PRICING ALBERTA'S GAS — COOPERATIVE FEDERALISM AND THE RESOURCE AMENDMENT

WILLIAM D. MOULL*

After discussing the "resource amendment" to the constitution (92A) and reviewing the statutory framework in the energy sector, the author goes on to look at the constitutional implications of the dual Federal-Alberta pricing structure, which involves a considerable overlap of jurisdiction.

I. INTRODUCTION

The resource-producing provinces, particularly those in Western Canada, have realized significant gains in legislative authority from the introduction of the "resource amendment" to the Constitution, section 92A.[1] For instance, subsection 92A(4) now allows a producing province to impose indirect taxation on non-renewable natural resources within the province and on the primary production from those resources. Subsection 92A(1) confirms and, in some measure, enhances the legislative powers of a producing province to regulate the development, conservation and management of non-renewable natural resources within the province. And subsection 92A(2) permits a producing province, for the first time, to legislate in relation to the export of resource production from the province. These provisions have gone a long way towards redressing the imbalance in federal-provincial legislative powers that was perceived by the producing provinces after the decisions of the Supreme Court of Canada in *CIGOL* and *Central Canada Potash.*[2]

But section 92A contains some notable gaps from the viewpoint of a provincial legislature. One of the most important of these is found within subsection 92A(2) itself.[3] That provision clearly expands provincial legislative authority, by giving the legislature of a producing province concurrent jurisdiction with Parliament in relation to the export of resource production from the province. However, the provincial legislative jurisdiction in this regard is only triggered if the resource production is exported "to another part of Canada". No comparable provincial jurisdiction is conferred by the provision if resource production is exported from Canada as well as from the producing province. In the context of the western provinces in particular, much of whose

* Associate Professor, Osgoode Hall Law School, York University, Toronto.

1. Added by the Constitution Act, 1982, sections 50 and 51. For a fuller discussion of the general effect of section 92A, *see* W. Moull, "Section 92A of the Constitution Act, 1867" (1983) 61 *Can. Bar Rev.* 715, and Moull, "The Legal Effect of the Resource Amendment — What's New in Section 92A?", to be published in 1984 by the Institute for Research on Public Policy.

2. *Canadian Industrial Gas & Oil Ltd.* v. *Government of Saskatchewan* [1978] 2 S.C.R. 545, 80 D.L.R. (3d) 449; *Central Canada Potash Co. Ltd.* v. *Government of Saskatchewan* [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609. For a discussion of these decisions, *see* W. Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980) 18 *Osgoode Hall L. J.* 1.

3. Subsection 92A(2) reads as follows:

   (2) 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.

resource production is destined for international markets, this qualification in subsection 92A(2) represents a marked deficiency in their legislative authority in both geographical and jurisdictional terms.

This gap in subsection 92A(2) arises whether or not Parliament has legislated regarding the export of a particular resource from Canada. Typically, however, the threat to the exercise of provincial legislative authority in the resource area has not come from competing federal legislation. Rather, the principal risk has been that private third parties will attack a province's legislative initiative as being in excess of its constitutional jurisdiction. Indeed, both *CIGOL* and *Central Canada Potash* were actions commenced by private-sector resource companies against the Government of Saskatchewan.[4] If a resource-producing province wishes to pursue a legislative initiative with substantial implications for international markets, it must do so with due regard for this risk in light of the gap inherent in subsection 92A(2).

This does not mean, however, that a resource-producing province must choose either to abandon its legislative initiative or to pursue it unprotected from constitutional attack. On the contrary, there are techniques — particularly those of cooperative federalism — that are available as a constitutional shield to a provincial initiative of this kind.[5] Of course, resort to the techniques of cooperative federalism necessarily assumes the concurrence of the federal government in the provincial legislative initiative, for without that concurrence the legislative and administrative steps required of the federal government would not be forthcoming. But federal concurrence is essential in any event under subsection 92A(2), even in respect of exports to another part of Canada, because federal opposition to a provincial legislative initiative with substantial extra-provincial implications would doom that initiative anyway.[6] So cooperative federalism will not enhance the position of a resource-producing province in the face of a hostile federal government. But cooperative federalism can shield from third-party attack a provincial legislative initiative with which the federal government is in agreement, whether openly or tacitly.

