

Constitutional Impasse Over Oil And Gas: Is Further Decentralization Compatible With Nationhood?*

JOSEPH A. GHIZ**

Canada's federal and provincial governments are in conflict over the control of energy resources. The author advocates, in the interest of Canadian unity, a strong federal presence in the development of oil and gas supplies and a larger federal share of the revenues produced. To strike a balance between federal and provincial control he suggests a measure of provincial ownership of offshore resources and a greater role for the provinces in federal decision-making.

Le gouvernement fédérale et les gouvernements provinciaux ont des conflits en ce qui concernent le contrôle de l'énergie de nos ressources. L'auteur préconise l'intérêt de l'unité canadienne par une forte présence fédérale dans le développement des ressources d'huile et de gaz et une plus grande participation dans les révenues.

SETTING THE BACKDROP

While the debate between resource producing provinces and Ottawa rages on, there has been a clear manifestation of a centralist trend in the Supreme Court of Canada starting with the *B.C. Offshore Reference*¹ in 1968 through *Caloil*² in 1971 and finally with *Cigol*³ and *Potash*⁴ within the last four years. While the latter three cases can be defended in the classical legal manner by calling in aid *stare decisis*, the *B.C. Offshore Reference* is an example of the Court acting "unabashedly centralist in it's final upholding of central government claims as against the provinces."⁵ Indeed it can be argued that the Court descended into the political arena. Small wonder that shortly after the decision was handed down, Prime

* This article is the concluding chapter of a thesis submitted to Professor Paul C. Weiler, Harvard University, in satisfaction of the written work requirement for an LL.M. Degree.

**B. Comm. (Dalhousie), LL.B. (Dalhousie), LL.M. (Harvard). Leader of the Liberal Party of P.E.I.

¹*Reference Re Ownership of Offshore Mineral Rights* (1968), 65 D.L.R. (2d) 355 (S.C.C.).

²*Caloil Inc. v. The Attorney-General of Canada* (1971), 20 D.L.R. (3d) 472 (S.C.C.).

³*Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan* (1978), 80 D.L.R. (3d) 499 (S.C.C.).

⁴*Central Canada Potash Co. Ltd. v. Government of Saskatchewan* (1979), 88 D.L.R. (3d) 609 (S.C.C.).

⁵McWhinney, "Constitutional particularism and the new, pluralistic federalism," in *Canada Challenged: The Viability of Confederation* (R. B. Byers & Robert W. Redford, eds., Canadian Institute of International Affairs, 1979), at 47.

Minister Trudeau could boldly assert in the House of Commons that the principles of the decision "appear to be substantially applicable to the east coast as well as the west coast. . .".⁶ And as recently as the National Energy program, Ottawa, undoubtedly buoyed by judicial opinion since 1968, could declare that "It is anxious to refer the matter of ownership quickly to the Supreme Court."⁷

It has been suggested that the Supreme Court's centralist trend is not in harmony with the political will of Canadians. In referring to *Cigol* and *Potash*, Richards and Pratt maintain: "For the Supreme Court to have adopted such a strategy, independently of a clear political will among Canadians to proceed in that direction, has exacerbated constitutional tensions."⁸ The aspirations of the West are not a passing fancy but are deeply rooted in the fabric of the region. Similarly, Newfoundland's claim, far from being based solely on "black letter" law, arises out of a deep attachment to and dependence on the sea. While, according to H. B. Nelles, the "main drift of expert analysis of energy policy"⁹ has favored dominant federal action, he has recently raised serious questions concerning the ability of the federal government to develop a national energy policy.¹⁰ Pointing out that since 1944 the federal government has conducted at least six surveys of the energy situation, none of which has proved correct, Nelles maintains that the differences among the regions call for "policy pluralism, perhaps even competition."¹¹ After all, he argues, we have managed "without a national education policy, national professional licensing, or national price uniformity in most other important things, such as housing, for example."¹²

It is against the foregoing backdrop that I articulate my views as to the reasons for the necessity of a strong federal presence in the energy sector. But before doing so, two matters, the proper role of the Supreme Court and the Nelles argument, deserve comment.

The Supreme Court

In the absence of a negotiated settlement, lawyers have a natural predilection to refer all manner of disputes to the courts for resolution.

⁶Lewis & Thompson, *Canadian Oil and Gas*, vol. 1, 29B, Part 1 (Butterworth, 1971).

⁷*The National Energy Program* (Energy Mines and Resources, Canada, 1980), at 42.

⁸Richards and Pratt, *Prairie Capitalism*. (McClelland and Stewart, 1979), at 282.

⁹Nelles, "The Particular Charm of Canada's National Resources" (unpublished paper presented to the University Consortium for Research on North America, December 16, 1980), at 20.

¹⁰H. V. Nelles, "Canadian Energy Policy, 1945-1980: A Federalist Perspective," in *Entering the Eighties: Canada in Crisis* (Carty and Ward, eds., Oxford University Press, 1980), at 91 *et seq.*

¹¹*Ibid.*, at 110.

¹²*Ibid.*

In the constitutional area W. R. Lederman¹³ has made the point that the courts have been influenced by economic and social conditions in the resolution of disputes. His view is summed up in the following passage:

As Canada expanded westward geographically and accepted heavy immigration, the country became more and not less diverse. The kind of a federal document that history gave us facilitated the development of a carefully balanced federalism that accommodated old and new diversities as well as ensuring essential unities. Unique flexibility for Canada comes from having many power-conferring phrases in competition with one another, and the equilibrium points established between them portray the critical detail of Canadian federalism. The power-conferring phrases themselves are given by the BNA Act, but the equilibrium points are not to be found there. They have necessarily been worked out painstakingly by judicial interpretation and precedent over many years. Furthermore, particular equilibrium points are not fixed for all time. As conditions in the country genuinely change and truly new statutory schemes are enacted, judicial interpretation can adjust and refine the powers to meet the new needs. So the high importance of sophisticated judicial interpretation as an ongoing process is obvious.¹⁴

If in *Cigol* and *Potash* the Supreme Court may have gone beyond judicial interpretation and embroiled itself in a political battle, the argument that it did so is even stronger in the *B.C. Offshore Reference*. Whether the Court should play an activist role in the development of the political psyche of the country is a question that has been hotly debated by Lederman and Paul C. Weiler.¹⁵ It is beyond the scope of this paper to develop the role a final appellate court should play in a federal system, but because the key cases in the energy field have a political ring about them, the issue should at least be raised and the main positions set forth. Professor Weiler eschews judicial interpretation of the BNA Act in favor of continuous bargaining and compromise among governments. In his view, after one hundred years, the Courts cannot get guidance from the words used in the Constitution, and hence, the court is developing the rules of the game as it goes along.

Edward McWhinney would also limit the role of the Court, although not to the same extent as Weiler. In his view, the Court has a role in interpreting the existing legal order, but it should not get involved in the "federal-provincial *causes célèbres* and political conflicts of the day."¹⁶

¹³Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1976), 14 *Alberta L. Rev.* 34, at 38-39. See also: Scott, "Constitutional Adaptations to Changing Functions of Government," in *Essays on the Constitution: Aspects of Canadian Law and Politics* (University of Toronto Press, 1977).

¹⁴Lederman, footnote 13.

