the Saskatchewan courts themselves had recognized in the *Grain Marketing* case.172

On which side of this line did the scheme fall? Laskin C.J.C. answers this in a single paragraph:

The present case reduces itself therefore to a consideration of “the true nature and character” of the prorationing and price stabilization schemes which are before us. This Court cannot ignore the circumstances under which the *Potash Conservation Regulations, 1969*, came into being, nor the market to which they were applied and in which they had their substantial operation. In *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan et al.* [citation omitted] this Court, speaking in its majority judgment through Martland J., said [citation omitted] that: “provincial legislative authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market.” It may properly be said here of potash as it was said there of oil that “the legislation is directly aimed at the production of potash destined for export, and it has the effect

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167 *Id.* at 72 (S.C.R.), 508 (N.R.), 629 (D.L.R.).
168 *Id.* at 66 (S.C.R.), 520 (N.R.), 625 (D.L.R.).
169 *Id.* at 74 (S.C.R.), 510 (N.R.), 630 (D.L.R.).
170 *Supra* note 42.
172 *Supra* note 41.
of regulating the export price since the producer is effectively compelled to obtain
that price on the sale of his product [citation omitted]."\textsuperscript{173}

Moreover, he rebutted the contention of Culliton C.J.S. that to hold the pro-
rationing scheme \textit{ultra vires} would result in a gap in legislative power. He
said:

I do not agree with Chief Justice Culliton that the consequence of invalidating
the provincial scheme in this case is to move to the Parliament of Canada the
power to control production of minerals in the Province and the price to be
charged at the mine. There is no accretion at all to federal power in this case,
which does not involve federal legislation, but simply a determination by this
Court, in obedience to its duty, of a limitation on provincial legislative power.
It is true, as he says that (with some exceptions, not relevant here) the \textit{British
North America Act, 1867} distributes all legislative power either to Parliament or
to the provincial Legislatures, but it does not follow that legislation of a Province
held to be invalid may \textit{ipso facto} be validly enacted by Parliament in its very
terms.\textsuperscript{174}

Furthermore, in reply to the call of Culliton C.J.S. for a "sense of realism"
in constitutional interpretation, Laskin C.J.C. responded:

Where governments in good faith, as in this case, invoke authority to realize desir-
able economic policies, they must know that they have no open-ended means of
achieving their goals when there are constitutional limitations on the legislative
power under which they purport to act. They are entitled to expect that the
Courts, and especially this Court, will approach the task of appraisal of the con-
stitutionality of social and economic programmes with sympathy and regard for
the serious consequences of holding them \textit{ultra vires}. Yet, if the appraisal results
in a clash with the Constitution, it is the latter which must govern. That is the
situation here.\textsuperscript{175}

\textbf{C. The Implications of Central Canada}

\textit{CIGOL}, then, has already spawned one offspring in \textit{Central Canada}.
The price-fixing aspect, mistakenly identified in \textit{CIGOL}, again took on a
determinative character. Here, however, the appearance of price-fixing was
not an illusion; it was, in fact, a clear ingredient of the prorationing formula.
But surely that simple assertion cannot be the end of the matter. The real
question still remains: what was Saskatchewan trying to do?

There can be little doubt about the fundamental aims of the Province in
adopting a prorationing programme. The potash industry is an important one
in Saskatchewan, both now and for the future and both for itself and as a
base for possible future industrial development. It is probably also fair to say
that the government of the day would have abdicated its proper function had
it not stepped in to revive it at a time when it was in danger of floundering.
Proratiing itself was not the goal; the "conservation" of the industry was.
Proratiing was simply the tool to achieve that end.

The more immediate aim of the Province, within the context of the pro-
rationing scheme itself, was to shrink supply until it equalled demand. This

\textsuperscript{173} \textit{Supra} note 5, at 75 (S.C.R.), 510-11 (N.R.), 631 (D.L.R.).

\textsuperscript{174} \textit{Id.} at 75-76 (S.C.R.), 511 (N.R.), 631 (D.L.R.).