Cooperative federalism is dead, some believe, having been replaced by the confrontational style of federal-provincial relations that we have witnessed in recent years. The leading example of that confrontational style must be the energy "wars" between Ottawa and Alberta in the 1970's and early 1980's. It may seem rather surprising to suggest that there was any room for cooperation between Ottawa and Alberta during those years, for their disputes over energy pricing, supply and revenue-

4. Although the federal government did join in the action in *Central Canada Potash* as a co-plaintiff after the action had been commenced. *See* Moull, *supra* n. 2 at 29.

5. For a general discussion of the techniques of cooperative federalism, particularly that of referential legislation which will be discussed in more detail *infra*, *see* P. Hogg, *Constitutional Law of Canada* (1977) 233-237.

6. Any valid provincial legislation enacted under subsection 92A(2) is still expressly subject to federal paramountcy under subsection 92A(3), which reads as follows:

(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.

sharing were fierce indeed. Yet since the middle of the 1970's (and even at the height of their battles, from the introduction of the National Energy Program in October 1980 to the conclusion of their umbrella energy agreement in September 1981) the two governments have managed to continue their cooperative efforts in at least one important, energy-related field: the regime for pricing Alberta's natural gas in the export market.

Since the middle of the 1970's, the federal government has pursued a two-price policy for Alberta-produced natural gas. The federal government has been quite willing to allow Alberta gas to be exported to the United States at prices approximating world prices (or, at least, the domestic prices prevailing in the United States). However, at the same time it has insisted upon restraint in the prices paid for Alberta gas consumed elsewhere in Canada, particularly in the East. As one can imagine, this policy has hardly been popular with the Alberta government, which would have preferred that Canadian domestic gas prices also rise to a level closer to world prices. That was not to be, however, and the best that the Alberta government could do was to try to capture for itself, and its gas producers, the "export differential" between the prevailing international price and the restrained domestic price.[7]

The statutory framework adopted by the two governments for pricing Alberta's gas reflects their respective goals. It also reflects the results of a cooperative effort that seems designed to allow both governments, and particularly Alberta, to achieve those goals without the risk of constitutional challenge from third parties. While that statutory framework is somewhat complicated, a brief description of it is necessary to illustrate its constitutional implications.[8]

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7. While its magnitude has varied over time, the "export differential" has been substantial in recent years. It can be calculated in approximate terms at any given time by deducting the "Alberta border price" (the base price for determining Canadian domestic prices: *see infra*) from the "international border price" (the base price for determining export prices: *see infra*). In November 1981, for example, the "Alberta border price" was set at $1.70 per gigajoule while the "international border price" was set at $5.75 per gigajoule (U.S. $4.60). The "export differential" was thus roughly $4.05 per gigajoule, or more than twice again the "Alberta border price". By late 1983, the "Alberta border price" had climbed to $2.63 per gigajoule while the basic "international border price" had declined to $5.13 per gigajoule (U.S. $4.10). This still left an "export differential" of roughly $2.50 per gigajoule, or almost as much again as the "Alberta border price". *See* Natural Gas Prices Regulations, 1981, SOR/81-973, as am. SOR/83-610; Gas Export Prices Regulations, SOR/83-332, as am. SOR/83-579.

8. The discussion that follows will focus only on the elements of the statutory framework that are necessary to an understanding of its constitutional implications, and will thus omit reference to other elements that are not pertinent to the constitutional issue despite their importance in a practical sense. One of these other elements, for instance, is the "cost of service" factor which is used by both governments to adjust the basic "Alberta border price" and "international border price" for transmission costs and the like: *see* Natural Gas Pricing Agreement Act, R.S.A. 1980, c. N-4, as am. sections 2 and 15; Energy Administration Act Part III Regulations, C.R.C. 1978, c. 1261, as am. section 3. For a fuller discussion of the technical aspects of the statutory framework, *see* Hunt and Lucas (eds.), *Canada Energy Law Service* (Richard De Boo, 1983).

II. STATUTORY FRAMEWORK

A. FEDERAL

There are three separate, though related, sources of statutory authority under which the federal government implements its two-price policy for Alberta gas. Two of these sources are found in Part III of the Energy Administration Act,[9] while the third is found in Part VI of the National Energy Board Act.[10]

The first of these sources is contained in two provisions of the Energy Administration Act that operate in the alternative, depending upon whether Ottawa and Alberta have, at the relevant time, entered into a formal agreement on the pricing of Alberta gas. Where such an agreement is in force at a given time (as is now the case), section 51 of the Energy Administration Act gives the Governor in Council the authority to make regulations prescribing the prices at which the various kinds of gas produced in Alberta are to be sold for delivery outside Alberta. Where no such agreement is in force (as was the case from November 1980 until the conclusion of a new gas-pricing agreement in November 1981), section 52.1 of the Energy Administration Act gives the Governor in Council comparable powers to make such regulations unilaterally.