¹⁵Weiler, "The Supreme Court of Canada and Canadian Federalism," in *Law and Social Change* (Ziegel, ed., Osgoode Hall Law School, 1973), at 39-72; See also: Dupre and Weiler, *Infra* 105, at 462, where the authors eschew judicial interpretation in favor of "federal-provincial diplomacy in matters of public policy." Professor Weiler's thesis has been attacked by Lederman in "Unity and Diversity in Canadian Federalism" cited in this note and again by Lederman in his comment to Professor Weiler's article in *Law and Social Change*, at 73-78.

¹⁶McWhinney, *Supra*, footnote 5, at 51.

In these areas the existing legal order is not involved; rather, we are presented with an entirely new or emerging problem outside the legal order which requires a political solution. While he doesn't say so expressly, it appears that he would place the *B.C. Offshore Reference* in the latter category. The other limitation that McWhinney would place on the Court is that it should deny standing to a private individual to call in aid the constitution to further a private interest. Absent a major public interest, standing should not be accorded plaintiffs such as Cigol and Central Canada Potash.¹⁷

The Nelles Argument

Nelles' argument is based on a *quid pro quo* that is divisive of nationhood and unlikely to withstand the test of time. Valuing the principle of equalization, Nelles would transfer jurisdiction in the energy field to the provinces in exchange for a provincially funded equalization scheme.¹⁸ This proposal, in my view, runs counter to the notion of nationhood. A citizen should look to his or her government, whether federal or provincial, for a basic modicum of public service, rather than to the government of a province with which he or she has no connection. A centrally funded scheme was favored in clear and explicit terms by the Task Force on Canadian Unity: "It should be clear that we feel the central government should have wide responsibility for regional economic balance and the broad taxing and spending power to meet it."¹⁹ In addition, while the *quid pro quo* may work financially in Canada's current situation, notwithstanding its divisiveness, there is no guarantee that it would continue to work when the pattern of wealth changes again. The "have" provinces of another day may balk at paying equalization even in the face of constitutional entrenchment. On the other hand, the federal government will always remain the government of all Canadians.

Nelles places too much emphasis on past federal failure to predict the energy potential of the country and develop a responsive energy policy. Hindsight is a great vantage point and it is with the benefit of hindsight that Nelles criticizes the federal government. Moreover, as I shall develop shortly, the absence of an effective national energy policy allowed the provincial governments to create a haphazard and uncoordinated policy primarily responsive to the needs of the United States. I agree with Nelles that an energy policy must be responsive to and compatible with regional needs. No one that I am aware of has advocated an abandonment of provincial jurisdiction in favor of total federal power. Rather, what is required is a greater federal presence in the national interest. We now turn to see why this is so.

¹⁷*Ibid.*, at 53-53.

¹⁸Nelles, *Supra*, footnote 9, at 21. The same argument is made by Nelles, in *Supra*, footnote 10, at 91 and 111.

¹⁹The Task Force on Canadian Unity (Minister of Supply and Services, Canada, 1979), at 73.

THE NEED FOR A STRONG FEDERAL PRESENCE

At least four compelling reasons can be advanced in support of a strong federal presence in the oil and gas field. These are: (1) the need for a co-ordinated energy policy; (2) the need to provide the federal government with the necessary finances to fund equalization; (3) the need for one policy on foreign ownership; and (4) the need to "scout against" provincial autarchies. Another reason of questionable economic validity, but probably supportable socially and politically, that is advanced by the federal government is the need for a "Made in Canada" price for oil which is not linked to the world price.²⁰ In the case of natural gas the federal government proposes to regulate the price in such a manner as to encourage a movement away from oil in favor of gas.²¹

A Co-ordinated Energy Policy

Energy policy has a pervasive effect on the whole of the country, impacting, both directly and indirectly, on employment not only in the energy industry but on virtually every other business endeavor in the country. Also, given our northern climate, energy impacts significantly on our quality of life. Certainty of supply is therefore an imperative. The problem of ensuring supply goes beyond the oil and gas industry and involves electrical, coal and nuclear energy as well as the developing future technologies of tidal and solar power.

In a powerful and compelling argument for greater federal presence in the energy field, Ian McDougall²² illustrates that provincial autonomy in energy development has led to an uncoordinated and haphazard policy in which provincial development is occurring in response to the needs of the American market with little or no regard to the Canadian market. He argues that it is in the country's interest for the federal government to assert itself in the energy field at the expense of the provinces. The federal government's National Energy program echoes the concerns of McDougall and claims as one of its basic objectives the integration of energy policy.²³ The supply of energy at a reasonable price represents one of the greatest challenges to Canada today. Effective planning is needed to utilize and coordinate all sources of energy.

Economic theory teaches us that if each province, reasoning rationally in its own self interest, chooses to adopt policies that further its

²⁰*The National Energy Program, Supra*, footnote 7, at 25.

²¹*Ibid.*, at 31.

²²McDougall, "Energy and the Future of Federalism: National Harmony or Continental Hegemony?" in *Canada Challenged: The Viability of Confederation, Supra*, footnote 5.

²³*The National Energy Program, Supra*, footnote 7, at 65-68.

economic objectives without regard to the overall well-being of the country, we will end up with a lower standard than would otherwise be achieved.²⁴ But Samuel H. Beer²⁵ correctly maintains that as the regulatory process is centralized there must be a greater degree of consent and active participation by all in the decision making process. Additionally, "Co-operation — something more than a grudging consent to 'the law' — is a further necessity."²⁶ Charles E. Lindblom²⁷ cautions against centralized power on efficiency grounds: "For central coordination may impose analytic and regulatory tasks on a central authority beyond its capacities." These considerations, posed by Beer and Lindblom, are the basis of the protestations by the provinces to Ottawa's control in the energy sector. Ottawa's National Energy program has not yet attained the status of being accorded grudging consent by the resource producing provinces. They are still "kicking and screaming." And these provinces maintain that on efficiency grounds they are in a better position to manage resource policy in a manner compatible with overall provincial needs and aspirations. However, the fact remains that primary provincial control in the past has not resulted in an effective energy policy. McDougall aptly demonstrates this fact in the following passages:

The disposition of Canada's conventional reserves of petroleum, natural gas, and hydro-electric power-generating capacity illustrates both the cost of failing to come to grips with the need to develop and implement an effective national policy and the now-urgent necessity of coming to terms with the problem. As a matter of sentiment alone there has never been doubt as to the desire of Canadians to keep the country independent and whole. But past failure to realize the potential for prosperity has shaken the virtue of the federal system in the eyes of many Canadians. It is now time to put federalism and the country as a whole back to work, and in this way offer a tangible demonstration of its worth to citizens in all its regions.²⁸

And again:

In almost all these cases, the development initiative came primarily from the individual province concerned; federal involvement in the basic decision was decidedly peripheral. In almost every case the opportunity to develop arose principally from market opportunities in the United States and not in Canada.²⁹

²⁴This, in a nutshell, is based on a summary of the justification for environmental air quality standards in the United States. The argument, however, is equally applicable in the energy field — or any other field — in which independent decision-makers are operating without regard to the common good because it is not in their interest to do so: R. B. Stewart: "Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy" (1976-77), 86 *Yale L.J.* 1196, at 1211-1213. For the classic account, see Hardin, "The Tragedy of the Commons" (1968), 162 *Science* 1243.

²⁵Beer, "New Structures of Democracy: Britain and America," in *Democracy in the Mid-Twentieth Century: Problems and Prospects* (The Washington Press, 1960), at 47.

²⁶*Ibid.*

²⁷Lindblom, *The Policy-Making Process* (Prentice-Hall, Inc., 1968).

