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ENERGY POLICY CHANGES IN BRITISH COLUMBIA, 1972-75:

THE CASE OF NATURAL GAS

by

Royce William Warren

B.A., Simon Fraser University, 1973

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

in the Department

of

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Royce William Warren 1979

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ABSTRACT

The objective of this thesis is to examine the energy policy changes relating to natural gas which occurred in British Columbia during the period 1972-75. The thesis also attempts to define the manner in which the policies were carried out and to determine their ultimate effectiveness.

There were two major problems in this area of public policy which faced the New Democratic Party government which took office in 1972. In the first instance, the constitutional parameters of resource ownership and control had to be defined in order to draft effective and legal energy policy. Secondly, the practical issue of persuading the natural gas industry to accept government measures which would impose restrictions on the free market operation of the industry was a major political challenge.

The constitutional analysis outlines the legal 'state of the art' with respect to resource ownership and control as of 1972 and updates it in view of the recent Cigol and Potash cases in Saskatchewan. The Energy Act and its subsequent application are then viewed against this legal background and in light of the economic conditions that led to the Act's introduction.

The application of the Act proved initially to be difficult and inconsistent, mainly as a result of the changing conditions caused by the changes in energy policies throughout the world at the time, the basic differences in philosophy

between the industry and the provincial government, and the resource-taxing conflicts between B.C. and the federal government. The development of an effective natural gas policy necessitated several re-examinations of government/industry relationships which are seen in contrast to policies of the federal government and those of other provinces. In conclusion, it is contended that the energy policy changes brought about by the N.D.P. between 1972 and 1975 were constitutionally sound and economically effective.

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CHAPTER 1

INTRODUCTION

The natural gas industry is one of the most lucrative and significant business activities in British Columbia. The revenue accruing to B.C. from the sale of natural gas amounts to hundreds of millions of dollars annually, and is increasing every year. As well as providing revenues, the substantial natural gas reserves within the province promote a sense of domestic energy security. In recent years, however, the province has become aware that natural gas is a non-renewable, depleting asset that requires careful management in order to maximize its benefits both over time and in money. This was not always so. For the first two decades of its existence in British Columbia, natural gas and petroleum exploration, development, and production had been ignored by the province, its importance paled in comparison to that of the big-money industries of forestry, mining, fishing, and tourism. This careless attitude toward petroleum development encouraged the evolution of an economic chimera whose principal goal was to export as much natural gas to the United States as possible. In these early years, the province and the federal government indulged the industry to such extremes that exports of natural gas were committed in prodigious amounts and at bargain prices, thus creating the foundations for future gas shortages in British Columbia.

In the 1960s, the people of B.C., and particularly the Social Credit government of the day, grossly underestimated the future value of natural gas, and especially its capacity to attract revenue from foreign sources. That natural gas would eventually become one of the province's main sources of foreign currency was far from the minds of a government and populace which used readily accessible foreign oil to fuel the 'good life'.

Confused though the policies and times were initially, the 1970s have proven to be a decade of burgeoning energy awareness, and the programs that have been instituted will determine for years to come the economic climate in which British Columbians live. Provincial awareness of the real value of domestic energy supplies was inaugurated, however humbly, in 1972 when the New Democratic Party under the leadership of Dave Barrett defeated for the first time the government of the aging W.A.C. Bennett. The initial recognition of energy problems brought about by the exposure to a new form of political thought at the provincial level was further established in the public's mind by the Arab-Israeli war in 1973 and the increased nationalism of the member states of the Organization of Petroleum Exporting Countries. Together, these factors increased the province's desire to attain a greater degree of energy security. Consequently, under the direction of the N.D.P., rational energy policies were eventually drafted to deal with this need.

The N.D.P. government was faced with two major problems: drafting legislation that was within the parameters of provincial jurisdiction; and encouraging and controlling the natural gas industry in such a manner that both enterprise and the public demand for conservation and increased revenues were satisfied. In the first instance, the make-up of the Canadian Constitution is such that major resource initiatives on behalf of either the provinces or the federal government immediately attract close scrutiny. The tax bases of both levels of government depend heavily on resource industries and, while the British North America Act recognized this and delineated the responsibilities, the Act was, by nature, unable to deal with all classes of cases that were to arise in the future. The acceptability of much of the legislation passed in recent decades would have been more appropriately dealt with at the political level through negotiation

between the federal and provincial governments rather than being left to the judiciary to decide. The courts have exercised an inordinate amount of authority in effecting policy by deciding cases which are formulated in such complex terms (in lengthy judicial decisions which often express both concurring and minority opinions) as to be exceedingly difficult to interpret through reference to the B.N.A. Act.

In the 1970s, the balance of resource and economic power began to shift from eastern to western Canada, and with it came changes in the Canadian constitutional environment. The traditional and long-accepted legal parameters of resource control began to be challenged by the western provinces in the most innovative manner. The very real risk attending these actions was the potential unconstitutionality of new resource legislation. The N.D.P. in British Columbia recognized this danger and made great efforts to draft its energy policies in accordance with accepted judicial precedent, so far as these could be readily understood and applied to new problem situations.

The fact that the province was able to accomplish such a task and still maintain its taxing position was almost unique considering the tribulations that other provinces endured. British Columbia was able to achieve its goals with only slight variations in the well-established divisions of authority between the provinces and the federal government.

The second issue that the new government had to deal with, and the one which was to cause the most problems, was the precise method of diverting increasing profits from the sale of natural gas to the province without having to increase the payments to the producers or the federal government and without adversely affecting the exploration climate. In this

respect, the N.D.P. government failed in their initial attempts and, only after much compromise, succeeded toward the end of their period in office. They misread the determination of the natural gas industry to garner a substantial share of the revenues, and they erred in comprehending the market forces that were at work in the petroleum industry on both the micro and macro level.

The N.D.P. were, however, the first provincial Party to attempt to gain solid control of the B.C. petroleum industry, and before they lost power to a re-vitalized Social Credit Party in 1975, they had instituted policies which were later to be adopted almost wholly by the Social Credit government.

This thesis examines the constitutionality of the British Columbia energy legislation and the implementation of the legislative policies and it also sheds some light on the complex synthesis of business and politics in Canada in general and the province in particular during the early 1970s. This fascinating interplay of various business and government interests, never more starkly evident than during the term of the Social Democratic government of the N.D.P., will be analysed with a view to determining the legality, social value and public acceptability of the provincial natural gas policies introduced between 1972 and 1975.

Much of the history of this period has been written in newspapers, periodicals, journals, and government reports rather than in publications, and these forms of communication generally deal with facts and figures on rather narrow issues rather than the complete and cerebral analyses of political and social events. Consequently, it is often left up to the reader to draw conclusions on incomplete supporting evidence. The paucity

of books on the N.D.P. period is quite surprising considering the radical change in approach to government in British Columbia that resulted from their 1972 election win. In addition, the constitutional and industry issues relating to natural gas were not of great importance during either the 1972 or 1975 elections. As a result, there was relatively little media coverage which may have indicated acceptance or rejection of the policies.

As a consequence of the lack of public information, research for this thesis relied heavily on primary information sources from business and government agencies and through personal interviews and discussions with several key individuals connected with the legal and business aspects of energy policy in British Columbia. This information is plentiful and provides a substantial basis for achieving the paper's objectives.

In Chapter 2, the constitutional basis for provincial ownership and control of natural resources is discussed in the light of several legal cases that have been adjudicated in the Supreme Court of Canada and the B.C. Court of Appeal. With this information as a background, it is much easier to understand the subsequent resource battles that emerged in coincidence with the energy crisis.

The events that led to the introduction of the B.C. Energy Act are examined in Chapter 3 along with an explanation of the Act itself. Not only do the events of the early 1970s show the need for powerful energy legislation, but the ties that the Act has to earlier legislation that has been tested in the Supreme Court show the undisputed constitutionality of the legislation. The application of the Energy Act and Regulations adopted under its enabling powers are discussed in Chapter 4 with the objective of determining their value to the province in terms of financial returns and awareness of the need for conservation.

Notes to Chapter 1

[1]"Way Seen to 'Incredible Riches'," Vancouver *Province*, (August 29, 1979), p.D3.

CHAPTER 2

The Constitutional Basis For British Columbia's Energy Policy

The issue of ownership and control of natural resources in Canada has long been a bone of contention between the federal government and the provinces. The provinces claim that control over domestic resources and related economic infrastructure is vital for long-term economic survival and self-expression within Confederation. Given the fact that income from exploitation of natural resources is one of their major sources of revenue, it is not surprising that the provinces have proven to be generally more conservative and cautious than the federal government in their use of domestic resources. For some it may be their only major source of income and to place it in the hands of a federal government that may divert the revenue to other areas could prove to be somewhat self-destructive for the provinces. In particular, most energy resources, as depleting assets, are much less forgiving of economic misjudgments than are other renewable resources such as agriculture and forestry and, as such, demand provincial control.

On the other hand, it cannot be disputed that, for taxation purposes, the federal government requires jurisdictional powers over certain areas of the economy in order to equalize economic opportunity between the rich and poor provinces. The Canadian Supreme Court (and before it the Judicial Committee of the Privy Council in London) has exercised the particularly difficult role of trying to reconcile these two interests through the interpretation of the British North America Act of 1867.

The B.N.A. Act, which formally outlines the areas of responsibility between the federal government and the provinces, has been the object of

much discussion and analysis with respect to natural resources. The original Act has been amended several times in an effort to clarify questionable points. The most recent important change occurred in 1930 when the 'Resources Agreement' gave the western provinces control over public lands and natural resources within their boundaries, hitherto under the jurisdiction of the federal government.[1]

The Act is, in fact, a constitution, even though as a formal, judicial matter it is, in its historical origins, a Statute of the Imperial (British) Parliament in London. However, the key to the B.N.A. Act, as law-in-action, is how it has been interpreted and applied by the judges over the years.

Interpretation of the Act can be separated into three main periods of time; from Confederation to the mid-1890s, the mid-1890s to the late 1930s, and from then until the present. As Dr. Edward McWhinney explains in his book Quebec and the Canadian Constitution,[2] the Act was viewed rather broadly during the first and last of these periods, as far as the powers of the federal government were concerned. The government was given residual powers that related generally to "Peace, Order, and good Government of Canada" under Section 91, the predominant source of federal authority. When the Privy Council, or the Supreme Court of Canada after 1949, settled constitutional issues during these two periods, they tended to centralize authority in the hands of the federal government. On this particular judicial vein the "twenty-nine specific heads of federal legislative power enumerated in Section 91 were merely illustrations of the general power."[3]

By the same token, it was assumed that the provinces' powers were limited specifically to those headings stated in Section 92, including

92 (13) 'Property and Civil Rights in the Province' and 92 (16) 'Generally all matters of a merely local or private Nature in the Province'.

The period between the mid-1890s and the late 1930s witnessed a reversal of the Privy Council tendencies of the post-Confederation period. Under Lord Watson and subsequently Lord Haldane, the powers of the federal government were viewed rather restrictively, being limited to those areas which in no way 'trenched' upon the authority of the provinces.

Far from being an arbitrary development, the judicial tendencies of these periods paralleled, to a large extent, the development of Canada and the political realities of the times. A strong federal power was needed during the early expansion west after Confederation, while from the 1890s onwards Laurier looked increasingly to a recognition of provincial powers and provincial rights.

There are several important factors dealing with the treatment of constitutional issues that will shed light on cases discussed below. Interpretation of the Act is not hampered by rules of evidence as in a trial situation, but legal precedent does play an important role in defining precise meanings of terms and expressions, especially when breaking new constitutional ground. Often, precedents are scarce or non-existant and the courts must determine to the best of their ability the Act's original intent, keeping in mind that constitutions do change with society over time and that this may influence how a court views the original intent. This is an extremely delicate phase of constitutional law and faulty arguments on behalf of one party may permanently alienate that party's interests under the constitution. W.R. Lederman, in The Courts and the Canadian Constitution,[4] explains that the variety and uniqueness of actions brought before the

judiciary often decry the utility of previous decisions for the current case. New laws, for example, whether federal or provincial, may have considerable impact on the applicability of a particular precedent. Past precedents are bench-marks and not necessarily controlling as to decisions in future problem situations.

Against this backdrop of delicate legal application, British Columbia and the federal government have attempted to resolve the problem of the precise delineation of provincial boundaries (thus the ownership of submarine mineral deposits) and jurisdictional control over development and marketing of resources in general. There is no doubt that B.C. has been granted the same rights within the B.N.A. Act as any other province, particularly in respect to natural resources. This does not define, however, what the rights entail.

> The provisions in the B.N.A. Act, 1867 'shall... be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces in the Dominion, and as if the Colony of British Columbia had been one of the Provinces originally united by the Act.'[5]

The B.N.A. Act has slowly evolved since 1867 but this maturation has not necessarily clarified the jurisdictional divisions of legislative competence set out in the Act. The arguments that are now being heard before the courts are infinitely more precise than they were one hundred years ago. The impact on the various levels of government, though, has been maintained through the escalating significance of formerly unappreciated issues and the development of new ones. In other words, the issues of law are, today, as important to the combatants as they were at Confederation despite the fact that the Articles of Confederation may now be more precisely defined.

There seems to be little question that the B.N.A. Act gives

unfettered ownership of all resources situated within a province to that province. Section 109 states:

> All Lands, Mines, Minerals, and Royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any interest other than that of the province in the same.

The Terms of Union between B.C. and Canada, as well as the British North America Act of 1930, afforded B.C. the same rights. Section 92 (2), 'Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes', and 92 (5), 'The Management and Sale of the Public Lands belonging to the Province and the Timber and Wood thereon', also appear to give unbridled ownership and control (which is not defined, but where it does not infringe upon the authority of the federal government) over the various resources to the province. Two major questions remain, however: what is the province's range of control over certain peripheral activities related to natural resources - namely, over production, transportation, pricing and marketing; and, what is the extent of provincial territoriality?

On the control and marketing of resources within a province, Gerard LaForest states:

> The entire control, management, and disposition of the Crown lands, and the proceeds of the provincial public domain and the casual revenues arising in the provinces were confided to the executive administration of the provincial governments and to the legislative action of the provincial legislatures so that Crown lands, though standing in the name of the Queen, were, with their accessories and incidents, to all intents and purposes the public property of the respective provinces in which they were situate.[6]

Despite LaForest's use of the term "entire control", the federal government has been given rights over certain properties and activities that are within the provincial boundaries. Sections 91 and 108 outline these quite graphically. The province must accept the superior authority of Parliament in any issue where there is a direct overlapping of jurisdictions of the federal government and the province. Federal Fisheries may, as an example, shut down a provincially controlled logging operation within the province if that operation interferes with spawning streams, or it may prohibit a mining operation from blocking navigable waters.[7] Obviously there must be a considerable amount of cooperation between the two levels of government if these areas of conflict are to be overcome. Lederman indicated that this sometimes divided, sometimes concurrent, legislation has introduced a reasonably well-defined bargaining process between the federal government and the provinces, that it has been an "invitation to practise cooperative federalism".[8]

It will be indicated later, in reference to specific cases, that the bargaining process does not always work as it should, and all too often the Supreme Court is forced to decide where governments fail to agree.

Property also becomes somewhat uncertain when viewed in the light of conflicts in jurisdiction. Property may or may not include natural resources (i.e. Lands, Mines, and Minerals), and may or may not come under the jurisdiction of the province. That is to say, there are certain types of properties which are owned by the province but controlled by the federal government (such as B.C.'s former share in Westcoast Transmission Company or Alberta's ownership of Pacific Western Airlines which are federally incorporated companies engaged in business of greater scope than

that of a "local and private nature"), and there are other properties which are not owned by the province but which are subject to provincial jurisdiction.

Section 125 of the B.N.A. Act states: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation." This section, which will be examined in Chapter 4, adds a quirk to the delineation of powers that has resulted in bitter federal-provincial disputes. The taxing powers of the federal government can be seriously undermined by a province that adopts a policy of provincial corporate ownership, and under such an environment the term 'property' and its concomitant powers become a little more hazy.

A knowledge and understanding of exactly where each of these interests lie is crucial to drafting successfully any legislation dealing with resources. The determination of these interests has not been left up to the arbitrary decisions of the provinces or the federal government, but to the constitutionally anointed third body - the judiciary.

The Supreme Court and the Privy Council have adjudicated several cases dealing with the constitutionality of certain legislation designed to control the 'grey' areas of resource responsibility. These cases have, for the most part, laid the groundwork for many of British Columbia's present controls over the provincial marketplace.

One of the most important legal actions which set out certain parameters of provincial control was <u>Shannon v. Lower Mainland Dairy Products Board, 1938</u> (A.C. 708). The board was formed under the <u>Natural Products Marketing Act</u> to regulate dairy prices in B.C. Although not dealing directly with natural resources, this case was a major plank on which the provinces of Canada began to exercise their constitutional rights in the control of prices

and trade within the province. Section 92 of the B.N.A. Act is quite explicit about these rights, but the Appelants argued that Section 91 (2) and (3) of the Act was being encroached upon by the Board. These two sub-sections gave "The Regulation of Trade and Commerce" and "The Raising of Money by any mode or System of Taxation" to the federal government.

As with most sections of the B.N.A. Act, the courts have determined that certain understandings should be made with regard to their interpretation. Lederman explains that the principle of 'mutual modification' as expressed by the courts permits parts of the Act, such as Sections 91 (2) and 92 (13), which is "Property and Civil Rights in the Province", to be interpreted exclusive of one another. While the basic logic would indicate that the regulation of Trade and Commerce is actually the control of "articles in which persons have property in respect of which they have civil rights,... the courts have said that 'regulation of trade and commerce' is to be reduced in generality and read as 'regulation of interprovincial and international trade and commerce'. Likewise, 'property and civil rights' is to be rendered 'property and civil rights except those involved in inter-provincial and international trade and commerce.'"[9]

The appeal in the Shannon Case was dismissed by the Judicial Committee on two grounds: 1. "... the legislation in question is confined to regulating transactions that take place wholly within the province, and are therefore within the sovereign powers granted to the legislature in that respect by s. 92 of the British North America Act."[10] 2. "The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the province and is therefore entirely intra vires of the province."[11]

One difficulty that arises from this concerns the absolutism of intra-provincial trade. What guarantees are there that the commodity involved is not destined for inter-provincial or international trade? It seems apparent that if the transaction dealt with by the marketing agency has its beginning and ending within the province, whether the terminus is a federally licenced export agency or not, the province has the right of control. This view is typified by the role the B.C. Petroleum Corporation plays in purchasing natural gas from producers and selling the same gas to the Westcoast Transmission Company - an exporting agency.[12]

Another important case, and one which had tremendous implications on the development of the B.C. Energy Act, was that of Home Oil Distributors Limited v. Attorney-General of British Columbia, the Coal and Petroleum Board.[13] The legal question in this dispute centered on the constitutionality of the Coal and Petroleum Control Board Act, B.C. (hereinafter referred to as the Control Board Act). The Control Board, which was to regulate and control the coal and petroleum industries, had powers under Sections 14 and 15 to fix prices "... at which coal or petroleum products may be sold in the province either at wholesale or retail or otherwise for use in the province."[14]

The province was considering at the time the fact that domestic coal and petroleum exploration and development were being adversely affected by low-cost imports from California. The State was dumping excess heavy heating oil in B.C. at prices far below what B.C. producers could economically charge. At the same time, gasoline, which B.C. could not produce, had to be imported from California at exorbitant prices. The province was feeling the cut of a two-edged sword and felt compelled to rectify the damage.

Taking this into consideration, it appeared as though the province

was in fact attempting to influence, either interprovincially or internationally, the prices of coal and petroleum products and the B.C. Supreme Court felt justified in finding for Home Oil. In subsequent appeals, however, the B.C. Court of Appeal and finally the Supreme Court of Canada determined that the judiciary had no right to attempt to interpret the reasoning behind the legislation using extraneous evidence such as Government reports but only the constitutionality of the said legislation based upon evidence presented in that court. The Supreme Court of Canada found unanimously for the Attorney-General and the Control Board on this point and on the Act's constitutionality by referring to the B.N.A. Act and to legal precedents; the main source being the Shannon case.

