The Politics of Constitutional Change in a Federal System: Negotiating Section 92A of the Canadian Constitution Act (1982)

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This article examines the process of constitutional change surrounding the enactment of the natural-resource amendment (Section 92A) to the Canadian Constitution Act (1982). It traces the motivations behind the adoption of the clause to a combination of long-term exogenous factors originating in the OPEC-inspired price rises of the 1970s, and short-term endogenous factors particular to Canada's political and institutional arrangements, including unpredictable patterns of judicial arbitration of constitutional issues. The presence of endogenous and exogenous "shocks" to long-established constitutional modus vivendi *allows some predictions to be made about the general nature and direction of future constitutional change. However, the workings of short-term political and institutional variables make it impossible to predict the exact content of the constitutional response to such influences. This finding supports Banting and Simeon's hypothesis that constitutional change is political process subject to political forces in society and that constitutional change, like constitution-making, remains an art and not a science.*

Constitutional development is a complex and time-consuming process involving a multiplicity of political actors contesting the basic institutional and procedural structures of governance. Although the complexity of constitutional development appears at times to resist analysis, a useful distinction can be drawn between the process of constitutional formation or "constitution-making" and the process of constitutional amendment or "constitutional change."

Constitution-making has been investigated extensively,[1] but the conclusions of such studies are of limited relevance to understanding constitutional change, namely, change that does not threaten the fundamental founding principles of the constitutional order, but, instead, occurs within its confines. The politics of constitutional change has been much less rigorously investigated than the politics of constitution-making, although several notable studies have recently attempted to address this gap.[2] These studies, however,

[1]See E. McWhinney, *Constitution-Making: Principles, Processes, Practice* (Toronto: University of Toronto Press, 1981).

[2]See, for example, the essays contained in Keith Banting and Richard Simeon, eds., *The Politics of Constitutional Change in Industrial Nations: Re-designing the State* (Toronto: Univer-

are not without difficulties. For one, the distinction between constitution-making and constitutional change has not always been made; consequently, relatively minor constitutional amendments have been compared with changes that have been so major, complex, and interrelated as to be considered more properly as instances of the formation of new constitutional orders. Second, from a methodological point of view, analysts have often made comparisons and drawn conclusions without having sufficiently detailed case studies to warrant generalizations.

This is not entirely the fault of the investigators because it is only very rarely that political analysts are presented with an instance of constitutional change in which the issues are sufficiently important yet sufficiently restricted in scope that meaningful conclusions can be drawn concerning the political influences that led to and influenced the change. Moreover, investigations have often been hampered by the secretive or semi-secretive constitutional negotiations found in many regimes. Analysis of the options rejected by the government is just as significant as the analysis of options adopted when it comes to understanding the dynamics of the constitutional process in any country; yet, in many cases, this record is not available.

This is not the situation in Canada, however, and the changes made to the Canadian constitution in 1982 present an excellent opportunity to assess the politics of constitutional change in that country, and to understand the dynamics that may underlie similar processes in other countries. The 1982 changes to the Canadian constitution provide a good subject for study for a number of reasons.

First, the changes are quite recent and received an inordinate amount of publicity and analysis in Canada when they were proposed, negotiated, and adopted. Compilation of a precise chronology of events is made relatively straightforward by this well documented public record.

Second, the fact that Canada is a federal nation greatly aids the analysis. The existence of two autonomous orders of government whose interaction is required in virtually every policy field generates a written record of government discussions and negotiations in such forums as intergovernmental meetings of ministers and officials, which allows the investigator to look well beyond the record of actions actually taken by governments.[3] In a federal system, intergovernmental collaboration provides a written record of all of the policy options seriously considered by governments, including constitutional options. The study of constitutional processes in a federal nation is also rendered much more straightforward than in other regimes because the structure of a federal system dictates that the major constitutional actors will be governments. This renders the process of clarifying the relevant constitutional actors transparent.

sity of Toronto Press, 1985).

[3]Michael Howlett, "Acts of Omission and Acts of Commission: Legal-Historical Research and the Intentions of Government in a Federal State," *Canadian Journal of Political Science* 19 (1986): 363–370.

Third, the package of constitutional changes made in Canada in 1982 is advantageous for study because, although part of a larger package of amendments, each change is more or less discrete in that each tends to affect a single section of the constitution rather than producing numerous small changes to individual clauses or to a number of clauses. Thus, for example, major changes in 1982 included introduction of an entire new schedule to the constitution in the form of a Charter of Rights and Freedoms and a new section providing a series of amendment formulas for future constitutional changes. This is significant from a methodological standpoint because it makes it possible to analyze a single area of constitutional change that encapsulates the general dynamics of the overall constitutional package.

An examination of this record of constitutional negotiation should reveal the answers to a number of questions that can be posed about the process of constitutional change.[4] These are: (1) How did the amendments emerge on the constitutional agenda? (2) What options were formulated and considered in the decisionmaking process? (3) Why was the decision taken to adopt some options and to reject other options?

The change to be investigated in this article is the addition of Section 92A and its corresponding Sixth Schedule concerning federal-provincial jurisdiction over "nonrenewable natural-resources, forestry resources, and electrical energy."[5] This was a very significant change for a number of reasons. First, it involved a productive activity that is crucial to the operation of both the provincial and the national economies, generating as it does, a large percentage of Canadian production and employment and an even larger percentage of the country's foreign exchange earnings.[6] Thus, any rearrangement of constitutional jurisdictions in this area could be expected to generate a great deal of controversy and discussion. Second, despite the fact that issues relating to the overall division of legislative powers between the federal and provincial governments have historically provided a focus for major disputes in the Canadian federation, the final version of the constitution enacted in the Canada Act (1982)(U.K.) contained only this one change to the preexisting distribution of legislative authorities contained in Section 91 and Section 92 of the Constitution Act (1867).

[4]These questions treat constitutional change as a specific instance of the public policy process and, more precisely, as an instance of the policy cycle. Thus, the questions concern the general process of agenda-setting, policy formulation, decisionmaking, policy implementation, and policy evaluation that comprise this cycle. The changes being of very recent vintage, in constitutional terms, necessitates concentrating on the first three stages of the cycle.

[5]See Department of Justice, *A Consolidation of the Constitution Acts 1867-1982* (Ottawa: Ministry of Supply and Services, 1983).

[6]See F. J. Anderson, *Natural-Resources in Canada: Economic Theory and Policy* (Toronto: Methuen, 1985).

THE DIVISION OF POWERS OVER NATURAL RESOURCES: PRE- AND POST-1982

Pre-1982 Law and Practice

Prior to 1982, the division of federal and provincial powers over natural resources was determined by colonial practices, the British North America (BNA) Act (1867), and subsequent judicial and parliamentary activities.

