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## **EXPORT PIPELINES AND PROVINCIAL RIGHTS: HOW BEST TO GET TO THE WEST COAST AND ASIAN MARKETS**

Dr. F.L. (Ted) Morton

The passing of former premier Peter Lougheed provided an occasion to remember not just his fierce defense of Alberta against the predatory policies of then prime minister Pierre Trudeau, but the substance of that defense: strong provincial rights based on the constitutional principle of equality of the provinces.

Equality of the provinces may not sound like a big deal today. But in the 1970s, it was.

To appreciate the significance of Lougheed's achievement, it is necessary to recall the state of Canadian federalism after the Second World War. Writing in 1954, J.R. Mallory, one of English Canada's leading constitutional scholars and a professor at McGill University, observed that "in a federal system there is assumed an equality of influence and treatment of the various individual units," but that "[i]n Canada the facts are, and always have been, very different." He explained thus:

"The inequalities in size and population of the provinces of Canada have been recognized tacitly in a constitution which to a large extent embraces two levels of federalism. The superior size and bargaining position of Ontario and Quebec give them a status and an autonomy which are different in kind to those of the rest of the provinces. ...The outlying provinces are still Canada's empire and Canada is still, for many purposes, little more than the original area which it encompassed at Confederation."<sup>1</sup>

To drive home his point, Mallory observed that Alberta and the other western provinces were "provinces not in the same sense as were Ontario and Quebec, but in the Roman sense."<sup>2</sup>

This is what Pierre Trudeau learned in school, and it is how he tried to govern when he became prime minister. Fortunately for Alberta and the rest of Canada, Peter Lougheed was there to challenge him.

For Albertans, the banner of provincial rights and provincial equality became a potent mix of justice and self-interest. It was the constitutional shield that Lougheed used to defend the ownership and management of Alberta's oil and gas. It was also the foundation of Lougheed's insistence that there be no special vetoes for Quebec (or Ontario) in the 1982 constitutional amending formula and his support for a reformed Senate with equal representation for all provinces.

Lougheed's determined crusade for equal treatment was the most recent chapter in a century-long struggle with Ottawa for control of Alberta's natural resources. In 1900, advocating for Alberta and Saskatchewan's entry into Confederation as full-fledged provinces, the then lieutenant-governor of the Northwest Territories, Sir Frederick Haultain, laid down five conditions. One was ownership of public lands and resources, the same as the four original provinces.<sup>3</sup>

This was not to be. Like Manitoba before them (1870), Alberta and Saskatchewan were relegated to second-class status — "provinces in the Roman sense" in Mallory's memorable words. They were made provinces in 1905, but ownership of public lands and resources remained with the federal Crown. At Dominion-Provincial conferences for the next 25 years, the premiers of the three Prairie provinces continued to demand equal treatment — without success.

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<sup>1</sup> J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954), 10, 176.

<sup>2</sup> *Ibid.*, 10.

<sup>3</sup> See Thomas Flanagan and Mark Milke, "Alberta's Real Constitution: The Natural Resources Transfer Agreement," in *Forging Alberta's Constitutional Framework*, Richard Connors and John M. Law, eds. (Edmonton: The University of Alberta Press, 2005), 165-190.

To bring the issue to a head, in 1923 the newly elected United Farmers of Alberta (UFA) government enacted the Mineral Taxation Act to collect rents from companies exploiting Crown resources in Alberta. Ottawa, at the urging of the Canadian Pacific Railway and the Hudson's Bay Company, immediately disallowed the Alberta legislation.<sup>4</sup> But the use of disallowance put the issue on the table and the federal government on the defensive. While Alberta lost this policy battle (as it knew it would), the province strengthened its political hand.

Seven years later, in 1930, under the enlightened leadership of Premier Robert Brownlee, Alberta and the other Prairie provinces got what they wanted: the transfer of Crown lands and resources to the provinces. Brownlee not only negotiated the Natural Resources Transfer Agreement with Prime Minister Mackenzie King, but also then drafted the legislation implementing the agreement — legislation that entrenched Alberta's exclusive right to tax its newly acquired natural resources.<sup>5</sup>

The full extent of the economic value of this transfer would not become evident until the post-war oil boom ushered in by Leduc Number 1 in 1947. In the following two decades, Alberta went from one of the poorest "have-not" provinces in Canada to one of the richest. The political architect of this transition was Ernest Manning, who served as Alberta's premier from 1943 to 1968.