There were several other cases that were used to substantiate the argument that the province had the right to control prices within its boundaries. Each of these was precedent-setting in itself, but minor planks in the final judgment in the Home Oil Case and simply supported the contention that resource controls within the province were a provincial matter.[15,16,17]

One case in which the province fared less well was in the Texada Mining Case.[18] In 1957 the provincial government passed two pieces of legislation at the same sitting levying a tax, or impost as it was called, on iron ore produced within the province, and the other granting a 'bounty' for iron ore that was processed within the province. Texada argued in the courts that both pieces of legislation were part of one scheme designed to impose an indirect export tax on outgoing ore.

This argument was supported by the fact that B.C.'s west coast, where Texada Mines held producing property, had no iron ore smelter. Also, the

fact that the bounty was greater than the tax on produced ore affected rather forcibly free exporting of resources at agreed-to prices. The courts subsequently found for Texada Mines and stated that the legislation constituted an export tax and was, therefore, ultra vires of the provincial legislature.

While it may appear as though the courts were interpreting the reasoning behind the tax, a tactic that was shown to be questionable in the Home Oil Case, the problem was quite different. While the Home Oil Case dealt with goods imported into the province and for use entirely within the province, the impost on iron ore was, in effect, a tax on goods leaving the province, since there was no way of smelting the ore within reasonable economic range of the mine site. Apparently, the tax was ultra vires only in conjunction with the bounty.

It is interesting to note that the bounty or 'incentive payment' seems to be legal if it is designed solely to aid domestic industry. The former N.D.P. government in B.C. announced plans in 1975 to build a copper smelter in Highland Valley using the tax reduction method outlined in Bill 31, the Mineral Royalties Act, as an incentive to smelt copper in the province. There had been, at that time, no legal challenges to this point in the Bill. By itself, the tax on production is also legal if it is designed simply to raise prices for income production within the province or for reasons of conservation. An example of this type of tax centres on the increases in the domestic price of natural gas during 1973 and 1974 that triggered the 105% contract rule governing the price of exports. The federal government had declared previously that the price of natural gas entering the export market must be at least 105% of the domestic price. In effect, then, the

provincial government indirectly, but quite intentionally and legally, raised the export price of natural gas by falling back on a federally-approved contract (discussed further in Chapter 4). This reflects certain powers in the B.C. Energy Act which Dr. Andrew Thompson, former Chairman of the Energy Commission, stated is on solid legal ground.[19]

Notwithstanding the Texada Mines Case, LaForest indicates that the provinces do have the power and authority to require that processing or manufacturing be carried out within the province prior to export, provided that an 'export' tax is not levied on unprocessed resources.[20] In Smylie v. R,[21] in the Ontario Court of Appeal, it was held that the province has a right to require any company cutting timber on Crown lands under a provincial license to manufacture the wood in the province. This refers directly to Section 92 (5) of the B.N.A. Act, 'The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.' The province has a prior right to dispose of its public property as it sees fit and Section 91 (2) of the Act, the federal powers of trade and commerce, cannot despoil this privilege.[22]

Since minerals and timber constitute a major source of provincial revenue, to say that this type of resource legislation relates to 'trade and commerce', would unfairly and unconstitutionally restrict the province in disposing of its property for the well-being of the province. It is generally recognized that the provinces have, in fact, considerable power in granting resource permits.[23]

These far-reaching powers place a great deal of strain on legal decisions made in the past. While the Texada decision went against British Columbia because of the obvious intent to influence the export price of iron

ore, the province of Alberta has instituted an interesting twist to the export issue by unilaterally raising the price of crude oil - an action that may be perfectly legal as long as it is non-discriminatory, that is, as long as the residents of the province are paying the same rate as those outside the province. A province cannot set a higher export than domestic price. Alberta circumvents this restriction by giving the Albertan tax-payers a rebate on their energy consumption. This clearly, is effectuating an export tax. The Energy Commission in B.C. has stated that this method should be ultra vires the Alberta Legislature and it is not the policy of the Commission to follow the same route.[24]

All of the cases described above took place prior to the drafting of the British Columbia Energy Act and were the main references used in determining the mengths to which the legislation could go and still be on safe legal ground. However, there have been a couple of important decisions since the Energy Act was introduced which shed light on the tendencies of the Supreme Court of Canada to decide in favour of the federal government and also which determine more accurately the general condition of provincial rights in the marketplace in respect to natural resources. Both cases involve the Province of Saskatchewan and its attempts to gain additional controls over two major natural resource industries; potash and petroleum.

The decision of the Supreme Court of Canada in the Cigol Case[25] was the type that causes great anger on the part of provincial governments. The economic case for Saskatchewan (the need to recover the high cost of importing oil from Alberta when it was unable to use its own reserves, and the desire to receive fair market value for an important depleting asset) was strong, and many of the legal arguments support the contention that the

province actually had the right to levy certain taxes on the industry. The Court was split, with Dickson, J., and de Grandpré, J., dissenting.

In 1973, Saskatchewan introduced legislation that levied a mineral income tax and a royalty surcharge on certain petroleum producers - determined by the size of their producing tracts of land. The province declared that the mineral income tax was a direct tax on the producer and, as such, was within the jurisdiction of the provincial legislature. The royalty surcharge was structured in such a way that it too was actually a tax, Dickson claiming a direct tax.

Definitions of the terms 'direct' and 'indirect' taxes, and 'royalties' will assist comprehension of the case. Funk and Wagnalls New Practical Standard Dictionary defines a royalty as "A share of proceeds paid to a proprietor...by those doing business under some right belonging to him".

The royalty is not a tax on a commodity or any net income, but, rather, a charge for a privilege, whether it be on production from a well, mine or timber lease. The province has a clear right to charge royalties as a method of commanding revenues.

A tax "is a compulsory contribution, imposed by the sovereign authority for public purposes or objects".[26] Dickson quotes John Stuart Mill's definition of the difference between direct and indirect taxation:

> A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.
> The producer or importer of a commodity is called upon to pay a tax on it not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.[27]

The determination of the directness or indirectness of a tax relates to the 'general tendencies' of the tax rather than an attempt to define precisely which it is - a task that is extremely difficult in borderline cases.

The crux of the debate in the Cigol Case turned on the fact that the provinces, under Section 92 (2) of the B.N.A. Act, have the right to apply direct taxes on the producers in the province. Indirect taxes are the unqualified responsibility of the federal government. It was determined first that the royalty was actually a tax. It was materially similar to the mineral tax and also contained the compulsory aspect common to all taxes.

As to whether or not the two taxes were direct and under the jurisdiction of the province or indirect and under the authority of Parliament, the majority of the Justices considered mainly the fact that 98.2% of the province's oil production was exported.[28] The province, on the other hand, felt that it had the authority to set the price at which oil could be sold and this was done by providing the producers a well-head price for their oil and charging a levy, or royalty, or mineral tax, over and above this basic well-head price such that the final selling price was equal to either the world or fair market price as determined by the Minister. From the producer, the oil went directly into the export market. This appears to be an attempt to affect the export market. However, in a fine defense of the legislation, Dickson, J. (dissenting), presented an equally compelling argument that the province was not intentionally setting an export price by levying the tax. With the Shannon Case in mind, he stated that "...a degree of price regulation in support of legitimate provincial interests was tolerable even though affecting the entry of foreign oil."[29] In addition, he stated that the selling price was not pre-determined:

The power of the Minister to determine the well-head value in respect of mineral income tax is not an unrestrained and unrestricted general power; it is exercisable only when oil is disposed of at less than fair value, and then, only after the sale has taken place. The purpose of s. 4A of Bill 42 is obviously to prevent such practises as sale of oil between related companies at artificially low prices."[30]

In a crucial explanation of the role of the Court vis a vis the constitutionality of provincial legislation, Dickson, J. (dissenting) stated that the province must be given the benefit of the doubt, since it is the Appellant's responsibility to prove beyond any reasonable doubt that the province's Legislation is unconstitutional. Speculation and conjecture are not satisfactory in proving unconstitutionality.[31]

Martland, J., speaking for the majority, rejected the view that the taxes were direct. This was based upon two factors: 1. Since all revenue above the basic well-head price went to the province in the way of taxes, the producer's income was completely curtailed at the well-head value; in other words, his income was frozen. 2. It was the Minister who had the authority to set the fair market value of the oil and this level was not necessarily determined according to extra-provincial prices. The arbitrary, or otherwise, fixing of the maximum returns to the producers and the selling price meant that the,

...effect of the legislation is to set a floor price for Saskatchewan oil purchased for export by the appropriation of its potential incremental value in interprovincial and international markets, or to ensure that the incremental value is not appropriated by persons outside the province.[32]

It was found that both the mineral income tax and the royalty surcharge were indirect taxes and ultra vires the provincial jurisdiction as stated in Section 92 (2) of the B.N.A. Act. It was also held that, in view of the overwhelming percentage of oil being exported, the tax and royalty

surcharge legislation was ultra vires the province in respect of Section 91 (2) of the Act. The important fact to consider was stated in the Ontario Reference Case by Kerwin, C.J., "Once a statute aims at 'regulation of trade in matters of inter-provincial concern' it is beyond the competance of the Provincial Legislature."[33,34]

Saskatchewan Premier Allan Blakeney reacted furiously to the decision, his anger directed both at the Supreme Court and the federal Liberals. On October 10, 1978, he wrote to Prime Minister Trudeau, whose Government had intervened against Saskatchewan, stating in part;

> You will understand, therefore, why many, including myself, perceived the subsequent action of the attorney-general of Canada in joining the action as a plaintiff against the province as a complete about-face and betrayal on the part of the federal government... If you continue to ignore the West, you will imperil the very fabric of our nation.[35]

On the Supreme Court, Blakeney said that changes were necessary "so that it will not only be, but be seen to be, an impartial arbiter of federal-provincial disputes."[36]

Although Alberta and British Columbia were disappointed with the result of the case, their immediate concern was more for the validity of their own legislation. There was a difference between the Saskatchewan policy and that of its two westerly neighbours. Saskatchewan pocketed the entire increase in the price of petroleum while Alberta and British Columbia were operating under separate profit-sharing arrangements with the producers. This was enough to avoid the legal morass in which Saskatchewan found itself.

If the appellants in the Cigol Case were expecting to have the one-half billion dollars collected under the legislation returned to them, they were mistaken. As Blakeney pointed out: "I'm sure that the people of Saskatchewan look upon it as 'they took the oil - we have the money. If they

return the oil - we'll return the money'".[37] Instead, the N.D.P. government introduced retroactive legislation that covered the legal problems encountered in the original legislation.

The Cigol Case, rather than demonstrating justice as the provinces interpreted it, served only to exacerbate the already festering wound between the federal government and the provinces and this was compounded when the Supreme Court decided on another Saskatchewan case on October 3, 1978. The case was Central Canada Potash Company Ltd. v. Government of Saskatchewan.[38] Again, the major issue was whether or not the Saskatchewan government was, through pertinent potash legislation, affecting the federal government's authority under Section 91 (2), trade and commerce.

Saskatchewan has the world's largest known reserves of potash, a resource that is in heavy demand for the production of fertilizers. Since the province has a low population and resulting low demand for potash, most of the production is exported, mainly to the U.S. As part of its drive to improve the province's control position over its natural resources, the Liberal government introduced, in 1969, the Potash Conservation Regulations[39] under the authority granted in the Mineral Resources Act, R.S.S. 1965, c.50. The Act's purpose is:

> (a) to promote and encourage the discovery, development, management, utilization and conservation of the mineral resources of Saskatchewan;
>
> (b) to regulate the disposition of Crown mineral lands;
>
> (c) to protect the corelative rights of the owners of surface rights and of mineral rights.[40]

The potash Regulations permitted the government to set prices, control production levels from individual mines,determine the share of total production that each mine was entitled to, and "any other matter that the Minister deems

advisable."[41] The Court had to decide if the province was simply trying to control the resource internally which was its constitutionally-given right or if it was 'aiming' at interprovincial and international trade and commerce.

To do this, Laskin, C.J., stated that the Court had "...to go behind the words used by (the) Legislature and to see what it is that it is doing."[42] Despite the fact that the potash market was very uncertain because of low prices and high production which did threaten the industry's stability, certain evidence was presented which indicated that the province had other things in mind. Although not damning in itself, the price Regulations did affect potash directly leaving the province, and it did also affect the contracts and export commitments of the producers. On August 24, 1971, the Deputy Minister sent a directive to the producers stating that "...all potash delivered to Europe from Saskatchewan pursuant to the agreement shall be for consumption in Europe."[43] This gave a clear impression that the province was aiming at trade and commerce. The provinces do not have the right to set market conditions in or for other countries, or other provinces.

It was not surprising to many people that, in a 7 to 0 verdict, the Supreme Court found against the province. However, the Court did acknowledge that the province was probably acting under the impression that the Regulations were constitutional and refused to award damages to the Potash Company.

These two cases point out the dilemma in which many provinces find themselves caught up. Case law, while continuously used, does not always provide the necessary basic information for the provinces to design legally acceptable legislation. Very often, they must attempt to second-guess the Justices of the Supreme Court who not only look at the constitutional aspect

of legislation but also examine the conditions and environment that give rise to the legislation. Subjectivity does play a role but only in a general understanding of the case. Chief Justice Laskin explains:

> They (the provinces) are entitled to expect that the Courts and especially this Court, will approach the task of appraisal of the constitutionality of social and economic programs with sympathy and regard for the serious consequences of holding them ultra vires. Yet, if the appraisal results in a clash with the Constitution, it is the latter which must govern.[44]

Defining the precise authority of the provinces within the headings of the B.N.A. Act, Section 92 being only one, has proven to be quite onerous. There is little hope that lines of authority will be drawn with any axactness when one considers the multitude of variations that are possible in any similar group of law cases. Saskatchewan's losses in the Cigol and Potash cases do not necessarily mean that they can no longer receive the fair market value for these goods or that they do not have the authority to regulate the industry. They do! Most often, the provinces must simply find the formula that will be acceptable to the Supreme Court should a conflict rise to that level.[45] In the Potash Case, one correct formula was, ironically, to purchase interests in the potash companies themselves. By January 11, 1978, Saskatchewan owned 40% of the productive capacity of the province, and since Crown holdings are not subject to income tax, the federal government lost out on a rather lucrative source of federal revenue.

While the attacks on the Supreme Court by the provinces and professional groups became rather strident after these two cases had been adjudicated, the problem lay in the initial justification for permitting the Supreme Court to hear the cases.

The Court must often decide on cases where nuances and ambiguities in

the wording of legislation permit subjectivity to creep into the adjudication. Depending on the majority view of the Justices, the constitutional centre of gravity can shift quite markedly over time. For example, the Court's attitude toward the parameters of 'Peace, Order, and good Government' may be viewed broadly during one period and restrictively during the next period. The Court cannot change or replace the law as it is passed by Parliament, but often its interpretation will extend to the outer limits of a particular law or will threaten encroachment upon some other law, at which point the Court, if it is acting as a proper Court, will back away. In most laws, the degree of flexibility permitted in their interpretation may be quite extensive, the main cause of which can be laid directly at the feet of language in all its imperfections. When used in its extreme, however, this flexibility imparts a quasi-lawmaking function to the Court.

In a federal system such as Canada's, where the federal government and the provinces are continuously at odds over resource and other issues, the Court has too often been used to solve differences which should have been hammered out between the parties involved. The ideal judiciary in any democratic system is an austere arbiter that has the confidence of all sectors of society. However, this ultimate is impossible to reach. There are imperfections in all judicial systems and, in Canada, these have not been properly addressed.

A. Milton Moore has indicated that appeals to the Constitution in the 1950s resolved nothing in the way of federal power versus provincial rights and that the same approach to the Constitution today would result in a similar stalemate.[46]

Canada has insisted on using the Constitution to solve jurisdictional issues that are not covered, in terms, by the B.N.A Act.

The Court becomes, in effect, a tool for amending or, indeed formulating law. Constitutional amendment, it is argued, should not be left up to the Court. It is the Court's responsibility to interpret the law rather than enact the law.

Attempting an agreement between the federal and provincial governments on the formal amending of the B.N.A. Act has generally been an exercise in futility. There are too many diverse interests that must be satisfied.

The answer may lie in legislation by exception - that is the drafting of agreements between the federal government and individual provinces and covering specific interests such as an Alberta-federal government oil pricing agreement under the Petroleum Administration Act. Common acceptance by the other provinces of these agreements, in effect, accomplishes constitutional change without the need to attempt formal amendment. However, to succeed, this method may require restraint on the part of the Executive, or federal government, to place political issues before the Supreme Court. Likewise, the Court must decline to give a judgment on questions that are obviously political.

Considering the backlash against the Supreme Court over the Cigol and Potash cases, Dr. McWhinney states of restricting the cases that go before the Court:

> Timely changes of this character, involving court practice and federal executive self-restraint, could do much to shield the Supreme Court from public criticisms and calls for reform or restructuring of the Court.[47]

In "The Constitution: A Basis for Bargaining",[48] W.R. Lederman explains his interpretation of the role of the B.N.A. Act in the division of federal-provincial jurisdiction. Rather than clearly defining the separate

responsibilities of the two levels of government, he states that the B.N.A. Act is only a base from which the parties can negotiate. This point of view is accepted by Dr. McWhinney, and Dr. Thompson,[49] as well as others, and the strength of the argument when observed in the light of the above mentioned Supreme Court decisions seems all but unassailable.

The results of the Cigol and Potash court actions were not surprising to many, and it may be that allowing a legal decision to be made strengthened the hand of the federal government in the Constitutional Conference that was held in the Fall of 1978. The fact that Blakeney and Lougheed both declared that they were intending to push for changes in the Constitution at the conference because of the negative results of the Cigol and Potash cases, does not imply that they were not about to do that anyway. The take-off points for bargaining had, nevertheless, been hardened toward the position of the federal government.

In the cases mentioned above, the only issue at stake was that of resource control rather than resource ownership. For the provinces bordering Canada's territorial sea the matter of ownership has periodically occurred, specifically with regard to the seabed and subsoil and the delineation between 'inland waters' and the 'territorial sea'. It seems fairly explicit that the federal government has certain controls over many aspects of the disputed seas. Section 91 (9) to (13) provide this framework of authority and no province has questioned these rights. However, the sub-sections are quite broadly defined and there remains a troublesome power vacuum in areas not adequately interpreted in this portion of the Act.

Most of the major disputes have arisen between the federal government and the provinces of B.C., Nova Scotia, and Newfoundland. Nova Scotia has

gone to court several times over the ownership of underwater coal mines,[50] cases which have been resolved by determining whether or not the mines were under inland waters or the Canadian territorial sea - a consideration that parallels British Columbia's present claims.

The cases of B.C. and Newfoundland are also similar in many respects. Both entered Confederation after the B.N.A. Act was endorsed by Canada, Nova Scotia, and New Brunswick; Newfoundland as an independent nation with international legal status, and B.C. as a British Colony with all the property rights of Great Britain. Both provinces claim the resources on and under the seabed off their respective coasts by referring to proprietary rights; that is, that they owned the resources of the seabed prior to Confederation and that these rights were not transferred to Canada when they joined Confederation.

Since the seabed and the continental shelf were not international concepts until well into the 20th century, the problem of who owns what is magnified. Newfoundland signed the Truman Proclamation as an independent nation in 1945 and, since this event may have been the major act that brought the concept of the continental shelf to the fore, she may have avoided many of British Columbia's subsequent problems.[51]

One major event that both provinces watched with more than cursory interest was the 1967 Supreme Court of Canada Reference Case on the ownership of offshore minerals. By Order in Council P.C. 1965 750 (April 26, 1965), the Governor in Council referred two questions to the court, perhaps in anticipation of future disputes arising over the ownership of offshore minerals. These questions referred to the waters and the seabed "outside the harbours, bays, estuaries and other similar inland waters", and focussed on who owned the lands; who had jurisdiction over them and had the right to

exploit them; and in respect of the minerals and other natural resources of the seabed, who had the right to exploit and develop them?