At confederation, the BNA Act followed British colonial practice—itself with a history extending back to the Norman conquest—of according jurisdiction over land and natural resources to the government that controlled the territory in which they were located. Hence, Section 109 of the BNA Act awarded ownership over land and resources to the provincial governments, while Sections 92(5) and 92(13) awarded provincial governments exclusive rights to legislate concerning the management and sale of public lands and resources and, more generally, "property" within the province, including privately owned land and resources.[7] The only significant exception to this rule concerned the fisheries which, under Section 91(12), fell into exclusive federal jurisdiction. This "exception," of course, befitted the nature of the ocean and anadromous fisheries that transcend provincial boundaries and belie provincial attempts to delimit property relations.[8]

Significantly, however, the terms of confederation also gave the federal government the right to control resources on its lands. These were minor at the time of confederation and restricted to Indian reserves, military installations, and the like, but in 1869 they were greatly expanded by the federal government's purchase of the Hudson Bay Company lands. Although British Columbia, Prince Edward Island, and Newfoundland entered the confederation on much the same terms as the original provinces of Nova Scotia, New Brunswick, Quebec, and Ontario and consequently owned and controlled their resources, this was not the case with the three provinces carved out of the federally owned Northwest Territories. Manitoba, Saskatchewan, and Alberta did not receive jurisdiction over their land and resources until this power was conveyed to them by the federal government in 1930.[9] In addi-

[7]On the historical background to federal and provincial rights with regard to natural resources, see Gerald V. La Forest, *Natural-Resources and Public Property Under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), pp. 3–47 and 164–195.

[8]See A. Scott and P. Neher, *The Public Regulation of Commercial Fisheries in Canada* (Ottawa: Economic Council of Canada, 1981). This was also in keeping with a second tenet of the BNA Act, which was to place interprovincial matters within federal jurisdiction, as occurred, for example, with ferries and other forms of interprovincial transportation and communication. The fact that fisheries installations were private property and that some inland fisheries did not cross provincial boundaries, however, was not lost on the provinces, which quickly engaged the courts in disputes over the limits of federal power, resulting in the emergence of a complex jurisdictional situation in this area. At present, some activities are exclusively federal (ocean fisheries), some exclusively provincial (aquaculture), and some joint (recreational fisheries).

[9]This was also true of a small portion of British Columbia originally transferred to the federal government for railway construction purposes in the Terms of Confederation of that province in 1871. See Chester Martin, *"Dominion-lands" Policy* (Toronto: Ryerson, 1937). The federal

tion, the federal government, citing international treaty obligations in the area of nuclear materials, invoked its little used "declaratory power" (Section 92(10)(c)) in 1945 to assume full responsibility for the control of uranium production in the country.[10] The federal government also was the beneficiary of a 1967 Supreme Court of Canada decision, which awarded the offshore regions to it and not to the provinces. As part of the "Canada Lands," offshore resources are the sole responsibility of the federal government.[11]

Moreover, exclusive federal powers in the areas of trade and commerce and very wide-ranging powers in the area of taxation have also limited the thrust of provincial constitutional supremacy in many resource matters. Control over the natural-resource industry has always been defined in Canada in terms of the question of the rights of provincial ownership versus the federal right to regulate trade and commerce contained in Section 91(2) of the Constitution Act (1867). This has always been the case because of the high percentage of Canadian natural resources destined for interprovincial or international markets, which elude provincial property-based jurisdiction and enter into the federal domain as soon as they cross provincial boundaries.[12]

In the area of taxation, the provincial governments also have had to defer to the more extensive federal powers in this area. Although granted the exclusive right under Section 109 to levy royalties on resources in their territories, these powers relate only to the extraction stage of natural-resource production. Revenues arising at further stages of production can be appropriated by both the provincial and federal governments. At this point, however, provincial governments under the BNA Act were prohibited from levying "indirect" taxes and were restricted under Section 92(2) to levying "direct" taxes, that is, taxes paid directly to the government by the final taxpayer. The federal gevernment's taxation powers under Section 91(3) are unlimited and include both direct and indirect taxes, that is, taxes originally paid by vendors and passed on to final taxpayers in the form of price increases.[13]

government still retains jurisdiction over the land and resources of the remaining Yukon and Northwest Territories, although it has begun to transfer some responsibilities in these areas to the two territorial governments.

[10] R. M. Burns, *Conflict and Its Resolution in the Administration of Mineral Resources in Canada* (Kingston: Center for Resource Studies, 1976), p. 21.

[11] See Peter Russell, *Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1987). This federal power was subsequently upheld in two disputes with the governments of Newfoundland and British Columbia. In the course of these disputes, the British Columbia government did retain rights to resources located in "inshore waters," defined by the Supreme Court to include the Straits of Georgia between Vancouver Island and the B.C. mainland.

[12] On the history of judicial interpretation of the trade and commerce and proprietary rights issue, see S. I. Bushnell, "Constitutional Law—Proprietary Rights and the Control of Natural Resources," *Canadian Bar Review* 58 (1980): 157–169.

[13] The distinction in provincial and federal taxation powers originates in the writings of John Stuart Mill and was incorporated into the language of the BNA Act by the fathers of confederation. Mill drew a distinction between taxes—such as income and corporate taxes—paid "directly" by the taxpayer to the recipient government and "indirect" taxes—such as customs and excise taxes—which are paid by producers and importers to governments and passed on to consumers, the ultimate taxpayer, in the form of higher prices. The distinction is clear in theory but difficult to apply in practice and has been the source of much federal-provincial contestation. See G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (Toronto: Canadian Tax Foundation, 1981).

Within this constitutional framework, the federal and provincial governments gradually developed a court-regulated *modus vivendi* in which the hallmark of natural-resource decisionmaking was provincially led intergovernmental collaboration. This occurred first in bilateral dealings with the federal government and, after World War II, in multilateral forums, such as the Canadian Council of Resource and Environmental Ministers (CCREM) and the Canadian Council of Forest Ministers (CCFM).[14] How this *modus vivendi* was altered by the 1982 constitutional amendment is discussed below.

Post-1982 Law and Practice

The six clauses of Section 92A of the Constitution Act (1982) address the three main issues that have shaped Canadian natural-resource constitutional politics since confederation: (1) federal-provincial jurisdiction and ownership, (2) control over extra-provincial trade and commerce, and (3) the division of taxation authority. First, Section 92A(1) provides an exclusive provincial right to legislate in the areas of nonrenewable natural-resource exploration, development, conservation, and management, including the generation and production of electrical energy. Section 92A(5) defines natural resources as those described in the Sixth Schedule to the act, while Section 92A(6) assures that the new language will not be interpreted in such a manner as to restrict preexisting provincial legislative rights. Second, Section 92A(2) extends provincial legislative jurisdiction to include interprovincial exports, subject to the caveat that "such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada." Provincial legislative authority is further limited by the establishment of federal paramountcy in Section 92A(3).[15] Third, Section 92A(4) establishes a provincial right to tax nonrenewable natural-resources, and electrical energy and facilities, by any mode of taxation, whether or not these goods are exported from the province. This right, however, is subject to the caveat that "such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province."

