THE VALUATION OF OIL AND NATURAL GAS AND THE BASIS FOR THE CALCULATION OF ECONOMIC RENT (ROYALTIES) FOR PRODUCTION FROM INDIAN RESERVES[1]

I. INTRODUCTION

The beneficial title to "lands reserved for Indians" in Canada has always been an anomaly under the common law or, more properly, an anomaly recognized by the common law. What the common law would label as the "surface rights" portion of this title has been the subject of extensive litigation over the decades. Whether the right to minerals is included in the beneficial, *sui generis* interest of aboriginal peoples within this title is a further complicating issue. Unfortunately the courts have rarely touched upon this latter issue.

This paper intends to explore the extent to which the "Indian interest" includes the rights to minerals within those particular lands reserved for Indians that have been designated as "Indian reserves" pursuant to the *Indian Act.*[2] It will not touch upon the broader traditional or aboriginal land rights of aboriginal peoples. More specifically, the paper will explore this interest in the Western Canada Sedimentary Basin as it pertains to petroleum and natural gas. The Western Canada Sedimentary Basin, generally speaking, falls within those lands which are the subject of the so-called "numbered treaties".[3] The paper will also focus on the era of high world oil prices in the 1970's and 1980's, a period when the majority of conventional oil production from Indian reserves was taken, and how the valuation of petroleum and natural gas during those years may impact on the valuation of petroleum and natural gas in the current era of once again soaring prices for these commodities.

---

[1] This paper is largely based on research done by Ms. Laurie Strapp, Mr. Owen McGorman, Ms. Judy MacLachlan and Mr. Tibor Osvath on behalf of the Samson Cree Nation. The author also wishes to acknowledge the assistance of Ms. Ruth Johnson.

[2] R.S.C. 1985, c. I-5.

[3] That is, Treaties 1 through 11.

II. THE LEGAL BACKGROUND

Morris stated in *The Treaties of Canada*[4] that the treaties with the "Indian tribes, of Manitoba, the North-West Territories and Kee-wa-tin" were all based on the models of that made at the Stone Fort in 1871[5] and the North-West Angle Treaty of 1873.[6] The Stone Fort and North-West Angle Treaties were, in turn, based "in many material features" on those made by W.B. Robinson with the Chippewas living on the shores of Lakes Huron and Superior [in 1850].[7] Morris noted with respect to those earlier treaties that they were "forerunners of the future treaties and shaped their course".[8]

In discussing features common to all the treaties, Morris noted the following:

> The allotment of lands to the Indians, to be set aside as reserves for them for homes and agricultural purposes, and which <u>cannot be sold or alienated</u> <u>without their consent</u>, and then <u>only for their benefit</u>; . . .[9]

Morris noted, in discussing the treaties with the Indian tribes of Manitoba, the North-West Territories and Kee-wa-tin, that their provisions "must be carried out with the utmost good faith and the nicest exactness".[10] The Robinson Superior Treaty stated as follows:

> . . . and should the said Chiefs and their respective tribes at any time desire to <u>dispose of any mineral or other valuable productions</u> upon the said reservations, the same will be at their request <u>sold</u> by order of the Superintendent-General of the Indian Department for the time being, <u>for their sole use and benefit, and to the best advantage</u>.[11]

---

[4] The Hon. Alexander Morris P.C. *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were Based* (1880) at 285 [**Morris**].
[5] That is, Treaty 1.
[6] That is, Treaty 3.
[7] Morris, *supra* note 4 at 285 [the **Robinson Huron Treaty** and the **Robinson Superior Treaty**].
[8] *Ibid.* at 16.
[9] *Ibid*. at 287 [emphasis added].
[10] *Ibid*. at 285.
[11] *Ibid*. at 303 [emphasis added].