The present regulations made under section 51 are the Natural Gas Prices Regulations, 1981.[11] These regulations prescribe a lengthy list of prices at which sales of Alberta-produced natural gas are to take place outside Alberta between an equally-lengthy list of named parties. This list includes both transactions in Alberta-produced gas that will be consumed elsewhere in Canada, and transactions in Alberta-produced gas that will be exported to the United States. The list of prices is determined by reference to two base prices, the "Alberta border price" which is set at a prescribed amount (and which is varied from time to time), and the "international border price" which, at present, is defined by reference to the Gas Export Prices Regulations.[12]

The Gas Export Prices Regulations are prescribed under the second source of federal statutory authority, subsection 85(2) of the National Energy Board Act.[13] That provision authorizes the Governor in Council to make regulations prescribing the price at which, or the range of prices within which, any gas is to be sold when it is exported under Part VI of the National Energy Board Act. At present, the Gas Export Prices Regulations set the prices at which Alberta-produced gas may be exported to the United States by those holding gas export licences from the National Energy Board.

9. S.C. 1974-75-76, c. 47 (formerly known as the Petroleum Administration Act), as am. S.C. 1980-81-82-83, c. 114.
10. R.S.C. 1970, c. N-6, as am. S.C. 1980-81-82-83, c. 116.
11. SOR/81-973, as am. From November 1980 to November 1981, the applicable regulations were the Natural Gas Prices Regulations, 1980, SOR/80-823, as am., made under the predecessor to what is now section 52.1 of the Energy Administration Act. Before November 1980, the applicable regulations under section 51 were the Natural Gas Prices Regulations, C.R.C. 1978, c. 1259, as am.
12. SOR/83-332, as am.
13. Added by S.C. 1980-81-82-83, c. 116, s. 27.

The third source of federal statutory authority is section 53 of the Energy Administration Act, which prohibits, *inter alia*, the acquisition of gas from within Alberta for movement outside Alberta unless the price paid to acquire that gas has been approved by special or general orders of the National Energy Board. Under this jurisdiction, the National Energy Board has issued a series of Export Price Orders, one such Order applying to each person holding a gas export licence under Part VI of the National Energy Board Act.[14] The purpose of these Orders is to give specific approval to the price to be paid at each link in the chain of export from the point at which gas is purchased for removal from Alberta until it is actually exported to the United States. In each case, the approved price is to be determined by reference to the "international border price" established under the Natural Gas Prices Regulations, 1981 (which, as noted above, now incorporate by reference the export prices prescribed by the Gas Export Prices Regulations).

Under section 53 of the Energy Administration Act, the National Energy Board has also issued the Alberta Natural Gas Gas Sales Contract Pricing Order,[15] which approves the price to be paid to acquire natural gas under a gas sales contract in Alberta for movement outside Alberta, and the Alberta Natural Gas Original Buyer Pricing Order,[16] which approves the price to be paid by the Alberta Petroleum Marketing Commission to acquire natural gas from an original buyer in Alberta for movement outside Alberta. Under both of these Orders, the price to be paid is to be determined by reference to the "Alberta border price" prescribed under the Natural Gas Prices Regulations, 1981.

In the context of Alberta-produced gas that is exported to the United States, the federal legislative structure can be summarized as follows:

1. When the gas is sold within Alberta before the point at which its movement outside Alberta begins, the price paid must be that approved by the National Energy Board under either the Alberta Natural Gas Gas Sales Contract Pricing Order or the Alberta Natural Gas Original Buyer Pricing Order, both of which are made pursuant to section 53 of the Energy Administration Act. The approved price is to be determined by reference to the "Alberta border price" prescribed by the Natural Gas Prices Regulations, 1981 made pursuant to section 51 of the Energy Administration Act.
2. When the gas is last sold within Alberta before it begins its movement to the point of export to the United States, the price paid must be that approved by the National Energy Board under the appropriate Export Price Order made under section 53 of the Energy Administration Act. The approved price is to be determined by reference to the "international border price" prescribed in the Natural Gas Prices Regulations, 1981 made pursuant to section 51 of the Energy Administration Act. In turn, the Natural Gas Prices

14. *See*, for instance, the TransCanada PipeLines Limited Export Price Order, SOR/78-102, as am.