\textsuperscript{175} \textit{Id.} at 76 (S.C.R.), 511-12 (N.R.), 632 (D.L.R.).
was accomplished through the imposition of production quotas. However, the mistake that the Province seems to have made, at least in the eyes of the Supreme Court of Canada, was to couple the production quotas with the setting of a minimum “fair and reasonable price” for potash free on board the mine in Saskatchewan. As between these two elements, it is hard to say with precision which was the more effective, but the question can be tested in at least one way. If price-fixing alone had been implemented, the likely result would have been harm rather than benefit to the Saskatchewan industry, at least in the large American market. There, it should be remembered, there existed a local industry in New Mexico which, until Saskatchewan potash began to come onto the market in the 1960’s, had the market almost to itself. The setting of an artificially high price for Saskatchewan potash, if that were the only step taken, would probably only have driven American consumers back to the New Mexico source of supply; at least until market demand had driven the price of New Mexico potash up to the set level of Saskatchewan potash, the Province’s producers would have had not only an aggravated problem of oversupply but also a loss of markets in which to sell it.

On the other hand, what would have happened had production quotas alone been instituted, without a minimum price being set? In all likelihood, with supply shrunk to equal demand, the price of Saskatchewan potash would have risen to a “fair and reasonable” level on its own, although it is impossible to say in what period of time. The goal of the prorationing scheme would still have been accomplished, though probably not as quickly. In this way, the price-fixing aspect of the scheme can be seen as a secondary feature. The true immediate aim was to shrink production, and the setting of a minimum price was just a bolster to speed up the process.

In the end, however, the Supreme Court of Canada fastened upon that aspect and condemned the whole scheme because of it. Even assuming that CIGOL were correct, and accepting for the moment that price-fixing was the goal of Bill 42, does that automatically mean that price-fixing in a different context is necessarily bad? For instance, it is one thing for a provincial government to attempt to fix prices in a situation in which supply and demand are already in some sort of equilibrium; then, the setting of a minimum price could easily be characterized as an interference with trade and commerce, since the only goal that could reasonably be attributed to the scheme would be the enhancement of the profit margins of the producers. The shrinking of supply below demand would be one means of accomplishing this. An attempt to shrink supply only to meet demand, however, is another matter altogether. Then, as was the case here, the purpose of the scheme is not price-fixing per se, and the true purpose and intent of the scheme must accordingly be sought elsewhere—in conservation or whatever.

In Carnation,176 for example, a price-fixing element was also present; if anything, it was closer to being the true aim of the scheme as between the milk producers and Carnation than it was as between Saskatchewan potash producers and their customers. Laskin C.J.C. distinguishes Central Canada

176 Supra note 35.
from *Carnation* by describing the latter as a case only of “concluded transactions of sale and purchase within the Province.” Surely, however, the same could be said in large measure of other marketing cases in which the provincial legislation was struck down. Would either the intent or the effects of the prorating scheme have been any different if the Saskatchewan potash market were set up so that all, rather than just some, of the potash were sold at the mine-head, or if Saskatchewan had required as part of the scheme that all potash be so marketed? Conceptually, this is doubtful.

The primary difficulty with *Central Canada*, apart from its result, is the paucity of reasoning that the Supreme Court of Canada leaves with us. It has been noted that the Court has tended toward a very terse opinion-writing style in recent years, and that:

A fundamental characteristic of this style is that the opinion of the court does not review and marshal the arguments which can be made on behalf of either of the two opposite decisions sought in the case, as a prelude to giving the reasons why it finds one position the more persuasive. At best, the opinion summarizes the doctrines and cases which support the conclusion which is reached, and then only in a very sketchy form. Unfortunately, *Central Canada* is a good example of this tendency. All that the Court has really told us is that the prorating scheme fixed potash prices, and that this is impermissible for a provincial legislature. It has *not* told us why it believed price-fixing to be the essence and “the true nature and character” of the scheme, nor has it set out for us what part or parts of the scheme might have been valid in the absence of a price-fixing element or whatever else it may have found objectionable. Laskin C.J.C. appears to say that economic conservation is a permissible goal for provincial legislation, and that *ordinarily* a province can control the production of a natural resource within its boundaries. However, does he mean to say by this that the Saskatchewan scheme would have been valid had no explicit attempt been made to set prices? We cannot know, for the invocation of the spectre of “price-fixing” put an end to the discussion. As has also been said:

Judicial opinions must clearly expose the room for movement within the relevant legal materials and then articulate the reasons which are taken to justify the adoption of one position rather than another. When these reasons and policies are brought out into the open, it will then be possible for other legal actors or participants to anticipate the direction in which they will move the court, to argue within the adversary process as to how they should move the court, and then to criticize, in a constructive manner, the content of these decisions in a way which can be fed back into the process to aid in the next decision. It is absolutely essential that the court specify the variables it considers important to the validity or invalidity of a particular statute when it applies the general doctrines available to it.

Here, the citation of *CIGOL* is a poor substitute for a reasoned elaboration of the policy or other grounds for the *Central Canada* decision.

And it is not just in the context of subsequent court decisions that ex-

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477 Supra note 167.
478 Weiler, supra note 45, at 365.
479 Supra notes 168 and 169.
480 Weiler, supra note 45, at 366.
licit reasoning is important, for legislators and many others must attempt to deal with and act upon the Supreme Court's rulings. For example, as was mentioned above, prorationing schemes are common at the provincial level in relation to other minerals, especially oil and gas. In the wake of Central Canada, even if none of these schemes may ever be challenged in the courts, the respective provincial legislatures may be well advised to re-examine their programmes and shore them up from the constitutional angle. But how—and how much? In Alberta, for instance, even discounting the potential price "influence" of the Alberta Petroleum Marketing Commission,\(^1\) what would be the fate of its oil prorationing scheme\(^2\) if it were challenged, and, perhaps more importantly, what steps, if any, could be taken to head off a successful challenge? Past writers, basing their views on the theme of economic conservation, have concluded (though not, it should be noted, universally) that the Alberta oil scheme is *intra vires* even in its application to prorationing among geologically distinct pools.\(^3\) Thanks to Central Canada, there must now be some measure of doubt about this proposition, but just how much remains a mystery. All that can really be said is that Central Canada jeopardizes to some unknown—but potentially large—extent the role of provincial governments in controlling (and, if they so choose, thereby assisting) the development of the natural resource industries within their boundaries. Like CIGOL, it has thrown a monkey-wrench into our constitutional machinery.

V. CONCLUSION—A BALANCED FEDERALISM

A. The Structural Issue

Before resuming the central theme of this article, it is worthwhile to digress for a moment and look further at the structural problems in our constitutional make-up that CIGOL and Central Canada illustrate.

Earlier, two propositions advanced by Professor Weiler were set out regarding the problems that any court would face if it had to become embroiled in the constitutional aspects of the pricing, sale and taxation of oil and gas (and, for that matter, any other natural resource). Four other propositions flowed from these two. At the risk of some repetition, it would be useful to record all six here:

(a) Neither the language nor the established principles of the British North America Act offer any firm guidance to a legal solution to the conflict.

(b) A court which is required to dispose of a concrete lawsuit will have to fashion constitutional policy from its own resources.

(c) An adjudicative body such as the Supreme Court faces serious institutional obstacles in developing a technically satisfactory solution to the problem of legislative jurisdiction.

(d) An unrepresentative tribunal such as the court risks serious damage to its long-run legitimacy if it is constantly forced to come down on one side or the


\(^{182}\) R.S.A. 1970, c. 7, as am.

other of these heated political battles which are the stuff of Canadian federalism.

(e) Judicial retreat from the role of umpire of Canadian federalism will not leave the task of conflict-resolution undone. As the oil and gas issue graphically illustrates, constitutional negotiations between governments have replaced constitutional adjudication as the most prominent institution in recent Canadian federalism.

(f) Contrary to the traditional legal point of view, judicial settlement of who has the right to exercise legislative jurisdiction detracts from the likelihood of voluntary, political agreement about the acceptability of particular governmental programmes.¹⁸⁴

The performance of the Supreme Court in the face of the challenges for it presented in CIGOL and Central Canada bear these propositions out to a great degree:

(a) In both cases, the factual issues and legislation involved were far too complex to fit neatly within one or other of the legislative "compartments" of The British North America Act, 1867. Nor were there any earlier precedents of real assistance except in the most general statement of basic doctrines.