Following the war, the supply of oil and gas in Alberta quickly surpassed local demand, and producers wanted pipelines to export the surplus to markets in Eastern Canada and the United States. The astute Manning saw that as soon as Alberta's natural gas or oil crossed the province's boundaries, it would fall under the federal government's broad power "to regulate trade and commerce."

To pre-empt any future federal intrusion, in 1954 Premier Manning created the Alberta Natural Gas Trunkline (AGTL), a joint Crown-private corporation that would transport most of the natural gas within Alberta. It was well established in constitutional law that the federal government could not tax provincial Crown corporations. But Manning's objectives were broader than just protecting Alberta's pipelines from federal taxation. Reflecting back years later, Manning explained, "Theoretically, if we'd ever had a constitutional hassle over export of gas under that arrangement, you could just simply turn the tap off at the border."<sup>6</sup> Not coincidentally, this is pretty much what Premier Peter Lougheed threatened to do after Trudeau announced his National Energy Policy in 1980.<sup>7</sup>

Ernest Manning was the first but not the last Alberta premier to use provincial ownership as a shield against Ottawa. In the midst of the "energy wars" in 1980, Peter Lougheed crafted a constitutional reference that challenged Ottawa's intention to impose a tax on natural gas exports from Alberta to the United States.<sup>8</sup> The reference directed the court to assume — hypothetically — that the gas in question was not only owned by the provincial Crown, but

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<sup>4</sup> Mallory, *Social Credit and the Federal Power in Canada*, 23.

<sup>5</sup> See Franklin L. Foster, "John E. Brownlee, 1925-1934," in *Alberta Premiers of the Twentieth Century*, Bradford J. Rennie, ed. (Regina: Canadian Plains Research Centre, University of Regina, 2004), 77-106.

<sup>6</sup> Edward Bell, "Ernest Manning, 1943-1968," in *Alberta Premiers of the Twentieth Century*, Rennie, ed. 147-182, 167.

<sup>7</sup> Lougheed announced that Alberta would reduce crude oil production over nine months in three stages, with each stage affecting a 60,000 barrel/day reduction.

<sup>8</sup> See Troy Riddell and F.L. Morton, "Government Use of Strategic Litigation: The Alberta Exported Gas Tax Reference," in *The American Review of Canadian Studies* (Autumn, 2004): 485-509.

that the government of Alberta had also drilled the wells and owned the pipeline to the Alberta-Montana border. The Alberta Court of Appeal ruled unanimously that under these circumstances, a federal export tax on natural gas would be unconstitutional. Lougheed was then able to use this legal victory as a lever to persuade Trudeau to drop the tax on gas exports in the energy accord announced in September, 1981.

Lougheed consolidated his energy victories in subsequent negotiations with Trudeau over patriation of the Constitution and adoption of the Charter of Rights and Freedoms. In order to get Alberta's support for these changes to Canada's constitution, Trudeau agreed to amendments that strengthened provincial control of natural resources. Sections 50 and 51 of the Constitution Act, 1982, which added section 92(A) and the interpretive "Sixth Schedule" to the Constitution Act, 1867, entrench exclusive provincial control over the exploration, development, conservation, and management of non-renewable natural resources. They also expand provincial tax capacity over natural resources to include indirect as well as direct taxation, thus reversing a Supreme Court ruling that had gone against Saskatchewan (and Alberta) in the 1970s.<sup>9</sup>

Today, the alignment of Alberta's energy policies and the principle of provincial rights is less certain. The same provincial rights that animated Lougheed's defense of Alberta's energy sector have become a potential liability: namely, the threat by British Columbia to block any new bitumen pipelines to the west coast. These proposed pipelines are critical to opening up new Asian markets and reducing Alberta's debilitating and expensive dependence on a single customer — the United States — for our oil and gas exports.