British Columbia argued, and the other provinces concurred, that the seabed belonged to the provinces by reason of proprietary rights and that they had sole legislative jurisdiction over it. Further, they argued that they had the sole right of exploration and exploitation.

The federal government countered that B.C. did not have these rights when it joined Canada and that no political entity except a sovereign state may control territorial seas. This was an international law concept based upon the theory that the rights to the territorial sea must be recognized internationally before a state can effectuate control over them.

The Court, in trying to determine whether or not the continental shelf was part of the territorial sea and who had jurisdiction over it, referred to cases as far back as the 19th century.[52] Its final verdict was for Canada on all questions.

Several individuals, including Dr. Thompson, Melvin Smith, and Dr. McWhinney have suggested that the federal government's case was relatively weak and that British Columbia, had it researched historical material a little better, may have gained some control over the seabed under the territorial sea.[53] Supporters of this view point to the fact that Ontario has ownership and jurisdictional control over the lakebed and subsoil of the Great Lakes, excluding Lake Michigan, out to the international boundary which actually exceeds three miles in many places. Also, there has been no evidence uncovered to indicate that B.C. has explicitly given up her rights to the seabed off her coast - if indeed she ever held these rights. International law deals with the loss of sovereignty in a very restrictive manner. It recognizes that only

those rights expressly transferred to another government can be recognized, thus giving the 'grantor' the benefit of the legal doubt. Additionally, many of the federal government's claims to ownership came from judicial comments in the British Queen v. Keyn case which B.C. supporters say has nothing to do with the Reference.

Dr. Thompson stated that he felt that the best avenue for the courts to take in these areas where there is no real precedent is to decline to give a judgment, that the matter of ownership of sections of the sea and subsoil would be better left up to the politicians to decide.[54] This agrees with the Dr. McWhinney's assessment. The apparent damage may have been done however, for during a trip to Ottawa in December, 1975, Dr. Thompson stated to the author that a Deputy Minister informed him that "they don't intend to bargain on the west coast",[55] only on the east coast - a development not surprising in light of the Reference decision which made the federal bargaining position all but unassailable.

Excluded from the 1967 case was the question of whether or not the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait and Queen Charlotte Strait were classed as part of the Pacific Ocean or as inland waters. By Order in Council 3459 of October 31, 1974, the provincial government set in motion a reference to the B.C. Court of Appeal to determine the ownership of these waters. The importance of this case is difficult to overestimate for it may affect the inland waters of many provinces. At stake are large areas of seabed and subsoil with considerable potential for natural resource exploitation. Needless to say, other coastal provinces had been watching the unfolding legal events with keen interest.

The province believed that the main point of dispute was one of

proprietorship of the above lands rather than legislative jurisdiction. A government may have legislative jurisdiction over certain lands without having proprietary ownership.[56] For the federal government to have proprietary rights over these lands, the province, or Great Britain, must have expressly transferred them to the Dominion. As in the 1967 Reference, the province argued that these rights were never transferred to the Dominion either explicitly or by implication, and that control remains vested in the province.

The federal government does exercise rights over these waters, admitted the province, through its legislative authority to control fishing, navigation and shipping, navigation aids, trade and commerce, and customs and defense, which effectively includes everything above the seabed and, as laid out in Sections 108 and 117 of the B.N.A. Act, portions of the seabed and subsoil in certain areas of the province; namely the harbours of Victoria, Esquimalt, Nanaimo, Alberni, Buarrd Inlet, and New Westminster. These are the only areas of federal control other than defense installations and Indian lands, and appear to omit the seabed outside the stated harbours, thus implying provincial ownership.

Still unresolved was the question of whether or not the four Straits were within the boundaries of the province of British Columbia. In the Reference Case, the Supreme Court had admitted making a decision on waters described as "harbours, bays, estuaries and other similar inland waters." It was now up to the province to prove that the Straits were estuaries or similar inland waters. Again, there was no closely related legal precedent from which to draw. Nevertheless, there were many cases where opinions had been expressed by judges which had a direct effect on cases they were trying

at the time. These opinions constitute, for all intents and purposes, legal precedent.[57]

Two things were militating against B.C. 1. The province had no true legal precedents from which to draw, thus giving the federal government a certain advantage under 'residual powers'. 2. The international boundary is, in many places, greater than three miles from B.C. shores and the fact of the boundary makes it quite different from the Conception Bay Case in Newfoundland.[58]

The final decision came in the summer of 1976 and it was split in favour of British Columbia. Chief Justice Farris provided the summation:

> It was the Imperial Act of 1866 which clearly defined the boundaries of British Columbia and such boundaries were not changed at the time of Confederation; a consideration of the historical treaties and enactments relating to mainland British Columbia and Vancouver Island showed the western boundary to be the Pacific Ocean off the coast of Vancouver Island so that British Columbia at the time of its entry into Confederation included all land east of the Pacific Ocean to the Rocky Mountains; the waters referred to in the stated question are internal waters of the Province of British Columbia.[59]

The three to two split, although in favour of the province, has done little to solve the conflict over ownership and control of submarine resources in these areas. The federal government is appealing the B.C. Appeal Court decision to the Supreme Court of Canada, and considering the record of this court, it would not be surprising if the verdict went the other way.

One other area of jurisdiction that causes no little problem between the federal government and the provinces is that of Indian lands. While the underlying title to lands reserved for Indians is vested in the Crown in the right of the province, the authority to legislate in respect of Indians and lands reserved for Indians is vested in Parliament as per Section 91 (24) of the B.N.A. Act.[60] In British Columbia, the ownership of certain resources on

Indian lands was formalized in the British Columbia Indian Reserves Mineral Resources Act, two identical Acts of which were enacted on July 24, 1943 and on March 18, 1943, by Parliament and the B.C.Legislature respectively. This Act covered only hard minerals and excluded such things as oil, natural gas, coal, clay, sand, gravel and timber. Revenues from any mine on Indian land were to be split 50/50 between the province and the federal government who acted as guardians of the Indians. The resources which were excluded from the Act were left totally in the hands of the federal government as were all revenues accruing from their exploitation.[61]

There are some quirks in this jurisdictional division though, that cause problems at times. For example, when some lands were originally designated reserves, the province excluded any existing timber leases for a period of years or during a specified maturation period for the trees. While the land was Indian land, the resources on it were not Indian resources, but rather, privately owned. Several of these issues have yet to be worked out.

The province also retains the right to take a portion of any Indian reserve up to 1/20th in area for public purposes such as power lines, highways and other projects. This 1/20th can be taken without compensation.[62]

Despite these perplexing grey areas of law, the provinces do have quite extensive and recognized freedoms to control resources. If a goal cannot be achieved using one method, there may be another method which will work. The difference between a Saskatchewan petroleum tax and a British Columbia petroleum tax may simply be a modicum of compromise to the producers rather than a radical difference in legislative structure. The N.D.P. government in British Columbia between 1972 and 1975 sought this sort of compromise in order to establish undisputed control over its own resources. As the next chapters

will show, they failed at first only to try again and finally succeed.

Notes to Chapter 2

[1]For a thorough discussion of the debates which eventually led to the "Agreement" see Chester Martin, The Natural Resource Question (Winnipeg: Saults and Pollard, University of Manitoba, 1920).

[2]Edward McWhinney, Quebec and the Canadian Constitution: 1960-1978 (Toronto: U. of Toronto Press, 1979), ch. 2.

[3]ibid., p. 12.

[4]W.R. Lederman, "Classification of Laws and the B.N.A. Act," The Courts and the Canadian Constitution, ed. Lederman (Toronto: McLelland and Stewart, 1964), pp. 177-199.

[5]Canadian Sessional Papers, 1871, No. 4, Paper No. 18, p. 6. Cited in Martin, op. cit., p. 58.

[6]Gerard LaForest, Natural Resources and Public Property Under the Canadian Constitution (Toronto: U. of Toronto Press, 1969), p. 14.

[7]See Bora Laskin, Laskin's Canadian Constitutional Law, eds. Albert S. Abel and John I. Laskin (4th ed.; Toronto: Carswell and Co., 1975), pp. 23-59 and, LaForest, op. cit., pp. 170-173.

[8]W.R. Lederman, "The Constitution: A Basis for Bargaining," Natural Resource Revenues: A Test of Federalism, ed. Anthony Scott (Vancouver: U.B.C. Press, 1976), p. 58.

[9]Lederman, The Courts and the Canadian Constitution, pp. 192-193.

[10]Shannon v. Lower Mainland Dairy Products Board, (1938) Appeal Cases 708, p. 718.

[11]ibid., p. 720.

[12]Despite this seemingly clear appraisal, the legal quagmire on this issue has never been solved satisfactorily and may prove very difficult to do. See Noel J. Lyon, Canadian Constitutional Law in a Modern Perspective, (Toronto: U. of Toronto Press, 1970), pp. 927-929.

[13]Home Oil Distributors, Ltd. v. Attorney-General of British Columbia, the Coal and Petroleum Board, (1940) Supreme Court Reports 444, pp. 444-445.

[14]ibid., p. 444.

[15]In re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919, (1925) 1 Appeal Cases 396.

[16]Fort Francis Pulp and Power Company, Ltd. v. Manitoba Free Press Company, Ltd., (1923) Appeal Cases 696.

[17]Toronto Electric Commissioners v. Snider, (1925) Appeal Cases 396.

[18]Texada Mines Ltd. v. Attorney-General of British Columbia, (1960) Supreme Court Reports 713.

[19]Taped interview with Dr. Andrew Thompson, Chairman of the British Columbia Energy Commission, Vancouver, British Columbia, December 16, 1975.

[20]LaForest, op. cit., p. xii.

[21]Smylie v. R., (1900) 27 Ontario Appeal Reports 172.

[22]LaForest, op. cit., p. 164.

[23]Brooks Bidlake and Whittal, Ltd.v. Attorney-General of British Columbia, (1923) Appeal Cases 450.

[24]Alan Forrest, "B.C. to Establish Agency to Gather and Market Gas," Toronto Globe and Mail, September 22, 1973, p. Bl.

[25]Canadian Industrial Gas and Oil, Ltd. v. Government of Saskatchewan et al., (1978) 80 Dominion Law Reports (3d) 449.

[26]ibid., p. 483.

[27]ibid., pp. 473-474.

[28]ibid., p. 466.

[29]ibid., p. 485.

[30]ibid., p. 481.

[31]ibid., p. 468.

[32]ibid., p. 463.

[33]Bora Laskin, Laskin's Canadian Constitutional Law, p. 333.

[34]There are several cases that deal with this issue of direct and indirect taxation. See Cigol Case pp. 473-484 for a partial list of references.

[35]"Blakeney Charges Ottawa Betrayal," Canadian News Facts, (Toronto: Marpep Pub. Ltd., 12, 1978), p. 2021.

[36]ibid.

[37]"Ottawa to Discuss Oil Tax Ruling with Provinces,"The Province (Vancouver) November 25, 1977, p. 6.

[38]Central Canada Potash Company, Ltd. v. Government of Saskatchewan, (1978) 88 Dominion Law Reports (3d) 609.

[39]Saskatchewan Order-in-Council 1737/69 amended by Order-in-Council 404/70.

[40]*Potash Case*, *op. cit*., p. 615.

[41]*ibid*., p. 617.

[42]*ibid*., p. 631.

[43]*ibid*., p. 630.

[44]*ibid*., p. 632.

[45]For a more in-depth discussion of this aspect of Constitutional Law see *Laskin's Canadian Constitutional Law*. In addition see the cases listed on pp. 611 and 612 of the *Potash Case*.

[46]A. Milton Moore, "The Concept of a Nation and Entitlements to Economic Rent," *Natural Resource Revenues: A Test of Federalism*, ed. Anthony Scott (Vancouver: U.B.C. Press, 1976), p. 243.

[47]McWhinney, *op. cit*., p. 110.

[48]Lederman, *Natural Resource Revenues*, pp. 52-60.

[49]Taped interview with Dr. Andrew Thompson, *op. cit*., December 16, 1975, and also, Dr. Andrew Thompson, "Natural Resource Revenue Sharing: A Dissenting View," *Natural Resource Revenues: A Test of Federalism*, ed. Anthony Scott (Vancouver: U.B.C. Press, 1976), pp. 112-117.

[50]*Dominion Coal Ltd. and the County of Cape Breton, Re* (1963) 40 Dominion Law Reports (2d) 593.

[51]For more information see Cabot Martin, "Newfoundland's Case on Offshore Minerals," *Ottawa Law Review*, Vol. 7:34 (Winter, 1975), pp. 34-61.

[52]See *Queen* v. *Keyn*, (1876)2 Ex. D. 63. Imperial Act of August 2, 1858, S. 1. Imperial Act of July 28, 1863, S. 3. Imperial Act of August 6, 1866, joining Vancouver Island and the Mainland of B.C. Revised Statutes of B.C., (1911) Vol. 4 pp. 266 and 273.

[53]Taped interview with Mel Smith, Director of Constitutional and Administrative Law, Province of B.C., Victoria, November 13, 1975. Taped interview with Dr. Andrew Thompson, *op. cit*., December 16, 1975. McWhinney, *op. cit*., pp. 41-43 and 53-54.

[54]Taped interview with Dr. Andrew Thompson, *op. cit*., December 16, 1975.

[55]*ibid*.

[56]*Attorney-General for the Dominion* v. *Attorney-General for Ontario*, (1898) Appeal Cases 700.

[57]See Capital City Canning Co. v. Anglo British Columbia Packing Co., (1905) 11 British Columbia Reports 333. Rex v. Johanson, (1922) 31 British Columbia Reports 211 (C.A.). Rex v. Furuzawa (1930) 53 Canadian Criminal Cases 398 (B.C.).

[58]Direct United States Cable Company, Ltd. v. The Anglo-American Telegraph Company, Ltd., (1877) 2 Appeal Cases 394.

[59]Reference re Ownership of the Bed of the Strait of Georgia and Related Areas, (1976) 1 British Columbia Law Reports p. 97.

[60]LaForest, op. cit., p. 176.

[61]Indian Act, Revised Statutes of Canada, c. 149.

[62]ibid., s. 35.

CHAPTER 3

The Development of the Energy Act

The Energy Act arose out of several national and international events and processes, the most important of which was the recent and local change in the attitudes of the people of Canada and British Columbia toward hydro-carbon energy fuels. This transformation occurred because of the rapid and virtually uncontrolled mutations in energy patterns in the early 1970s, and necessitated decisive government action in the form of legislation which was designed to minimize, and indeed capitalize from, the negative influences of the energy crisis.

For British Columbia, the most important spin-off from the world upheaval was the sudden, and perhaps unexpected, increase in the fiscal and social value of natural gas. Ounce for ounce, natural gas contains more calories of heat than any of the petroleum by-products and, while processing can be expensive depending upon the amount of impurities in the gas, it generally costs much less to clean and deliver to homes and businesses than heating oil. Although its main use is for industrial, commercial, and home heating, it has also been used widely in the past for electrical generation, although this is not as prevalent today.

In most western Canadian oil wells there is a certain amount of gas, usually high in hydrogen sulphide and relatively low in quantity. The industry generally has little option but to burn off the gas at the wellhead since the cost of 'scrubbing', or cleaning it of the hydrogen sulphide is uneconomical.

In natural gas wells, the gas, which is basically methane, also contains varying amounts of other gases - called Liquid Petroleum Gases (LPGs)

which must be extracted. These forms of gas, which include ethane, butane, propane, pentane, hexane and others, liquify at relatively low pressure compared to natural gas and were they not removed prior to pipeline transportation, they could cause blockages by settling as fluids in the lower portions of the line. The cost of scrubbing plants is extremely high and can only be contemplated where there is gas in marketable quantities and where a separate transportation system exists to carry the clean gas to markets. If proper oxidation occurs, the scrubbed natural gas burns cleanly with combustion gases consisting of only carbon dioxide and water.

In British Columbia, as a result of different geology, most of the wells drilled have been gas rather than oil producers. In the early years of exploration in the Province, the wells were capped because of lack of markets and adequate transportation systems. It was not until the late 1950s when the Westcoast Transmission line was built from the B.C. North-East to the American border that gas began to flow to markets.

However, it soon became evident that the public, despite increasing interest, was somewhat reluctant to change over from fuel oil or electricity to natural gas at prices that approached that of oil. Gas was a new product to many people in the Pacific North-West - an explosive one - and this caused some generally unwarranted concern about its safety. In reaction to this, a selling campaign was launched in the late 1960s and early 1970s to convince the public of the virtues of the fuel. The advertising had its desired effect and consumption of natural gas climbed dramatically through 1973 (see Tables 6 and 8).

While the demand for natural gas rose, the prices asked for it remained fairly constant. Table 5 indicates that the export price between 1965 and 1972

rose only 8¢ per thousand cubic feet (Mcf), or about 27%. This was just slightly less than the cost of living increase during these years. The domestic price (Table 3) rose only 4¢ or 16% between 1960 and 1972, considerably less than the increase of the cost of living during the same period. In effect, natural gas for domestic use became cheaper as the demand rose.

The economic argument for increased export volumes during this period, even at prices that were extremely low compared to today's prices, pointed to the fact that the exceedingly high fixed costs of transmission and distribution systems required these costs to spread out over a larger number of units. While this may have reflected the conventional wisdom of that day, by present standards the price and royalty figures, which had remained relatively unchanged for years, appear to be quite inadequate.

British Columbia had been charging the corporations that produced and sold gas in the province a nominal royalty of 15% of net returns. This royalty, by the time the N.D.P. took over in 1972, had been in effect, without change, for over a decade. Since there were few brakes applied to the natural gas industry or the export licences, by the late 1960s and early 1970s, the drain on the province's reserves was so great that the royalty became much too inadequate to compensate for the lost resources. New gas had to be found and this generally occurred in areas that were much less accessible than previously and further from markets and transportation systems, all of which resulted in inflated costs for exploration and development. In addition, the environmental costs of developing new gas have proven over the years to be considerably higher than they had been for old gas, and the majority of these charges have either directly or indirectly come out of the provincial coffers. These

considerations, combined, meant that British Columbia was actually paying a heavy price for the cheap sale of natural gas.

The New Democratic Party in Opposition occasionally expressed concern about the apparent lack of interest that the Social Credit Party demonstrated toward the natural gas industry, and these criticisms were often accurate. In 1972, the province had very little control over exploration, development, transportation, end uses or revenues in the industry. While prices remained extremely low, the British Columbia consumption rose from 89 billion cubic feet (Bcf) in 1968 to 121 Bcf in 1972 (Table 6). Exports during the same period climbed from 134 Bcf to 247 Bcf (Table 8).

Two major factors were evident in the confusion over control of the natural gas industry. First, the physical make-up of the industry in B.C. contributed to an oligopoly situation where a very few companies had virtually complete control over the exploration, transportation, and marketing of gas. Second, the governments of British Columbia and Canada, the latter through the National Energy Board, were painfully slow to act on resource issues, particularly as they related to the petroleum industry.

Westcoast Transmission Company was, and still is, the major purchaser, wholesaler, and exporter of natural gas in the province. A provincial government press release stated that this gave the company "a hammerlock on the entire industry, and the provincial government had no control over the operations of Westcoast Transmission or the disposal of natural gas in and out of British Columbia."[1] In 1973, the two major shareholders in Westcoast Transmission were Phillips Petroleum Corporation whose subsidiary in B.C., Pacific Petroleums Ltd., owned approximately 26% of the outstanding shares and El Paso Natural Gas Company of Texas which owned approximately 13.5% of the

outstanding shares.[2] Together these companies effectively held sway over the policies and decisions of Westcoast Transmission.