(b) Accordingly, the Court in each case had to fall back on its own policy choices in order to reach a decision (although, to the extent that these policy choices were elaborated, it was done largely in the language adopted from the earlier authorities).

(c) First, it was not always clear (especially in Central Canada) from where the policy choices of the Court were coming, since their discussion was often incomplete. Second, where justification for the policy choice was offered, it was found (as in CIGOL in particular) in a relatively insignificant factual premise that is hard to sustain, on an objective footing, as the foundation for the "legal" argument that supposedly flowed from it. Third, the Court's adjudicative function prevented it from adjusting the conflict; it could not, for example, in its "win-or-lose" role, say to Saskatchewan that taxation under Bill 42 would be allowed to continue, but that the rate of tax would have to be reduced to some reasonable level below 100 percent to get rid of the confiscatory "income freeze." (It could, on the other hand, have told the province that prorating without price-fixing was acceptable, but chose not to do so.)

(d) When caught between competing factions in any popular or political issue, a court always runs the risk of incurring the wrath of one or the other; this is especially so if it is not careful to enunciate its policy reasons clearly and justify them in legal terms. Otherwise, it may come to be seen as a mere extension of one side or the other (particularly if one is the constant winner) and may then unwittingly become cast as a non-elected bulwark constantly thwarting the popular will of the political constituency of the "loser." Saskatchewan disenchantment with the Supreme Court of Canada is symptomatic of this.

¹⁸⁴ Weiler, supra note 6.
(e) As was mentioned above, with respect to both Bill 42 and the potash prorationing scheme, federal-provincial negotiations—the process of "executive federalism"—had ironed out a number of the practical and constitutional wrinkles, and a measure of intergovernmental accommodation had been reached. If anything, CIGOL and Central Canada upset this balance by destroying the prior basis for co-existence.

(f) Many believe that the chances for negotiated settlements between the two levels of government on their respective spheres of action within constitutional limitations can only be arrived at once each is sure of its legislative scope,¹⁸⁵ but in the "winner-take-all" world of constitutional litigation, the "loser" often finds himself at a distinct disadvantage in any after-the-fact negotiations with the "winner." Inequality of bargaining power results.

Professor Weiler has concluded from these six propositions that consideration should be given to "abolishing judicial supervision of Canadian federalism except in the case of direct conflict in actual statutes from two jurisdictions."¹⁸⁶ Constitutional adjustment would thus be left to be worked out within the political process and by federal-provincial negotiations. This suggestion has a certain attraction. In a way, the CIGOL and Central Canada companies can each be seen as a "renegade" that upset what had become a fairly well-balanced and generally-accepted arrangement. Through the Oil Export Tax Act and subsequent federal-provincial negotiations, and then later by the amending of the Income Tax Act to deny the deductibility of provincial resource levies, the revenues available for oil taxation were effectively shared between the federal and provincial levels,¹⁸⁷ so that the policy priorities of both were reasonably well met.¹⁸⁸ While not necessarily pleased with Bill 42, the bulk of the oil industry in Saskatchewan was at least prepared to live quietly with it as part of the cost of doing business in the Province. Changes in the potash prorationing scheme were negotiated between the federal and Saskatchewan governments; the potash producers had originally welcomed the implementation of the scheme, and only Central Canada was eventually unhappy with it because of its special circumstances. Under these conditions, one might well ask, does constitutional review at the instance of one person, and in defiance of the wishes of almost everyone else concerned, really make much sense?