15. SOR/78-100, as am.

16. SOR/78-101, as am.

Regulations, 1981 incorporate by reference the "international border price" established by the Gas Export Prices Regulations made pursuant to subsection 85(2) of the National Energy Board Act.

3. When the gas is actually exported to the United States, the export price is that established by the Gas Export Prices Regulations made pursuant to subsection 85(2) of the National Energy Board Act.

B. ALBERTA

As is the case federally, the Alberta legislative framework has two alternative components. The first is the Natural Gas Pricing Agreement Act,[17] which operates when there is a formal agreement on gas pricing in effect between Alberta and Ottawa (as is now the case). The other is the Natural Gas Price Administration Act,[18] which operates when no such formal agreement is in effect (as was the case from November 1980 to November 1981).

The key element in the Alberta legislative framework is the system by which all Alberta-produced gas must be delivered to the Alberta Petroleum Marketing Commission under section 15 of the Natural Gas Pricing Agreement Act.[19] That gas when delivered becomes the property of the Commission. The Commission must then re-sell the gas to the person from whom it was acquired (unless that person elects not to repurchase the gas, in which case the Commission may re-sell it to any other person). After such re-sale, the gas will then move on to its intended destination, whether within Alberta, within Canada outside Alberta, or outside Canada.

The rationale behind this system of compulsory sales and re-sales lies in the prices that must be paid when the Alberta Petroleum Marketing Commission purchases and re-sells gas. By subsection 15(3) of the Natural Gas Pricing Agreement Act, when any gas is sold to the Commission the price to be paid by the Commission is to be based upon the "Alberta border price". By subsection 15(5), when gas re-sold by the Commission is intended for consumption within Canada, the price to be paid to the Commission is to be equal to the price paid by the Commission when it acquired that gas. As a result, the Commission will realize no net proceeds on the compulsory sale and re-sale of gas that is to be consumed in Alberta or elsewhere in Canada. However, when gas re-sold by the Commission is intended for consumption outside Canada, the price to be paid to the Commission is to be determined by reference to the "international border price". Accordingly, the Commission will realize substantial net proceeds — the "export differential" — as a result of the compulsory sale and re-sale of gas destined for export to the United States. These net proceeds are distributed by the Commission to all

17. R.S.A. 1980, c. N-4, as am.

18. R.S.A. 1980, c. N-3, as am.

19. The equivalent provision of the Natural Gas Price Administration Act is section 16, which adopts the same framework and terminology when no formal agreement with Ottawa is in effect.

Alberta gas producers, in the form of a monthly price adjustment under section 17 of the Natural Gas Pricing Agreement Act.

Under section 1 of the Natural Gas Pricing Agreement Act, the "Alberta border price" for the purposes of these compulsory sales and re-sales is to be determined in accordance with the federal-provincial agreement that triggers the operation of that Act. When no such agreement is in effect, so that the Natural Gas Price Administration Act is operative, the "Alberta border price" is to be determined unilaterally by the Alberta Petroleum Marketing Commission under section 15 of that Act. Under section 13 of each Act, the "international border price" for any gas re-sold by the Commission is to be the price that is stipulated as the export price for that gas by the federal government.

In the case of Alberta-produced gas that is destined for export to the United States, the current Alberta statutory framework can be summarized as follows:

1. All such gas must be sold to the Alberta Petroleum Marketing Commission before it is removed from Alberta, under section 15 of the Natural Gas Pricing Agreement Act. The price to be paid by the Commission is to be determined by reference to the "Alberta border price" that is established by federal-provincial agreement.
2. The Alberta Petroleum Marketing Commission is required by section 15 of the Natural Gas Pricing Agreement Act to re-sell the gas at a price determined by reference to the "international border price" that is established by the federal government. The Commission thus captures the difference between the "international border price" and the "Alberta border price", and distributes that "export differential" among its gas producers.
3. The gas can then be removed from Alberta, and will be exported to the United States at the "international border price" established by the federal government.

III. CONSTITUTIONAL IMPLICATIONS

The pricing of Alberta-produced gas that is destined for export to the United States is undoubtedly a complex matter of policy, thus requiring a complex legislative framework. That we certainly have. Beyond mere complexity, however, we appear to have developed a dual federal-Alberta pricing structure that entails considerable overlap in jurisdiction, and one may well wonder why this has been thought necessary. The reasons evidently lie in the mixture of goals pursued by the federal and Alberta governments here, and in the perceived need for overlapping legislation to shield the attainment of those goals from constitutional challenge by third parties.