To compound matters further, Pacific Petroleums was the province's major natural gas producer, accounting for some 40% of the entire provincial production, while El Paso, which had been buying B.C. gas since the opening of the Westcoast Transmission line in the mid 1950s, was the major purchaser to the tune of 65% to 75% of production.[3] The remaining 30% to 35% was destined for domestic consumption.

Not surprisingly, this corporate inter-locking resulted in the maintenance of artificially low prices paid for gas at the border. It was in the interests of the parent companies to buy low, not simply for economic reasons, but during part of the Nixon years, to satisfy the American Federal Power Commission's edict that imported fuel remain at a specified price level. The difference between their purchase price and the import price was maintained at the highest level possible. Also, any potential losses by producing subsidiaries in British Columbia could be claimed as tax deductions on their Canadian income tax returns. Notwithstanding the F.P.C., the purchasers of natural gas had the option to profit where they could in the American market, and this was better achieved through the purchase of extremely low-cost gas from Canada.

Because of the effect President Nixon's wage and price controls had on natural gas imported into the United States (a situation extant when the N.D.P. came to power), the American-controlled Westcoast Transmission Co. was unable, of its own accord, to raise the price of natural gas above a specified level. In apparent harmony with this stand, Mr. E.C. Phillips, President of Westcoast Transmission, stated before a hearing of the F.P.C. on August 28, 1973: "The objective of Westcoast Transmission representations before

Arbitration Boards will be to retain wellhead prices at the lowest possible level."[4] Also, "It is in Westcoast Transmission Company's best interests to sell as large volumes as possible and it will be seeking to keep the cost of gas at as low a level as possible in order to do this."[5] As a result of the low prices Westcoast carried the burden for its parent companies, forgoing the rule of profit maximization.

A question is raised as to whether Mr. Phillips' statements were a reflection of Westcoast's immediate fiscal interests or represented the position taken by the American shareholders. It will be shown later that the fortunes of Westcoast were actually enhanced by the assertive actions of the N.D.P. in 1974 and 1975.

The immediate effect of the low natural gas prices on the company and on the producers was that many companies not tied to the American importers suffered substantial loss of potential returns desperately needed to further exploration and development. Lack of exploration, in turn, threatened future supplies of natural gas which led to serious concern for the future revenues accruing to the province from natural gas royalties. This snowballing and self-destructive program of artificially low prices pointed out the inherent weakness in free enterprise especially when governments fail to carry out their regulatory responsibility.

Since Westcoast was the only purchaser in the province, the smaller independent companies were unable to bargain successfully for substantially higher prices. This led to numerous complaints by these companies to the provincial government over the monopolistic forces at work in the natural gas industry, but, the pleas appeared to fall on deaf ears in Victoria.

The province, and this includes the public as well as all of the

political parties, was aware, in 1972, of a possible 'energy crisis' but had not as yet experienced it and, moreover, really had no conception of its detrimental effects. While the N.D.P. was cognisant of the problem in the natural gas industry, it had no concrete policy on energy, a fact that became very obvious during the 1972 election. The 'Democrat', the official voice of the New Democratic Party, summarized the N.D.P. policy papers in 1973, a year after the election, in which it was stated that the energy resource policy was, even at that late date, very poorly defined. The only consensus seemed to be toward the formation of a Crown Corporation to handle production, transmission and distribution of natural gas.[6] Even this concept came, in sophisticated form, from the recommendation of the newly incorporated British Columbia Energy Commission. The extreme paucity of the press coverage of the energy issue during the election suggested that it was not an issue at all. On May 20, 1972, the Vancouver Province published the results of a public opinion poll which showed that the top four issues were: 1. unemployment; 2. labour and attendant problems; 3. pollution; 4. W.A.C. Bennett's age. Energy was not even mentioned in the longer list of issues. The fact that it was accepted in subsequent years does not explain why the Socreds were tight-lipped about their own energy policy at the time, if indeed they had one. Nor does it explain why the N.D.P. did not attack the Socreds with vigour for their tardiness in attempting to remedy the problem. The only conclusion that one can draw is that energy still was not regarded with the seriousness that it deserved.

The federal government, too, was partly to blame for the muddled industry situation in British Columbia. The B.N.A. Act confers the right to regulate exports on the federal government rather than the provincial

governments. To exercise this authority with respect to petroleum and natural gas, Ottawa formed the National Energy Board through the Act of the same name. The Board was set up in July, 1959, as a direct result of the Pipeline Debate in 1956 and the Borden Royal Commission on energy which followed. The N.E.B.'s duty was two-fold: Advisory and Regulatory. Through its monitoring responsibilities, the Board reports to the Energy Minister the state of the industry and makes recommendations for the improved utilization of energy resources. The Regulatory functions concern the granting of licences or certificates of public convenience for pipeline and international powerline construction and the issuing of export and import permits.

While the provinces may desire to increase the export price of oil or natural gas, the final determination is still in the hands of the National Energy Board, and it is generally conceded that the Energy Board has been quite slow in supporting the western provinces desires for greater returns for exports or fewer and tighter export permits.[7] The situation in B.C. was not in any way aided by the cautious and conservative actions of the N.E.B. which, in all fairness, receives its mandate from the federal cabinet and is often subject to the political pursuasions of that body.

The federal government, at that time, had not defined any form of long range energy policy beyond vague references to energy self-sufficiency by 1980. Nor had the government been successful in negotiating even a skeleton of an energy policy with the provinces, let alone fleshing it out. In this vacuum, the National Energy Board was given, informally and almost by default, the responsibility of forming policy, a task it was not designed to handle.[8] Seemingly, in much the same way the federal government used the Supreme Court, it used the N.E.B. Nevertheless, it was the N.E.B. that made the initial

recommendations (based on information gathered at public hearings) which resulted in many huge export permits being issued at extremely low prices.

One of these gas licenses was to cause considerable problems for the N.E.B. and the federal government as well. The largest natural gas license ever to be issued in Canada was GL 41, made to Westcoast Transmission authorizing the company to export a total of 5 trillion cubic feet of natural gas to the United States from November 1, 1971 (when the average price was only 12¢ Mcf), to October 31, 1989. In 1976, the entire proven reserves of natural gas in B.C. amounted to only 6.7 Tcf (see Table 10).

The N.E.B. was careful to permit exports only when reserves were such that Canadian demand could be met within the foreseeable future. Gas that was surplus to domestic requirements could, with federal government approval, be exported. To determine reserve requirements for Canada, the Board used its 25A4 formula which multiplied the anticipated domestic demand four years hence by twenty-five. Reserves beyond this resulting figure were deemed surplus. Considering the critical reductions in reserves during the subsequent years, the ramifications of GL 41 were immense.

These factors were eventually viewed with grave concern by the public and government and prompted legislative action to counteract their debilitating influences. The resulting Energy Act, which was passed in the British Columbia Legislature on April 18, 1973, may prove to be one of the most significant Acts passed by any government in the history of the province. The Act finally gave the province the mechanics to control effectively the industry on which so much of the province's lifestyle has become dependent.

Its origins can be traced to the Liberal government of Thomas Dufferin Patullo and his endeavour to gain some mastery over the vital coal and

petroleum industry which was under strong pressure from outside the province. In 1937, Premier Patullo introduced into the Legislature the Coal and Petroleum Products Control Board Act[9] (see Chapter 2).

Where it did not infringe upon the authority of other Acts, such as the Petroleum and Natural Gas Act, The Control Board Act regulated retailing, wholesaling, licensing, licensing conditions, licensing suspensions, and prices. It could set standards in the industry; require audits of coal or petroleum companies; request operating information; and it had powers of inspection.

The Act authorized the formation of the Coal and Petroleum Board, which consisted of only one member, Dr. William Alexander Carrothers. The Board was entrusted with powers of a similar nature to the Supreme Court of British Columbia, and it could compel witnesses to attend hearings and could examine them under oath. In support of its duties, the Board could subpoena any books, papers, financial reports and the like from any company engaged in business under its jurisdiction.[10] Some of the more powerful sections of the Act placed the burden of proof on the accused where there is a conflict with any of the Board's Regulations, and empowered the Board, in certain circumstances, to expropriate the property of persons or companies engaged in the petroleum industry if they were in conflict with the Act.[11] Providentially, the Act also stated that its powers extended only to the province of British Columbia. This was one of the key clauses which convinced the Supreme Court of Canada that the Act was designed for provincial matters only.

Many of the sections of the Energy Act are quite similar in wording to the Coal and Petroleum Products Control Board Act but the major difference

was that the 1937 Act remained subservient to several natural resource Bills in effect at the time, while the Energy Act was invested with additional powers that made it one of the most dominant and over-riding natural resource Acts in the province.

The Energy Act was not designed simply to moderate the industry or to act as a watchdog. It gave the government the power to expropriate entire utilities and set prices, conditions and rewards. Few moves could be made in the exploration, development, transportation, or sale of any energy commodity that was owned by the province without the prior approval of the Energy Commission. In many cases, it superceded other Acts, such as the Municipal Act, and could make certain energy decisions for city councils. It empowered the government to fine individuals, companies, utilities, and even councils of municipalities. Perhaps most importantly, it laid the groundwork for a vastly improved system of revenue generation through increased domestic prices, which it could apply directly, and export prices, which it could affect indirectly. It was a powerful Act, and it was legal!

The legal premises upon which the Energy Act was built were carefully and thoroughly researched (see previous chapter), particularly in respect of its constitutionality and its potential for affecting the export market.

The Act went as far as it could in the control of energy resources within the province without pretending to extend this control beyond the provincial boundaries. Many of the basic premises of the Act had been through the test of fire in the Supreme Court of Canada as the Home Oil Case dealing with the Coal and Petroleum Products Control Board Act, and had been found intra vires the province.

The one serious failure, however, in the extent of the Energy Act's

power related to the B.C. Hydro and Power Authority. The largest utility in the province, B.C. Hydro was subject to the B.C. Hydro and Power Authority Act of 1964, and only one small part of the Energy Act applied to this mammoth Crown Corporation - that of customer complaints. It had long been one of the New Democratic Party's wishes to control Hydro as though it were just another utility, but the complexity of its operations confounded any major exercise of authority in a short time period. Not only does Hydro manage power distribution in many centres of the province, it also supervises the construction of dams, power transmission lines, thermal plants and some natural gas lines. Any government which contemplates placing Hydro under the Energy Act will likely have to break the utility into components (such as the transit authority, a hydro-electric section, and natural gas distribution systems) and transfer some of these to other government ministries.[12]

Notwithstanding the enigma of B.C. Hydro, the Energy Act was fairly unrestrained in its power. The Act authorized the formation of the British Columbia Energy Commission which acted as the Bill's trustees and carried out its purposes. Rather benignly, considering the powers of the Act, Dr. Thompson stated that the duties of the Energy Commission were "... to regulate the industry's activities in the province and to advise the provincial government on matters of prices and policies.[13] The Board, which was appointed by the government, consisted of a maximum of seven members, any two of whom were a quorum, and they held office for five years. No employee or Board member of the Commission could hold any material interest in any utility or segment of the petroleum industry that came under the powers of the Commission. All employees were sworn to secrecy with respect to confidential information gathered during the discharge of their duties. Annual reports of

the Lieutenant-Governor, i.e. the government, were due on or before March 1st for the preceding calendar year.

Part II of the Act, which covers only about a page and is two sections long, outlines the responsibilities of the Commission with respect to energy resource management. These duties consume a very large part of the Commission's operational efforts each year. Under this Part, the Commission acts as advisor to the government in such matters as "nature, quality and extent of...energy resources" in the province; measures to "promote discovery, conservation, and prudent use of energy resources"; the advisability of exportation of energy resources; and "the nature and amounts of government revenues", as well as other unspecified duties. The Commission was given the power to hold hearings or inquiries in order to elicit information in the fulfillment of these duties.

The control that the Commission has over the operation of utilities is quite extensive. A 'utility' is defined as anyone operating facilities for the production or storage of any energy commodity for the ultimate sale to customers, but it does not include municipalities that distribute their own power within their boundaries or any industry generating its own power requirements. The latter would include sawmills or pulpmills burning hog fuel for electrical generation within the plant. Standards of operation are set by the Commission and no utility may commence or conclude operations without the prior consent of the Commission. Any and all information that is requested by the Commission of any aspect of the operation of a utility must be provided. A set of books, acceptable to the Commission, must be kept at an office in the province, as must all other accounts, papers, or records of the utility. The Commission has the authority to constitute new utilities or

to cancel the certificates of existing ones.

Rate schedules of the utilities are subject to approval and revision where necessary. As in many sections of the Act, decisions of the Commission with respect to the justifiability of rates schedules can be made only after a hearing has taken place. Contracts that any utility enters into with a customer that are shown to be discriminatory in any way, may be declared null and void.

Careful control is maintained over capitalizations, the issuance of stocks and bonds or other evidence of indebtedness, transference of shares, or any form of amalgamation or merging with any other utility.

Section 50 (1) states, "Every power utility shall supply electrical energy to any premises situate within one hundred yards of any supply wire or cable suitable for that purpose." In addition, the utility may be compelled to supply service to any premises beyond one hundred yards if the owner agrees to paying the additional cost. Utilities are, as a consequence, empowered to supply service whether it is economical or not.[14]

It is interesting to note the rights that the Act provides in the use of municipal thoroughfares. With or without the permission of the municipality, the Commission may authorize a utility to use any public land within the municipality for transmission lines, sub-stations, or for any other authorized purpose "notwithstanding any law or contract granting to any other person exclusive rights with respect thereto."[15]

The Commission has the authority to appraise the value of any energy utility in the province and to charge the costs of such an appraisal to that utility. Supervisors or inspectors may be appointed to a utility for the inspection of equipment and procedures and the Commission may order that the

salary and expenses of these personnel be charged to the municipality in which the utility operates.[16]

Of the several sections of the Act, the one to warrant a second glance by the N.D.P. government was Part IV dealing with regulation of the petroleum industry. The original Act gave the Commission quite extensive powers, subject to a few other provincial Acts, in setting conditions, prices, and powers of expropriation. This portion of the Act was amended in 1974, most of that amendment being subsequently enacted on August 22 of that year.

The amendment relaxed some sections while defining more accurately the Commission's powers vis a vis the petroleum industry. Gone were the powers to enter the premises of a company and seize its property for violation of the Act. Also amended was the power to set prices of petroleum products arbitrarily. It could only inspect the property or books of a company to see that it was complying with the Regulations, and it could only approve or reject price increases or decreases made by companies. However, the Commission was given the authority to make certain Regulations without having to go to the Lieutenant-Governor for prior approval as was the previous case.

The powers of the Commission outlined in Part V are quite extensive. It can hear complaints regarding any energy utility, including B.C. Hydro, and may act on the results, which may entail issuing restraining orders or authorizations to perform certain tasks. It can hold hearings that are equivalent in many ways to a court of law, but it is not bound by legal precedent. Decisions are made on the merits of each case. Section 90 states that the Commission, in respect to the Energy Act, "has all the powers,

rights and privileges vested in the Supreme Court." This again, is much the same as the 1937 Control Board Act. In cases where other suits or prosecutions are pending in a court, the Commission may still hear evidence regarding the same matter irrespective of the concurrent case. Generally speaking, hearings are a requirement before any major decisions are made, but in some cases the Commission has the power to make decisions involving loss to a person or utility without the benefit of a hearing. At the discretion of the Lieutenant-Governor in Council, a hearing may be public or *in camera*, and is vested with tremendous authority. Police officers and sherriffs are regarded as "ex officio" officers of the Commission and are bound to act for the Commission as they would for the Supreme Court.

Perhaps one of the most important sections of the Act, and one that has been most controversial, has been that of expropriation. The Commission has the right to take possession of any property belonging to an energy utility which has defaulted on its obligations under the Act, and the expropriation may be effected by force if necessary. Where the expropriation of property belonging to the petroleum industry was deemed to be too powerful to be included in the Act and was repealed, this section on utility expropriation was not.

Consequent to the takeover, the Commission must manage the utility with or without the aid of the utility's personnel. In other words, the Commission can fire any person working for the utility if that person does not perform to the expectations of the Commission. As a final result, the Commission may completely dissolve the utility. Dr. Andrew Thompson, former Chairman of the Energy Commission, said that this power of expropriation is one that is not likely to be used.[17] The option is there, however, should the government ever need it. Although it is unlikely that the full

expropriatory power would ever be used, it is conceivable that certain officers in a utility may be replaced under the authority of the Act for actions in conflict with their position.

The Energy Board may, upon request, review any previous decision it has made and, if it feels that it is justified, may hold a second hearing to determine the correctness of its first action. In a case where a person is unable to change the decision of the Board, he may, if given leave, appeal to the B.C. Court of Appeal under the normal constraints of such an appeal.

Any person who defies or ignores an order of the Commission is subject to pecuniary punishment. This includes officers of utilities, private citizens under the jurisdiction of the Act, petroleum industries under the Act, and even councillors of municipalities.

Other punishable offenses include submitting a false return, obstruction of an employee or board member of the Commission performing his/her duties, disclosure of confidential information, and accepting bribes.

Under Part VIII, miscellaneous, there are a few points that should be made. Section 147 states, "Nothing contained in, or done under, the Municipal Act supercedes or impairs any power conferred on the commission or any energy utility, or relieves any person of any obligation imposed by or under this Act or the Gas Utilities Act." In the Government's list of priorities, distribution of energy ranks before the sanctity of the municipality. Regulations made pursuant to the Energy Act are "deemed to be part of this Act" notwithstanding the Regulations Act.

The obvious need for powerful legislation such as the Energy Act, and the care with which the Act was drafted, eventually brought all of the

political parties in Victoria together in its support. The Social Credit government has, since late 1978, been seriously considering limiting the role of the Energy Commission to simply that of a regulatory agency and only recently have moves been made to accomplish this although no steps have yet been taken to amend the Energy Act to facilitate the movement of the Commission's other responsibilities to the Department of Energy, Mines and Petroleum Resources. As yet, there has not been a single change in the wording of any portion of the Act since the 1974 amendment by the New Democratic Party government. In fact, the Social Credit government have, during the past five years, proclaimed many sections of the Act that were left un-enacted when the N.D.P. lost the 1975 election. Although it remains to be seen what new roles the Social Credit government plan to give the Energy Commission through possible amendments to the Energy Act, the fact that no changes have been made up to the present time seems to reflect well on the initiative of the N.D.P. to introduce the Act.

Chapter 4 examines in detail the events that occurred in the province subsequent to the introduction of the Energy Act, the problems that were encountered, and the methods used to correct the energy imbalances.

Notes to Chapter 3

[1]B.C. Government News Release, July 17, 1974.

[2]B.C. Energy Commission, First Annual Report (Vancouver: B.C. Energy Commission, 1973), p. 5.

[3]ibid.

[4]ibid.,p. 8.

[5]ibid.

[6]New Democratic Party, "The Environment," Democrat, August-September, 1973, Vol. 13 No. 4, p. 9.

[7]For further information on the National Energy Board see Law Reform Commission of Canada, The National Energy Board, prepared by A. Lucas and T. Bell (Ottawa: Ministry of Supply and Services, 1977), pp. 24-26 and, B.C. Energy Commission, 1975 Natural Gas Field Price and Incentives Inquiry (Vancouver: B.C. Energy Commission, October, 1975), pp. 7,8.

[8]Law Reform Commission of Canada, The National Energy Board, (1977), pp. 35,36.

[9]1937, c.8, Sec. 1, Chapter 54, Revised Statutes of British Columbia.

[10]ibid., Sec. 29.

[11]ibid., Sec. 37.

[12]Province of British Columbia, The Committee on Crown Corporations, Report to the Premier (Victoria: April 25, 1979).

[13]"B.C. Defines Position, Assesses Energy Crisis," Oilweek, Vol.24, No. 45 (December 24, 1973), p. 11.