However one might answer that question, and whatever the political chances might be of having judicial review in constitutional matters eliminated, one obstacle to a whole-hearted endorsement of the idea is the thought that the alternative may not prove much better. Executive federalism has

¹⁸⁵ Crommelin, supra note 7, at 87; Lederman, Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation (1975), 53 Can. B. Rev. 597, at 615-16.
¹⁸⁶ Weiler, supra note 6.
¹⁸⁷ Supra notes 63 and 66.
accomplished much in many areas, but it has also had its dim moments (the
entry of the federal government as co-plaintiff in Central Canada, in the face
of its earlier negotiations, is a particularly low point in this regard). More-
over, it seems that the larger and more fundamental the constitutional issue
involved, the more inertia settles into any federal-provincial attempts to re-
solve it. The tangled skein of First Minister's Conferences over the past de-
dcade and more have accomplished very little in re-designing our constitutional
basis; as of the most recent one, in early February 1979, full agreement had
been reached on only two issues: that the monarchy should be retained, and
that the provinces should have the primary control over marriage and di-
 vorce.189 If this is any example of how federal-provincial negotiations would
operate at the higher, political level, then perhaps it is better not to take this
road lest the modest successes of executive federalism at the lower, more ad-
ministrative levels be thereby jeopardized.

Proposals for different kinds of third-party “adjusters” in the federal-
provincial process have also been advanced. Thus, Mr. Trudeau’s “Constitu-
tional Amendment Bill,” as introduced in June 1978, has proposed the reform
of the Senate as “The House of the Federation,” which would include repre-
sentation of the provinces through one-half of the seats allocated to a province
being filled by appointments made by the provincial legislature in proportion
to its party standings from time to time.190 The Supreme Court's adjudicatory
function would be retained, but with provision for provincial involvement in
the process of appointing its members.191 The Pepin-Robarts Report would
go even further. The “Council of the Federation,” replacing the Senate,
would be composed entirely of provincial delegations subject to the direct
control of their respective provincial governments.192 Again, a Supreme Court
more regionally representative in its composition would exercise a super-
visory function.193 In either case, it should be noted, the revamped upper
House would have no impact on provincial legislation, which would not come
before it. Its function would be more that of a check on federal power, which
is only half the story. And with the Supreme Court still exercising its role
much as it now does, problems of the kind outlined in this article would still
be possible; a member of the Court is unlikely to bring with him any regional
bias that would unduly temper his legal reasoning, and indeed he ought not
to do so.

A different kind of proposal might be the creation of a “Permanent
Constitutional Commission” designed along the lines of the present federal
and provincial law reform commissions. Its function, in part, would be that
of a continuing task force on constitutional matters. It could undertake, for
example, comprehensive studies of the allocation of legislative powers in re-

190 The Constitutional Amendment Act, 1978, Bill C-60 (30th Parl. 3d sess.), ss.
63, 64.
191 The Constitutional Amendment Act, 1978, Bill C-60 (30th Parl. 3d sess.), ss.
101, 102, 104, 106.
192 Supra note 2, at 97.
193 Id. at 100-01.
lation to various issues that cut across jurisdictional lines and then recommend alternative methods of re-aligning those powers to deal most effectively with the problems that it foresees. As well, it could act as a repository of constitutional expertise available for consultation by governments faced with unanswered questions about their constitutional limitations in relation to specific statutes and other measures that they may be contemplating. It could also act as an informal mediator between governments when conflict seems imminent. Not being a court, it would not be bound solely to an adjudicative role but could instead propose accommodations beyond the strict words of the constitution itself, and suggest formal amendments to it should they be necessary. As a body independent of the political process, it should be able to function without the subjectivity and partisanship endemic to past constitutional confrontations at the political level, but since its work would be advisory only, the various governments involved would still retain the ultimate check on its activities (though its prestige might prove highly influential). It might thus be able to act as a true “adjuster” of Canadian federalism.

In the long run, these or other suggestions may prove fruitful. In the meantime, however, we are still faced with the problems of trying to operate within the existing constitutional adjudication system and of trying to deal adequately with the legal side of our constitutional wrangles in the courts and especially in the Supreme Court of Canada. What we need is a change in attitude and a strong dose of the “sense of realism and practicality” of which Culliton C.J.S. spoke in *Central Canada.*

We need to have the Supreme Court appreciate that complicated legislative measures are often required of governments—federal or provincial—if they are to have any hope of effectively handling the complex social, cultural and economic problems with which they are increasingly confronted. The world is not as simple as it was when the present categories of legislative authority were set down in 1867, so that the potential for incidental infringement on the legislative “turf” of the other level of government is that much greater. Any infringement that is both deliberate and substantial should still be checked, but the Court now, as never before, must take special pains to be sure that such infringement is the real “pith and substance” of the measure before acting. Some real substance should be given to the old presumption that challenged legislation is *intra vires* unless clearly demonstrated to be otherwise.

