

## Peter Lougheed's Section 92A

By Alastair Lucas

### Commenting on:

the legacy of section 92A of the *Constitution Act, 1982*

“**Exclusive**” power of provincial legislatures to make laws for “**exploration**”; “**development, conservation and management**” of provincial non-renewable resources and forestry resources. Provinces can also regulate, (without price or supply discrimination) the **export** of these natural resources. This is the essence of section 92A of the *Constitution Act 1982*, a provision for which Peter Lougheed fought hard in the negotiations that led to patriation of the Canadian Constitution in 1982.

Section 92A, supported by provincial property (*Constitution Act, 1867*, s. 92(13)) and natural resource (s. 92(5)) power, as well as opt out rights in the constitutional amending formula, (*Constitution Act, 1982*, s. 38(2) (3)) secured economic protection for Alberta. This was not merely theoretical. The 1980 National Energy Program (NEP) had, to many Albertans at least, revealed a rapacious federal government hungry for an even greater share of provincial natural resource revenues, and the control that this would produce.

Lougheed's section 92A initiative involved carefully developed legal and political strategy. Under the direction of Lougheed and Energy Minister Merv Leitch, the Alberta government had countered this perceived federal resource revenue grab by asserting a novel constitutional theory, namely that the province as resource owner could, though a lease condition requiring compliance with provincial laws (breach of this contract condition would automatically terminate a Crown oil and gas lease), assert greater control over its resources than it could merely acting as legislator. This carried weight, though subsequent scholarship strongly suggests that the theory works only in the absence of conflicting (and otherwise valid) federal legislation.

Alberta had also challenged successfully (as a purported tax on the provincial government contrary to section 125 of the *Constitution Act, 1867*) a federal excise tax on exported natural gas, one of the NEP elements. (*Re: Exported Natural Gas Tax*, 1981 ABCA 92, aff'd, [1982] 1 SCR 1004, 1982 CanLII 189) The mechanism was a reference to the Alberta Court of Appeal built on a carefully cooked scenario that involved, somewhat incongruously, the Alberta government itself contracting to drill a gas well, then shipping produced gas to the Alberta boundary for export to the U.S. In any event, the Supreme Court of Canada agreed that the federal tax was invalid.

The political element of the Lougheed strategy involved securing Quebec as an ally. Both provinces sought to strengthen provincial powers and ward off federal incursions though on very different matters. Roger Gibbins (In Allan Tupper and Roger Gibbins, *Government and Politics*

*in Alberta*, (Edmonton: University of Alberta Press, 1992 at 72-74) captured Alberta’s objectives in this unlikely alliance when he said that Lougheed and Alberta:

“... surfed adroitly on the constitutional waves generated by the nationalist movement in Quebec.”

The result, Gibbins argued, was that:

“Alberta secured more from the 1982 Act with respect to economic protection than did Quebec with respect to cultural protection.”

Section 92A has not been the subject of many judicial decisions. Its constitutional law impact has been limited. But its symbolic value has been considerable. It confirms the constitutional foundation for provincial natural resource management and a significant role in natural resource trade and anchors Alberta’s energy resource economic strength. This is Peter Lougheed’s economic legacy for Alberta.