On the federal side, there can be little question that Parliament has the legislative authority to set the price for Alberta-produced gas at the point of its export to the United States. Nor can there be much doubt that Parliament has the legislative authority to set the price of Alberta-produced gas as it crosses the Alberta border and enters extra-provincial trade and commerce, whether it is destined for consumption elsewhere in Canada or for export to the United States. In both respects, Parliament is

exercising its authority under section 91(2) of the Constutition in relation to extra-provincial "trade and commerce", and nothing in section 92A diminishes that authority. The exercise of that authority thus allows the federal government to maintain its two-price system for Alberta gas that is consumed outside Alberta. By regulating the "Alberta border price", the federal government can restrain domestic gas prices to what it believes to be an appropriate level for consumers in Eastern Canada. By separately regulating the "international border price", the federal government can maintain what it believes to be a desirable price level in the export market.

Correspondingly, there can be little doubt that Alberta lacks the constitutional authority to legislate the export price of Alberta-produced gas as it enters the United States. Even under subsection 92A(2), Alberta lacks the legislative jurisdiction to make laws "in relation to" the export of its gas from Canada. Attempting to establish the price of its gas at the international boundary would clearly run afoul of the federal trade and commerce power, and nothing in section 92A has in any way remedied Alberta's pre-existing lack of jurisdiction in this regard.[20]

Before the introduction of subsection 92A(2), there would also have been little doubt that Alberta lacked the constitutional authority to legislate the price of its gas at the Alberta border. Whether that gas was destined for inter-provincial or international trade, any attempt by Alberta to set the "Alberta border price" by legislation would likely have been struck down as an interference with extra-provincial trade and commerce. Subsection 92A(2) has cured that lack of jurisdiction in respect of gas destined for consumption in Eastern Canada, because Alberta can now legislate in relation to the export of its gas "to another part of Canada" (although, by virtue of subsection 92A(3), the Alberta-set price would still be subject to the paramountcy of any conflicting "Alberta border price" established under federal legislation).

But it would seem unlikely that Alberta could claim the authority to legislate the "Alberta border price" for any part of its gas that is destined for export from Canada, again because subsection 92A(2) does not confer on Alberta any legislative jurisdiction in relation to the export of its gas from Canada. An "Alberta border price" legislated by Alberta in respect of gas to be exported to the United States would likely be seen by a court to be as much an interference with the flow of international trade and commerce as would an attempt to set the "international border price" itself.[21] The fact that the interference occurred at the Alberta border rather than the international border would not alter the nature and characterization of the interference itself in the context of a continuous export chain from within Alberta to the United States.

So the power to regulate the two base prices that are the key elements of the Canadian gas-pricing system, at least with respect to gas exported to the United States, still lies beyond the constitutional authority of

20. The pit-falls of provincial price-setting legislation in the export market — whether inter-provincially or internationally — are amply illustrated by the *CIGOL* and *Central Canada Potash* decisions, *supra* n. 2. *See also* Moull, *supra* n. 2.

21 *Id.*

Alberta despite the introduction of section 92A. And yet, these two base prices are also the key components of the system by which Alberta captures the "export differential" between the two. In an apparent attempt to circumvent its lack of constitutional authority in respect of price-setting *per se*, Alberta has adopted the system of compulsory sales and re-sales that is set out in both the Natural Gas Pricing Agreement Act and the Natural Gas Price Administration Act.

It can be argued, in favour of Alberta's system, that the compulsory sales and re-sales all must take place within Alberta, and so are within Alberta's legislative jurisdiction. The decision of the Supreme Court of Canada in the *Carnation* case might give some support to this argument, on the theory that any extra-provincial effect of Alberta's compulsory sales and re-sales is an incidental one only, and not the "pith and substance" of the scheme.[22] But the fact that the relevant transactions in *CIGOL* and *Central Canada Potash* took place within Saskatchewan was of little significance to the Supreme Court of Canada in view of the great weight that the Court placed on the extra-provincial intent and effect of Saskatchewan's schemes. Indeed, because of the pricing structure associated with Alberta's system of compulsory sales and re-sales, it would not be hard for a court to conclude that the primary purpose for the existence of the system is the capture of the "export differential" — a matter with a significantly extra-provincial, international flavour to it.