[14]B.C. Hydro is in the same situation. The Authority is continuously running into criticism for constructing huge dams that seem quite unnecessary at the present time. It appears, however incorrectly, that they have been on a 'power' trip for the past two decades, that they are only concerned with building edifices for the sake of building. This is not quite true. B.C. Hydro was given an order to 'supply electricity and other forms of power to the people of the province such that there will never be a shortage. Supply it in quantity and universally throughout the province where demanded.' This order makes it necessary for the Authority to act in the way it does. If the government, and this is where the responsibility lies, were to decide that perhaps at some rare times we may be able to put up with brown-outs or some natural gas shortages, B.C. Hydro would not be required to construct enormous economically and environmentally disastrous projects. The bottom line indicates that the people, through their government, are responsible. This, of course, does not absolve Hydro of all blame. It has a powerful lobby in Victoria and, all too often, encourages the blind growth syndrome.

[15]*Energy Act*, *op. cit.*, Secs. 54,55.

[16]*ibid.*, Secs. 62,63.

[17]"B.C. Defines Position, Assesses Energy Crisis," *Oilweek*, loc. cit.

CHAPTER 4

The Developing Control of the Natural Gas Industry

As awareness of the seriousness of the natural gas supply and demand problem became clear to the fledgling New Democratic Government in Victoria, its impact became increasingly untenable. It was evident that no government in the past had seriously considered setting up a Crown agency to control the industry. The N.D.P., true to their philosophy, were convinced that such an organization would protect the rights of the British Columbia population with regard to energy and would support the maintenance of a solid economic foundation for the Province, a good portion of which was the energy industry.

Being assaulted, as it were, on two sides of the N.E.B. and the corporate oligopoly in the natural gas industry, the province felt compelled to appoint a task force to look into all aspects of the energy industry and its resource base. This it did in January of 1973.

Very quickly thereafter, the task force recommended the establishment of a regulatory agency that was to deal solely with energy matters. The Energy Act had been drafted by Mr. Martin Taylor (now Mr. Justice Taylor) and was ready to be introduced when the task force made its report. On April 18, 1973, the Act was given Royal Assent. The government lost no time in forming the British Columbia Energy Commission under the authority of the Act, and appointing its first Board. The members included, among others, James Rhodes, Chairman (appointed because of his business background and association with the N.D.P.), and Dr. Andrew Thompson, Commissioner and eventual Chairman.

It was clear by the forethought that went into the Act and the speed with which it was implemented that the N.D.P. government, and Attorney-General Alex MacDonald in particular, were determined to effect rapid and

substantial control over the natural gas industry. It was the stated position of the government that considerably higher prices were to be applied to natural gas regardless of some initial political opposition. The three opposition leaders in the Legislature, W.A.C. Bennett (Social Credit), David Anderson (Liberal), and Scott Wallace (Conservative), united in expressing fear that the Act gave excessive power to the government, that it was much like Bill 42, the Land Commission Act.[1] There was also some concern that the Act may have been in conflict with the National Energy Board Act, but this has not, to date, been tested in court. A careful statement by Mr. Ed. Phillips, President of Westcoast Transmission, seemed to accentuate this concern.

> In principle, we would not be opposed to any provincial regulation that is in the public interest, properly constituted and unquestionably not in conflict with the National Energy Board Act.[2]

One of the first contentious issues handled by the new Government was a proposed amendment to Gas License 41 by Westcoast Transmission Company. In 1973, El Paso Natural Gas approached Westcoast expressing a desire to purchase additional volumes of natural gas up to 400 MMcf per day for its American customers. Westcoast subsequently applied to the National Energy Board for the amendment to GL 41 incorporating the increase. This application, had it been approved, would have meant a massive increase of 50% over the existing approved export volume which was already twice the size of the next nearest export license held by Alberta and Southern Gas Co. Ltd.[3]

There was a very serious concern within B.C. for domestic supplies of natural gas if this permit were to be re-issued and this was perhaps one of the major factors which caused the quick formation of the B.C. Energy

Commission. The Commission, as soon as it was able to act, recommended to the National Energy Board that the proposed export volumes under the new contract were much too high and the return proposed by El Paso to Westcoast of 5¢ extra per Mcf was far below the real market value. El Paso had promised Westcoast an extra 3½¢ Mcf regardless of export levels, and the additional 1½¢ Mcf only when the company had succeeded in achieving the increased export volumes. The Commission proved successful in obtaining a delay of approval to the amendment until such time as it was able to carry out a thorough study of the natural gas industry in the province.

Since the N.D.P. had no definite energy plan, it was left largely to the Energy Commission to define the precise method of proceeding with the re-structuring of the natural gas industry. The government, though, provided ample philosophical impetus. Alex MacDonald was quoted in the Toronto Globe and Mail as saying that "...we want to recapture for the people of B.C. the kinds of dividends that will result from natural gas rising to its true value on the market."[4] While seemingly benign, this statement was actually a basic precept of the N.D.P. and was bolstered by all the authority and conviction of the provincial government.

Another philosophical initiative that worried many businessmen in the province was the possible nationalization of the entire natural gas industry. In a telegram to the N.E.B. concerning GL 41, MacDonald indicated that the province was indeed considering the option of nationalization because "...this province is not and has not been receiving adequate returns from natural gas and the agreements proposed would merely perpetuate this position and throw increasing burdens and costs on our consumers."[5] The threat of nationalization may have been a bluff; one which no one appeared ready to call.

This form of Social Democratic philosophy frequently caused disputes to flare between the industry and the government during subsequent years. These philosophical differences aggravated the major problem in the industry, that of adequate returns to the producers from increased prices for natural gas, and when returns proved inadequate, their consequent reluctance to sustain the degree of exploration activity necessary to maintain reserve levels.

Shortly after the formation of the Commission, the provincial government issued Order-in-Council 1481 ordering the Commission to look into certain aspects of the natural gas industry and into the March 31, 1973 agreement between El Paso and Westcoast. This resulted in the province's first full-scale public inquiry into the natural gas industry. Four hearings were scheduled: Vancouver, June 12 - July 6, 1973; Cranbrook, July 23 - July 25; Prince George, July 31 - August 1; and Vancouver again, August 6 - August 10. The Terms of Reference were quite broad in order to develop a sound feeling of public opinion over the entire spectrum of the natural gas and energy industry. There was a great deal of public interest in the hearings and scores of companies, lobbying groups, public interest groups, and private citizens held forth on their respective concerns. Other than the Westcoast - El Paso Agreement, the hearings covered such issues as reserve estimates, exploration and development levels, pricing, royalty systems, exemptions, rates and tariffs, securities, annual reviews of the industry, and alternate forms of energy. The last item proved to be a major concern to the private citizens and organizations such as the Society for Pollution and Environmental Control, while pricing and royalty structures of natural gas seemed the main concern of industry.[6]

As the hearings continued amid growing interest, it became evident that the Commissioners were dealing with the participants in a fair manner. All were given a chance to participate irrespective of their political or philosophical persuasions. It also became quite clear throughout the long proceedings that provincial government interference was being kept to a bare minimum, and the public's respect for the varnal Commission grew with that knowledge.

In its final report published September 14, 1973, the Energy Commission stated:

> It is apparent to the Commission that both in relation to alternate fuels sold in the U.S. Northwest, and in relation to Alberta gas sold at the B.C. border, the price being realized for British Columbia natural gas is so low that it can only be regarded as absurd in relation to competitive value.[7]

Several recommendations were made: 1. Raise the price of natural gas to the Competitive Energy Value (CEV); 2. Establish a Crown Corporation to engage in production, processing, transmission, and marketing of natural gas; 3. Abandon the present profit margin based royalty system in favour of a price for each Mcf removed at the CEV minus certain allowances for costs of production and attendant risks; 4. An annual re-evaluation of prices, reserves, and other industry activities; 5. Reduce the length of time exploration companies were permitted to hold rights over land without carrying out exploration activity; 6. Perhaps most importantly, that no further exports be contracted until:

> 1. Reserves are established sufficient to meet all present contractual commitments and the reasonably foreseeable future requirements of the province, including Vancouver Island; and 2. prices paid for presently committed gas have reached competitive energy values.[8]

When these recommendations were accepted by the government and subsequently presented to the National Energy Board, the Board after due consideration, rejected the amendment to GL 41 and actually added additional restraints to the existing license.

Three events caused this re-assessment of export practise by the N.E.B. The impending energy crisis and the report by the Energy Commission were two.[9] The third, a rather coincidental event, was the flooding in September 1973, of the large Beaver River gas field which straddled the B.C. - Northwest Territories border. The field was operated by Amoco, one of the largest producers in the province. Export commitments on a large scale necessitated rapid extraction of gas, a practise that can be exceedingly detrimental if not properly controlled. If extraction takes place at too high a rate, the loss of pressure at the well may suck in water from surrounding strata thus flooding out portions of the field. This is what occurred at Beaver River.

To repair the damage, the water would have to be extracted at great cost in money and time, or separate wells would have to be drilled in each of the isolated pockets. Both of these alternatives proved far too costly to contemplate seriously. As a result, the province lost one of its largest natural gas fields, a total of 220 - 260 MMcf/d or some 10% to 15% of its total production (the field was finally shut down completely in 1978).

The shortfall that this caused in Canada's GL 41 export commitments was approximately 26% or 213 MMcf/d. Since three out of the four Amoco wells could not be repaired, Amoco was compelled to declare 'force majeure' as its reason for not supplying Westcoast. 'Force majeure' simply meant that because of circumstances beyond the control of the company, it was unable to

fulfill the contract. Under this condition, the company is not liable for breach of contract. Westcoast, because it was unable to supply B.C. utilities and El Paso, was also forced to resort to 'force majeure'. This meant that exports being at the end of the line would be curtailed rather than domestic utility supplies, however, Energy Minister Donald MacDonald in October, 1973, refused to allow any reduction in exports without first attempting to obtain alternate supplies for the Westcoast line.

> Until the position is clear with regard to alternate supplies we would not move to take action to curtail all (supplies to U.S. customers).[10]

Several meetings were held in an attempt to solve the problem and it was finally decided to divert Alberta gas into the Westcoast line in the Peace River area - the so-called 'Zama Link'. This supplied some, but not all, of the shortfall. Despite the initial concern caused by MacDonald's statement, there is no doubt that the province had the right to use what gas it required before the full export commitments were honoured. This point was accepted by the N.E.B. The final result was a substantial cutback in exports but, still, some voluntary curtailments in domestic use on the part of the province in order to assist American consumers. The Burrard thermal plant, for example, switched over to the use of oil from natural gas in order to free that much more gas for the export market. The fact that the temporary conversion to oil was considerably more costly to the province apparently went unnoticed by the American states and no offer was made to compensate B.C. for these incurred costs. On this point, the argument can be made, of course, that the province wanted the additional export revenues more than it wanted the gas to run the Burrard plant.

Throughout this confusion, one thing was clear; the province badly needed some direct input into the pricing, development and transportation of natural gas. It had been unclear to many within and without the New Democratic Party just exactly how the government could best control the industry. The Energy Commission's role was evident: it advised in matters of pricing and policy and it regulated utilities, but it did not directly control methods of transportation or any actual industry transactions. Although nationalization of the industry had long been touted as a possible solution, the complexity of the industry and relationships between government and private sectors were such that this extreme act would probably not aid the development of the province in the short term. The costs of exploration and development of petroleum and natural gas are so high that even the budget of a provincial government is likely to be strained.

Having been an N.D.P. election promise in 1972, the nationalization of Westcoast Transmission was also viewed with much interest, but the rider here was that the company was a federally licenced transmission carrier and, while the province might have gained some revenue by taking over the assets, it was still subject to the control of the N.E.B.[11]

To overcome some of these difficulties, the government, on the recommendation of the B.C. Energy Commission, formed the British Columbia Petroleum Corporation under the Petroleum Corporation Act, Bill 70, introduced in the Fall of 1973. Quite deliberately, the government placed the Corporation directly between the producers and the purchaser, in this case Westcoast Transmission. Premier Barrett was fond of stating that he was never intending to nationalize the pipelines and the wells; all he desired to do was nationalize the small joint of pipe between the wellhead

and the transmission line. All natural gas going anywhere in the province had to go through that tiny bend, which was now the B.C. Petroleum Corporation.

The Corporation was empowered to:

> 1. ...buy, sell, and otherwise deal in petroleum and natural gas. 2. ...build, purchase, lease or otherwise acquire, operate, and dispose of pipelines, gathering systems and storage facilities. 3. ...explore for, develop and produce petroleum and natural gas.[12]

Immediately following its inception, all of the contractual responsibilities for purchasing natural gas were effectively transferred from Westcoast to the B.C. Petroleum Corporation.

Dr. Thompson stated in an article written for the British Columbia Institute for Policy Analysis that:

> The principal reason for recommending the establishment of the British Columbia Petroleum Corporation to act as a broker in the sale of the province's natural gas was to wrest control of the industry from a producing company and a transmission company which were subsidiaries controlled by the same foreign parent corporation. But an equally important reason was the need to find a system as flexible and pointed as royalties to capture the economic rent. The fine tuning was to be accomplished by the Corporation establishing producer prices at an acceptable level and re-selling at newly established export prices, with the mark-up over processing and transmission being received by the Corporation as an agent for the province.[13]

James Rhodes, who became the Chairman of the B.C. Petroleum Corporation after being transferred from the equivalent position in the Energy Commission, stated the immediate policy of the Corporation:

> We have inserted ourselves between the producers and the distributors. In doing this, we feel that we can re-negotiate the long term gas contracts which Westcoast has with El Paso. ...it is also clear that Westcoast on its own was unable to re-negotiate.[14]

It was decided that the main role of the Corporation would be as a marketing agency for natural gas. The other roles, particularly with respect to oil, would be disregarded.

The Corporation was obliged to pay the producers only a pre-determined royalty-free price rather than an amount that varied with market prices. Westcoast had been receiving an average of about 9% return on its investment prior to the formation of the Petroleum Corporation. Now it received 9½% return on its rate base (i.e. the amount of invested capital on which the base is calculated) including a 15% return on equity. The negotiated return on investment provided for in the Westcoast/B.C. Petroleum Corporation Agreement increased by ½% per year to 11% as of January 1, 1977. The difference between the price paid to the producers and the wholesale selling price to the utilities, minus the financial return and cost of service to Westcoast, was the revenue accruing to B.C.P.C. (or B.C. Pete as it was called).

Lorne Kavic and Gary Nixon in their book on the N.D.P.'s short flirt with power, The 1200 Days,[15] suggest quite strongly that lack of decisive action immediately after the N.D.P. were elected cost the province one billion dollars in potential revenues.[16] It is true that action on price increases was not taken until a year after their election, and only after the B.C.E.C. had a chance to determine through its 1973 Report on the natural gas industry exactly where the problems lay and the best method of counteracting them. However, it may have been folly for the government to make quick decisions on pricing and exploration policies without first obtaining the recommendations of an independent body. It was strongly indicated during the Inquiry that the complexity of the industry and the business climate were such that considerable thought had to be given to any new royalty scheme prior to adoption. Kavic and Nixon were correct in their assertion that revenues were lost through lack of immediate action, but it had to be remembered that the previous government appeared to be much more alienated from the situation than

was the N.D.P. and that designing a new policy with such wide-ranging effects could not be accomplished overnight without risking industry stability.

Also playing against any quick government decisions was the constitutional prerogative of the federal government to control export prices. Since the majority of the province's production was exported, raising the domestic price would only have a marginal effect on revenues and would tend to alienate B.C. residents who would naturally feel that they should receive preference in natural gas pricing. The National Energy Board sets the export price which is now uniform across Canada and the only way the province was able to raise the price at that time was through a clause in the Westcoast/ Northwest Pipelines contract that stated that the export price must be 105% of the domestic provincial price paid by B.C. Hydro. Therefore, if the province were to raise the price to British Columbians, the export rate would also rise. To use this option, and a few other political initiatives, the N.D.P. government felt that a well-planned approach would serve better than a shotgun attack. The surprising care that the government took before making radical fiscal changes diminished fears that the B.C.E.C. had been set up in an effort to carry out a 'witch-hunt' against the gas industry.[17]

In order to trigger the 105% rule in the export contracts, B.C. Hydro agreed to pay a substantially higher amount for the natural gas it purchased from Westcoast. The domestic price subsequently rose from 31¢ Mcf to 58¢ Mcf. This automatically pushed the export price to 61¢ from 33.5¢ Mcf. Its costs doubling, El Paso appealed in dismay to the National Energy Board, but the Board rejected the appeal and made the increases effective November 1, 1973.

Prior to the formation of the B.C. Petroleum Corporation, the gas producing areas were split into two sectors: Fort St. John and Fort Nelson.

Gas in the Fort St. John area was being purchased at 13¢ Mcf while gas from Fort Nelson was earning only 11.5¢ Mcf. The new system separated gas into "old" gas (from pools producing before November 1, 1974) and "new" gas (from pools producing after November 1, 1974). The returns to the producer varied from 18.5¢ - 20¢ Mcf for "old" gas and 22¢ Mcf for "new" gas after the inception of the new system. It was intended that "old" gas would rise to 22.75¢ - 27¢ Mcf by 1975.[18]

There were several industry arguments against this type of pricing system. 1. The system, although an improvement over Westcoast's, still did not allow for industry sharing of future price increases. 2. It was argued that there should be no difference between "old" and "new" gas because cash flow was required to carry out further exploration and development. 3. The point was made that gas, whether "old" or "new", should be paid for according to its competitive energy value. 4. It was strongly hinted that low prices for "old" gas could curtail production from already producing fields.[19] One additional question was asked: Why did the prices not include some benefit for exploring the more costly geographical areas? To do this would have entailed a horrendous logistical problem of defining which areas were high cost and which were not.

Acceptance of the system was voluntary for each of the 81 producers in the province, the option being continuation of the old system that was introduced under the Social Credit government. Since most of the producers were under long-term contracts, some extending to 1989, the netbacks permitted under the old system and the effects of the Pacific Petroleums - El Paso duopoly made the existing prices progressively less attractive. Virtually every producer in the province recognized the improvement over the previous

outmoded system and accepted the new conditions. Those few that did not generally had properties that sat on the B.C. - Northwest Territories border, and apparently because of some complexity in the taxation payable, chose to come under taxation terms of the Petroleum and Natural Gas Act.

For those five of the eighty-one companies which chose not to adopt the new pricing structure, the N.D.P. amended the Petroleum and Natural Gas Act in the Spring of 1974 (Bill 132) to bring it more in line with the Party's changing views on lease tenure and to ensure adequate control over these few companies. The amendment increased rental fees, increased royalties, and set conditions that would guarantee continuing exploration and development on pain of the company losing its permit.

The new taxing system for natural gas and its by-products operated as follows:[20]

Gross Selling Price per Mcf	% of Gross Production
0 to 10¢	15
10¢ to 20¢	$15 + 20 \frac{\text{market value per Mcf} - 10¢}{\text{market value per Mcf}}$
20¢ plus	$25 + 50 \frac{\text{market value per Mcf} - 20¢}{\text{market value per Mcf}}$
natural gas by-products	50

While the Energy Act, the Petroleum and Natural Gas Act, the Mineral Act and the Coal Act levy royalties on minerals taken from Crown lands, the Mineral Land Tax Act imposes an acreage tax and a mill rate assessment on minerals taken from private land. While this Act does not encompass a large productive capacity, there are some areas in the province where oil or gas is taken from private lands. The N.D.P. made the necessary changes in the Act to

bring it in line with the intent of the other Acts - protection of the public interest and maximization of revenues for the province.