²⁸McDougall, *Supra*, footnote 22, at 317.

²⁹*Ibid.*, at 329.

Oil and gas constitute but two sources of energy for Canada. Development of these resources must be coordinated with energy development in other areas in order to ensure long term security of supply in Canada. Canada's resources should not be exploited in response to market conditions in the United States. This goal can be accomplished with the consent and cooperation of the provinces by restructuring some of Canada's basic institutions so as to give the provinces a greater role in federal decision making power.

Equalization

The increasing wealth of a few provinces plays havoc with the ability of the federal government to achieve equalization between the "have" and "have not" provinces. The principle of equalization is a basic federal goal which is included in the federal government's proposed constitutional changes. According to Prime Minister Trudeau, equalization captures "one of the most important elements of what it means to be a Canadian — a willingness to share our good fortune and our opportunities so that we can grow stronger together."³⁰ Donald V. Smiley³¹ characterizes equalization as one of the essentials of a contemporary economic nation. He concludes that the inordinate revenue accruing to Alberta has played havoc with the equalization system, thus resulting in a diminution of full-revenue equalization, "and it is reasonable to expect the increasing financial stringency will lead the federal authorities to compromise this principle even further."³² The federal government's declining capacity to fund equalization represents, in Smiley's view, one of the four manifestations of the decline of Canadian nationhood.³³

The interaction between provincial energy revenues and equalization has been put in stark focus by Thomas J. Courchene.³⁴ Courchene's analysis of the 1979-80 fiscal year graphically illustrates the reason for the erosion of the equalization principle. Ottawa's increasing obligation to pay for equalization is based, in large part, on the increasing revenues accruing to the resource producing provinces without a concomitant

³⁰Notes for a statement by the Prime Minister of Canada on Equalization, Document 800-14/070, Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, September 8-12, 1980.

³¹Smiley, *Canada in Question*, (3rd ed. McGraw-Hill Ryerson, 1980), at 159.

³²*Ibid.*, at 254.

³³*Ibid.*, at 253-55. The other manifestations are: (1) the barriers to the free movement of goods and services throughout the country; (2) the Federal government's declining capacity to commit Canada in international relations and the concomitant assertion of the role of some of the provinces in this area; (3) the increasing emphasis on culture, language, and ethnicity as the foundations for political organization and allegiance in the country and the lack of emphasis given for (a) the dilemma posed by the neglect of the peripheries (Atlantic Canada and the West) in the development of the country and (b) Canada's relations with the United States.

³⁴Courchene, "Energy and Equalization," in *Energy Policies for the 1980s* (special research report of the Ontario Economic Council, 1980), at 103 *et seq.*

appreciation of federal revenue. Put otherwise, equalization is based on provincial revenue sources and not on the federal government's intake of revenue. The rationale for this method of calculating equalization is that the program is designed to ensure that all provinces are able to provide "reasonable comparable levels of public services without resorting to unduly high levels of taxation."³⁵ In its pure form, total revenues from some twenty-nine provincial revenue sources are equalized to the extent that each province's share of revenue from a particular source is guaranteed to be not less than that province's proportion of Canada's population. If the total from all sources is positive, a province is entitled to equalization; if negative, none is paid.

Since essentially only three provinces, Alberta, Saskatchewan and British Columbia, have energy revenues,³⁶ all of the other provinces are entitled to an equalization credit from energy sources. In most cases this entitlement results in an increase in equalization or the conversion of an otherwise "have" province into a "have not" province. As provincial energy revenue increases, Ottawa assumes a concomitant obligation to pay out more equalization without obtaining the necessary revenues to do so. This is undoubtedly one reason why Ottawa is now demanding a greater share of energy rents. Failure to receive additional revenue will result in a further dilution of the equalization principle, placing in jeopardy Ottawa's ability to redress economic imbalance among the provinces.

Ottawa has already moved to dilute equalization pursuant to the provisions of the 1977 *Fiscal Arrangements Act*.³⁷ This Act provides that (1) only one-half of all energy royalties would be eligible for equalization; and (2) equalization from energy revenues is limited to one-third of total equalization from all sources. This latter provision "essentially puts a cap on the degree to which equalization payments could be spiralled upwards by energy royalties."³⁸ The Task Force on Canadian Unity has observed that "the 50 percent limit introduces an arbitrary element into a formula which purports to equalize the per capita national average of virtually all provincial revenue sources."³⁹ The one-third limit, of course, aggravates the arbitrariness.

Another reason justifying Ottawa's demand for additional energy revenue results from the inequity of funding the scheme. Put bluntly, the energy producing provinces, principally Alberta, are not bearing

³⁵*Ibid.*, at 105.

³⁶Out of a total of 4.786 billion dollars, Ontario had one million and Manitoba had 11 million. I have ignored these amounts as *de minimis*. These amounts appear at 119 of Courchene, *Supra*, footnote 34.

³⁷Federal-Provincial Fiscal Arrangements and Established Programs Financing Act, 1977, Stats. Can. 1976-77, Ch. 10, Part I.

³⁸*Supra*, footnote 34, at 114.

³⁹The Task Force on Canadian Unity (Minister of Supply and Services, Canada, 1979), at 73.

their share of the equalization program. Courchene has demonstrated that for 1979-1980 Alberta had a total of 4,091 million dollars from energy revenue out of a Canadian total of 4,786 million, but Ottawa was only able to collect \$107 million from Alberta residents by way of taxes to fund that portion of the equalization bill of \$889 million attributable solely to provincial energy revenue. Ontario, with practically no energy revenue, contributed \$346 million dollars to fund equalization attributable to energy revenue.⁴⁰ Courchene's comment on this inequity: "To put it starkly, why should Ontario residents be called upon to contribute \$346 million each year to pay for equalization that arises because Alberta is pocketing \$4 billion annually."⁴¹ This imbalance prompted Courchene to comment that "the combined principles of cooperative federalism and the ability to pay suggest that the producing provinces ought to bear a larger portion of equalization flows arising from energy."⁴²

It should also be noted that Ontario now qualifies as a "have not" province strictly because of the energy revenues accruing to Alberta, although it has not received any payments.⁴³ A further discussion of this phenomenon is deferred until the discussion on energy pricing.

Foreign Ownership

The federal government argues that it is in the best position to control foreign ownership and control of Canadian industry.⁴⁴ As the October 1980 budget and the NEP illustrate, the federal government is committed to Canadian ownership and control, and is prepared to go as far as penalizing non-Canadian owned and controlled industry. Even before the budget Premier Lougheed, while extolling the virtues of Canadian ownership, criticized what he perceived to be a singling out of the oil and gas industry. "What I don't understand is why this industry is being singled out in terms of foreign ownership — why?"⁴⁵ Notwithstanding Premier Lougheed's question, Donald V. Smiley has pointed out that federal screening of foreign investment under the *Foreign Investment Review Act* has not led to incompatibility between the provinces and Ottawa.⁴⁶ In the oil and gas field this is undoubtedly because the

⁴⁰*Supra*, footnote 34, at 119.

⁴¹*Ibid.*, at 129.

⁴²*Ibid.*

⁴³*Ibid.*

⁴⁴*Supra*, footnote 34.

⁴⁵*Supra*, footnote 7, at 16 *et seq.*

⁴⁶Address by Premier Lougheed, Canadian Daily Newspaper Publishers' Assoc., Toronto, April 16, 1980, at 10.

