

Max Lalonde
Jan. 14/81

Resources in the Constitution

Implications of the Saskatchewan Proposal

On December 19, 1980, the Honourable Allan Blakeney presented a brief before the Special Joint Committee on the Constitution. This included proposed amendments concerning resources which would clarify provincial authority to manage their resources, extend provincial jurisdiction to interprovincial and international trade and taxation. The attached chart summarizes the implications of the Saskatchewan proposal respecting resources as it relates to the federal proposal and the current issues surrounding energy policy.

To briefly review the concerns and recommendations set out in the attached paper, they are as follows:

1. The essential goals of the proposed amendments are to clarify provincial authority to manage their resources and to preserve the balance between provincial and federal powers. In order to retain that balance it is recommended that
 - (a) the phrase "whether or not such production is exported in whole in part from the province" be deleted from sub-section 92A(1); and

Blakeney
↓

tion is intended to
rovincial resource
t authority.
phrase in the
wan draft of the
n (which does not
the Federal Draft),
r not such production
ed in whole or in
the province", is
to avoid the result
tash and CIGOL cases
tent that those cases
the question of
wan legislation which
regulate a commodity
the main moved in
lncial or international
A could therefore be
lized as an attempt
te such trade.
se serious concern that
se would contribute
renchment of provincial
manage their resources,
rmitting a balancing
owers with federal
r, for example, the
t of trade and commerce,
e are competing
nd provincial
er the rate of
oduction is implicit
ds "development",
on and management",
(1) (b). Such control

(b) that the phrase "including laws in relation to the rate of primary production" be deleted from paragraph 92(A) (1) (b).

2. It is recommended that the proposed concurrency in jurisdiction over interprovincial trade matters set out in the Saskatchewan Draft not be extended to international trade. While the extension to interprovincial trade will pose difficulties, a similar extension to international trade matters would give rise to even more difficult problems which could not be simply resolved by an overriding federal jurisdiction. It is therefore recommended that specific provincial concerns be dealt with by consultative and administrative mechanisms developed for that purpose.

3. In view of the damage that could be done to Canada's trading interests by discriminatory taxes applied to foreign customers of Canadian resources, it is recommended that the words "to another part of Canada" in sub-section 92A(4) be deleted. The effect will be to permit provinces to levy both direct and indirect taxes in respect of non renewable resources, etc., so long as such taxes are not discriminatory as between production exported and not exported from a province. This requirement is doubly important given that an overriding federal jurisdiction as is proposed in respect of interprovincial trade is not possible.

tion is intended to provincial resource authority.

phrase in the draft of the (which does not the Federal Draft), not such production in whole or in the province", is to avoid the result ash and CIGOL cases ent that those cases the question of an legislation which regulate a commodity he main moved in ncial or international could therefore be zed as an attempt e such trade. erious concern that e would contribute renchment of provincial manage their resources, rmitting a balancing owers with federal r, for example, the of trade and commerce, e are competing nd provincial

er the rate of duction is implicit ds "development", on and management", (1) (b). Such control

Section

Saskatchewan Draft

Federal Draft

Comments

92A(1)

In each province the legislature may exclusively make laws in relation to:

In each province the legislature may exclusively make laws in relation to

- (a) exploration for non-renewable natural resources in the province,
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom, and
- (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy,

- (a) exploration for non-renewable natural resources in the province;
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province,
- (c) development, conservation and management of sites and facilities in the province for the generation and production electrical energy.

whether or not such production is exported in whole or in part from the province.

we had the Sask. words for (b) in the draft going to BroadBent

- The subsection is intended to clarify provincial resource management authority.
- The final phrase in the Saskatchewan draft of the subsection (which does not appear in the Federal Draft), whether or not such production is exported in whole or in part from the province", is designed to avoid the result of the Potash and CIGOL cases to the extent that those cases turned on the question of Saskatchewan legislation which sought to regulate a commodity which in the main moved in interprovincial or international trade, and could therefore be characterized as an attempt to regulate such trade. There is serious concern that this clause would contribute to the entrenchment of provincial powers to manage their resources, without permitting a balancing of those powers with federal powers over, for example, the regulation of trade and commerce, where there are competing national and provincial interests.
- Control over the rate of primary production is implicit in the words "development, conservation and management", paragraph (1)(b). Such control

Section

Saskatchewan Draft

Federal Draft

Comments

127(2)

In each province the legislature may make laws in relation to the export from the province of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

In each province the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

as under the British North America Act, will operate in light of federal powers over, for example, trade and commerce, again permitting a balancing of federal and provincial interests. Inserting the clause "including laws in relation to the rate of primary production", gives rise to serious concern that provincial powers over rates of production will be so entrenched as to permit, for example, provinces to impose production cutbacks that may make it extremely difficult, if not impossible for the Federal Government to give effect to competing national interests, through federal jurisdiction over the regulation of trade and commerce. To limit scope for the courts to enlarge provincial powers in this area beyond intentions to clarify ownership rights, it is preferable therefore to delete the above-mentioned clause.

we've never had the power to force production - in order to force power

- In respect of any concern that this clause amended in the manner proposed will in any way restrict provincial powers, reference should be made to subsection 6 which protects all existing provincial rights. To the extent that the provinces

a variety of reasons. exercise such overriding authority after the fact and before the fact. However, in the interim, the government