In sum, the provisions of Section 92A reaffirm previously existing provincial powers, allow provinces to levy indirect taxes in regard to natural-resource revenues, and provide provincial legislatures with control over interprovincial resource and energy exports, subject to several non-discriminatory caveats

[14]The necessity for such collaboration is discussed in A. R. Thompson and H. R. Eddy, "Jurisdictional Problems in Natural Resource Management in Canada," *Essays on Aspects of Resource Policy*, eds. W. D. Bennett, A. R. Chambers et al. (Ottawa: Science Council of Canada, 1973). An example of the political dynamics at work in this process is Michael Howlett, "The 1987 National Forest Sector Strategy and the Search for a Federal Role in Canadian Forest Policy," *Canadian Public Administration* 32 (1989): 545-564.

[15]On the doctrine of paramountcy in Canadian constitutional interpretation, see W. R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada," *McGill Law Journal* 9 (1962-1963): 185-199 and Eric Colvin, "Legal Theory and the Paramountcy Rule," *McGill Law Journal* 25 (1979-1980): 82-98.

and federal paramountcy. In the case of resource regulation, the caveats contained in Section 92A(2) provide that a province may discriminate between products destined for intraprovincial markets and those destined for interprovincial trade, but require each province to treat all extra-provincial Canadian markets equally. The caveats contained in Section 92A(4) prohibit tax discrimination between intraprovincial and interprovincial exports. The most significant difference between the two sections, however, concerns provincial control over international exports. Provincial regulatory control over natural-resource trade is explicitly limited by Section 92A(2) to that concerning the "export from the province *to another part of Canada.*" The regulation of international trade hence remains an area of exclusive federal jurisdiction under Section 91(2), "The Regulation of Trade and Commerce." Provincial taxation requirements, however, are not limited to those affecting exports to domestic markets. Instead, Section 92A(4) refers more generally to "whether or not such production is exported in whole or in part from the province."

Thus, Section 92A represents a significant rearrangement of the pre-1982 federal-provincial *modus vivendi*. It not only reaffirms provincial control over many important aspects of natural-resource management, but, subject to several caveats protecting the national interest, gives the provincial governments additional powers of interprovincial regulation and resource taxation which had previously formed a part of established federal jurisdiction. The first question that must be asked about this process of constitutional change, then, is why such a change should have occurred in 1982. How did this issue arrive on the constitutional agenda in the form and shape that it did?

CONSTITUTIONAL AGENDA-SETTING: THE FEDERAL PROVINCIAL MODUS VIVENDI DERAILED, 1973-1979

OPEC and the Question of Windfall Rents

Mineral tax, and oil and gas revenue issues arose as a serious constitutional issue in the late 1970s as a result of several developments linked to changes in federal tax policies and to the increase in oil and gas prices brought about by the OPEC oil embargo of 1973. Prior to 1966, both the federal and provincial governments had supported short-term exploitation of natural resources, especially of mineral resources, through the provision of special depletion allowances and other tax incentives provided the resource industry. In the early 1960s, this favorable tax treatment had come under investigation by the Royal Commission on Taxation, which treated traditional arguments advocating special privileges for the industry with a great deal of skepticism.[16] Among the recommendations of the Carter Commission

[16]On the Carter Commission, see R. M. Burns, *Conflict and Its Resolution in the Administration of Mineral Resources in Canada* (Kingston: Centre for Resource Studies, 1976), pp. 23-41 and Wendy MacDonald, *Constitutional Change and the Mining Industry in Canada* (Kingston: Centre for Resource Studies, 1980), pp. 19-34.

was that provincial mineral taxes no longer be deductible from federal taxes. Although the commission's recommendations were successfully attacked by the mining industry,[17] by 1972 the federal government had introduced legislation providing for the gradual withdrawal of many tax practices favorable to the resource companies, including the deductibility of provincial taxes. The result of this legislation was that the provinces placed an increasing emphasis on royalty systems rather than on taxation as a means of recouping natural-resource revenues.[18]

While these moves by the federal government brought the question of provincial taxation to the fore, the situation was exacerbated by the rapid increase in oil and gas prices brought about by supply limits imposed by the Organization of Petroleum Exporting Countries (OPEC) in October 1973. Provincial governments moved quickly to capture windfall profits accruing to the oil industry through the imposition of royalty surcharges covering up to 100 percent of the difference between the basic well-head price set by legislation and the market price received by the producer.[19] However, by November 1974, the federal government, recognizing the shift to royalty-based systems, moved to disallow the deductibility of both provincial taxes and provincial royalties.[20]

These moves on the part of the federal government caused considerable concern among provincial governments which, following the lead of Manitoba, had based their development schemes on the revenues accruing from natural-resource exploitation.[21]

The Supreme Court and the Attenuation of Provincial Jurisdiction

The issue of control over natural-resource development, then, was clearly tied to provincial concerns about the 1962–1974 changes in natural-resource taxation. The reason it actually emerged on the constitutional agenda in the late 1970s, however, was due to a 1977 Supreme Court decision.

The balance of federal and provincial jurisdiction was finally upset by the November 1977 decision of the Supreme Court of Canada in the CIGOL case.[22] The essence of that decision was to declare *ultra vires* a Saskatchewan government royalty scheme established to collect windfall energy profits and future natural-resource rents. The Court ruled against the scheme

[17]See M. W. Bucovetsky, "The Mining Industry and the Great Tax Reform Debate," *Pressure Group Behavior in Canadian Politics,* ed. A. P. Pross (Toronto: McGraw-Hill Ryerson, 1975), pp. 89–114.

[18]Burns, *Conflict and Its Resolution in the Administration of Mineral Resources*, pp. 35–39.

[19]See Robert D. Cairns, "Extractive Resource Taxation in Canada," *Tax Policy Options in the 1980's*, eds. Wayne D. Thirsk and John Whalley (Toronto: Canadian Tax Foundation, 1982), pp. 255–288.

[20]MacDonald, *Constitutional Change and the Mining Industry in Canada*, pp. 26–30.

[21]See E. Kierans, *Report on Natural Resources Policy in Manitoba* (Winnipeg: Government of Mannitoba, 1973) and John Richards and Larry Pratt, *Prairie Capitalism: Power and Influence in the New West* (Toronto: McClelland and Stewart, 1979).