⁴⁶*Supra*, footnote 31.

federal government has ignored the problem of foreign ownership; it has admitted as much.⁴⁷ Premier Lougheed's question does nevertheless substantiate Kenneth Norrie's statement that "the western provinces are naturally going to be less interested than the federal government in policies to limit the inflow of foreign capital."⁴⁸

The federal government now views the problem as one of the export of capital rather than its importation. The government through the NEP states:

The industry, in addition to maintaining its normal dividend and interest payments, supported net capital outflows abroad of \$2.1 billion in 1975-79. Some of these funds represented a return of capital to foreign owners; others represented new foreign investments by Canadian companies. If dividends and interest payments are added to this total, the total outflow over the period 1975-79 becomes approximately \$3.7 billion. Dividends rose from \$200 million a year in 1973 to \$600 million in 1979. In addition, the foreign parents have received fees for technological, operating and managerial services.⁴⁹

The question of foreign ownership of Canadian industry strikes at the heart of Canadian independence and involves the repulsion of American continentalist beliefs espoused by Professor Harry Johnston of the University of Chicago and George Ball, Undersecretary of State under Presidents Kennedy and Johnson.⁵⁰ Continentalism today is very different than in 1867. One of the motivations for the creation of Canada in 1867 was the fear of an American invasion. Today continentalism manifests itself "in the deceptive form of American influence upon the economy and the cultural life of Canada."⁵¹ The continentalism espoused by George W. Ball is horrifying for anyone who believes in the continued sovereignty of Canada. In a matter-of-fact fashion Ball states that Canada "is fighting a rearguard action against . . . the inevitable economic integration, which will require for its full realization a progressively expanding area of common political decision."⁵² Ball sees danger for Canada and the whole trading world in "the efforts of successive Canadian governments to prevent United States economic domination."⁵³

⁴⁷*Supra*, footnote 7, at 18.

⁴⁸Norrie, "Natural Resources, Economic Development and U. S. - Canada Relations," in *Natural Resources in U.S. - Canadian Relations* (Beigie & Hero, eds., Westview Press, 1980), at 297.

⁴⁹*Supra*, footnote 7, at 17.

⁵⁰Gordon, *Storm Signals New Economic Policies for Canada* (McClelland and Stewart Ltd., 1975) at 42 and 90.

⁵¹Watts, "Survival or Disintegration" in *Must Canada Fail?* Simeon (ed.) (McGill-Queen's University Press, 1977), at 49.

⁵²Ball, *The Discipline of Power* (Little, Brown and Company, 1968), at 113.

⁵³*Ibid.*

The influence of American companies over the Canadian economy with its consequent threat to Canadian independence has been candidly made by the following two Canadians. Walter L. Gordon, writing in 1975, pointed out that since 1957, when the Royal Commission on Canada's Economic Prospects submitted its final report, there have been four inquiries into the question of foreign investment in Canada. All of these inquiries concluded that foreign-controlled Canadian companies do not operate necessarily in the best interests of Canada.⁵⁴

Donald V. Smiley, writing in 1980, stated that: "Along with Quebec nationalism and the growing economic strength of the western provinces, the influence of multi-national corporations and of the American government over the Canadian economy has weakened, and is weakening, the capacity of Ottawa to structure and control that economy."⁵⁵

The federal government can no longer ignore its responsibility to maintain the integrity of the country; it must assert itself in controlling foreign domination of the Canadian economy. It has taken a necessary first step in attempting to Canadianize the oil and gas industry, but it must be recognized that the problem of foreign ownership goes beyond the export of capital to such areas as hiring practices, research and development policy, and purchasing policy. In short, foreign owned companies may not be advancing the overall well-being of the Canadian economy, but are concerned solely with the maximization of profit of the multinational conglomerate at the expense of the overall Canadian economy.

Provincial Autarchies

Edwin Black and Alan Cairns present an overview of increasing provincial dominance in most phases of government.⁵⁶ Dealing specifically with resources, they share the concerns of Ian McDougall⁵⁷ in stating that "[A]ll but three of the provinces cover vast land areas whose lavish natural resources are exploited at the sole discretion of provincial cabinets."⁵⁸ They question whether increased provincial power could move us towards "provincial autarchies."⁵⁹ While the use of the word autarchy may be too strong, it is perhaps just one step removed from the aspirations of those espousing "economic provincialism." The development of

⁵⁴*Supra*, footnote 50, at 90.

⁵⁵*Supra*, footnote 31, at 273-74.

⁵⁶Black and Cairns, "A Different Perspective on Canadian Federalism." *Canadian Federalism: Myth or Reality?* (J. P. Meekison 3rd, ed., Methuen, 1977), at 398-9.

⁵⁷*Supra*, footnote 22.

⁵⁸*Ibid.*, at 42.

⁵⁹*Ibid.*, at 46.

provincial economies in a manner that may be inconsistent with a coordinated energy policy and may frustrate equalization, as well as play havoc with Canada's balance of payments, is not consistent with nationhood. The western provinces combined with Newfoundland seek to change the direction of the ship of state by according much more power and control to the provinces, allowing them to develop in their own way. The consensus of academic writing that I have surveyed supports the conclusion of Messrs. Black and Cairns of the harm that economic provincialism or regionalism can do to Canada. They state: "[W]hile speculation is hazardous, the possibility of accentuated economic regionalism must be scouted and guarded against if the federal system is to retain any significant control over its economic future."⁶⁰ The incongruity between the increasing sentiment in favor of "economic provincialism" over "economic nationalism" has been succinctly underlined by Garth Stevenson as follows:

The provincial governments, rather than the federal government, tend to be the vehicles and the beneficiaries of this widespread sentiment, yet it is the federal government that is expected to develop and express a Canadian position with respect to international resource issues, as well as to defend a national interest the very existence of which is implicitly denied by much of the rhetoric emanating from provincial capitals.⁶¹

A NATIONAL PRICE

Oil

The Alberta position is to tie the Canadian price of oil to the world price. The Canadian government rejects the so-called world price as the basis of fixing a Canadian oil price because the world price does not reflect market conditions but is based on an effective cartel.⁶³ In the federal view world prices are arbitrary and artificial, and Canadians, with abundant energy, should not be held ransom to OPEC. Canadians have an opportunity for economic development unmolested by the shock waves from OPEC. Canadians can, therefore, strive for a price which will provide an inducement to continued exploration as well as providing revenue to both levels of government. Further, federal policy ensures that, subject to transportation differentials, all Canadians pay the same price.⁶⁴

⁶⁰*Supra*, footnote 56, at 16.

⁶¹Stevenson, "The Process of Making Mineral Resource Policy in Canada," in *Natural Resources in U.S.-Canadian Relations*, *supra*, footnote 48, at 170.

⁶²*Supra*, footnote 7, at 5.

⁶³*Ibid.*, at 6-7; Speech of Honorable Marc LaLonde, House of Commons Debates, *Hansard*, October 29, 1980, p. 4237.

⁶⁴*Ibid.*, at 23.

While a one-price policy for all Canadians can be justified on the grounds of fairness, the federal proposal for a "Made in Canada price" that is not linked to world prices has come under attack by G. C. Watkins and Kenneth H. Norrie in two recent separate articles.⁶⁵

Watkins challenges the view that the world price for oil is arbitrary and artificial; he maintains that while perfect competition is not present, the world price nevertheless does respond to supply and demand and is not established in a vacuum. Watkins also maintains that holding down the Canada price below world levels results in excess consumption resulting in a net loss to the economy. Moreover, the federal government's price fixing adversely affects supply, resulting in a further overall loss to the economy. Watkins estimates that the total net loss to the economy in the year 1984, assuming optimistically no increase in the *real* price of world oil, will amount to some \$3.4 billion.