Morris' account of the negotiations leading to the Stone Fort and Manitoba Post[12] treaties includes the following assurances from Wemyss M. Simpson, Indian Commissioner, to the assembled Indian bands:

> First. Your Great Mother the Queen wishes to do justice to all her children alike. She will deal fairly with those of the setting sun, just as she would do with those of the rising sun.[13]
>
> . . .
>
> [Y]ou must understand that she can do for you no more than she has done for her red children in the East. If she were to do more for you that would be unjust for them. She will not do less for you because you are all her children alike, and she must treat you all alike.[14]

Morris' account of the negotiations leading to the signing of the North-West Angle Treaty[15] includes the following representation:

> They asked if the mines would be theirs. I said if they were found on their reserves, it would be to their benefit but not otherwise.[16]

In addition, the negotiations of the North-West Angle Treaty included the following exchange between Lieutenant Governor Morris (as he then was) and a chief:

> CHIEF - "Should we discover any metal that was of use, could we have the privilege of putting our own price on it?"
>
> GOVERNOR - "If any important minerals are discovered on any of their reserves the minerals will be sold for their benefit with their consent. . . ."[17]

[12] That is, Treaty 2.
[13] Morris, *supra* note 4 at 28 [emphasis added].
[14] *Ibid.* at 29 [emphasis added]. There is no mention of the sale or lease of minerals in the written form of either Treaty 1 or 2.
[15] That is, Treaty 3.
[16] Morris, *supra* note 4 at 50 [emphasis added].

The North-West Angle Treaty stated as follows:

> . . . and provided also that the aforesaid reserves of lands or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained.[18]

Morris' account of the negotiations leading to the signing of the Qu'Appelle Treaty[19] contains the following statement:

> After long and animated discussions the Indians asked to be granted the same terms as were accorded to the Indians of Treaty Number Three, at the North-West Angle, hereinbefore mentioned. The Commissioners assented to their request and the treaty was signed accordingly.[20]

In the course of the negotiations leading to the signing of the Qu'Appelle Treaty, Morris compared it to North-West Angle Treaty and said to the assembled Indians, who had asked for better terms:

> That would not be right and it is well that you should know that we have not power to do so; we can give you no more than we gave them. . . .[21]

Treaty 4 stated as follows:

> . . . and provided further that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use

[17] *Ibid*. at 70 [emphasis added].
[18] *Ibid*. at 323 [emphasis added].
[19] That is, Treaty 4.
[20] Morris, *supra* note 4 at 79.
[21] *Ibid*. at 122 [emphasis added].

> <u>and benefit</u> of the said Indians, with the consent of the Indians entitled thereto first had and obtained; . . .[22]

Treaty 5 stated as follows:

> . . . and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the <u>use and benefit</u> of the said Indians entitled thereto, with their consent first had and obtained; . . .[23]

In 1876, Treaty No. 6 was entered into between Her Majesty the Queen of Great Britain and Ireland on the one part and the Plain and Wood Cree and other tribes of Indians, inhabiting the area contemplated by the Treaty, on the other part. Treaty No. 6 provided in part as follows:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the <u>benefit</u> of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada.
>
> . . .
>
> . . . [T]he aforesaid reserves of lands, or any interest therein, may be sold or otherwise disposed of by Her Majesty's government for the <u>use and benefit</u> of the said Indians entitled thereto, with their consent first had and obtained.
>
> . . .
>
> It is further agreed between Her Majesty and her said Indians, that such sections of the reserves above indicated as may at any time be required for public works or buildings of what nature soever, may be appropriated for

[22] *Ibid*. at 332 [emphasis added].

> that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon; [24]

On August 19, 1876, a few days prior to the signing of Treaty No. 6, which took place August 23 and August 28, Lieutenant-Governor Alexander Morris addressed the assembled Plain and Wood Cree and other groups of Indians. His address included the following remark with respect to the proposed Treaty:

> You think only for yourselves, we have to think of the Indians all over the country, we cannot treat one better than another, it would not be just, we will therefore do this, and what I tell you now is the last.[25]
>
> . . .
>
> I cannot treat you with more favor than the other Indians.[26]

That same day Morris promised:

> But understand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; . .. .[27]

In September 1877, Lieutenant-Governor Laird was reported by the Globe newspaper as having made the following statement to the Blackfeet and other Indian groups assembled to sign Treaty No. 7:

> The Queen wishes to offer you the same as was accepted by the Crees. I do not mean exactly the same terms, but equivalent terms, that will cost the Queen the same amount of money.[28]

---

[23] *Ibid*. at 345 [emphasis added].
[24] *Ibid*. at 353 [emphasis added].
[25] *Ibid*. at 207 [emphasis added].
[26] *Ibid*. at 214 [emphasis added].
[27] *Ibid.* at 205 [emphasis added].
[28] *Ibid*. at 268 [emphasis added].