<u>Section</u>	<u>Saskatchewan Draft</u>	<u>Federal Draft</u>	<u>Comments</u>
92A(2)	In each province the legislature may make laws in relation to the export from the province of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.	In each province the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.	<p>have jurisdiction over their resources under the B.N.A. Act, their control will be protected in any case.</p> <ul style="list-style-type: none"> - This subsection extends concurrently provincial jurisdiction in respect of exports from a province, subject to limitations over discrimination on price or in supply in interprovincial trade. - The key distinction here is that the Federal Draft provides only for provincial concurrency in interprovincial trade whereas the Saskatchewan Draft extends this concurrency to international trade. - The Federal Government is not willing to accept provincial concurrency in international trade because it views regulatory control over international trade and commerce as an essential responsibility of the Federal Government as the international actor in the federal system. - While subsection (3) would permit Parliament to override provincial legislation in cases where provinces took actions that were contrary to the national interest, it would be more difficult for a variety of reasons, to exercise such overriding authority after the fact than before the fact. Moreover, in the interim, the Government

Section Saskatchewan Draft

Federal Draft

Comments

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

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

of Canada could be subject to possible representations from and retaliation by, foreign countries for an act which it neither initiated nor approved. From a foreign countries' point of view, the distinction between provincial and federal laws would be irrelevant. Canada's trading partners or foreign investors would hold the Federal Government responsible for provincial actions.

- Even without any action on the part of a province, such a provision could encourage foreign interests to play off provinces against each other and against the Federal Government, thus undermining opportunities for coordination of national export and trade policies. In that respect, it should be remembered that this subsection applies to all non-renewable natural resources, including minerals, such as copper, with very important international policy implications in trade, political and security aspects.

- Thus, in respect of this issue, the federal position is that it is preferable to develop consultative and administrative mechanisms to deal with specific provincial concerns.

In each province the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

In each province the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

in industry revenue consultation indirect taxation.

<u>Section</u>	<u>Saskatchewan Draft</u>	<u>Federal Draft</u>	<u>Comments</u>
92A(3)	Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.	Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.	<ul style="list-style-type: none"> - This subsection provides for concurrent federal and provincial jurisdiction in respect of those matters coming within subsection (2) and for an overriding federal jurisdiction where there is a conflict. - This section applies only to interprovincial trade matters under the Federal Draft and to international and interprovincial trade matters in the case of the Saskatchewan Draft. The Federal Draft assumes the recommendations stated in subsection (2) above. - The effect of this section is that provincial laws will prevail until such time as Parliament passes contrary federal legislation. This will pose a variety of difficulties for the Federal Government in giving effect to overriding national concerns. It will be necessary to develop consultative and administrative mechanisms to cope with those difficulties.
92A(4)	In each province the legislature make laws in relation to the raising of money by any mode or system of taxation in respect of <ul style="list-style-type: none"> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and 	In each province the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of <ul style="list-style-type: none"> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and 	<ul style="list-style-type: none"> - The power to levy indirect taxes is extended to the provinces to address the effects of the CIGOL case in which the Supreme Court ruled that a tax and royalty scheme imposed by Saskatchewan to collect windfall increases in industry revenues constituted indirect taxation.

Section

Saskatchewan Draft

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom

whether or not such production is exported in whole or in part from the province, but such law may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

Federal Draft

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported and production not exported from the province.

Comments

- Although this section includes a clause to prohibit discrimination between provinces, it will, by omission, permit the province to levy different taxes on products that are sold outside Canada and discriminate among foreign countries. There is considerable concern about the ramifications of this measure for federal policies on international trade and commerce if provinces are able to take steps that can interfere with such national policies. Again such provincial actions may lead to strong international protests and retaliatory measures which the Federal Government would be powerless to respond to because it would have no tools to alter the provincial taxes directly.

- It has been recommended, therefore, that the underlined words be deleted to eliminate these problems. Provinces will still have greatly increased power to levy taxes which will still have a considerable impact on national trade policies, but will be constrained to ensure that, at least, such taxes are not discriminatory.

<u>Section</u>	<u>Saskatchewan Draft</u>	<u>Federal Draft</u>	<u>Comments</u>
92A(5) and Schedule 6	The expression "primary production" has the meaning assigned by the Sixth Schedule.	The expression "primary production" has the meaning assigned by the Sixth Schedule	- Subsection (5) and Schedule 6 define primary production which is referred to in the subsections on exclusive provincial ownership rights and taxation.
	1. For the purposes of subsection 92A of this Act.	1. For the purposes of section 92A of this Act,	
	(a) production from a non-renewable resource is primary production therefrom if	(a) production from a non-renewable resource is primary production therefrom if	
	(i) it is in the form in which it exists upon its recovery of severance from its natural state, or	(i) it is in the form in which it exists upon its recovery or severance from its natural state, or	
	(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product resulting from refining crude oil, refining up-graded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and	(ii) it is a product resulting from the processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining up-graded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and	
	(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.	(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood."	

Section

92A(6)

Saskatchewan Draft

Nothing in subsections (1) to (5) derogates from any powers or rights than a legislature or government of a province had immediately before the coming into force of this section.

Federal Draft

Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

Comments

- Subsection (6) guarantees that any powers provinces currently hold will not be diminished by the proposed amendments.