B. *The Substantive Issue*

In the narrower context in which this article has discussed the problems of natural resource revenues and control, one question still remains. Can anything constructive be said about one level of government or the other having a greater right to (or, perhaps, a greater responsibility for) the exercise of legislative jurisdiction?

Objective criteria are not easy to find in any issue that can be as emotionally charged as this one. Since 1867, “provincialists” and “centralists” have fought a running battle over the scope to be accorded to the various

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104 *Supra* note 164.
heads of sections 91 and 92 of *The British North America Act, 1867* (the trade and commerce power being one of the chief battlegrounds), and each camp has held sway more than once—though temporarily, as it turned out. Even now, federal and provincial politicians habitually use each other as election cannon-fodder. During his March 1979 election campaign, the Alberta Premier, Mr. Lougheed, warned his electorate of the “outsiders” in “Ottawa and Toronto” who wish to “change the rules of the game” now that Alberta is beginning to accumulate some petroleum wealth; and in calling the May 22, 1979 federal election, Prime Minister Trudeau asked for a strong mandate to keep energy policies out of “the hands of the Exxon oil corporation of New York or of the provincial Government of Alberta.” It seems that our most important constitutional debates become mired in passionate rhetoric.

Beyond the realm of emotion, however, there are some hints, at least, of more objective standards that can be applied. Economics, history and common sense all suggest that the primary role in the natural resource field belongs to the provinces, but that, at the same time, there are varied national interests involved that require a balance to be reached between provincial and federal powers.

For instance, economist Anthony Scott has discussed the revenue-raising aspects in terms of which level of government should be entitled to appropriate the economic “rent” arising from present natural resource development in Canada. He defines the concept of “rent” in economic terms as being the excess of revenue remaining after all necessary costs of materials, labour and capital have been satisfied; it is “the sum of the surplus of every type of earning over what could be earned in the best alternative.” He then posits four criteria that might be used in the application of the concept of “rent” to the division of national resource tax revenue. These criteria can be summarized as follows:

(a) Whether resource revenues can be seen as benefit taxes, in that they represent not pure windfalls but rather payments to governments for necessary services that helped to create the rent in the first place. He concludes that “provincial actions are thought to be necessary for the existence of taxable rent, but federal actions are not,” although some federal services exist that may require a sharing of the tax base.

(b) Whether the resource being taxed would be exhausted in a short or long period of time, especially in relation to the durability of the public services and works required to develop and maintain the resource. A further factor is the proportion of the population that can be expected to leave the locality once the resource and its side benefits are gone. He

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195 *Globe & Mail*, Mar. 12, 1979, at 1, col. 6.
196 *Globe & Mail*, Mar. 27, 1979, at 9, col. 7.
198 Id.
199 Id. at 8-17.
200 Id. at 10.
concludes that the faster the depletion of the resource, the greater the expected life of the associated public services and works, and the greater the proportion of the population expected to leave, then the greater should be the share of the local jurisdiction (which must continue to pay for public services after the resource is gone but with a reduced population and tax base).

(c) Whether the “time preference” of a particular government shows a tendency to spend natural resource revenues or to reinvest them. The government which tends to reinvestment is to be favoured.

(d) Whether a particular government shows a propensity to “risk aversion” or instead a willingness to accept a degree of variability in revenues. The government that is less “risk averse”—less likely to dispose of its resources quickly and for assured but probably smaller compensation—should get a correspondingly larger share of the rent. Since the last two factors, Scott says, depend largely on the relative abilities of governments to “hook into” the capital markets of the world at different rates, they tend to “fade away” in the Canadian context “where the provinces are each large, varied, and hooked into the same capital market as serves the federal government.” The first two criteria still remain, however, and point to a division of the revenues between the two levels of government, with some preference for provincial governments that provide special services that must be amortized over a short resource life-span.