At the summer B.C.E.C. Inquiry, support for the pricing system came, at least in part, from an unlikely source. The Canadian Petroleum Association was very much in favour of natural gas being priced at its CEV. Their estimate of parity price, eliminating the "old" and "new" labels, was 38¢ Mcf in 1973 rising to 44¢ Mcf in 1974, 46¢ Mcf in 1975, 81¢ Mcf in 1980, and $1.29 Mcf in 1990.[21]

Industry had not suffered because of the moves to control the market-place. Westcoast was making a higher profit than it had previously; the producers were receiving better prices for their production; and the people of the province were receiving much higher royalties for the resources that belonged to them. True, the domestic price had risen, but this was more than compensated for by the swollen profits made in the export market. Peace in the industry was not to last long, however, as external influences made their marked effect on the industrial climate of the province.

By late 1973 and early 1974, especially during the Arab-Israeli war, prices for petroleum in the world market were changing so rapidly that there was almost a daily need to re-appraise petroleum and natural gas prices. The Canadian Petroleum Association's projections of parity price were obsolete within three months of their presentation. Canadian petroleum export taxes in November, 1973, were a meagre 40¢ a barrel. By December they were $1.90 bbl, and by January, 1974, $2.20 bbl.[22] It was clear that the old royalty system for natural gas of a straight 15% could not compete with the tax increases on petroleum and, as such, was unable to protect the province's interests. In addition, many of B.C. initiatives were being up-staged by other provinces,

particularly Alberta, which began to alter their resource taxing policies to adjust to the changing world conditions.

To solidify its control over the industry, the British Columbia government, in January, 1974, made a move that caused a great stir in the boardroom circles. On the 18th, it announced that it had purchased 13.5% of the Westcoast Transmission Company shares formerly owned by El Paso Natural Gas. Overnight, B.C. became the second largest shareholder in the largest provincial pipeline. At the time, the line was not being used to capacity, partly because of the Beaver River flooding, and it may have then appeared to be a somewhat dubious economic move. Nevertheless, time has shown that the purchase was indeed a good one. Since then Westcoast has continuously turned out a respectable profit for the government, although it should be noted that some of that profit came from the Petroleum Corporation.

Premier Barrett had a chance to explain his government's position on this and numerous other issues in January, 1974, at the First Minister's Conference on Energy. He made several recommendations including the curtailment of additional exports to the U.S. except in emergencies, pricing of oil and natural gas at the competitive energy value, subsidizing the have-not provinces from an emergency price stabalization fund set up by the producing provinces and the incorporation of an excess profits tax. He also went on record as opposing any long-term two price system for energy between Canada and the U.S. The last point meant that Canadian consumers should pay the same amount as consumers in the U.S. This, naturally, caused considerable concern to the eastern provinces which depended so much on federal subsidies for energy purchases.

The winter of 1973-1974 proved to be rather ominous with respect to

exploration. In November, 1972, the Alberta Government had introduced legislation that increased the field prices of natural gas by linking the issuance of removal permits with guarantees to the producers of 'fair market value'. Since the prices for natural gas in British Columbia before the N.D.P. came to power were far below the 'fair market value', the Alberta policy tended to shift exploration and development away from B.C. By the 1973 drilling season, the effect had become quite marked. Many of the drilling rigs available went to Alberta because of their incentive scheme which "allowed 30% of well drilling costs to be credited against various governmental fees." Saskatchewan was also offering a 50% sales tax reduction on drilling and other equipment that was needed for exploratory wells.[24] Even though the new structure in B.C. was a vast improvement over what it had been in the past, the netbacks to the producers were still substantially lower than they were in other producing provinces.

Initially, and until the other provinces advanced far beyond British Columbia's position, the industry seemed fairly satisfied with the improvements to the B.C. pricing formula, but there were growing complaints. Many within the industry refused to credit the government for the price rises. They claimed that prices were about to rise anyway and the N.D.P. just happened to be there at the right time. Some credence can be given to this opinion. During the 1973 shortage caused by the flooding of the Beaver River field, the entire Pacific Northwest was scrambling for additional supplies of gas wherever they could be found. Pan Alberta Gas Ltd. offered the APCO Group, an American company that took over the Pacific Northwest gas pipeline system from El Paso and which now was the major purchaser from the Westcoast Transmission line, an additional 30 to 60 MMcf from Alberta fields

upon construction of a 40 mile pipeline to link the supply with the north end of the Westcoast line. The price, although never specified, was thought to be approximately 50¢ Mcf. This would have been a substantial increase over the existing contracts held by Westcoast. Whether this price jump would have meant the automatic re-negotiation of other gas contracts within British Columbia is unclear. However, the time to accomplish this task, if re-negotiation were in order, would have been considerably longer had the government not become involved and ordered the new price increase as soon as it did. The fact that the government did act first, rather than leaving the decisions to the foreign oligopoly, meant several tens of millions of dollars in revenues for the province as well as increased returns to the many producers, most of whom had no ties to the American parents of Westcoast. Also, had this action not been taken at the time, it is certain that the loss in drilling and development that occurred in 1973 and 1974 would have been greater.[25]

Another complaint concerned the pricing system itself. Many companies which had gas reserves classified as "new" claimed that they were actually realizing less for their product than those with "old" gas. They claimed, with some justification, that industry finding costs had doubled between 1970 and 1974. This meant that the system actually penalized new producers, the result of which was some lack of enthusiasm in the exploration field, particularly when contrasted with the Alberta scheme. This problem was belatedly recognized and, in response, the government increased the "new" gas prices in September, 1973, by some 50%. While this alleviated an existing problem, it was too late to affect exploration until the following spring.

In this respect, it was important that any policies adopted by the

Petroleum Corporation be adequate to maintain exploration and development. The tremendously long lead time in developing a producing well, approximately seven years, required carefully planned and competitive policies. A loss of one year through ill-conceived policies may mean a natural gas shortage several years later.

In order to insulate the Canadian public from the rising costs of petroleum, the federal government, in September, 1973, placed a freeze on the domestic prices of energy fuels, and by doing so, affected rather forcibly the goal of 'fair market value' for these fuels. The move may have been a 'vote-getter' in the east, but the producing provinces were quite upset. The freeze was to have been temporary, lasting only until January, 1974, but political pressure from the federal N.D.P. which held the balance of power in Ottawa forced the extension of the freeze beyond January.

Alberta's reaction was unexpectedly severe. The province and the federal government had been attempting to solve the schism that had opened up over a national energy policy and, to Alberta, this move appeared to be a rejection of Alberta and its views. Oilweek phrased the industry's sentiments rather bluntly: "Pierre and Donald duck into Lewisland" and "Ad-Hockery turns to Ad-Mockery".[26]

While British Columbia sympathized with Alberta, and Premier Barrett came out against the two-price system in the January First Minister's Conference, the government in Victoria was N.D.P. and the party that instigated much of this furore in Ottawa was N.D.P. The provincial government, partly in an effort to show its concern for the Eastern consumers and partly to show solidarity within the federal and provincial ranks of the N.D.P., remained relatively quiet, despite the fact that she too was being hurt.

For example, the British Columbia Petroleum Corporation was losing money on its domestic sales to B.C. Hydro which could only pay the maximum allowed under the federal freeze. The Corporation was forced to make up the loss through its export revenues.

Even after the Liberals had re-gained the majority in the House of Commons subsequent to the election in the summer of 1974, they steadfastly maintained the freeze. Their reasoning was apparent: the cost of fuel, more than almost any other factor, affected inescapably the cost of living. This meant, of course, that the producing provinces were paying the price of decreased revenues in order that the country as a whole would not suffer. Whether this was good or not is another question. Should the Canadian public be led to believe that things are much better than they really are? Are we simply delaying, and in fact worsening, the inevitable? While these questions cannot be answered, except in a philosophical manner, they do indicate the potentially serious consequences of such a move. For all intents and purposes, strict price controls are still in effect today. The Canadian consumer pays for less than the average of the world price for domestic oil and gas, although the December, 1979, federal Conservative budget is making an effort to change this.

There were other moves afoot in Ottawa during 1974 that were to have a further serious effect on British Columbia gas production. Without a doubt, the federal budget that was brought down on November 18 had a greater negative effect on the exploration and development of petroleum and natural gas in B.C. than any other piece of legislation, federal or provincial, during these years.

Up until this time, resource companies had been able to deduct from the earnings shown on their federal income tax forms any royalties paid to the

provincial government. The provinces saw this as a green light to increase royalty rates at the expense of the federal government. The companies suffered little in this exchange since it meant simply a re-direction of taxes they were forced to pay anyway. The Canadian government soon recognized that its tax base was being cut out from underneath it by vaulting provincial royalty schemes, and it now moved to correct the imbalance. The budget disallowed completely the deductibility of provincial royalties on resource companies' income tax returns. In his budget presentation, Finance Minister John Turner explained the government's stand:

> Fourth, I proposed that royalties, taxes and other like payments to governments should no longer be recognized as a deduction in computing income for tax purposes. My reasons for this action were described in the May 6 budget and I have elaborated upon them since. I am satisfied that this is a necessary step in order to avoid the erosion of the federal tax base.
>
> I have considered carefully permitting deductibility of royalties and I have concluded that this approach does not offer a practical solution.
>
> I acknowledge that royalties in respect of property rights have traditionally been deductible as a business expense. However, in tax reform, we began the process of disallowing certain income royalties in the mineral field and substituting federal tax abatements. Today it is evident that a royalty is no longer a royalty in the traditional meaning of the word. There have emerged various provincial charges which are thinly disguised income taxes.
>
> Today provincial charges take many forms. They are no longer limited to flat charges against a unit of production. Now there are provincial charges that are determined by price, profit and volume. In addition, there are provincial claims exercised through joint ventures and marketing boards. In fact, there are so many kinds of provincial charges and claims that it would be virtually impossible to draft workable legislation which could distinguish between bona fide royalties, traditionally deductible, and other taxes and charges.
>
> That being so, we have chosen to disallow the deduction of all these levies and to make room for the provinces by giving additional tax abatement.
>
> In this way, the provincial taxes and charges and the federal taxes will each be discrete, and visible decisions, which each can take in the light of what they know the other is doing,

> giving full recognition to the needs of the industries. Surely the goal is to find a compromise which gives reasonable results in financial terms to the provinces, to the industries and to the federal government. This is what my proposals aim to do.[27]

This move served to protect the federal tax base but caught the provinces and the companies in a difficult situation. The companies immediately complained that they were now in effect paying double taxation through high provincial royalties and reinstated federal taxes. The resulting hue and cry over the taxation clauses in the budget that sprang from every quarter had very little effect on the federal government which had its fiscal back to the wall. Mr. Turner also indicated that any thoughts that the provinces may have in nationalizing the resource industries in order to maintain their lucrative taxing position would be met with federal legislation to tax provincial Crown Corporations. It was apparent that the federal government was determined to maintain its presence in the resource taxation field.

Serious constitutional questions were raised by the federal move. There has been some concern whether or not the non-deductibility of royalties was actually a tax by the federal government on provincial income from royalties. Section 109 of the B.N.A. Act gives the province the undivided authority to apply royalties respecting provincial lands, including minerals. Section 125 ensures that the provincial interest in lands cannot be taxed; referring to the 'immunity of instrumentalities' discussed in Chapter two. It may be reasonable to deduce that provincial royalties, as a portion of the total value of the product, are provincial property under Section 125, and as such, cannot be taxed by the federal government. This would mean that Ottawa could levy income taxes only on the remaining value of the product, but up to 100% if they so choose. Obviously, in the absence of cooperative federalism,

the power to tax is tantamount to a 'license to destroy'.[28]

The Courts have not been asked to decide on this issue to date and, with an energy agreement between the federal government and the provinces possible in the near future, a legal decision may be indefinitely postponed.

At the time the budget was presented, the average selling price for gas was approximately 82¢ Mcf. The 'deemed fair market value' on which the federal tax was levied, was 82¢ minus transportation costs of 25c Mcf, leaving 57¢. In its calculations, the federal government assumed that the producer was receiving the entire 57¢ Mcf and deemed that figure as the income. The province, through B.C.P.C., paid a royalty-free price to the producers of 21¢ Mcf and kept the balance as provincial revenue. In effect, no royalty was levied on the producers in B.C. By subtracting the actual well-head price of 21¢ Mcf paid by B.C.P.C. to the producers, from the 'deemed fair market value', the federal government arrived at an 'implicit' royalty which became non-deductible on federal income taxes. As a result, the producers were being taxed on an additional 36¢ Mcf that they were, in fact, not receiving.

Reactions to the budget came swiftly. Premier Barrett at various times called it an "honest mistake", a killer of exploration activity, and a move which gave "credence to those who support Western separatism."[29] Barrett also initially refused to come to the aid of the natural gas industry by denying any form of tax benefit. This was done simply to apply pressure on the federal government by using the industry as a pawn; exactly as the federal government had done.

Alberta, again, offered the most outspoken replies. Premier Lougheed suggested that the federal move would destroy the country and that it was a monumental "ripoff". He let it be known that as far as he was concerned the

oil-pricing agreement that had been worked out in the Spring of 1974 was cancelled. His Attorney-General, C.M. Leitch, referred to the B.N.A. Act, Section 125, which stated that "no line or property belonging to Canada or any province shall be liable to taxation", since it was clear that all natural resources are the property of the provinces in which they are situated.

Imperial Oil stated, in reaction, that all capital spending programs in Canada would be re-examined. Shell Oil was seriously concerned that the taxation clauses in the budget would prove disastrous to further exploration and development in Canada and that the country would run short of oil and gas in a few years if the tax climate were not improved. Gerry McAfee, President of Gulf Canada, stated that at least $100 million of their $332 million exploration program would have to be cut. He stated further:

> This should not be interpreted as a threat. It is just a simple statement of an inescapable, unhappy fact that we will have a lot less money to spend next year than we thought we would.[30]

Pierre Nadeau, President of Petrofina Canada, emphasized the companies' position by summing up the quarrel and its effect this way:

> I think it's a shame that we should be caught in the middle of a federal-provincial confrontation. I am afraid that Canadian citizens will suffer. Drilling rigs and experienced personnel have been leaving the country because of the dispute and this will continue.[31]

The B.C. Energy Commission indicated in its 1975 report of field prices that the federal legislation had a very severe effect on the exploration programs of some companies in the province. Pacific Petroleums cancelled its 28 well program while Chevron cancelled its first exploration program in British Columbia. Gulf Canada also ceased exploration entirely in the province.[32]

Despite the fact that the November budget made one major concession to the oil companies in allowing exploration costs to be fully deductible, this did

not seem to assist in any great degree the exploration programs. It became much more attractive to move drilling rigs to the U.S. or overseas where returns were higher.

The additional tax abatements that the Finance Minister referred to in his budget speech, which were on production profits on a declining basis, proved to be unworkable. In its place, the government instituted a resource allowance of a flat 25% of net revenues which were derived from oil and gas operations.[33] This meant that the producing provinces could levy a 25% royalty without fear of the federal government also taxing this portion. The federal government limited its taxing rate to only 75% of the net revenues, a major concession to the provinces.

By early 1975, the provincial government had caved in to the federal taxation changes. While British Columbia supported Alberta in the struggle for provincial control over its resources, Barrett finally recognized the need for the federal government to tax the natural resource industries. The province decided to pay to Ottawa the producers' share of the federal income tax out of provincial revenues. This move allowed the Canadian government the revenues it needed to carry on the duties of Parliament but also left the taxation of the industry to the province. The alternative, which had been followed by Alberta, was to provide a rebate of taxes to the producers in order for them to pay the tax.

British Columbia's system discouraged the companies from hiding their profits in convoluted bookkeeping, and this gave the province additional fiscal control. The federal government accepted this position and, in return for B.C.'s support, permitted the province to examine the private federal income tax statements of the producing companies in order to prevent the use

of loopholes or other taxation-evading initiatives, a move highly unpopular to the industry. Ottawa also agreed to allow all export price increases to flow to the Corporation and, furthermore, would not apply a federal export tax.[34]

It is interesting to note that, while many of the large companies and employer organizations in the country decried the federal budget as a destroyer of motivation, the 1975 B.C.E.C. Hearing on Field Prices heard testimony from several exploration companies in the province, including Pacific Petroleums, categorically stating that it was not the federal budget at all that caused them to cancel their exploration programs. They claimed that this action was taken because the province was not guaranteeing them a share of any price increases that may in future be levied on natural gas, and that exploration would not have been curtailed if the province had increased the netbacks to the producers to a large enough extent to cover the revised federal taxes, in effect taking the difference out of provincial revenues and paying it to the producers. Their statements also implied that additional guarantees beyond simple protection from federal taxes would have been necessary to maintain the drilling programs.

This position has been a continuous and persistent one for the natural gas companies. The ideal, for them, would be to retain as much flexibility as possible in 'designing' their profit and loss statements. The old system of a flat 15% royalty on the wellhead value, which had been in effect since before 1963, allowed the companies the freedom to curtail costs where possible and to lobby for higher prices which would increase their returns. For the provincial government to control their returns was anathema to the free enterprise spirit of the companies.

The concern over resource taxation evolved a line of thinking that

many provinces are now beginning to adopt. Under Section 125 of the B.N.A. Act, Crown Corporations owned by a province are exempted from federal tax. Gerard LaForest states:

> A provincially owned industry is constitutionally exempt from taxation by the federal parliament, so that revenues derived from taxes that would go to the federal government if an industry were privately owned remain as profits to the province, a matter of no inconsiderable importance having regard to the great demands made on the taxing powers of the provinces.[35]

The purchasing of companies by the provinces can under the present Constitution effectively short-circuit the federal tax-collecting powers. Saskatchewan's recent purchases of some large potash mines in that province bears this out.

While the federal budget caused an upheaval in the industry that persists to the present day, the provinces generally reacted quite swiftly and positively in lessening the tax burden suddenly imposed on the companies. However, the provinces did not react equally or concurrently and it was no great surprise to many in the industry when the oil companies, which have historically been very mobile, migrated to the province where they could receive the best deal - in this case it was Alberta. The tremendous loss of exploration activity in B.C. prompted the Energy Commission to state that, "The industry has in effect gone on strike against the current Corporate price schedule and the government, in a poor bargaining position and facing dire consequences of a 'prolonged strike', must meet the terms of the industry."[36]

As a result, the Commission recommended the establishment of a Crown Corporation to engage in exploration and development of oil and natural gas in competition with private developers.[37] The Commission did recognise, though, that the long-term fixed prices that the producers were receiving was having a negative effect on motivation, especially in the face of rising prices.[38]

Three of the N.D.P. stalwarts, Alex MacDonald, Robert Williams and James Rhodes, saw the problem in a slightly different way. At a meeting in Calgary with B.C. gas producers in February, 1975, James Rhodes was quoted as saying that, "B.C. Pete has no hesitation, no apology (over the fact) that gas prices will not be increased until gas starts to flow, and that we (will only then) consider price increases."[39] At the same meeting, Alex MacDonald stated; "Gas prices to producers in British Columbia are good. We don't think any change in well-head prices is needed or justified."[40] He did, however, make one concession by promising assistance to small firms that may be short of working capital.

Robert Williams, who was continually being attacked by the resource industries as one of the more virulent of the N.D.P. members of the Legislature, seemingly supported this claim by striking out hard against the gas producers, in particular Mobil of Calgary, which he named as one of the companies that was intentionally sabatoging production in B.C. His contentions of a 'strike' found sympathy with the Energy Commission and the possibility was even recognised by Ed Phillips of Westcoast Transmission Company.[41]

The effect that the industry 'strike' and the flooding of the Beaver River field had on the province was substantial in terms of shortfalls of natural gas. During the 1973-74 heating season, the shortfall was approximately 149 MMcf/d. By 1974-75, this figure had risen to 213 MMcf/d and to 300 MMcf/d in the winter of 1975-76.

The serious reductions in natural gas production during 1973 and 1974, as shown in Table 4, had an alarming effect on British Columbia. Not only was the province morally bound to supply where it could enough gas for the export market, but it also had serious supply problems to contend with on the home front. Despite the fact that the N.E.B. found as far back

as 1970 that Canada would have insufficient reserves of natural gas to permit further export committments to the U.S., GL 41 was signed and British Columbia's percentage of production exported rose to seventy percent. This careless move eventually caught up with the province, and forced her to take some unpopular actions.