Norrie not only supports Watkins' analysis but also rebuts the arguments advanced to defend the federal position. Briefly, he argues that: (a) prices are not temporarily high; rather OPEC has demonstrated that high prices are a stable phenomenon; (b) low income earners can be shielded against high energy prices through the tax system rather than a general subsidy on all oil and gas which has a retrogressive effect; (c) large windfall gains to foreigners can be mitigated against through taxation or other measures; (d) the inflationary aspect of price increase is over-exaggerated because gradual changes are more inflationary than a sudden change and low prices affect Canada's self-sufficiency goal thus ensuring dramatic price increases; (e) lower oil prices do not provide a competitive advantage for Canadian industry because of the small extent that energy use (5%) accounts for total industrial costs; (f) industrialization will not suffer, but rather, a rise in price will decrease dependence on foreign oil thus strengthening the Canadian dollar.

These persuasive arguments are a frontal attack on what the authors conceive as an irrational oil pricing policy. But the arguments are not advanced to repel federal presence in this sector of the economy. The federal government can exert a strong measure of control regardless of the price. Why then has it opted for a low price? Two reasons can be suggested. The first is the stated position of the federal government, the second is the reasoned view of Norrie.

Ottawa acknowledges that "(T)here is a broad national consensus that oil prices in Canada should rise substantially."⁶⁶ But rather than relying on purely economic reasons as the basis for its decision for

⁶⁵Watkins, "Mr. LaLonde and The Price Mechanism: Or, Never the Twain Shall Meet"; Norrie, "The National Energy Program: A Western Perspective"; both articles in *Reaction: The National Energy Program* (The Frazer Institute, 1981) at 55-73 and 105-124.

⁶⁶*Supra*, footnote 7, at 25.

moderate price increases, it also relies on political and social reality. Ottawa states in the NEP:

It must be remembered, too, that price is only one route to further conservation. Societies have strong "structural" rigidities; it is not easy to bring about rapid changes in energy use. Entrenched social and economic patterns, based on relatively cheap oil, must be modified, but this takes time. Governments must move on all fronts to create a total environment that both encourages and allows consumers to cut their energy consumption. Rapid price rises in the absence of these other measures could undermine the consumer's ability to make the necessary changes.⁶⁷

That the above quoted reasons can be justified has been demonstrated by Ian McDougall. He argues that energy policy cannot be developed in a vacuum but rather the impact on the economy at large must be taken into account. He states:

The situation is straightforward. Canada today, more than ever before, needs secondary industrial growth and the employment and income that comes with it. The rate of secondary growth is completely dependent upon the quantity of energy available, and, even more important, on the price at which it can be delivered. Energy policy cannot continue to be developed in a vacuum divorced from the development consequences for the economy at large.⁶⁸

McDougall does not support his conclusion with calculations, but even a 5% increase in production costs may be significant. How many plants will be forced to close down with an added 5% in production costs? How much unemployment will this create? What are the costs in human misery? In speaking to the multifaceted issues involved in striking a proper pricing policy, McDougall states:

Given the range of considerations to include — the fair distribution of economic rents between producing and consuming regions, the net effect upon per-capita consumer buying power, the implications for primary and secondary employment, the structure of federal and provincial fiscal expenditures, and conservation incentives — it would appear that few things could be more complex.⁶⁹

Lacking the necessary economic background I cannot criticize the approach of Watkins and Norrie, but I am skeptical of relying solely on economic theory to establish a proper price for oil. As suggested by McDougall the cumulative impact of oil pricing must be considered. Pure economic analysis fails to take into account social and political issues that can, and perhaps should, be addressed through an oil-pricing policy.

Kenneth Norrie develops what may be another reason for the federal policy. When we discussed equalization above we noted the impact of oil

⁶⁷*Ibid.*, at 24.

⁶⁸*Supra*, footnote 22, at 333.

⁶⁹*Ibid.*, at 339.

revenue on the equalization scheme. Equalization payments are increasing as a result of the increased energy revenues accruing to the resource producing provinces, principally Alberta. On the other hand Ottawa must pay for increased equalization out of its general revenue. We noted Ottawa's inability to continue to fund an equalization scheme on this basis. Undoubtedly Ontario is not pleased at seeing its residents supplying tax revenues to Ottawa to pay for equalization resulting from Alberta's increased wealth. By holding down the oil price, Ottawa, in effect, provides a subsidy to the rest of Canada at Alberta's expense. Moreover, strictly speaking, Ontario became a "have not" province commencing with the fiscal year 1976-77 and has maintained that status since, although it has not received any payments.⁷⁰ Thomas J. Courchene conjectures that Ontario may claim the accumulated amount, which approaches \$1 billion, shortly.⁷¹ However, another suggestion might be that Ontario will not submit a claim as long as it receives cheap oil, thus providing it with equalization in another fashion. This rather lengthy background brings me to Norrie's point that the payment of equalization out of general revenues comes "with consequent budgetary deterioration at great political cost. More than anything else perhaps, it is this problem of internal distribution of revenues that has prevented the move to a more rational pricing system."⁷²

Ultimately, governmental policy, in a democracy, is tested by the will of the people. The 1979 general election was fought on the oil-pricing issue. Canadians, as a whole, repudiated higher oil prices. A democracy does not always operate in step with pure economic logic. To the extent that Ottawa has made a political and social decision in tune with majority Canadian opinion, its oil pricing policy can be defended. Indeed, many programs of the welfare state would fall in the face of economic analysis.

Gas

Given the current over-supply of gas relative to demand, the federal government proposes that gas prices will "rise less quickly than oil prices in order to encourage a shift to natural gas."⁷³ Watkins is less critical of the gas-pricing policy because a lower gas price is consistent with the demands of the market place. He questions, however, the wisdom of a regulated price over one freely determined in the market place.⁷⁴ Moreover, Watkins points out that federal policy fixes one price for natural

⁷⁰*Supra*, footnote 34.

⁷¹Courchene, "The National Energy Program and Fiscal Federalism: Some Observations," *Supra*, footnote 34, at 85.

⁷²Norrie, *Supra*, footnote 65, at 109.

⁷³*Supra*, footnote 7, at 31.

⁷⁴Watkins, *Supra*, footnote 65, at 70.

gas east of Toronto irrespective of transportation differentials, thereby creating "a policy of price discrimination . . ." ⁷⁵ Again, a political rejoinder is in order. Given the excess of natural gas relative to demand and NEP's desirable goal of energy self-sufficiency by 1990, Ottawa's policy ensures delivery of natural gas east of Toronto. The National Energy Policy is clear in defending this federal policy on political rather than economic grounds. It states:

This pricing policy will allow gas marketers to easily penetrate new areas, and should lead to rapid increases in gas deliveries through the new pipelines.

The Government of Canada is determined that the new transmission system eastward of Montreal proceed as rapidly as possible. There should be no uncertainty as to the Government's intentions in this regard. If necessary, the Government will take direct action to remove financial bottlenecks, with the objective of making gas available in the Maritimes in 1983. ⁷⁶

I have already indicated my skepticism of developing a pricing policy in a vacuum. Through its policy the federal government is attempting to insulate Easterners from the harsh financial effects they would face as an independent nation. But the east is not a separate nation; as a part of Canada it should enjoy its bounty. To the extent that Ottawa's policy serves this otherwise valid goal it can be defended, perhaps not on economic grounds, but on political and social grounds.