Other economists have expressed doubt as to whether allocational criteria such as these can really help to solve the distributional question, and, as Scott himself says, “much more research needs to be done before this tentative conclusion can be regarded as comprehensive.” However, it is still interesting to see how his four criteria would operate in the oil context as regards Alberta and Saskatchewan. First, oil in the West is a relatively recent industry, so that the works and services needed to sustain it (and the population that lives by it, directly or indirectly) are also comparatively new. Such works and services, including those relative to the industry itself as well as schools, hospitals and other public services required by the involved population, are largely the responsibility of the provincial governments. At the same time, oil is a quickly exhausted resource, and, to some degree at least, the services now being provided must continue even after the oil is gone and some part of the population goes elsewhere. True enough, the federal government also provides services, but it would be required to do so no matter the province in which the population resides and it also has a broader tax base to

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201 Id. at 13.
202 Id. at 14.
203 Id. at 16.
204 Id. at 17.
205 Id.
206 See, for instance, Paus-Jenssen, supra note 118, at 47.
207 Supra note 3, at 17.
support its programmes. Both Alberta and Saskatchewan seem intent on re-investing a large part of their oil revenues in their local economies (although some current expenditures is taking place though the reduction of taxes from other sources). Saskatchewan, for example, has used much of its Bill 42 revenues to pay for the acquisition of its large stake as a potash producer through the Potash Corporation of Saskatchewan, and both provinces seem willing to bear the risks of revenue variations: the present tax and royalty schemes of both are variable in accordance with production and prices, and, under Bill 42, with its 100 percent rate, Saskatchewan was solely at risk with respect to price fluctuation. Therefore, if Scott's economic criteria illustrate anything, it is to underscore the claims of Alberta and Saskatchewan to the larger share of the "rent" accruing from their oil. The federal government also has its interests, which should not be overlooked, but the provincial need is the greater.

Historical arguments also have their place here. As was mentioned above, Western Canada has long played the role of the "hinterland" of Canada—a role that Professor Smiley has described as follows:

Western Canada was from the first and to a considerable extent remains an economic colony of the country's central heartland. The acquisition and subsequent development of a western hinterland was one of the central purposes of Confederation and in the early years of the Dominion and afterward relations between the heartland and the hinterland were regulated according to classic mercantilist principles: a. metropolitan policies required the hinterland to buy the manufactured goods of the heartland; b. capital development in the hinterland was carried out mainly by the activity of public and private institutions centred in the heartland; c. the hinterland and the heartland were physically linked by transportation and communication facilities established and operated for the benefit of the latter; d. in international economic relations, the interests of the hinterland were usually sacrificed to those of the heartland; e. many of the critical aspects of hinterland development were carried out through the instrumentalities of large business organizations protected by heartland policies from foreign or hinterland competition; f. there was a continuing pattern controlling the political authorities of the hinterland in the interests of the heartland through the workings of the national political parties, reservation, and disallowance of provincial legislation, etc.

Smiley also notes the "generalized revolt" of the Western provinces in recent years against continuing to be cast in this role.

What history really raises here is the question of equity, both as between provinces and regions and over time. For one thing, as economist Irene M. Spry has noted, oil is not the only energy source in Canada (something of which the federal government lost sight in its response to the 1973 oil crisis); it has never been suggested, for example, that the citizens of hydro-rich Ontario should be forced to subsidize those of hydro-poor provinces. The Pepin-Robarts Report refers to the historical aspects of interprovincial equity in a slightly different way:

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208 Zwarum, supra note 1, at 26.
209 Supra note 3.
In the first half of the nineteenth century, the Maritime colonies were as prosperous as any in British North America: today the Maritime provinces depend heavily on the transfer of funds from other parts of the country through programmes financed or directly administered by the central government. Though it now seems hard to believe, Alberta, just a couple of generations ago, was dirt poor; the memory of this fact, combined with a historic sense of grievance toward the "East" and a provincial economy which is largely dependent on oil and natural gas, helps to explain Alberta's ardent defence of provincial rights in the resource sector.\textsuperscript{211}