[22]*Canadian Industrial Gas and Oil Ltd.* v. *Government of Saskatchewan,* 80 D.L.R.3d 449 (S.C.C.) (1977).

on the ground that it constituted an export tax and thus represented an attempt by the province to regulate the export price of oil, hence transgressing the exclusive federal right to legislate for interprovincial and international trade. Although the ruling has been challenged on economic grounds,[23] the impact of the decision was to put into doubt the validity of all existing and future provincial tax or royalty schemes in the resource sector. This was due to the fact that most resources are exported from their province of origin. As such, according to the Court's reasoning, any provincial tax or royalty could be interpreted as affecting export prices and, therefore, interfering with the federal trade and commerce power.[24]

The CIGOL ruling sparked a storm of protest from provincial governments. Saskatchewan Premier Allan Blakeney, for example, wrote to Prime Minister Pierre Trudeau, stating:

> It seems clear that the implications of the Court's decision for our federal system are profound. The grounds for the majority decision—the manner in which the "direct taxation" test was applied and the interpretation given to the federal trade and commerce power—seem to put in serious jeopardy the capacity of *all* provinces to raise revenues from resources. Such a result would mark a fundamental change in Canadian jurisprudence, would affect the fiscal capacity of a number of provinces, and would constitute a grave risk to our federal system itself.[25]

In the minds of the provincial governments, by equating provincial royalty schemes previously interpreted as falling under Section 109 with export taxes, the CIGOL decision created a precedent for extending exclusive federal control to virtually any aspect of the regulation of provincial commodities destined for export. This upset the precarious balance of provincial proprietary rights and federal trade and commerce powers in favor of the federal government. It forced the provinces to reassert their rights to regulate and tax natural-resource industries.[26]

The situation in 1977, which had shifted in favor of federal control over important aspects of natural-resource development, was compounded in 1978 by the *Central Canada Potash* decision,[27] which ruled *ultra vires* another Saskatchewan government attempt to regulate natural-resource production. In this case, the Supreme Court ruled that a provincial scheme to pro-ration

[23]See Arne Paus-Jenssen, "Resource Taxation and the Supreme Court of Canada: The Cigol Case," *Canadian Public Policy* 5 (1979): 45–58.

[24]John D. Whyte, *The Constitution and Natural Resource Revenues* (Kingston: Institute of Intergovernmental Relations, 1982), p. 9.

[25]November 1977 letter from Allan Blakeney to Pierre Trudeau, contained in Government of Saskatchewan, *Resources: The Saskatchewan Position* (Prepared for the First Ministers' Conference on the Constitution, Ottawa, 8–12 September 1980).

[26]cf. William D. Moull, "Natural Resources: Provincial Proprietary Rights, The Supreme Court of Canada, and the Resource Amendment to the Constitution," *Alberta Law Review* 21 (1983): 472–487.

[27]*Central Canada Potash Co. Ltd. v. Government of Saskatchewan,* 78 D.L.R.3d 609 (S.C.C.) (1978).

potash in order to protect against disruptions caused by overproduction constituted an indirect tax and hence fell within an area of exclusive federal taxing authority.[28]

Like the CIGOL ruling, the *Central Canada Potash* decision also was interpreted by the provincial premiers as threatening their ability to pass any legislation in this area of traditional provincial jurisdiction. Given these decisions, it was clear that new constitutional language would be required either to create a new federal-provincial *modus vivendi* or simply to retain the old one.

CONSTITUTIONAL POLICY OPTIONS

The 1978 Bill C-60 Proposals and Their Predecessors

The federal constitutional initiative that eventually resulted in the enactment of the Constitution Act (1982) was contained in Bill C-60, which was placed before the House of Commons in June 1978. No mention was made of natural-resource issues or of a redistribution of federal and provincial powers.[29] This was largely due to the constitutional strategy adopted by the federal government, which was to deal with constitutional negotiations in two phases: the first involving federal institutions and the second involving the division of powers.[30] Bill C-60 itself was based on a 1976 draft proposal prepared by the federal government and circulated by the prime minister to the provincial premiers. The 1976 draft followed the same strategy of separating federal institutional reforms and questions arising from the division of powers, and contained no reference to natural-resource issues.[31]

Nevertheless, the matter had been of concern to the provincial premiers since at least 1974.[32] That year, the premiers had reaffirmed their respon-

[28]See S. I. Bushnell, "The Control of Natural Resources Through the Trade and Commerce Power and Proprietary Rights," *Canadian Public Policy* 6 (1980): 313-324.

[29]See Canada, *The Constitutional Amendment Bill: Text and Explanatory Notes* (Ottawa: June 1978).

[30]Canada, *Statement by the Honorable Marc Lalonde, Minister of State for Federal Provincial Relations to the Joint Parliamentary Committee on the Constitution* (Ottawa: 15 August 1978).

[31]See Roy Romanow, John Whyte, and Howard Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984), pp. 1-2.

[32]This emphasis on natural-resource issues in 1974-1982 differed from the previous round of constitutional negotiations which began in 1967 and culminated in the Victoria Charter of 1971. Although the question of the appropriate federal-provincial division of powers had been extensively discussed, natural-resource control had not been among the items raised by either order of government. See Secretariat of the Constitutional Conference, *A Briefing Paper on Discussions within the Continuing Committee of Officials* (Ottawa: 12 December 1968) and Canadian Intergovernmental Conference Secretariat, *The Constitutional Review 1968-1971: Secretary's Report* (Ottawa: Information Canada, 1974). The same cannot be said, however, for the issue of provincial powers of taxation. Both the provinces and the federal government agreed that provincial governments should be given access to indirect taxation. In 1972, the Special Joint Committee on the Constitution concluded that "Provincial Legislatures should have the right to impose indirect taxes provided that they do not impede interprovincial or international trade and do not fall on persons resident in other provinces." See Special Joint Com-

sibility for mining taxes and for oil and gas royalties derived from provincial ownership of resources. In 1976, the premiers had again reviewed the Constitution and unanimously agreed that an essential ingredient of constitutional change should be the strengthening of jurisdiction of provincial governments over taxation in the areas of primary production from lands, mines, minerals, and forests. In 1977, the premiers had reaffirmed the primacy of provincial control over natural resources, and, at their 1978 Regina Conference, the ten provinces had unanimously agreed that constitutional changes should strengthen and confirm provincial powers over natural resources.[33]

These issues were formally placed on the federal-provincial agenda in October 1978, when the Alberta government proposed to a meeting of first ministers on the constitution that "the existing sections in the British North America Act protecting ownership and control of natural resources be strengthened" and that "the Constitution be clarified in order to reaffirm the provinces' authority to tax and to collect royalties from the sale and management of their natural resources."[34]

The 1979 "Best Efforts" Draft

Following the introduction of Bill C-60, extensive federal-provincial consultations and meetings ensued on the entire constitutional agenda. During this period, a so-called "Best Efforts" Draft proposal on the Constitution was worked out by federal and provincial officials. Negotiated during the fall of 1978, this draft was presented to the first ministers meeting on the constitution in Ottawa on 5-6 February 1979. This draft contained a clause on natural resources that closely approximated the final wording of Section 92A, although with several significant differences.