Several commentators have argued that British Columbia lacks the constitutional authority to unilaterally veto projects like Enbridge's Northern Gateway pipeline and Kinder-Morgan's proposed expansion of the existing TransMountain line. They point to the federal government's authority, under the section 92(10)(a) of the Constitution Act, 1867, to regulate inter-provincial works such as railways and canals — which, by extension in today's economy, includes pipelines.<sup>10</sup>

In theory, this is all well and good. But in practice, if the Harper government were to try to use its constitutional muscle to blast the Northern Gateway line through to the west coast, the B.C. government has an array of regulatory and taxing powers that it could use to delay and undermine the economic viability of these pipelines.

No doubt this would all end up in the courts. While federal paramountcy might ultimately prevail, it could take a decade. Meanwhile, Canada's competitors for long-term Asian contracts would have the field to themselves.

This depressing scenario has led some to recommend that Ottawa use its "declaratory power" to take control of all aspects of the West Coast pipelines and strip the provinces — in this case B.C. and Alberta — of any jurisdictional authority.<sup>11</sup> They point out that the declaratory power,

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<sup>9</sup> *CIGOL v. Government of Saskatchewan* [1978] 2 S.C.R. 545.

<sup>10</sup> See Tom Flanagan, "To connect the pipeline, connect the dots," *Globe and Mail*, Aug. 2, 2012.

<sup>11</sup> *Ibid.*

found in section 92(10)(c) of the Constitution Act, 1867, has been used over 470 times since Confederation, and mostly with respect to inter-provincial works that are analogous to the proposed pipelines.<sup>12</sup>

The declaratory power is the nuclear bomb in the federal arsenal. It allows Ottawa to declare that a public work or undertaking — such as a pipeline — is “for the general advantage of Canada” and thereby obliterates any provincial claim to continue to regulate whatever the activity is. The ability of one level of government unilaterally to usurp powers given to the other level is in blatant conflict with the principles of federalism. For this reason, there is no similar or analogous power in either the American or Australian federal constitutions. It also explains why the declaratory power has been used only twice in the past 50 years, and would have been repealed completely by the failed Charlottetown Accord in 1992.<sup>13</sup> There is a consensus amongst constitutional scholars that the declaratory power has fallen into desuetude and that any attempt by a contemporary government to use it would provoke a vigorous political counter-attack, if not a constitutional crisis.

Tempting as this solution may seem to some, it would be a mistake for Alberta to endorse such a move by the Feds. Stephen Harper will not be prime minister forever, and the Conservative Party will not form majority governments forever. Now is not the time to set a precedent for the future use of this power.

If the Harper government uses the declaratory power to push through Northern Gateway, it opens the door for some future government that is *not* favourably disposed towards Alberta or the oilsands to do the same. Thomas Mulcair and the NDP come to mind. They might be the next federal government, but certainly neither the first nor the last to use Alberta’s oil and gas to advance their own political ambitions. Buying eastern votes with western resources is a tried and true strategy in Canadian federal politics.

Principles are not always convenient. And now is not the time for Alberta to abandon its historical defense of provincial rights.

There is another way forward, one that Lougheed traveled many times: building alliances with our neighboring Western provinces. This is the better way. As Lougheed said repeatedly, strong provinces make for a strong Canada. Societies that forget their past, risk losing their future.

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<sup>12</sup> Section 92(10)(c) limits the application of the declaratory power to works “wholly situate within the province.” Given that the proposed Northern Gateway pipeline would traverse two provinces — Alberta and B.C. — it can be argued that a federal declaration under 92(10)(c) would be inappropriate or even unconstitutional. The counter-argument is that if the declaratory power applies to a works located wholly within one province, then it applies with even greater force (*a fortiori*) to a work that crosses provincial boundaries. Suffice it to say that if Ottawa were to use the declaratory power to try to take control of the West Coast pipelines, this, too, might be challenged in court.

<sup>13</sup> The two instances are the Cape Breton Development Corporation Act, S.C. 1967-68, c. 6, s. 35; and Teleglobe Canada Reorganization and Divestiture Act, S.C. 1987, c. 12, s. 9.



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## **About the Author**

**Dr. F.L. (Ted) Morton** is currently an Executive Fellow at The School of Public Policy at the University of Calgary. He recently served as a minister in the Alberta government in the portfolios of Energy, Finance, and Sustainable Resource Development.