For a time, the Maritime provinces were our wealthiest; their economy was based on their shipping and transportation facilities. In this century, with increasing industrialization in the central provinces and a captive "hinterland" in the West—a source of both supply and markets—the "heartland" of Ontario and Quebec prospered. It still does by and large, but recently, the erstwhile "hinterland" has found for itself an economic base that can, even if for only a short time, put it at the head of the national economic union. History dictates that the "hinterland" will give up this new position only grudgingly, if at all. A sharing of a part of the transitory wealth can be expected, but its total absorption and redistribution by the federal government would run counter to the historical trend of interregional Canadian economic development, and would be the equivalent of a demand that the Western provinces forego their prospects for long-term economic growth and resume their former "hinterland" status.

There are, of course, areas within the natural resources field in which the federal government must prevail—those areas in which it has special abilities that no single province or combination of provinces can muster. The "mini-crisis" in early 1979 caused by the Exxon Corporation to divert Venezuelan oil from its Canadian subsidiary, Imperial Oil Ltd., is a good example of this kind of case, as is the continuing concern of the federal government for the rapid development of new and secure sources of energy supply, particularly in frontier areas. Financially, in addition to its interest in protecting a measure of resource revenue for its own purposes, the federal government also funds our equalization programme. Thus it has a legitimate concern that the formula, based on the average of provincial revenues,\textsuperscript{212} not be unduly distorted by the increased resource revenues flowing to the treasuries of the Western provinces, especially Alberta. Some adjustments in this regard have already been made,\textsuperscript{213} and it is not unreasonable to expect that more will be forthcoming if they prove necessary. Moreover, on such issues as the effect of the price of domestically produced oil and gas on the price and availability of their domestically consumed products, the federal government (on behalf of the consuming provinces) has legitimate concerns that must be recognized and accommodated by the producing provinces.

However, if we are to realize the Pepin-Robarts ideal of allowing the forces of regionalism "a fresher and fuller expression" within a revised con-

\textsuperscript{211} Supra note 2, at 38.
\textsuperscript{213} Supra note 2, at 73.
stitutional structure, we must try to reach a balance—legal and otherwise—in our federal arrangements between national and regional interests in the one area, natural resources, that is of vital concern to the Western region.

To do this, both revenue-raising and control powers should be divided functionally. Each level of government has its bona fide interest in raising some revenue from natural resource taxation as part of the ordinary contribution to its expenditures; the Western provinces, though, have an additional interest in converting the short-term benefits of resource revenues into long-term economic growth, particularly industrialization. Hence, the provinces should have access to the resource revenue base that is ample for such purposes, and should have such access through the mechanism of indirect taxation, if that is what they choose to employ. The Pepin-Robarts Report and other proposals have recognized that whatever historical justifications for restricting the provinces to direct taxation may have existed in 1867 are of little relevance now. Moreover, the position of the provinces as the residual owners of the resources within their boundaries should be reconfirmed, so that their power to exact royalties and thereby to exert a measure of control is beyond question.

It is also necessary to clarify the scope of the trade and commerce power. The management of the local economy—whether it be resource or manufacturing-based—is one of the responsibilities of a provincial government in the eyes of its citizens. So long as they do not place in jeopardy any overriding national interest (security of energy supply, for example), they should be free to do so without undue fear that any extra-provincial effect, however incidental to the main goal, will nullify their efforts. This can only be so if a revised constitution, however drafted, leaves the interpretation of the spheres of respective provincial and national authority beyond doubt.

If and when steps such as these are taken, the after-shocks of CIGOL and Central Canada will have dissipated, and the "other" crisis in Canadian federalism will have been averted—at least for the time being.

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214 Supra note 2.
215 Id. at 92.
216 See Report of the Task Force on Canadian Unity: Coming to Terms (Hull: Supply and Services Canada, 1979) at 96 (Victoria Charter, 1971), 102 (Committee on the Constitution, Canadian Bar Association), and 108 (Canada West Foundation).