The legislated inter-position of the Alberta Petroleum Marketing Commission in the chain of export of Alberta-produced gas thus seems on its own to be a marked intervention in international trade and commerce by Alberta. It is hard to argue with conviction that the compulsory sales and re-sales of exported gas that take place within Alberta have only an "incidental effect" on international trade and commerce. Rather, that effect seems quite direct. A producer/exporter of Alberta gas, but for the Alberta legislation, would be free to remove his gas from Alberta and sell it into the United States at a price based upon the "international border price" established by the federal government. Instead, he is required by the Alberta legislation to sell his gas to the Alberta Petroleum Marketing Commission at a price based upon the much-lower "Alberta border price" (as if his gas were destined for Eastern Canada, not the United States). He must then re-purchase that gas at a price that is based upon the much-higher "international border price" that he would be entitled to receive when his gas is actually exported. From his point of view, there could hardly be a more direct interference in the flow of extra-provincial trade in his gas, because the "export differential" that would otherwise be his is instead captured by the Alberta Petroleum Marketing Commission and distributed among all gas producers in Alberta.

Accordingly, despite the introduction of section 92A, the Alberta system of compulsory sales and re-sales could be subject to serious constitutional challenge by a producer/exporter if it were not provided with a protective shield. That protective shield arises from the overlapping federal-Alberta statutory framework that was described above.

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22. *Carnation Co.* v. *Quebec Agricultural Marketing Board* [1968] S.C.R. 238, 67 D.L.R. (2d) 1.

It is important to note that neither the Natural Gas Pricing Agreement Act nor the Natural Gas Price Administration Act itself purports to set the "international border price" that forms the basis for determining the price at which the Alberta Petroleum Marketing Commission must re-sell gas that is destined for export from Canada. Instead, each of these Acts incorporates by reference the "international border price" as it is determined federally from time to time. By referentially incorporating valid federal legislation, instead of attempting to legislate the "international border price" independently, Alberta has placed that element of its statutory framework on a constitutional footing that would be difficult for a producer/exporter to challenge successfully. This footing is reinforced on the federal side by the various Export Price Orders issued by the National Energy Board under section 53 of the Energy Administration Act, as these Orders specifically approve the sale by the Alberta Petroleum Marketing Commission of gas destined for export at a price based on the "international border price" prescribed federally.

The determination of the "Alberta border price", the other key element in the Alberta system, also illustrates the technique of referential legislation although in a slightly different form. Under the Natural Gas Pricing Agreement Act, the "Alberta border price" is to be the price that is determined from time to time under the federal-provincial agreement that brings that Act into operation. At present, the November 1981 gas-pricing agreement between Ottawa and Alberta (as amended on June 30, 1983) sets out a schedule of "Alberta border prices" that is to be in effect through to the end of January 1987.[23] It is that schedule of "Alberta border prices" which is reflected in the Natural Gas Prices Regulations, 1981 as they are amended from time to time by the Governor in Council pursuant to section 51 of the Energy Administration Act. As those regulations change pursuant to the Ottawa-Alberta agreement, the "Alberta border price" for the purposes of the Natural Gas Pricing Agreement Act is automatically adjusted as well. Again, then, Alberta has referentially incorporated valid federal legislation as the keystone of its own scheme, although in this instance it is incorporating prices that are set by an agreement to which it is a party. And the federal government again reciprocates, under the Alberta Natural Gas Gas Sales Contract Pricing Order and the Alberta Natural Gas Original Buyer Pricing Order issued by the National Energy Board under section 53 of the Energy Administration Act, by approving purchases by the Alberta Petroleum Marketing Commission of gas intended to be removed from Alberta at prices based upon the "Alberta border price".

When no formal Ottawa-Alberta agreement is in effect, the Natural Gas Price Administration Act purports to give the Alberta Petroleum Marketing Commission the unilateral authority to determine the "Alberta border price" (the mirror image of the unilateral authority then conferred on the Governor in Council by section 52.1 of the Energy Administration Act). As was noted above, there could still be some serious doubt as to the constitutional validity of an "Alberta border price" that

23. Alta. Reg. 412/81, s. 4. Reproduced in D. Lewis and A. Thompson, *Canadian Oil and Gas* (1982) Volume 3A, p. 39,651 *et seq.*.

is established under Alberta legislation in relation to gas to be exported from Canada. Even if the Alberta-set price were valid under subsection 92A(2), the express preservation of federal paramountcy under subsection 92A(3) would render Alberta's price inoperative if it were in conflict with an "Alberta border price" established at the same time by the federal government.