The "Best Efforts" Draft proposed adding Section 92(2) to 92(7) to the existing Section 92. Like the language actually adopted in Section 92A, the new Sections 92(2) to 92(7) covered the three key areas of resource regulation, resource taxation, and the preservation of existing provincial powers.

Although several of its clauses are very similar to the language finally adopted in 1982, this only makes it all the more significant that the actual constitutional package introduced into Parliament in October 1980 contained no mention of natural resources.[35] The reasons for this absence are outlined below. Before turning to this discussion, however, one further per-

mittee of the Senate and the House of Commons on the Constitution of Canada, *Final Report* (Ottawa: Information Canada, 1972), p. 98.

[33]MacDonald, *Constitutional Change and the Mining Industry in Canada,* pp. 35-46, Canadian Intergovernmental Conference Secretariat, *Proposals on the Constitution 1871-1978* (Ottawa: Canadian Intergovernmental Conference Secretariat, 1978), pp. 229-287, and Rowland J. Harrison, "Natural Resources and the Constitution: Some Recent Developments and Their Implications for the Future Regulation of the Resource Industries," *Alberta Law Review* 18 (1980): 1-25.

[34]Alberta, *Harmony in Diversity: A New Federalism for Canada* (Edmonton: October 1978), pp. 6-7.

[35]See Government of Canada, *The Canadian Constitution 1980: Proposed Resolution Repatriating the Constitution of Canada* (Ottawa: Publications Canada, 2 October 1980).

mutation of Section 92A should be examined: this being the reintroduction of the natural-resource language into the constitutional package at the special joint committee stage in the form of an amendment proposed by federal New Democratic Party (NDP) leader Edward Broadbent.

The 1981 Broadbent Amendment

The amendment brought to the special joint committee in February 1981 was based on the 1979 "Best Efforts" language. Both the "Best Efforts" Draft Section 92(5) concerning resource taxation and the Section 92(7) clause concerning the preservation of existing provincial powers, for example, are identical to the Broadbent Sections 92A(4) and 92A(6), although they contained several important differences from the earlier proposal.

Differences can be found between the Broadbent proposal and the "Best Efforts" Draft in each of the remaining sections. The Broadbent proposal clarified the wording of the "Best Efforts" Section 92(3), and added "supplies" to its prohibition of price discrimination in provincial exports to other parts of Canada. The proposal also made two modifications to the lists of powers and responsibilities resting with the federal and provincial governments. Broadbent's proposed Sixth Schedule added to the "Best Efforts" Section 92(6) definition of primary production the terms "refining ungraded heavy crude oil, refining gases or liquids derived from coal." Further, it deleted references in the "Best Efforts" Section 92(2)(b) and Section 92(2)(c) to provincial control of the "exploitation" and "extraction" of nonrenewable natural and forestry resources, and of sites and facilities for generating electrical energy. Under the Broadbent proposal, the provinces were to be restricted to regulation regarding the "development, conservation, and management" of those resources.

These changes remain minor, however, in comparison to the two different approaches favored by the proposals regarding legislative paramountcy. The Broadbent proposal created an area of concurrent federal and provincial jurisdiction over interprovincial exports by specifically applying the doctrine of federal paramountcy in Section 92A(4) to the provincial legislative powers outlined in Section 92A(2). Broadbent's Section 92A(4) states that:

> Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

The "Best Efforts" Draft Section 92(4), however, just as clearly opted in favor of provincial paramountcy, and provided for only two specific exceptions to that rule.

> Any law enacted by the legislature of a province pursuant to the authority conferred by subsection (3) prevails over a law enacted by Parliament in relation to the regulation of trade and commerce except to the extent that the law so

enacted by Parliament,

a) in the case of a law in relation to the regulation of trade and commerce within Canada, is necessary to serve a compelling national interest that is not merely an aggregate of local interests; or

b) is a law in relation to the regulation of international trade and commerce.

The above provisions reflected a significant change in emphasis between the 1979 "Best Efforts" Draft and the 1981 Broadbent amendment and subsequent Section 92A. While the 1981 legislation dealt with only the three main issues of resource regulation, resource revenues, and preservation of provincial powers, the 1979 draft proposals were equally concerned with a fourth issue, that of specifying the relationship expected to exist between federal and provincial legislation in any new constitutional agreement.

The 1981 Special Joint Committee Proposals

The language contained in Section 92A of the Constitution Act was adopted by Parliament on 2 December 1981.[36] It contained no changes from the language Parliament had adopted on 22–23 April 1981 on the recommendation of the Special Joint Committee on the Constitution, which met to consider the 2 October 1980 government constitutional resolution.[37] Although the bulk of the language of Section 92A was contained in the New Democratic Party amendment introduced in the committee, the Liberal majority in the committee made several significant changes to the amendment before approving it.

In committee, Progressive Conservative members proposed amendments to Section 92A that would have added offshore resources to those placed under provincial jurisdiction and would have inserted a subclause limiting provincial powers by specifying that the new section would not "derogate from the powers of the Parliament of Canada relating to fisheries, navigation, and shipping."[38] Although the offshore amendment was rejected by the government on the basis that the question had been referred to the courts, the defeated fisheries amendment and a second amendment moved by government members were significant in that both provide insight into the federal government's interpretation of the intent and implications of the new section.

The successful government amendment concerned provincial resource-regulation powers contained in Section 92A(1) and Section 92A(2). In the case of the former, the Broadbent proposal had specified that provincial

[36]Canada, *The Canadian Constitution 1981: A Resolution Adopted by the Parliament of Canada* (Ottawa: December 1981).

[37]House of Commons, *Debates*, 22 April 1981, pp. 9398-9420 and 23 April 1981, pp. 9437-9474. For the actual text adopted see House of Commons, *Order Paper and Notices*, 21 April 1981.

[38]Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, Issue no. 54, 5 February 1981.

regulation would remain in effect "whether or not such production is exported in whole or in part from the province." These words were subsequently deleted, and the words "to another part of Canada" were added to the first line of Section 92A(2) so as to read: "In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources." The effect of these two changes was to eliminate any reference to provincial regulation of international trade while retaining provincial control over nondiscriminatory interprovincial trade, subject to federal paramountcy.

The Progressive Conservative fisheries amendment was rejected because it might have had the effect of limiting federal powers in other, nonresource areas. The federal government was confident that in the event of a conflict between the existing exclusive powers of Parliament under Section 91 and the exclusive powers of the provincial legislatures in Section 92, the federal law would prevail. However, as Assistant Deputy Minister of Justice Barry Strayer pointed out to the committee regarding the proposed nonderogation clause:

> If one started to put in a special rule that only certain things in Section 91 should enjoy that paramountcy, it would . . . create the possibility of a court saying, "Well since you have made a special rule for fisheries and navigation, the implication must be that other things, such as the criminal law and laws with respect to Indians are not to be paramount over laws passed under proposed Section 91A(1)."[39]

On both the successful and defeated amendments, then, the actions of the committee tended to limit provincial powers. References in the original Broadbent amendment to provincial regulatory authority over international exports were eliminated, and federal paramountcy over provincial legislation was stressed.