STRIKING THE BALANCE

While "economic provincialism" must be scouted against, one must bear in mind that a federation must balance provincial and regional needs, aspirations, and differences against the need for an effective central government. Frank Scott's injunction is worth recalling: "Too much centralism invites tyranny, too little creates anarchy." ⁷⁷

While I am convinced that provincial demands in the oil and gas field would denude Ottawa of necessary power to maintain the viability of the country, it would be ludicrous for me to attempt to detail the specific budgetary measures and other programs necessary to achieve meaningful federal control. It should be noted, however, that my argument for a strong federal presence in the resource field does not amount to an endorsement of the means through which the federal government proposes to assert itself. The fiscal and other ramifications of the NEP are well beyond my knowledge. My point is simply that a major federal presence is required in the resource sector in order to preserve the

⁷⁵*Ibid.*, at 71.

⁷⁶*Supra*, footnote 7, at 58.

⁷⁷Scott, "Centralization and Decentralization in Canadian Federalism," in *Essays on the Constitution: Aspects of Canadian Law and Politics* (University of Toronto Press, 1977) at 279.

vitality of the country. It should be noted, however, that the program has not received acclaim in the business community.⁷⁸ Further, the financial implications of the program have come under attack in *Reaction: The National Energy Program* by no less than seven prominent Canadians, including Watkins and Norrie.⁷⁹ M. A. Walker, in the Preface, suggests that the program ought to be regarded as a "first draft" of policy rather than "a final immutable statement of it."⁸⁰ Walker states that "whatever its merits as a political stratagem, the NEP is defective as an economic policy, and, if the economic objectives addressed by the policy are to be achieved, the energy program must be revised in the light of the realities which, for whatever reason, it failed to probe."⁸¹

But irrespective of the wisdom of this particular program the federal government has a duty to act on behalf of all Canadians in this industry which affects all our lives every minute of the day. But how the balance should be struck depends on the exigencies of the moment and on the responsibility of the federal government to take account of regional and provincial concerns. This much, however, is clear: Ottawa requires not only additional revenue, it also requires the necessary power to develop a coordinated energy policy and a policy on foreign ownership. To the extent that Ottawa asserts itself in these three areas allocational as well as distributional power is involved. It is perhaps unfortunate that the price to be paid for a greater measure of central control is not limited to revenue sharing but also involves the larger questions of production, development and marketing. Indeed, *Caloil* and *Potash* are glaring examples of federal assertion of power affecting these vital areas. But federal assertion of power by no means precludes a continued provincial presence. The interplay between the two levels of government is the stuff federalism is made of. The provinces must realize that in the energy sector, with its pervasive effect on all Canadians, the federal government must have more of a say and this say must come at the expense of, but not the preclusion of, provincial power. There will always be many overlapping areas where federal and provincial objectives diverge. While it is easy to state that the federal government should prevail in inter-provincial and international economic development policies, and the provinces in their intraprovincial aspects, one must conclude, as did the Advisory Committee to the Ontario Government on Confederation, that "there will be many gray areas."⁸² I agree with the conclusion of the

⁷⁸See, for example: "Federal Budget Upsets Industry," in *Oilweek*, Vol. 31, no. 39 (MacLean-Hunter, November 3, 1980) at 3 *et seq.*; Rowland C. Frazee's criticism in *Globe & Mail*, January 27, 1981, at 4. The clear implication from these excerpts is that the present energy policy will impact adversely on Imperial's investment in Canada.

⁷⁹Walker, "Preface," in *Reaction: The National Energy Program*, *Supra*, footnote 65 at XI.

⁸⁰*Ibid.*, at XII.

⁸¹*Ibid.*, at XI.

⁸²*Second Report of the Advisory Committee on Confederation*, "The Federal-Provincial Distribution of Powers" (Ontario Government, March 1979), at 24.

Advisory Committee that "(N)ational economic policy will be the result of the combined efforts of federal and provincial development policies. For these reasons machinery for continuing coordination and consultation on these policies is essential,"⁸³ but coordination and consultation can only be successful if there is a realization on the part of the provinces of the dominant role that Ottawa, in the national interest, must play in the oil and gas industry.

On the financial side, no one in the current debate, not even the federal government, suggests that the central government should be the sole beneficiary of the wealth from oil and gas. It is for this reason that I can only express bewilderment at the observation made by William Moull, in his critique of *Cigol* and *Potash*. Professor Moull states:

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.⁸⁴

Who, it may be fairly asked, has asserted the proposition that the federal government should totally absorb and redistribute the wealth from oil and gas?

In my view one of the means, in addition to the interplay between federal and provincial power, available to protect against "too much centralism" is the according to the provinces of a role in federal decision-making power and ensuring the representation of all provinces in the governing party through a system of proportional representation. For the moment, in arguing for a strong federal presence, I align myself with two other Canadians. Milton Moore asserts that "the economic rents from natural resources be treated as a national asset."⁸⁵ Donald Creighton describes Canada's natural resources as "the birthright of Canada" for all Canadians.⁸⁶ It is submitted that "economic provincialism" is incompatible with nationhood. It would denude Ottawa of power and relegate it to "an agency of the provinces"⁸⁷ ultimately leading to the fracture of the nation.

⁸³*Ibid.*

⁸⁴Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980), 18 *Osgood Hall L.J.* i, at 47.

⁸⁵Moore, "The Concept of a Nation and Entitlements to Economic Rents," in *Natural Resource Revenues: A Test of Federalism* (Scott, ed., University of British Columbia Press., 1976), at 242.

⁸⁶Creighton, "Continentalism and the Birthright of Canada," in *Towards the Discovery of Canada* (MacMillan of Canada, 1972), at 287. The federal government uses the words "national patrimony entitlement" in referring to the right of the citizens of Canada to share in the benefits of the oil and gas industry: *The National Energy Program, Supra*, footnote 7, at 14.

⁸⁷This is Premier Peckford's language. The statement made on the night of the Quebec Referendum is reported in: "MacGregor, Confederation's Bad Boy," *MacLean's*, November 3, 1980, at 30.

Offshore Ownership: A Compromise

Newfoundland has presented a strong case in logic and equity for its claim to offshore ownership. However, in its appeal to the public, it has failed to make the strongest argument available to it; it should de-emphasize the importance of ownership by arguing that even if it succeeds, the federal government would retain considerable jurisdiction over the offshore area. Apart from the power Ottawa enjoys under Section 91 of the BNA Act, Section 109, which would vest ownership in the province, is constrained by Section 117 which accords paramountcy to the federal government "to assume any Lands or Public Property required for Fortifications or the Defence of the Country."

The example of the United States and Australia demonstrate that a measure of provincial offshore ownership and consequent jurisdiction is compatible with nationhood. In the words of Attorney-General for Australia, "History, common sense and the sheer practicalities make these matters for state administration rather than central control, in the absence of overriding national or international considerations."⁸⁸ As a result of the logic of this proposition, the Commonwealth and the States within the last year entered into an offshore Constitutional settlement described as "A milestone in cooperative federalism."⁸⁹ Pursuant to settlement the Commonwealth Parliament has agreed to vest in each state proprietary rights and title in the seabed of the adjacent territorial sea to a breadth of three miles, irrespective of whether Australia moves to a 12-mile territorial sea.⁹⁰

The same considerations led the United States Congress to pass the *Submerged Lands Act*⁹¹ in which submerged lands three nautical miles seaward of the limit of inland waters were awarded to the coastal state. The resolution of the issue in the United States and Australia is a sensible one providing a measure of ownership in each level of government, allowing the coastal province to administer and control the sea adjacent to the coast but reserving the outlying sea to the central government to explore and exploit on behalf of the entire nation.