Alberta nimbly avoided this pit-fall during the most contentious period in Ottawa-Alberta relations, from November 1980 to November 1981, by setting the "Alberta border price" for the purposes of the Natural Gas Price Administration Act at the same level as the "Alberta border price" that was established by the federal government during the same period.[24] By so doing, Alberta also managed to shelter its price under the Alberta Natural Gas Gas Sales Contract Pricing Order and the Alberta Natural Gas Original Buyer Pricing Order issued by the National Energy Board pursuant to section 53 of the Energy Administration Act. Those Orders have the effect of approving sales of gas to the Alberta Petroleum Marketing Commission at the "Alberta border price" established federally from time to time, whether that price is set under section 51 or section 52.1 of the Energy Administration Act. Thus, they operate as an implicit approval mechanism for the Alberta system whether or not a formal gas-pricing agreement is in effect between the two governments. Again, therefore, Alberta's risk of constitutional challenge was minimized, because a private producer/exporter would have had a difficult time in attacking Alberta's price when that price was tied so closely to (and, by implication, approved pursuant to) the federal legislative framework.

It would seem, then, that the Alberta legislative framework continued to function during the height of the energy battles with Ottawa primarily because the federal government was prepared to continue its concurrence in the capture and distribution of the "export differential" by the Alberta Petroleum Marketing Commission. It would have been a fairly easy matter for the federal government to have altered its own statutory framework during that period in a way that exposed the Alberta system to constitutional challenge, for instance by rescinding the Alberta Natural Gas Gas Sales Contract Pricing Order and the Alberta Natural Gas Original Buyer Pricing Order in their application to gas destined for export to the United States. Or the federal government could have altered its statutory framework in some way that reduced the "export differential" that Alberta could capture, such as by amending the Export Price Orders issued by the National Energy Board to authorize sales by the

24. Compare the prices established by the Natural Gas Pricing Orders made during this period under the Natural Gas Price Administration Act (Alta. Regs. 320/80, 175/81 and 366/81) with the prices established during that period by the Natural Gas Prices Regulations, 1980 made pursuant to the Energy Administration Act (SOR/80-823, as am.). Those prices differed in only one month, September 1981, out of the 13 months in which they were in effect (November 1980 to November 1981). The difference in September 1981 was small, and may be attributable to nothing more than a one-month delay by Alberta in acquiescing in a slight reduction in the federal price that was not published in the Canada Gazette until September 9, 1981 (*see* SOR/81-653). In any event, the conclusion of a new Ottawa-Alberta umbrella energy agreement on September 1, 1981 likely lessened the sense of urgency for both parties.

Alberta Petroleum Marketing Commission at something less than the "international border price" (at the "Alberta border price", for example). The federal government could even have gone so far as to itself capture and distribute the "export differential", as it has the statutory authority to do (through the National Energy Board) under section 64 of the Energy Administration Act.

That the federal government did nothing of the kind must be taken as indicating its tacit acquiescence in the continuation of the pre-existing cooperative scheme. But the point is not so much whether the understanding between Ottawa and Alberta is formal or tacit at any given time. At present, a provision in the November 1981 gas-pricing agreement expressly contemplates that Alberta will continue to capture and distribute the "export differential" in accordance with its own legislation.[25] This provision reflects similar understandings in earlier gas-pricing agreements between the two governments, which were in effect from the mid-1970's until October 1980.[26] But given the apparent will of the two governments to keep their cooperative system functioning notwithstanding the absence of such a formal agreement from November 1980 to November 1981, the formal agreement itself shrinks in importance.

So the point must be, rather, that federal-provincial cooperation is possible even in contentious resource-related areas, and that, given the will to cooperate, the techniques of cooperative federalism are available to furnish the statutory mechanisms for putting a cooperative understanding into effect. The governments concerned must first perceive the advantages of cooperation, of course, before the will to cooperate will arise. For the federal government, in this instance, the advantages in cooperation with Alberta may lie primarily in obtaining Alberta's acquiescence in federal policy initiatives in related areas, such as the two-price system for Alberta-produced gas. Agreement with Alberta also reduces the risk of the Alberta government resorting to other weapons, such as its provincial Crown proprietary rights, in a prolonged struggle with Ottawa over resources.[27] For Alberta, the principal advantage in this instance is the shield that the federal legislative framework can provide for the Alberta system of capturing and distributing the "export differential". Agreement with the federal government also reduces the risk that Ottawa will exercise its own statutory powers, under section 64 of the Energy Administration Act, by capturing and distributing the "export

25. Alta. Reg. 412/81, *supra* n. 23, section 6.

26. *See*, for instance, Alta. Regs. 305/78, 281/79, 30/80, 206/80 and 251/80. Reproduced in Lewis and Thompson, *supra* n. 23, at p. 39,621 *et seq.*.