Further Questions on the 1979–1981 Developments

Clearly, natural-resource issues that had not merited serious consideration in the 1967–1972 round of constitutional negotiations were taken up by the provincial premiers by 1974 and brought to the constitutional negotiating table by 1978. Further, the comparison presented above of Section 92A of the Constitution Act (1982) with the Broadbent 1981 Joint Committee Amendment and with the 1979 "Best Efforts" Draft natural-resource proposal has underlined several key aspects of the 1978–1982 constitutional process. This comparison revealed that by 1979 agreement had been reached on the issue of provincial access to indirect taxation of natural resources first mentioned by the premiers in 1974. It also revealed that by 1979, agreement had been reached on the preservation and conservation of existing provincial powers, which the premiers had first insisted upon in 1978. Equally

[39]Ibid., p. 76.

underlined is the fact that demands for strengthening provincial control over natural-resource regulation raised in 1976 remained controversial throughout the entire constitutional negotiation process, especially provincial control over exports from the country. The most significant element of this controversy was reflected in the abrupt shift from provincial paramountcy to limited concurrency embodied in the Broadbent Section 92A(3) revision of the "Best Efforts" Draft Section 92(4).

The comparison also, however, has raised several questions that must be answered if the political issues and concerns embodied in Section 92A are to be understood. These questions are: (1) Why was an agreement on resource taxation and a nonderogation clause possible in 1979? (2) Why was the paramountcy clause changed between 1979 and 1981? (3) Why was the agreement dropped from the federal government agenda in 1980 and reintroduced in 1981? (4) Why did the federal NDP again attempt in committee to secure provincial control over international trade in 1981? These questions all point to the shifts in federal and provincial negotiating postures, which were significant for the final outcome of the constitutional process. As the discussion below illustrates, all of these changes have their roots in short-term political interests involved in the constitutional decisionmaking process.

THE POLITICS OF CONSTITUTIONAL DECISIONMAKING: PARTISAN AND ELECTORAL INTERESTS IN THE CREATION OF SECTION 92A

The Taxation Agreement as a Response to Judicial Uncertainty

The fact that Bill C-60 did not include any reference to Section 109 made it all the more remarkable that agreement on provincial access to indirect taxation of natural resources and on the establishment of a nonderogation clause could be reached by the "Best Efforts" Draft of February 1979. That is, both issues appear as major concessions to the provinces, reversing the implications of the Supreme Court decisions, and calming provincial fears of further federal government "intrusions" into areas previously protected by judicial interpretation of provincial proprietary rights. Why was such an agreement possible?

Part of the answer was provided by Prime Minister Trudeau. In October 1978, during the Constitutional Conference called to discuss Bill C-60, Trudeau outlined federal concerns regarding natural-resource regulation and taxation. On taxation, he reconfirmed the federal government's long-standing commitment to allow the provinces access to indirect taxation. Trudeau suggested to the premiers that:

> We agree in principle to revive the proposal made in 1969 by the federal government that provincial legislatures be allowed within certain limits *to levy indirect as well as direct taxes* . . . the only conditions that I must make as Prime Minister

> of the whole federation, are that the relevant constitutional provisions be so drafted as to ensure that provincial taxation would not create impediments to interprovincial and international trade, and drafted in such a way as to substantially confine the burden of each province's taxes within its boundaries.[40]

With regard to natural-resource regulation, the prime minister proposed that:

> We agree in principle to *clarify the respective powers* of federal and provincial authorities in respect of
>
> - The control, management, and taxation of *natural resources.*
>
> - The control and regulation of *interprovincial and international trade.*
>
> The object, of course, being to ensure that both orders of government can acquit themselves of their responsibilities effectively, and that a fair share of the benefits from natural resources accrue to the people of the province where they are found, without depriving other Canadians of a reasonable share of these benefits.[41]

Thus, in the case of matters relating to indirect taxation, agreement between the federal and the provincial governments was possible because the federal government had, in fact, been prepared since at least 1969 to allow the provinces access to all modes of taxation.

In the case of provincial regulation, it is important to note that the proposals put forward by Trudeau did not suggest a redistribution of powers between the provincial and federal governments, but a clarification of the existing division of powers. This was due primarily to the fact that the federal government itself had not been prepared for the Supreme Court's ruling in *Central Canada Potash*. This was confirmed by both Saskatchewan and federal government spokesmen on later occasions. Blakeney, for example, told the February 1979 First Ministers Conference on the Constitution that "in the *Central Canada Potash* case we were pursuing a line of policy at least tacitly agreed to by the federal government."[42] As for the federal government, in 1981 federal Justice Minister Jean Chretien told the Special Joint Committee on the Constitution that:

> One of the cases that involved the Saskatchewan government as producers was an area where the federal government had no objection, and they had consulted with the federal government before moving. We said we had no objection and they moved ahead with their plans, and the legislation, and the court

[40]cf. "An Agenda for Change: Notes for Comments by the Prime Minister at the Constitutional Conference, Tuesday, October 31, 1978" in Canadian Intergovernmental Conference Secretariat, *Proposals on the Constitution 1871-1978*, p. 282.

[41]Ibid., p. 283.

[42]See Opening Statement by Allen Blakeney in Canadian Intergovernmental Conference Secretariat, *Verbatim Transcript, Federal Provincial Conference of First Ministers on the Constitution, Ottawa, February 5-6, 1979* (Ottawa: Canadian Intergovernmental Secretariat, 1979), p. 348.

ruled against them because they have no jurisdiction, even if they had our approval.[43]

Thus, agreement was possible on a nonderogation clause because governments needed to clarify the existing situation with regard to natural-resource regulation. The nonderogation clause provided an affirmation of the status quo, which also provided the provinces with a sign of the good faith of the federal government vis-à-vis its constitutional intentions.