But Newfoundland does not seek a mere three miles; it lays claim to the entire continental shelf, "an area of some 700,000 square miles,

⁸⁸Statement by the Commonwealth Attorney-General, Senator the Hon. Peter Durack .C., "Offshore Powers a Milestone," in *Offshore constitutional settlement, selected statements and documents, 1978-79* (Australian Government Publishing Services, Canberra, 1980).

⁸⁹*Offshore Constitutional Settlement, A Milestone in Co-Operative Federalism* (Australian Government Publishing Service, Canberra, 1980).

⁹⁰*Ibid.*, at 6-7.

⁹¹Passed on May 23, 1953, 43 U.S.C. 1301-1315.

nearly five times the entire land mass of the Province."⁹² In the situation off Newfoundland this area extends up to 600 miles in some places.⁹³

Newfoundland's claim is incongruous with nationhood. The incongruity is made clearer when one observes the enormity of the concessions to be made in favor of coastal states by the proposed Convention on the Law of the Sea arising out of the Third Conference on the Law of the Sea.⁹⁴ This convention will fix the breadth of the territorial sea at 12 miles.⁹⁵ It will also establish a region of a breadth of 200 miles, the exclusive economic zone, in which sovereign rights are accorded the coastal state for the purpose of exploring and exploiting the natural resources of the zone. Moreover, jurisdiction will be accorded the coastal state in the exclusive economic zone over artificial islands, marine scientific research and the protection and preservation of the marine environment.⁹⁶ Additionally, the coastal state exercises, in the continental shelf, sovereign rights over natural resources.⁹⁷ For the purposes of the convention, the continental shelf extends a distance of at least 200 miles but not more than 350 miles, or 100 nautical miles from the 2500-metre isobath, unless there are submarine elevations that are natural components of the continental margin.⁹⁸ It is, from this writer's perspective, unimaginable that the country can survive with coastal provinces exercising control, albeit shared, over these vast areas of the ocean.

Also, in the event of an eastern coastal province acquiring ownership over the resources in the territorial sea or the broader continental shelf, Ottawa would be confronted with an intolerable situation on the west coast. There could be no justification in denying ownership to one province and according it to another.

⁹²This Statistic is Newfoundland's; see: *Heritage of the Sea . . . our case on offshore mineral rights* (Government of Newfoundland, undated). It should also be noted that throughout the discussion we have referred to "the continental shelf" whereas the more technically correct term is "the continental margin." The term "continental shelf" is referred to in most of the literature and judicial pronouncements on the subject. It is clear, however, that in international law the term "continental shelf" comprises the entire "continental margin." The 1958 Geneva Convention on the continental shelf does not fix an outer limit to the shelf. The proposed Convention on the law of the sea defines "continental shelf" as being the prolongation of a state's "land territory to the outer edge of the continental margin." Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/Conf. 62/WP, 10 Rev. 3, August 27, 1980, art. 76.

⁹³*The future of the oceans* (Government of Canada, 1975), at 10.

⁹⁴Draft Convention of the Law of the Sea (Informal Text), *Supra*, footnote 93.

⁹⁵*Ibid.*, Article 3.

⁹⁶*Ibid.*, Article 55.

⁹⁷*Ibid.*, Article 77.

⁹⁸*Ibid.*, Article 76.

In both the United States and Australia the resolution of the coastal state offshore question was attained after a determination of legal rights.⁹⁹ Assuming Ottawa succeeds in the Supreme Court, perhaps an agreement can be reached. Evidence of Ottawa's conciliatory attitude was demonstrated following the *B.C. Offshore Reference*. Notwithstanding the decision, the Prime Minister in a statement to the House of Commons on December 2, 1978 stated that the federal government intended to proceed by negotiation.¹⁰⁰ On the sharing of revenues the Prime Minister stated that the federal government is open to suggestions, and, until agreement, the provincial share would be held in escrow.¹⁰¹ In a later speech in the House of Commons the Prime Minister indicated that one-half of the revenues could be placed in a national pool to be distributed by the provinces as agreed by them.¹⁰²

In summary then, what is required in the offshore dispute is an agreement that provides a measure of ownership and consequent control between the coastal provinces and Ottawa. Given the tough stance being taken by Newfoundland, it is unlikely that any agreement can be struck until after a determination of the legal issue. If that determination is in Canada's favor it could then seek an agreement along the lines struck in the United States and Australia or an agreement based on a sharing of revenues. If Canada does not succeed then it would be imperative to place British Columbia in the same position as the other provinces and it would then become all the more important that Canada have effective jurisdictional control over the area. Failing effective jurisdictional control, the country will be further weakened and fragmented with the coastal provinces exercising ownership and control over vast areas of the ocean for provincial purposes without regard for the paramount interest of the country.

If the federal government were to vest proprietary rights and title in the seabed of the territorial sea to a breadth of three miles in the provinces, a degree of decentralization of power would be accomplished that otherwise would be vested totally in the central government. Another area where there is room for decentralization is in the institutions of Canada. A greater provincial role in these institutions could be the way out of the impasse over the struggle between Ottawa and the provinces over legislative jurisdiction. We now turn to this issue.

⁹⁹In the United States in: *United States v. California* (1947), 332 U.S. 19.; *United States v. Louisiana* (1950), 339 U.S. 699; *United States v. Texas* (1950), 339 U.S. 707. In Australia in: *New South Wales and Others v. Commonwealth* (1975), 8 A.L.R. 1 (High Ct.).

¹⁰⁰As reproduced in Lewis and Thompson, *Canadian Oil and Gas*, Vol. 1, 29B, Part 1, *Supra*, footnote 6.

¹⁰¹*Ibid.*

¹⁰²*Ibid.*, statement of March 4, 1969.

An Alternative: Institutional Change

As we have seen, federal assertion of power in the oil and gas field strikes at the heart of the west's grievances with Ottawa and stands in the way of Newfoundland's vision of its future. However, in view of the pervasive effects of this industry on all aspects of Canadian life, in addition to the enormity of the area of the continental shelf and the need for a coordinated developmental policy, there can be no substitute for a strong federal presence in this industry. Further, this writer shares the view that Canada is one of the most decentralized federations in the world.¹⁰³ To further decentralize the country, in the name of unity, by the devolution to the provinces of more legislative power in the resource sector would lead to the disunity of the country. In addition, if ownership rights over the entire continental shelf are vested in the provinces, the degree of decentralization becomes even more acute. Yet one is left with the observation that "most close observers of Canadian federalism would agree with the Task Force on Canadian Unity that a more decentralized federation is inevitable."¹⁰⁴

But decentralization does not have to come at the expense of federal power and ownership rights. Canada, by according to the provinces greater input into federal decision-making, can have greater decentralization without denuding the federal government of legislative power and ownership rights. Interestingly enough this is the view taken by *Alternatives*,¹⁰⁵ in its paper prepared for the Canada West Foundation. Its authors argue that central government institutions and structures require change rather than a reordering of the division of powers.¹⁰⁶ As far as the division of powers is concerned: "Canada strikes a fair balance between regional variability and flexibility on the one hand, and national stabilization and flexibility on the other."¹⁰⁷ And again, "in terms of the actual division of powers and functions, Canada is possibly one of the world's best examples of a functioning federal system."¹⁰⁸ The authors reach this conclusion fully cognizant of the energy crisis and the issue of natural resources.¹⁰⁹

¹⁰³Forsey, "The 'Third Option'" (1979), 57 *Can. Bar Rev.* 472, at 485; Weiler, "Confederation Discontents and Constitutional Reform: The Case of the Second Chamber" (1979), 29 *U. Toronto L.J.* 253, at 258.