27. Alberta believes very strongly in its provincial Crown proprietary rights under section 109 of the Constitution. Alberta relied on its proprietary right, for example, when it cut back Crown oil production during the 1980-81 confrontation. *See* Moull, "Natural Resources: Provincial Proprietary Rights, the Supreme Court of Canada, and the Resource Amendment to the Constitution" (1983) 21 *Alta. L.R.* 472.

differential" in a way that differs from the Alberta system.[28] For both, of course, life can be much more pleasant if cooperation and agreement replace confrontation and hostility. So the tools of effective federal-provincial cooperation are still available if the will to use those tools can be found.

IV. CONCLUSION

Cooperative federalism is not really dead. It still survives, even in the contentious field of natural resource regulation, although it is certainly farther removed from the public spotlight than were the recent federal-provincial energy confrontations.

The survival of cooperative federalism should not really be that surprising, since our constitutional structure seems to require a flexible mechanism for adjusting federal-provincial relations in circumstances in which a formal constitutional amendment may be inappropriate.[29] Federal and provincial governments may agree to shift constitutional powers and responsibilities temporarily, or for a particular purpose, when one or the other side would not contemplate agreement on a permanent shift by constitutional amendment. Such is the case, it would appear, in the context of provincial legislative authority in relation to the export of resource production from Canada, where it is unlikely that the federal government will ever agree to share its exclusive legislative powers. But where the federal government does not object in principle to a temporay exercise of powers of that kind by a province, then a less formal, and less-than-permanent, shift in legislative authority can be contemplated.

It also seems evident that the techniques of cooperative federalism could be pursued in other resource-related areas, provided that the governments in question are prepared to reach agreement on the nature and extent of their cooperative efforts. Take Saskatchewan potash, for example. Because so much of Saskatchewan's potash production is exported from Canada, it is unlikely that subsection 92A(2) has given Saskatchewan any greater legislative powers in relation to the export of its potash production from Canada than it had before the introduction of section 92A. In this respect, section 92A apparently has not reversed the effect of the decision in *Central Canada Potash*.[30] A further constitutional amendment might solve this problem for Saskatchewan, but no amendment of this kind seems at all likely in the forseeable future.

And yet there may be good reasons why Saskatchewan should be able to regulate at least certain features of the export of its potash production from Canada. As *Central Canada Potash* demonstrates, it is difficult for the courts to separate intra-provincial matters (such as controls on the rate of resource production) from extra-provincial marketing matters

28. For instance, by distributing the "export differential" among all gas producers in Canada, not just those in Alberta. The federal power is not used with respect to Alberta-produced gas, presumably because of the continuing agreement that Alberta may capture and distribute the "export differential" under its own legislation.

29. *See* Hogg, *supra* n. 5 at 55 and 236.

30. For a fuller discussion of this point, see Moull, "Section 92A of the Constitution Act, 1867" (1983) 61 *Can. Bar Rev.* 715 at 730-31.

(such as export pricing) when the bulk of the production of a resource is destined for international markets. Because of these conceptual difficulties, Saskatchewan might well have to run the risk of third-party constitutional attack, despite section 92A, if that province ever again thought it necessary to impose close controls on the production and marketing of its potash.

In those circumstances, assuming it had no fundamental policy objection to the provincial initiative itself, it would be possible for the federal government, through Parliament, to concur in a scheme of cooperative regulation that would effectively shield the provincial initiative from third-party attack. It would not be necessary for the federal government to relinquish any point of constitutional principle in this regard, because a cooperative regulatory scheme would be effected without a constitutional amendment that broadened the general legislative powers of the resource-producing provinces in relation to international trade. And yet an appropriately-designed cooperative regulatory scheme could give the province in question, for a limited time and a specific purpose, the legislative powers that it might require to fully address the problems of the particular resource industry within its boundaries.

All of this depends, of course, upon there being a will to cooperate when cooperation is needed. But given that vital ingredient, the tools to effect cooperation are readily available. The specific details of cooperation in each instance must, of necessity, be tailored to the particulars of the problem to be addressed. But there seems no real reason why the techniques that are effective in the context of pricing Alberta's gas cannot, or should not, be adapted for use elsewhere.