Amid threats of lawsuits and retaliatory action, the volumes of gas exported were cut back through the 'force majeure' provision of the export contract, even though some additional gas was found in Alberta to cover a portion of the Beaver River supply. The foreign oil companies and State officials in the U.S. warned Canada that her reputation would be seriously undermined if the cuts were continued. Some politicians in the U.S. even went so far as to threaten retaliatory action. Northwest Pipelines Corporations gave thinly veiled hints that it would sue the province if it could not obtain the needed gas,[43] despite the fact that Westcoast was obtaining supplies from Alberta and not even charging Northwest for the use of the transportation system.

Premier Barrett was not known for his fear of multi-national oil companies or State officials and it is highly unlikely that threats or coercion had much effect on him. Nevertheless, he did order that export committments be honoured wherever possible.

By the end of 1974, government leaders in Canada began to express fears that demand for Canadian gas would soon outstrip supply. In 1975, the National Energy Board stated that: "Natural gas supplies in Canada will not be adequate in the near term to meet both the projected increase in domestic demand and existing export committments."[44] This fact was apparent in B.C. long before the N.E.B. finally made its declaration.

It was blatantly clear that the province would have to make some critical decisions in order to improve the climate of business in the province.

The year 1975 had witnessed a strange paradox incorporating the rapidly rising world price of petroleum and the parallel curtailment of exploration in many areas. A crisis had evolved that had little to do with the relative abundance of energy resources. It was a capital crisis made worse by what A.E. Pallister, Vice Chairman of the Science Council of Canada, called a 'crisis of management'.[45] Solving this dilemma required a vast improvement in communication between the three levels of authority (the federal government, the provinces, and the industry), and the public/consumers. It is the public which provides input to all of the levels, but the information must be digested and policies formulated from the top down. If there is any confusion between the levels, the lower sectors generally suffer the most. While the federal-provincial dispute raged over taxation, the companies became understandably confused and hesitant about making any policy decisions that may have had to be overturned at some future time.

The public was equally confused about the governmental dispute and about the general policies of the oil companies. J.K. Gray of Canadian Hunter Exploration Company stated, with reason, that the petroleum industry has the worst public image in Canada,[46] partly because of the lack of communication. The public and the provincial government believed that the increased prices and subsequent revenues would encourage further exploration and development, and were puzzled by the disinterest that many companies showed in carrying out these programs. The oil companies, on the other hand, viewed with a great deal of uncertainty the whole climate of taxes, royalties and federal-provincial squabbles. Despite the increasing export prices for natural gas, they remained well below the world equivalent price for petroleum. To make matters worse, the domestic price was frozen. The

high taxes and royalties, which skimmed off the cream of any price increases, tied in with the relatively low price levels and undoubtedly, contributed to the exploration cuts in the province.

The 1975 Hearings into Field Prices were partly in response to the already obvious reduction of activity in the gas fields. The two main thrusts of the Hearings were the examination of present crude oil and natural gas prices and the drafting of schemes to increase the exploration, development and production of oil and gas in the province. The latter included a long, hard look at the effect of the federal budget of the previous Fall on industry activity and also the consequences of revamped energy policies by B.C.'s neighbours.

The Commission felt obliged to issue an Interim Report on August 20, 1975, in order that the government could act as quickly as possible on its recommendations. The government wasted no time in accepting the report and instituting many of the recommendations. The first effort involved increasing the field prices of natural gas in time for the 1975-1976 winter drilling season. The second recommendation, unadopted, was both widely acclaimed and widely assaulted, was the establishment of a Crown Corporation to engage in exploration and development of natural gas in British Columbia. It seems apparent that the province could have benefitted substantially by such a Corporation. In addition to the federal Petro-Can, other provinces had proven the value of Crown-owned corporations involved in the field of exploration, namely the Quebec-owned Soquip, Saskatchewan Saskoil, and the Alberta Energy Corporation. The third major recommendation called for an increase in the domestic price of natural gas of 25¢ Mcf, a suggestion that was not followed because of the current provincial price freeze.

It was intended that the provincial exploration company would contribute

to the reversal of foreign domination of the energy industry in British Columbia. It was also hoped that it would act as a 'spur' to private industry to encourage them to produce and also to minimize the effect of their 'strikes' against the province. In order to prevent antagonising the industry, the Commission recognised that the corporation must be completely isolated from confidential information which might give them a competitive edge. It was also acknowledged that the provincial government would not be able to subsidize its normal operations which could likewise give it an unfair competitive advantage. The Commission exempted, of course, the start-up capital costs that would be required to bring the corporation to a producing level.

The Commission recommended that an initial outlay of $15 million would be required to set up the corporation and that an additional cash grant of some $10 million per year for the next ten years would also be required. These contributions would be supplimented by a reserve fund of $25 million that the corporation could use for emergencies or to take advantage of opportunities that may materialise in the near future. While this large amount of money may seem extravagant, most medium or large exploration companies were spending much more than this each year. Considering the revenues that could, within five to ten years, begin to accrue to the corporation and the royalties, ie. net profit, that would be paid to the province, the figures were not out of line. Nor can one regard the cash grants over ten years as being an unfair subsidy to the corporation when consideration is given to the time span involved in finding and developing a single producing well.

It was hoped by the Commission that, at some future time, the corporation would provide a share offering on the stock exchange so that

private citizens could become directly involved. This move would serve to minimize governmental interference in the operations and would encourage more efficient expenditure of maoney. The Energy Commission felt, however, that the province should retain control of the exploration company.

Unfortunately, the provincial government was unable to act immediately on the recommendation because of its cash flow situation, but it is possible that if the Party had won the 1975 election, a corporation designed for exploration would have been seriously considered.

The initial recommendation dealing with netbacks to the producers was the most critical in the short term. First, the netbacks had to be increased to entice the producers back to the province. Second, a fund credit system was to be instituted which would force re-investment of producer cash flow by refunding some of the costs of exploration and development when they took place.

The first problem with the re-structuring of the pricing formula was raising the prices for 'old' gas to such a level that income from this gas would be adequate to explore for more 'new' gas - thus increasing the cash flow of the producers and making more money available for exploration and development.

The new pricing system was broken down into two other catagories; the basic price paid to the producers, in this case 20¢ Mcf for 'old' gas and 55¢ Mcf for 'new' gas; and the exploration and development fund credit on the 'old' gas which amounted to 15¢ Mcf. Referring to Table 9, the recommended price increases to the producers amounted to 15¢ for 'old' gas and 20¢ Mcf for 'new' gas.

Compared with Alberta, whose netbacks ranged much higher than British Columbia's, B.C. may have been somewhat fortunate to have sustained

the exploration activity it did during the 1975-76 winter season. The key was that the companies could now make a profit in B.C. even if that profit were somewhat lower than it may have been in Alberta.[47]

The exploration credit of 15¢ Mcf was held back from the field price payment to the producer and credited to his 'account'. When the producer spent money in British Columbia on exploration and development, the credit could be paid to him to allay the costs of the new programs up to 75% of the cost of the work and to the maximum of his credit. One half of the credits must have been earned in the past twelve months and the remaining half not beyond the past three years. One added advantage was that the incentive trust credits could be traded around among the producers so that those companies which needed them the most could take advantage of the rebate.

In contrast, Alberta permitted a federal tax indemnification of a maximum of $1 million, which assisted the smaller companies, and it also instituted an incentive credit plan that was so generous that the larger companies could recover the vast majority of their exploration and development costs. In the case of a very active exploration company, the entire exploration and development costs could be written off. This was a considerably better scheme from the producers standpoint than was being offered in B.C.[48] Nevertheless, the improvement in B.C. was substantial enough that many companies returned to the province to continue their exploration programs.

One complaint that the producers had regarding the credit was that it forced them to explore in B.C. rather than in those locations that allowed the best financial returns and promised the best geological potential for discovering natural gas. They claimed that the freedom to move about the

country would help all Canadians and should be encouraged.

British Columbia took into account the federal tax on the producers and, while somewhat different than Alberta's, did compensate the producers indirectly. The Commission estimated that the additional federal tax due to royalty non-deductibility would vary from 16¢ to 20¢ Mcf. This amounted to about $12 million a year and came out of the provincial revenues. During 1975, the combination of this tax burden and the loss of revenues from the Beaver River field cost the province a substantial amount of its potential natural gas revenues. Table 7 shows revenues of just over $98 million for 1975. This should have been considerably higher.

It was clear to the Commission that the province of Alberta was British Columbia's main competition for exploration and development expertise and any policy designed to attract this expertise would have to parallel the policies of that province. Since Alberta provided for the sharing of higher natural gas prices on a percentage basis with the producers while B.C. netted back only a certain specified amount somewhat lower than Alberta's, it was understandable that the producers chose the latter province as the place to invest. By this time, the provinces and the federal government has reached a tentative agreement on the pricing of natural gas, based upon 85% of the Toronto city gate price for petroleum.

It was understood that the Alberta formula was largely untried and entailed a certain degree of risk with respect to equitable application throughout the province. The Commission was of the view that it should wait to see the results before jumping into the same form of policy, although it seemed inclined in that direction.

> The choice is to establish a percentage sharing formula such as is provided by the Alberta royalty system or to implement some form of price review. A percentage sharing could be achieved

> by a pricing formula which incorporated into the Corporation's price schedule an adjustment machanism which would give the producers a share of annual increases in the domestic and export prices.[49]
>
> It is the Commission's view that a percentage system sharing is preferable to an annual review in order to avoid the costly, and sometimes arbitrary, administration that is inherent in a review process. On the other hand, a sharing formula cannot be acceptable unless it is seen on all sides to be fair and equitable.[50]

The Commission did not have a formula designed that could be implemented that year and its final recommendation was that an annual pricing review be carried out each year until a formula could be designed that could be applied effectively. This decision meant that Alberta would have the advantage of more stable relations with the producers since they would know, in advance, the returns likely to accrue to them. In B.C., undertainty would prevail from year to year as the price reviews were undertaken. There were no guarantees.

Nevertheless, these policies were adequate to attract exploration and development as the Tables show. Table 1 indicates quite graphically the effect of the divergent policies of B.C. and Alberta on the drilling activity in the respective provinces. While Alberta shows a steady increase for 1971 through 1973, B.C.'s growth showed a definite slump in the year following the provincial election, not because of the election, but in spite of it. Alberta had introduced new natural gas 'Policies for Albertans' in 1972 and these policies were encouraging enough that producers began to shift rigs to that province.

B.C. was unable to recover in time to halt the exodus of drilling rigs. In lending support for the contention that the federal budget caused a serious downturn in activity in 1974, it will be noted that even Alberta's growth in drilling came to a virtual standstill, actually a loss

of four rigs. British Columbia, still behind in industry attraction, suffered the brunt of the federal policy with a drop of twenty-nine rigs over 1973. Again, in 1975, Alberta led the way with higher netbacks to producers, while the N.D.P. were struggling under the industry 'strike'. A most severe drop of some sixty-six rigs during that year caused the sudden re-appraisal of industry needs by the government and the Energy Commission. It was only after the new policies were adopted that rigs began to return to the province.

Table 2 shows the serious drop in industry expenditures during 1975 and the subsequent increases in the following two years. Since the Social Credit Party did not substantially change the policies finally adopted by the N.D.P. and accepted the major thrusts of the Energy Commission, the upturn in activity can best be related to policy changes by the N.D.P.

The trend toward much higher prices, begun in B.C. by the N.D.P., was followed just as vociferously by the Social Credit Party in following years, as Tables 3 and 5 indicate.

The industry recognised the fact that the Social Democratic government in B.C. had initiated the policies which supported a healthy natural gas climate, but they were not appreciative of any sort of initiative by the province. "Canadian Petroleum" magazine stated:

> The new government in British Columbia gives hope to producers that the concessions extorted from the Barrett government in the dying days of its rule will, if anything, be broadened.[48]

From the industry's standpoint, this was probably true. It was against the principles of Social Democratic theory to permit the industry to have such a control over the precious energy resources of the province, and any yielding to this end would be evidence of serious philosophical compromise.

Nevertheless, from the point of view of the public, the N.D.P. moves were timely and very necessary. The lines of battle had not been drawn between the government and the public but rather between the public and the industry with the government acting as the solicitor for the people. As Table 7 indicates, their success was remarkable. Revenues to the province rose some 800% between 1972 and 1976-77 and this was caused largely by the province's initiatives, both at the federal and provincial levels.

Despite the fact that Alberta producers still receive a greater return on investment, the producers in British Columbia are at present sufficiently compensated to encourage them to remain in the field. Lower returns to the producers means higher revenues for the province and the federal government. The balance in B.C. seems to dip slightly toward the direction of the province rather than toward the industry but the disparity is not yet so great as to affect gas exploration in any drastic fashion. Again, the foundations of this sharing of revenues rests in the hard bargaining that occurred during the N.D.P. term in office. Without the application of that Government's philosophy, the beneficial terms which the province now has with the producers may not have been obtained.

Notes to Chapter 4

[1]Nate Smith, "Too Much Clout Says Opposition," The Province (Vancouver), March 23, 1973, p. 1.

[2]ibid.

[3]National Energy Board, 1973 Annual Report (Ottawa: N.E.B., 1973).

[4]Allan Forrest, "B.C. to Establish Agency to Gather and Market Gas, Toronto Globe and Mail, September 22, 1973, p. Bl.

[5]"B.C. Threatens to Nationalize Gas," The Province (Vancouver), August 3, 1973, p. 1.

[6]For a complete list of participants see the Glossary of the Report on Matters Concerning the Natural Gas Industry in British Columbia, British Columbia Energy Commission, 1973, pp. 32-34.

[7]ibid., pp. 12, 13.

[8]ibid., p. 12.

[9]Law Reform Commission of Canada, The National Energy Board, prepared by A. Lucas and T. Bell (Ottawa: Minister of Supply and Services, 1977), pp. 24-26.

[10]Iain Hunter, "Ottawa Hedges on Gas Issue," Vancouver Sun, October 18, 1973, p. 1.

[11]Taped interview with Dr. Andrew Thompson, op. cit., December 16, 1975.

[12]British Columbia Energy Commission, 1975 Natural Gas and Field Price and Incentives Inquiry, (Vancouver: British Columbia Energy Commission, October, 1975), pp. 7, 8.

[13]Thompson, Natural Resource Revenues, pp. 114-115.

[14]"B.C. Defines Position, Assesses Energy Crisis," Oilweek, Vol. 24, No. 45, December 24, 1973, p. 10.

[15]Lorne Kavic and Garry Nixon, The 1200 Days, (Coquitlam: Kaen Publishers, 1978).

[16]ibid., pp. 104-111.

[17]Horst Heise, "B.C. Set to Grab $100 Million Windfall," Financial Post, December 1, 1973, p. 30.

[18]British Columbia Energy Commission, 1975 Inquiry, p. 9.

[19]ibid., Chapter 3.

[20]Canadian Tax Foundation, Provincial and Municipal Finances 1977, (Toronto: Canadian Tax Foundation, 1977), p. 126.

[21]Canadian Petroleum Association, Submission to the British Columbia Energy Commission Report on the Natural Gas Industry, 1973.

[22]Jim West, "Canada Petroleum Future Hangs on Pending Policies," Oil and Gas Journal, Vol. 71, No. 51, (December 17, 1973), p. 18.

[23]The 1979 'giveaway' of shares of the British Columbia Resources Investment Corporation, which included the Government's share of Westcoast Transmission, now means that the Government's interest has been effectively liquidated.

[24]Jes Odam, "Conflicting Figures Presented on Gas and Oil Drilling in B.C.," Vancouver Sun, June 15, 1973, p. 21.

[25]Bob Shaw, "Gas Supply Hangups," The Province (Vancouver), October 19, 1973, p. 27.

[26]"Canadian Energy at the Crossroads," Oilweek, Vol. 24, No. 43, (December 10, 1973), p. 5.

[27]Canada, House of Commons Debates, 30th Parliament, 1st Session, 1974, p. 1424.

[28]Lederman, Natural Resource Revenues, pp. 56-57.

[29]Patricia Ray, "British Columbia," Canadian Annual Review of Politics and Public Affairs - 1974, ed. J. Saywell (Toronto: University of Toronto Press, 1975) p. 231.

[30]Fred Lazar, "The National Economy," Canadian Annual Review of Politics and Public Affairs - 1974, ed. J. Saywell (Toronto: University of Toronto Press, 1975) pp. 390-392.

[31]ibid., p. 390.

[32]British Columbia Energy Commission, 1975 Inquiry, p. 14.

[33]For a legal explanation see M.A. Carten, "Federal Income Taxation of Oil and Gas Operations," Alberta Law Review, (Vol. XV, No. 3, Edmonton University of Alberta, 1977) pp. 455-493.

[34]For a brief analysis of the tax schemes designed by the various Provinces in response to the federal budget see J.B. Katchen and R.W. Bowhay, Federal Oil and Gas Taxation, (2d; Toronto: Richard De Boo Ltd., 1977) Chapter XII.

[35] La Forest, Natural Resources, p. XIII.

[36] British Columbia Energy Commission, 1975 Inquiry, p. 73.

[37] ibid., p. 105.

[38] ibid., p. 25.

[39] Horst Heise, "Face-to-Face Meeting Over Gas Prices Resolves Nothing," Financial Post, Vol. 69, February 22, 1975, p. 32.

[40] ibid.

[41] John Schreiner, "Why British Columbia is Suspicious of Gas Shortfall," Financial Post, Vol. 69, February 22, 1975, p. 32.

[42] British Columbia Energy Commission, 1975 Report, p. 33.

[43] Taped interview with Marvin Schafer, British Columbia Energy Commission, Vancouver, British Columbia, Nov. 13, 1975.

[44] "Canada Eyes More Cuts in Gas Exports to U.S.," Oil and Gas Journal, Vol. 73, No. 30 (July 28, 1975), p. 63.

[45] " 'Management' Crisis Better Tage for Canadian Energy Situation," Oilweek, Vol. 24, No. 42, December 3, 1973, p. 88.

[46] "Public Image of Industry Worse of any in Canada," Oilweek, Vol. 25, No. 32, (September 23, 1974), p. 9.

[47] For a thorough discussion of pricing and netbacks see the British Columbia Energy Commission, 1975 Report, chapter 3.

[48] Katchen and Bowhay, op. cit., chapter XII.

[49] British Columbia Energy Commission, 1975 Report, p. 65.

[50] ibid., p. 66.

[51] "Energy Outlook '76," Canadian Petroleum, Vol. 17, No. 1, (January, 1976), p. 15.

CHAPTER 5

CONCLUSIONS

The New Democratic Party in British Columbia came to power in 1972 on a wave of domestic issues prior to the O.P.E.C.-induced world energy crisis. At that time, B.C. had no properly defined energy policy. However, because of the pressure of external politics and business, the province was soon forced to challenge the energy policy question head on. Ill-prepared though it was to handle this immense problem in 1972, by the time it was defeated in 1975, the N.D.P. government had invested the province with a workable and lucrative formula for natural gas production, conservation, and revenue generation.

The apparent lack of importance with which the previous Social Credit Government held the natural gas industry was evidenced in the increased control and manipulation of the market conditions by the companies. With extremely low prices being paid for the province's gas, the drain on her reserves became excessive. Production climbed rapidly through 1973 (Table 4) and, as a result of relatively large expenditures for exploration and development in the late 1960s, domestic reserves also climbed. However, in 1970, reserves began to fall rather drastically behind production. From this date onward, B.C.'s reserves have continued to decrease (Table 10). By 1973, the province was in its third straight year of falling reserves, and exploration and development was unable to maintain reserve additions at a level that would ensure future years' supplies.