Electoral Politics and the Provincial Paramountcy Clause

In considering the reasons behind the shift from provincial to federal paramountcy in the 1979 and 1981 proposals, it is important to note that the 1979 "Best Efforts" Draft had not provided for complete provincial paramountcy, but had restricted that paramountcy in cases involving "a compelling national interest" or the regulation of "international trade and commerce." This proposal had not represented a complete surrender of the federal government to provincial demands because it had not satisfied the aspirations of either Alberta or Saskatchewan. Rather, the provincial paramountcy clause, like the nonderogation clause, had represented an attempt on the part of the federal government to meet the concerns of the provinces stemming from provincial interpretation of the Supreme Court decisions as having enhanced the federal trade and commerce power at the expense of provincial proprietary rights.[44] What the "Best Efforts" Draft provided was concurrency in all areas of natural-resource regulation, with the exception throughout of matters relating to international trade. In all areas except international trade, provincial legislation would remain valid unless the federal government expressly occupied the field. Provincial legislation could no longer be struck down by the courts strictly because it might infringe on an unclaimed aspect of exclusive federal jurisdiction. Disallowance by the courts would require any provincial legislation to be distinctly displaced by federal legislation, thus eliminating the possibility of future decisions like *Central Canada Potash*. However, federal legislation could always override provincial legislation by using the "compelling national interest" clause, so that any semblance of actual provincial paramountcy was greatly muted. What the "Best Efforts" Section 92(4) actually created was the provincial right to legislate in any area, except international trade, which had not been occupied by the federal government.

[43]Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 5 February 1981, p. 20.

[44]cf. Romanow, Whyte, and Leeson, *Canada . . . Notwithstanding*, pp. 27-28, J. Peter Meekison and Roy J. Romanow, "Western Advocacy and Section 92A of the Constitution," *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources*, eds. J. P. Meekison, R. J. Romanow, and W. D. Moull (Montreal: Institute for Research on Public Policy, 1985), pp. 3-32, and Marsha A. Chandler, "Constitutional Change and Public Policy: The Impact of the Resource Amendment (Section 92A)," *Canadian Journal of Political Science* 19 (1986): 103-126.

By the time the constitutional negotiations resumed in June 1980, however, the federal government was unwilling to grant the provinces any semblance of concurrency, let alone provincial paramountcy. Instead, the federal government dissociated itself from the "Best Efforts" Draft and began to link any constitutional provision on natural resources to provincial agreement on new, expanded, federal powers over the economy.[45]

The resurgent centralism fostered by the federal government following its reelection and the defeat of the Quebec Referendum in May 1980 has been noted in several of its post-1980 policy initiatives.[46] On the constitutional level, resurgent centralism was apparent in the federal government's proposals on the economic union. These proposals called for the entrenchment of mobility rights for citizens, the expansion of Section 121 provisions eliminating provincial barriers to trade, and the general broadening of federal powers "so that they might encompass all matters that are necessary for economic integration."[47]

One of the most obvious manifestations of this resurgent centralism, in terms of the natural-resource provisions of the constitution, was the reassertion of broad federal paramountcy contained in the Broadbent Section 92A(3). It should be noted, however, that in the negotiations conducted in the summer of 1980, even the inclusion of this provision was considered by the federal government as a concession to the provinces. The federal position at the CCMC had originally been to withdraw any mention of paramountcy whatsoever, thus eliminating any possibility of interpreting the natural-resources section as referring to concurrent powers. It was only during the fourth week of negotiations in Ottawa that the federal government made a new offer, which resulted in the establishment of concurrency with complete federal paramountcy over interprovincial resource exports. It would no longer be necessary, as in the "Best Efforts" Draft, for the federal government to override provincial legislation specifically on the grounds of a compelling national interest. Now the mere presence of federal legislation in the field could be interpreted broadly by the courts so as to prohibit provincial legislation in that area. As in the "Best Efforts" Draft, the question of concurrency in international trade remained out of the question.[48]

[45]See Jean Chretien, *Opening Statement, Meeting of the Continuing Committee of Ministers on the Constitution, July 8-11, 1980* (Ottawa: Continuing Committee of Ministers on the Constitution, 1980) and Romanow, Whyte, and Leeson, *Canada . . . Notwithstanding*, pp. 60-105.

[46]These include the National Energy Program and the tax measures contained in the October 1980 federal budget. See G. Bruce Doern, "Spending Priorities: The Liberal View," *How Ottawa Spends Your Tax Dollars: Federal Priorities 1981*, ed. G. B. Doern (Toronto: James Lorimer, 1981), pp. 1-55.

[47]Jean Chretien, *Securing the Canadian Economic Union in the Constitution* (Ottawa: Ministry of Supply and Services, 1980), p. 29.

[48]See Federal-Provincial Relations Office and Department of Justice, *Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers Conference and Beyond* (Ottawa: 30 August 1980, Mimeo.), p. 10 and statement by Prime Minister Trudeau in Canadian Intergovernmental Conference Secretariat, *Verbatim Transcript, Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, September 8-13, 1980* (Ottawa: Canadian Intergovernmental Conference Secretariat, 1980), pp. 107-110.

Partisan Politics and the Broadbent Amendment

Post-1980 resurgent centralism on the part of the federal government also provides part of the explanation for why the natural-resource clauses were dropped from the 2 October 1980 federal constitutional bill. It is clear from the record of the September 1980 meeting of first ministers on the constitution that no agreement was reached between the federal and provincial governments on federal powers over the economic union.[49] At first glance, given the demand by the federal government throughout the summer of 1980 that these powers be linked with any resources clause, this should have provided a sufficient explanation for why the resources clause was dropped in the 2 October 1980 federal draft resolution.

This explanation is not completely satisfactory, however, as it appeared that the federal government, as late as August 1980, was committed to entrenching some sort of natural-resource clause in any constitutional bill. In July 1980, for example, while unveiling the new federal strategy of linking natural resources and the economic union, Chretien had maintained that:

> Nonetheless, I want to re-emphasize our desire to see in a new Canadian Constitution a clear and unequivocal statement of provincial ownership of resources and of provincial responsibilities for their development and management. Furthermore I want to re-state our position that the Constitution could allow producing provinces to levy indirect taxes in a non-discriminatory way.[50]

As pointed out above, the federal government had agreed to concurrency in interprovincial trade by August 1980, and, from all indications, the provinces were not completely dissatisfied with the clause as it now stood. At the September first ministers meeting, for example, Saskatchewan Premier Allen Blakeney endorsed most of the proposal, although he continued to argue that concurrency should be extended to international trade.[51] Similarly, Alberta Premier Peter Lougheed did not reject the proposal so much as imply that it had limited relevance to Alberta. Given that over 85 percent of Alberta's oil-producing land was owned by the Crown, Alberta had not encountered the problems in regard to taxation which Saskatchewan had had in controlling freehold production. Alberta's main concern, according to Lougheed, was that the constitutional amendment formula not permit the consuming provinces to gang up and expropriate "Alberta's heritage."[52] Considering the federal government's own recognition in August 1980 of the political importance of breaking up the opposition of western premiers to

[49]See the reports contained in Robert Sheppard and Michael Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982).

[50]Jean Chretien, *Opening Statement, Meeting of the Continuing Committee of Ministers on the Constitution, July 8-11, 1980*, p. 4.

[51]Canadian Intergovernmental Conference Secretariat, *Verbatim Transcript, Federal Provincial Conference of First Ministers on the Constitution, Ottawa, September 8-13, 1980*, pp. 111-114.