¹⁰⁴Dupre and Weiler, "Reflections of the Task Force on Canadian Unity" (1979), 57 *Can. Bar Rev.* 446, at 466.

¹⁰⁵Elton, Engelman and McCormick, *Alternatives: Towards the Development of an Effective Federal System for Canada, A Revision of a Discussion Paper Prepared for the Canadian West Foundation* (1978).

¹⁰⁶The central government institutions dealt with in *Alternatives* are the Upper House and the Supreme Court.

¹⁰⁷*Supra*, footnote 165, at 8.

¹⁰⁸*Ibid.*, at 11. The authors do argue, however, for areas of greater concurrency which, they state, would merely recognize reality. They also make a case for Provincial indirect taxation and the repeal of the federal disallowance power.

¹⁰⁹*Ibid.*, at 3.

Institutional change has also been proposed by the Task Force on Canadian Unity¹¹⁰ and the Canadian Bar Association's Committee on the Constitution.¹¹¹ Without engaging in detail, both of these reports support the abolition of the present Senate to be replaced by an Upper House whose members would represent the provinces, thus ensuring a provincial voice in federal decision making irrespective of the make up of the House of Commons. Also, both would have provincial involvement in the selection of members of the Supreme Court in order to remove the perceived federal bias of Judges appointed by the federal government without provincial involvement. The Task Force also proposes a modification of the present mode of election to the House of Commons by introducing an element of proportionality to complement the present simple-majority representation. This method of election would ensure that all provinces would have a degree of representation in the federal governing party.¹¹²

The failure of the September 1980 First Ministers' Conference in achieving agreement is evidence that the trade-off of institutional change for federal power over resources is not acceptable to the provinces. However, given a federal assertion of power such as the October 1980 budget and the national energy program, and given a Supreme Court that is upholding federal power over the oil and gas industry, the provinces may well opt for this measure of input and control rather than the route of separation.

While institutional change may provide the basis for a reluctant compromise with the resource producing provinces, other issues are involved in the country's commitment to Quebec for constitutional change.¹¹³ This is the subject presently being addressed by the Trudeau government in its proposed resolution to amend the Constitution by providing for patriation with an amending formula, a charter of rights and the entrenchment of the principle of equalization. However, as

¹¹⁰The Task Force on Canadian Unity, *A Future Together: Observations and Recommendation*, *Supra*, footnote 39.

¹¹¹Canadian Bar Association Committee of the Constitution, *Towards a New Canada*, (Canadian Bar Foundation, 1978).

¹¹²For a critique of the Task Force Report, see: Dupre and Weiler, "A sense of Proportion and a Sense of Priorities," *Supra*, footnote 104. Messrs. Dupre and Weiler do, however, support a system of proportional representation.

¹¹³This commitment was made by Canadians during the Quebec Referendum and has been summed up by the Prime Minister as follows: This past spring, when Quebecers were urged by their provincial government to separate from Canada, people in all parts of the country confirmed the bargain, the social contract, which made Confederation possible: the promise that all can share fully in Canada's heritage.

The Canadian Government's commitment was clear. So was the commitment of all national party leaders and of each of the Premiers. Hundreds of thousands of individual Canadians signed petitions; schools, churches, and city councils declared themselves.

Statement by The Prime Minister on the Canadian Constitution Ottawa, October 2, 1980, at 6-7.

inviting as the issues presented by the present debate in this area might be, they are clearly outside the scope of this paper.

CONCLUSION

Canada is at a crossroads in the field of energy regulation. Starkly put, the nation is on the horns of a dilemma as to which course to take in the future development of and control over oil and gas resources. The choices to be made are not easy ones but ones which must nevertheless be made. The easy solution to the nation's problems in this area is to strike a course somewhere between the two extremes through the process of bargaining and compromise. However, because of the seemingly intransigent positions adopted by the combatants, it seems unlikely that a negotiated solution will be found. At issue is the balance of power between Ottawa and the provinces. There can be no question but that the increase in economic rents available from the oil and gas sector has vaulted the dispute into center stage in the constitutional wrangling between Ottawa and the provinces.

As we have seen, the current dispute turns essentially on the sharing of revenue. In this regard I have argued that the resource producing provinces have benefitted inordinately at the expense of Ottawa. Ottawa must have a greater share of the rents from this resource in order to fulfill its mandate to all Canadians. The inability of the parties to agree has resulted in necessary but discordant litigation. Ultimately, the Supreme Court is called upon to settle differences; whatever the result in the ensuing litigation, the political balance of power is affected. But when the disputants are unable to resolve their differences, there is no other recourse than adjudication by an "independent" tribunal.

On the legal front, we see a centralist Supreme Court maintaining federal power. Unfortunately, in the process, the Supreme Court may have descended into the political arena. While the Court can be criticized for playing an activist role in the resolution of disputes between the provinces and Ottawa, I am of the view that the decisions rendered by the Court will be seen, in the long run, as a contribution to the maintenance of the integrity of the country. The provincial demands are admittedly, at least in the case of Alberta and Newfoundland, aimed at altering the nature of Canadian Federalism by creating provinces with superwealth and all the power that wealth commands. The aggrandizement of provincial wealth and power is to be achieved by denying that wealth and power to Ottawa. This can only have a crippling effect on Ottawa's ability to manage the country.

While the specter of western separation has been raised, one cannot ignore the countervailing argument that the accumulation of wealth and power in the hands of one province, or in more than one province, could

undermine confederation. Premier William Davis, in referring to Alberta's loans to other provinces, has stated that there is "something a little out of whack" when one province lends money to other provinces. "You don't see that anywhere else in the world."¹¹⁴ The *Globe & Mail* reports that "some Queen's Park officials believe that in making the loans Alberta has to some extent adopted the role of central banker, a function that is properly the preserve of the federal government"¹¹⁵.

This paper has suggested a more balanced approach to oil and gas development which would allow Ottawa to raise needed revenues in order to maintain the national programs necessary to ensure a basic modicum of living standards throughout the country, and which would allow the central government to develop an overall consistent energy program, rather than the haphazard and uncoordinated approach of provincial development consistent only with provincial concerns and aspirations.

In the event that the resource producing provinces fail to voluntarily accord this measure of power to the central government, then Ottawa must assert itself in a unilateral fashion for the good of the country. There is, of course, no question that a negotiated settlement is far better than the utilization of the arsenal available to Ottawa. But when there is an impasse in an area that is so vitally fundamental to the country as a whole, it is time to pull out the stops and get on with the job. To those who argue that this is in itself divisive, my answer is that it is time to test the will of westerners and Newfoundlanders. Have them declare themselves for a better Canada or for a nation fractured not only geographically, culturally, and linguistically, but also split between the rich and the poor, leaving the latter to the mercy of a province or provinces with which they have no connection.

¹¹⁴*Globe & Mail*, December 22, 1980, at 10.

¹¹⁵*Ibid.*