The provincial policies that had remained in effect up to 1973 reflected a *laissez-faire* attitude toward private industry, and generally had

done so since the late 1950s. Concomitant to this was the preoccupation of industry with short-term development in order to maximize exports and profits for the parent American Corporations. This was unaccompanied by any long-range programs for exploration and development to ensure future supplies and, as such, meant an absence of effective guarantees for the people of B.C.

Had it not been for the world energy crisis, which began a short time before the N.D.P. took office, any remedial action may have taken much longer to introduce. The energy crisis was a spur to the government and served to accentuate the problems already extant in the industry. The focus of public attention shifted rather abruptly from relatively mundane domestic disputes to a very serious concern for future energy supplies and this brought an improved awareness of British Columbia's position within the global energy milieu.

At the same time, Alberta, which depended to a large extent upon income generated from natural gas and petroleum production and which profiled the industry much more than did British Columbia, was instituting policies to encourage exploration and development within the province. These policies increased the incentives to the producers in the province, a program B.C. did not have at that time. While there was no apparent intent on the part of Alberta to steal exploration and development companies away from British Columbia, its policies tended inevitably to do this, to the detriment of B.C.

The N.D.P. government of B.C., shortly after taking office, became aware of the loss of exploration within the province and this, combined with the loss of domestic reserves, the oligopoly situation in the natural gas industry resulting from the imperfect competition between two great companies

occupying a large majority of the field, and the world energy crisis, caused the much-needed re-appraisal of the entire industry climate in the province. The initial step was to introduce legislation that would give the B.C. government the power to look into certain aspects of the industry and to take action to correct or prevent further abuses.

Despite the fact that the B.C. government had no long-range energy policy up to that time, there had been a great deal of thought and rather sophisticated planning put into the development of the Energy Act. The Coal and Petroleum Products Control Board Act of 1937, while laying the groundwork for the Energy Act, was not powerful enough to be effective under the glaring inequities of the energy crisis. It was apparent that any subsequent Act would have to give the government unprecedented power to make rapid and conclusive changes in the industrial environment. This form of action was ideally suited to a Social Democratic government which, by nature, opposed the type of corporate oligopoly then existing in B.C.

The Act also reflected the technical and legal sophistication of the then Attorney-General, Alex MacDonald. Under his direction, the constitutionality of the Energy Act was given careful advance consideration. The saving grace in this respect was the fact that the above mentioned Control Board Act had already been tested in the Courts and proven intra vires the province. Little new ground was broken in the Energy Act and most of its sections were simply beefed-up extracts from the Control Board Act. Although token outcries were expressed in the Legislature over the powers of the new Act, the Opposition would simply have had to go to the Court record to determine its constitutionality.

The tremendous advantage that this gave the N.D.P. government is difficult to overestimate. Unlike the Mineral Royalties Act, which was

a radically new form of legislation and immediately became subject to legal contest, the Energy Act was a solid piece of legislation, building on historically-established constitutional practices and experiences. It was also very skillfully drafted from the technical legal viewpoint. Although the N.D.P. government made some subsequent changes in the Bill, the Social Credit government that replaced it in late 1975 has, to date, made no amendments whatsoever.

Since a general need had been determined by the government, it was now left up to the British Columbia Energy Commission under Part II of the Energy Act to define that need in precise terms and make recommendations to satisfy it. This is a major area within the Energy Act in respect to which the government has a great deal of discretionary power.

The mandate given to the British Columbia Energy Commission was to recommend ways of bringing the natural gas industry under control and to design a workable formula for revenue generation - the declared goal of the N.D.P. Since the N.D.P. government had no energy policy, the Commission was left with the responsibility of designing one. The result was that the government formed its policy not in Party conventions or Party caucus meetings but largely through the efforts of the Commission with only the somewhat hazy conceptions of industry control and revenue generation remaining as the Party platform.

The British Columbia Petroleum Corporation was a natural outgrowth of Energy Commission attempts to achieve control of natural gas within the province. The Corporation succeeded in bringing virtually every producer and Westcoast under contract within weeks of its formation, and it did this simply by offering a better deal than these companies had had previously. It paid

only a certain rate to the producers while Westcoast agreed to pay all its revenue, minus a specified percentage to the Corporation.

The changes in energy policy, particularly natural gas, that were enacted in 1973 produced far better returns for the companies than they had received previously. Nevertheless, British Columbia's incentive system to the producers seemed continuously to be one step behind those of Alberta and Saskatchewan. It was evident that the province was simply unable to compete with the other producers. The loss of exploration activity demonstrated in Table 1 points this out.

The difference between Alberta's scheme and British Columbia's was the excellent revenue sharing incentive of Alberta. As the price of natural gas rose, the returns to the producers also rose, In B.C., the producers received only what the provincial government, on the advice of the Commission, gave them, and this return was initially quite low in comparison to the other province.

It was apparent that the N.D.P. were trying to maximize the returns to the province and give little quarter to the producers. In this respect, the government underestimated the market forces that were at work in the industry and certainly appeared unconcerned about the possible effect that the Alberta policies would have on B.C. exploration and development. Nevertheless, it became quite obvious that the rate schedule set up in 1973 was inadequate to encourage exploration and development, with the result that the loss of drilling activity during 1973-74 worsened.

During 1974, an additional blow was struck at the natural gas industry. The federal budget of that year most certainly had negative effects on the energy climate of all the western provinces. Although some of B.C.'s producers stated that it was the policies of British Columbia that forced them

to cancel exploration programs, there is compelling evidence, as shown in Chapter 4, indicating that the federal budget effectively knocked the supports out from all the producing provinces. Table 1 shows that even the booming petroleum industry in Alberta with all its incentives and netbacks to the producers was hit so hard that the incredible growth that it had sustained in the industry over the past few years ground to a complete halt.

While it may have been true that some of the drastic curtailment of exploration activities in B.C. were caused by the province's poor competitive pricing position, the federal budget and B.C.'s reluctance to compensate the producers immediately was clearly to blame for much of the downturn. The federal budget more than doubled the taxable income of the producers, and none of the provinces was able to react at a moment's notice to provide compensation.

Since Alberta was the first to come to an agreement with the federal government and the producers over sharing the burden of the federal tax, they managed to escape the extremely serious undertainties that plagued other provinces, B.C. in particular. British Columbia delayed in coming to an agreement hoping the federal government would retract its policy somewhat - which it did several months later. Initially, Premier Barrett, and others in his Cabinet, declared that they would not compensate the producers at all. It was only after they realised that the federal government was determined to protect its tax base and the producers were determined to find the most lucrative area in which to drill (and this was not B.C.) that they decided to cover the additional costs out of provincial revenues.

This move was still unable to halt the slide of exploration activity, and it was not until 1975 that the government, again on the advice of the Commission, substantially increased the netbacks to the producers. The

scheme that was adopted provided for annual re-evaluation of the price schedule and, while this was not the same percentage sharing system that Alberta had, it gave the producer some guarantees of re-evaluation on a regular basis.

The policy adopted a few months before the N.D.P. were defeated at the polls, in late 1975, has proven to be quite effective. The new schedules were unable to save the 1975 drilling season, but the recovery began as soon as the producers could set in motion drilling plans that, in some cases, had been on the shelf for years. By 1977, the number of gas and oil wells completed in B.C. had risen to its highest level ever - four times what it had been in 1975 (Table 1).

The struggle for higher export prices by the N.D.P. government placed considerable pressure on the National Energy Board to modify its previously conservative stand. The province met with some success both in 1973 when the export price of gas rose from 28¢Mcf to 61¢ Mcf and 1974 when the price went to $1.00 Mcf for British Columbia natural gas. This was two months before the rest of the country received the $1.00 Mcf figure.

Under the Social Credit Government, lobbying for higher export prices continued. Jack Davis, the former Minister responsible for Energy, strongly encouraged the N.E.B. to increase the price to the competitive energy value of oil. While this has still not been accomplished as a consistent and automatic matter of policy, the price did rise to $2.54 Mcf in 1978. Toward the end of 1979, the price began to approach $4.00 Mcf. The policy of the Social Credit Government to increase the export rates is identical to the N.D.P. policy, and the reasons for this are the same - to increase the returns to the people of British Columbia and to conserve a resource which has proven to be extremely valuable to the province.

Perhaps one of the most important contributions made by the N.D.P. was the solidifying of the provincial authority over the control and marketing of natural resources. The formation of the B.C. Petroleum Corporation - so-called '30 second socialism' - and the role of the Energy Commission in setting domestic utility prices, ensured that every wholesale transaction of natural gas came under initial government control and scrutiny. The moves made by the N.D.P. apparently anticipated and certainly avoided, as a result, the major constitutional law difficulties which Saskatchewan subsequently encountered in its efforts to control the petroleum and potash industries. The B.C. government did not attempt directly to control the prices or conditions for sale of natural gas outside the borders of the province. It did control the prices and conditions within the province, in respect of which, on past judicial precedents it had the clear constitutional right to act. By 'biting the bullet' and raising the domestic price of natural gas, the province used a condition in the export contract, ratified by the N.E.B., which stipulated that the export price would be 105% of the price paid for gas by the nearest utility to the place of export (B.C. Hydro's purchase price).

These actions were very effective in furthering the aims of the government, and they were quite likely within the constitutional jurisdiction of the province. In contrast, Alberta attempted to raise the price of natural gas and petroleum leaving the province by simply pretending that the domestic price had risen as well. In fact, however, the taxpayers of the province received a rebate on the increases which only supported the contention that the Alberta government was attempting to apply a direct export tax - which would be ultra-vires the province. Although this conflict was temporarily settled between the federal government and Alberta, the constitutional authority of the province in this respect would seem questionable in the light

of the opinions rendered by the Supreme Court of Canada majority in the CIGOL case. This potential legal quagmire contrasts the B.C. legislation and highlights the more cautious approach taken by the province.

Although not pioneering the use of Crown corporations to obtain control over some aspect of the economy, the N.D.P. used this entirely legal route to great advantage. Profits made from such enterprises are free from federal taxation, and this can add a considerable percentage to the profit of a corporation.

The federal government recognised this, of course; but legislating against the power of a province to set up its own Crown agencies would have been a step with enormous constitutional implications, involving fundamental Section 91/Section 92 questions and the "immunity of instrumentalities" doctrine covering attempts by one level of government to tax or otherwise reach the agencies of the other level, and would therefore be ventured upon with great prudence.

For a Social Democratic government such as British Columbia's in the early 1970s and Saskatchewan's today, the formation of Crown agencies is a natural extension of Social Democratic philosophy. The more right-wing governments have a somewhat difficult time in justifying such developments, although that did not stop former premier W.A.C. Bennett from taking over the old B.C. Electric Company and re-organising it under the Crown-owned B.C. Hydro and Power Authority. Nevertheless, the present Social Credit government has seen fit to divest itself of the Crown companies purchased or set up under the N.D.P. government.

British Columbia's portion of the Westcoast Transmission Company, for example, while not free of federal taxes because of the relatively small share it held in the company, was a very lucrative acquisition for the

province, not only providing revenue, but also giving the province some input into the policies of the only major transmission line in the province. This consideration was over-ridden by the Social Credit government in the case of Westcoast Transmission because of its evident conclusion that the provincial government purchase of corporate shares therein conflicts with basic free enterprise principles.

Excluding this one major political issue, it is clear that the Social Credit government has adopted almost in total the energy policies of the former N.D.P. government. This fact, more than any other, would seem to confirm public acceptance of the policies as they were finally agreed upon in 1975. In the matter of natural gas policy, the N.D.P. government succeeded in bringing under control an industry which had long been operating as though it were completely divorced from the social and economic community. The government did this in a careful and certainly - as the absence of federal government challenge would seem to indicate - constitutionally valid manner, with due consideration for the people of the province, the export customers, the producers of the province, and the rights of the federal government.

APPENDIX

LIST OF TABLES

TABLE 1

GAS AND OIL WELL COMPLETIONS[1]

YEAR	B.C.[2]	ALBERTA[3]
1968	190	----
1969	179	----
1970	178	----
1971	201	2014
1972	224	2719
1973	177	3538
1974	148	3534
1975	82	3646
1976	189	5042
1977	328	----

[1]Well completions include both dry and successful wells.

[2]From "Oil and Gas Exploration Development Production and Crown Revenue Statistics 1947-1977", Pamphlet, Ministry of Mines and Petroleum Resources, Victoria, British Columbia.

[3]From Canada Year Book, Statistics Canada, 1974, 1975, 1978-79.

TABLE 2

BRITISH COLUMBIA PETROLEUM INDUSTRY EXPENDITURES[1]

(Millions of Current $)

YEAR	EXPENDITURE[2]
1968	100.9
1969	110.9
1970	118.6
1971	153.1
1972	137.9
1973	143.7
1974	201.4
1975	178.5
1976	270.2
1977	403.1

[1]Taken from the Canadian Statistical Handbook as compiled in the British Columbia Energy Commission Report on Natural Gas Supply Forecast 1978-1992, Table 3, March, 1979.

[2]Expenditures include operating and royalty costs under Exploration and Development.

TABLE 3

BRITISH COLUMBIA NATURAL GAS FIELD, WHOLESALE, AND DEEMED PRICES ($/MCF)[1]

YEAR	FIELD[2]	WHOLESALE WEIGHTED AV.[3]	DEEMED PRICE + TRANSPORTATION COSTS[4]
1960	0.09	0.32	0.25
1961	0.09	0.32	0.25
1962	0.10	0.32	0.25
1963	0.10	0.32	0.25
1964	0.10	0.32	0.25
1965	0.10	0.32	0.25
1966	0.10	0.32	0.25
1967	0.10	0.32	0.27
1968	0.10	0.32	0.27
1969	0.10	0.32	0.27
1970	0.10	0.30	0.29
1971	0.10	0.30	0.29
1972	0.10	0.30	0.29
1973	0.10	0.31	0.51
1974	0.15	0.52	0.81
1975	0.20	0.58	0.82
1976	0.40	0.70	1.01
1977	0.71	0.92	1.51
1978	0.87	1.13	1.86

[1]Taken from a compilation of statistics in B.C.E.C. 1978-1992 Forecast.

[2]Field prices are those paid for the gas at the well head. They are meant to cover all exploration and development costs and are royalty free.

[3]The wholesale price is the price paid by the utilities to the wholesaler. Since the utilities pay varying amounts, the volumes they buy are compared and an average is then calculated.

[4]This is the basic price charged at the retail level.

TABLE 4

BRITISH COLUMBIA NATURAL GAS PRODUCTION[1,2]

YEAR	PRODUCTION (MCF)
1968	280,462,773
1969	324,278,791
1970	344,986,194
1971	359,076982
1972	444,913081
1973	481,878,329
1974	416,312,293
1975	403,004,014
1976	386,995,939
1977	394,293,179

[1]Measured at 14.65 psia and 60 degrees F.

[2]From "Oil and Gas Exploration Development Production and Crown Revenue Statistics 1947-1977", Pamphlet, Ministry of Mines and Petroleum Resources, Victoria, British Columbia.

TABLE 5

NATURAL GAS EXPORT PRICES (CAN. $)[1]

YEAR	PRICE
1965	0.22
1966	0.22
1967	0.24
1968	0.24
1969	0.25
1970	0.28
1971	0.28
1972	0.28
1973	0.61
1974	1.00[2]
1975	1.00
1976	1.70
1977	1.94
1978	2.54

[1]Taken from the Canadian Petroleum Association Statistical Handbook, Annual Utility Reports and NEB materials as compiled by the British Columbia Energy Commission, 1979.

[2]The National Energy Board permitted British Columbia gas to be sold in the export market at $1.00 Mcf in November, 1974, while the other producing provinces received $1.00 on January 1, 1975.

TABLE 6

BRITISH COLUMBIA CONSUMPTION OF NATURAL GAS [1,2]

YEAR	CONSUMPTION (MCF)
1966	75,844,954
1967	76,895,898
1968	89,274,142
1969	92,458,357
1970	100,332,344
1971	104,939,036
1972	121,148,636
1973	153,337,088
1974	131,921,807
1975	150,449,652
1976	141,158,819
1977	140,433,296

[1] "Oil and Gas Exploration Development Production and Crown Revenue Statistics 1947-1977", Pamphlet, Ministry of Mines and Petroleum Resources, British Columbia.

[2] Measured at 14.65 psia and 60 degrees F.

TABLE 7

BRITISH COLUMBIA REVENUES FROM NATURAL GAS AND BY-PRODUCTS (CAN. $)[1,2]

YEAR	NATURAL GAS	NATURAL GAS BY-PRODUCTS[3]
1968	27,869,402	3,648,455
1969	32,910,416	3,079,251
1970	35,200,442	3,383,516
1971	36,268,945	4,007,939
1972	43,042,713	3,951,049
1973	50,261,000	5,979,000
1974	65,897,000	12,559,000
1975	98,264,000	15,455,000
1976	349,657,000	15,480,000
1977	278,620,000	21,693,000
1978	261,769,000	20,451,000

[1] Taken from the Financial Post Survey of Oils, 1975, p. 21, for the years 1968-1972 and from the Financial Post Survey of Energy Resources, 1979, p. E23 for the years 1973-1978.

[2] The years 1973-1977 inclusive include the value of 30-35 Bcf from the Beaver River and Pointed Mountain area, the latter of which is in the Northwest Territories.

[3] Natural Gas by-products include pentanes, butanes, and propanes with small amounts of other gases.

TABLE 8

BRITISH COLUMBIA NATURAL GAS EXPORTS[1,2]

YEAR	EXPORTS (BCF)
1968	134.4
1969	158.4
1970	164.2
1971	178.4
1972	246.8
1973	262.2
1974	232.9
1975	213.3
1976	214.4
1977	230.8

[1]From "Oil and Gas Exploration Development Production and Crown Revenue Statistics 1947-1977," Pamphlet, Ministry of Mines and Petroleum Resources, Victoria, British Columbia.

[2]Measured at 14.65 psia and 60 degrees F.

TABLE 9

RECOMMENDED PRICE SCHEDULE[1]

	Present Schedule	With Tax Indemnification	Without Tax Indemnification
I. Old Gas			
Price	20¢	20¢	35¢
Exploration & Development Fund Credit	--	15¢	15¢
Estimated Tax Indemnification	20¢	16¢-20¢	--
Total Cost to B.C.P.C.	40¢	51¢-55¢	50¢
II. New Gas			
Price	35¢	55¢	65¢
Estimated Tax Indemnification	16¢	11¢	--
Total Cost to B.C.P.C.	51¢	66¢	65¢

[1]Taken from the British Columbia Energy Commission Final Report on the 1975 Natural Gas Field Price and Incentives Inquiry, Appendix B.

TABLE 10

ESTIMATED PROVEN RESERVES OF B.C. NATURAL GAS[1]

YEAR	RESERVES (MCF)
1968	7,462,938,
1969	8,339,347
1970	9,626,692
1971	9,614,625
1972	9,145,563
1973	8,631,565
1974	7,304,848
1975	6,839,724
1976	6,692,043

[1] Compiled from statistics in the Financial Post Survey of Oils, 1970-76 and the Financial Post Survey of Energy Resources, 1978.

TABLE 11

PROJECTED ANNUAL NATURAL GAS REQUIREMENTS 1979-1992 (BCF)[1]

YEAR	DOMESTIC[2]	EXPORT[3]	TOTAL
1979	154.0	189.0	343.0
1980	158.3	189.0	347.3
1981	162.6	189.0	351.6
1982	171.6	189.0	360.6
1983	179.9	189.0	368.9
1984	186.7	189.0	375.7
1985	192.4	189.0	381.4
1986	196.9	189.0	385.9
1987	200.5	189.0	389.5
1988	205.2	189.0	394.2
1989	210.2	158.0	368.2
1990	215.0	NIL	215.0
1991	220.0	NIL	220.0
1992	225.0	NIL	225.0

[1]Taken from an unpublished list compiled by the B.C. Energy Commission, 1978.

[2]Includes the highest potential Vancouver Island demand from 1983 onward.

[3]1989 is the last year of the present export contracts.

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