[52]Ibid., pp. 150-151.

the constitutional package,[53] the absence of the natural-resource clause from the 2 October 1980 constitutional package does, on second examination, appear somewhat surprising.

The only adequate explanation for the exclusion of the natural-resource clause from the 2 October package is political expediency. Support for this explanation is provided by the fact that the federal government moved extremely quickly to reinsert the clause in response to the public urgings of the federal New Democratic Party.[54] It is somewhat improbable, however, that a clause which had generated so much discussion since 1978, and on which there appeared to be substantial federal-provincial agreement, should be so quickly discarded and then so quickly resurrected. It appears more likely that the federal government had never intended to discard the clause permanently, but to remove it temporarily so that it would be perceived by the public to have been brought back at the urgings of the federal NDP, as the "price" for NDP support of the constitutional resolution.

As to the final question of why the NDP insisted on reintroducing the issue of concurrency over international exports at the committee stage, the answer is simple. The NDP government of Saskatchewan had always pressed for such a provision, and the Broadbent international concurrency provision clearly catered to Saskatchewan interests. By introducing such an amendment, the federal NDP simultaneously accomplished two ends. It was able to portray itself as standing up for the interests of the Saskatchewan government. At the same time, the party could deflect the mounting criticisms leveled at the federal party by its provincial wings for having sold its support too cheaply. If the proposed international trade amendment was accepted, the federal NDP could take the credit. If it failed, this would clearly indicate that it was the federal Liberals blocking the proposal, not the federal NDP's negotiating strategy.[55]

CONCLUSION

It is apparent that the content of Section 92A was determined by the interplay of long-term institutionalized political and economic arrangements in Canadian confederation and short-term factors originating in the politics of the Canadian constitutional process itself. Attention was first turned to the issue of natural resources by the desire of the federal government to shift its strategy toward the resource industry from short-term exploitation to long-term development. This process was given a sudden and unexpected impetus by

[53]Federal Provincial Relations Office and Department of Justice, *Report to Cabinet on Constitutional Discussion, Summer 1980, and the Outlook for the First Ministers Conference and Beyond*, p. 41.

[54]Sheppard and Valpy, for example, claim that by 5 October, after meetings with Ed Broadbent, Trudeau had agreed to reinsert the natural-resources clause. Robert Sheppard and Michael Valpy, *The National Deal*, pp. 110-134.

[55]On the federal-provincial tensions within the NDP during this period, see ibid., pp. 110-134.

the rapid expansion of the revenue base brought about by the 1973 OPEC oil embargo. The issue of regulatory control of the natural-resource industry emerged as provincial development strategies based on export-led natural-resource exploitation were challenged by Supreme Court rulings perceived by the provincial governments as having enhanced the federal trade and commerce power at the expense of provincial proprietary rights. Agreement was still possible on most issues concerning natural resources in 1979 because the federal government had had a long-standing commitment to extending provincial powers over indirect taxation, and because the provincial governments could be placated by a federal commitment to protect existing provincial rights. Conflict arose in 1980, however, because a newly reelected federal government attempted to renege on its previous commitments and advocated a new, centralized division of powers. Disjunctions in the negotiation process after the summer of 1980, including the removal and resurrection of Section 92A and the federal NDP international trade amendment, were attributable more to the political need to obtain partisan support for the completed constitutional package than to substantive disagreements over its content.

The negotiation process underlined the continuing coexistence of conflictual and collaborative issues within the Canadian federation. Issues centering on the extension of indirect taxation powers to the provinces and the confirmation of existing provincial powers raised little controversy throughout the entire process. The key conflict-oriented issue was the control of interprovincial and international trade. That issue proved controversial because of the competing definitions made by the federal and provincial governments of the appropriate unit for instituting economic development strategies. Especially after 1980, the federal desire to promote development based on a national economic unit conflicted with the desire of the provincial governments to promote province-by-province economic development.

The negotiation of Section 92A, therefore, reveals a great deal about the process of constitutional change in a federal system. First, it illustrates at least two reasons why a long-established federal-provincial consensus can break down. One causative agent is major structural change to institutionalized political and economic arrangements—in the case of Section 92A, OPEC-derived increases in natural-resource rents upsetting established federal-provincial fiscal arrangements. A second factor is constitutional arbitration by the courts, which can produce verdicts that neither order of government expects or desires. The Section 92A case also illustrates the precariousness of the actual constitutional policy process, a process that can be derailed by electoral outcomes and manipulated for partisan purposes.

These findings confirm three observations made by Banting and Simeon in their comparative study of constitutional change,[56] but significantly alters the context of their remarks.

[56]Keith G. Banting and Richard Simeon, "Introduction: The Politics of Constitutional Change," *The Politics of Constitutional Change in Industrialized Nations*, eds. Banting and

First, it reaffirms the contention that "demands for major change originate in social and economic forces which shift the relative status of different groups, and which in turn lead the groups to call for alterations in their political relationships. . . . The resulting breakdown in the pre-existing consensus precipitates demands for constitutional change."[57] However, the findings of the present study differ from Banting and Simeon's in that the present work underlines the significance of events linked to the international and domestic political economies while the latter work stresses change originating in domestic cultural, linguistic, and ethnic structures.

Second, analysis of the Section 92A case confirms Banting and Simeon's finding that while constitutional change is set in motion by relatively long-term socioeconomic events, the actual changes achieved are by no means determined by those events. That is, constitutional change is a political process and is subject to political forces in society. As Banting and Simeon put it, "social or economic changes which complicate social relations or upset the balance between contending groups are not sufficient in themselves to account for constitutional change . . . the emergence of conflict over the constitution . . . depends also on a more proximate, and more specifically political dimension."[58] Again, however, the evidence of the Section 92A case requires some modification to these conclusions. Banting and Simeon apply this analysis only to the agenda-setting stage, but the Section 92A case clearly reveals the extent of political involvement at each stage of the constitutional policy process.

Finally, the Section 92A case also reaffirms Banting and Simeon's conclusion that constitutional change is "not an exercise in value-free problem solving; nor is it usually a search for a set of words which enshrines a pre-existing consensus. Rather it is a process born of conflicting values, interests, and definitions of the political community."[59] That is, the process of constitutional change is an art, not a science. As the analysis of the Section 92A case describes, the interaction of structural or institutional stress and the pursuit of partisan political and electoral interests makes for an unpredictable pattern of constitutional change. Although the general necessity for constitutional adaptation caused by institutional stress and the resulting emergence of an issue on the constitutional agenda can be predicted with some accuracy, the strength of partisan influences and the characteristics of constitutional negotiation as a bargaining process between those interests make the actual direction of change and the final determination of constitutional outcomes contingent and unpredictable.

Simeon, pp. 1-29.
[57]Ibid., pp. 10-11.
[58]Ibid., p. 12.
[59]Ibid., p. 27.