

Memorandum



CONFIDENTIAL

July 30, 1980

CONCURRENCY AND FEDERAL ACTION TO OCCUPY THE FIELD

1. By giving provinces concurrent powers over precisely the same subject matter as Parliament has, even with full federal paramountcy, it does create the possibility of unwelcome provincial legislative initiatives. These may be difficult for Parliament to overtake and reverse, because of:
 - (a) the problems of achieving quick legislative action by Parliament to pass paramount legislation in conflict with the provincial law, and
 - (b) the political problem of directly reversing a provincial policy.
2. Such problems would arise, however, mainly because Parliament had not taken the initiative to put in place a regime of law to "occupy the field" - that is, to provide rules to deal with the field of activity and to make clear that such rules are to exclude all others. If Parliament took such pre-emptive action, it would largely avoid the difficulties noted.
3. While we have little experience with the operation of paramountcy in the field of conventional concurrency (as compared to overlapping) of powers, the field of immigration does provide an example of Parliament occupying the field with the *Immigration Act* in such a way as to leave limited room for the provinces to regulate immigration. For example, it is clear that criteria for admission under that Act completely govern that aspect, though provinces may play some role in selection of immigrants from among those eligible.
4. A federal law, to occupy the field in the area of a newly-created concurrent power, would have to be fairly comprehensive, and if provincial laws are to be precluded it should indicate that the federal regime is intended to be exclusive. Not every detail would have to be enacted, however. It would be possible to leave certain matters to regulations which the Governor in Council could then adopt if it were necessary to counter quickly provincial action.

5. If there were concurrency over interprovincial and international trade in non-renewable resources, for example, the federal law might:
- (a) prohibit the export of certain resources in an unprocessed state;
 - (b) provide a system of export permits both for international and interprovincial trade (i.e. an expanded *Export-Import Permits Act*) which the Governor in Council could operate by regulation or a minister could administer by permit to control movement of:
 - (i) strategic materials or materials destined for countries subject to economic embargoes;
 - (ii) resources that should be upgraded in the province of production; or
 - (iii) resources that are in a surplus supply in other parts of Canada or elsewhere in the world, where excessive exportation will disrupt markets or prices.
 - (c) fix prices or empower, e.g. the Governor in Council to fix prices (cf. the *Petroleum Administrative Act* which allows the Governor in Council to fix prices for oil sold outside the province if there is no agreement with the producing province).
6. As another example, if offshore resources were put under a concurrent power, the federal law might:
- (a) provide for a system of licensing of exploration and development that would clearly give exclusive rights to the licensee; nevertheless, the legislation could leave room for provincial laws controlling the rate of development or production;
 - (b) fix, or provide for the fixing, of royalties, even though it channeled all or most of the proceeds to the provinces;
 - (c) prescribe comprehensive standards for protection of the environment and fisheries; if left as minimum standards the province could apply higher standards; but if clearly stated as maximum standards as well, this would preclude provincial laws.

- (d) be silent on some or all of employment qualifications, safety standards, terms of employment, etc., thus leaving room for provincial laws to apply;
 - (e) make clear that those engaged in exploration and development are free to buy, hire, establish onshore facilities, process, sell, etc., in any province, or remain silent in whole or in part, leaving some room for provincial laws to govern these matters.
7. It might be noted that while, in the case of overlapping jurisdiction (e.g. criminal law and regulation of highway traffic) the courts have been very reluctant to find a conflict, it can be argued that this would not likely be the case with paramountcy in relation to concurrent powers. In the overlapping situation, where each order of government is dealing with the matter in exercise of distinct power over different subject matters, courts are unwilling to curtail the exercise of a provincial power in an area of "exclusive" provincial jurisdiction. It would probably be otherwise where the province is exercising a shared power with respect to the same subject matter. It is also fair to say that, where courts have failed to find conflict in "overlapping" situations, Parliament had not made explicit its intention to occupy the field.
8. It should be noted that "conflict" has been found more readily in the U.S. and Australia, being said to exist where there is only an implication in a federal law that it is to cover the field and excluding state law. We cannot assume that, on the basis of past Canadian experience with "overlapping" situations, the courts will go as far in finding conflict. They have generally limited findings of "conflict" to situations where there would be operational incompatibility. They may well go beyond this in situations of true concurrency, as noted above, but it would be wise to draft paramount federal laws in a way to occupy the field expressly.