The next day, Lieutenant-Governor Laird completed his remarks to the Blackfeet and other Indian groups, and stated as follows:

> . . . and should you desire to sell any portion of your land, or any coal or timber from off your reserves, the Government will see that you receive just and fair prices, and that you can rely on all the Queen's promises being fulfilled.[29]

There is no mention of the sale or lease of minerals in the written form of Treaty 7.

Throughout the treaty making process, the Indians were promised that their reserve lands would not be taken without their consent. This is reflected in Morris' own statement on the conclusion of that process:

> The allotment of lands to the Indians, to be set aside as reserves for them for homes and agricultural purposes, and which cannot be sold or alienated without their consent, and then only for their benefit; . . . [30]

In 1896, section 2 of the *Indian Act* provided as follows:

> 2. (k) The expression "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains a portion of the said reserve, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein;[31]

Over the years the *Indian Act* has required that Indians as defined therein surrender their minerals to the Crown in order that the Crown might grant rights in such minerals[32]; Indians to this day are not permitted to lease the minerals directly, on their own behalf.[33]

---

[29] *Ibid.* at 270 [emphasis added].
[30] *Ibid*. at 287 [emphasis added].
[31] *Indian Act,* R.S.C. 1886, c. 43 [emphasis added].
[32] *Indian Act*, R.S.C. 1927, c. 98, s. 50.
[33] *Supra* note 2.

A typical surrender provided that the First Nation surrendered "all the land deemed to contain salt, petroleum, natural gas, coal, gold, silver, copper, iron and other minerals" in the particular reserve to the Crown:

> TO HAVE AND TO HOLD the same unto his said Majesty the King, his Heirs and Successors, forever, in trust to grant in respect of such land the right to prospect for, mine, recover, and take away any or all minerals contained therein, to such person or persons, and upon such terms and conditions as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people;[34]

The language of the surrender was invariably drafted by the Crown. Surrenders were then accepted by the Crown by Order in Council to be dealt with in accordance with the *Indian Act* and, subsequent to 1974, the *Indian Oil and Gas Act.*[35]

With this background largely having been formulated in the 19th century, how has oil and gas produced from Indian reserves been treated during the modern, post-Leduc oil producing era in Western Canada? Has oil and gas been produced in accordance with the terms of the treaties and the mineral surrenders?

III. BACK TO THE FUTURE: THE OIL CRISIS OF THE 1970's

Prior to 1973, the price of oil sold in Canada was not subject to overt price regulation. Prior to 1973 the price on which the royalty for production from Indian reserves was calculated was comparable, for better and for worse, to the price at which oil was generally traded throughout the world. Price-making was still with the "Seven Sisters" and had not yet been transferred to the Organization of Petroleum Exporting Countries ("OPEC"). Life was simple. For consumers, life was good.

[34] From 1946 surrenders.
[35] R.S. 1985, c. I-7.

On September 4, 1973, Prime Minister Trudeau announced in the House of Commons that the government would:

> ask for the oil industry to refrain from implementing any further price increases affecting consumers until January 30, 1974 (at that time the price was $3.80 per barrel[36]); and
>
> seek a control mechanism whereby higher prices in the United States would not automatically result in higher prices in Canada.[37]

On September 6, 1973, a decision of the federal Cabinet authorized the Minister of Energy Mines and Resources to discuss a "two-tier" oil price system with the producing provinces.[38]

On September 13, 1973, the federal Cabinet approved the proposals of the Minister of Energy Mines and Resources to:

> introduce legislation to authorize collection of any amount by which the export price exceeded the domestic Canadian price starting October 1, 1973. Any amount collected was to be held in escrow. No commitment was to be made at this time as to the eventual distribution to be made between the provinces, the producers and the federal treasury; and
>
> announce that the National Energy Board had denied all applications to export crude oil for the month of October because it was unable to satisfy itself under s. 83 of the *National Energy Board Act* that the prices to be charged for the oil to be exported were just and reasonable in relation to international prices. The National Energy Board was prepared to consider export prices that were $0.40 per barrel in excess of the price resulting from the voluntary price restraint.

---

[36] Imperial Oil Limited pricing bulletin.
[37] House of Commons Debates (4 September 1973) at 6184 (Hon. P.M. Pierre Elliot Trudeau).
[38] Press clippings.

On September 14, 1973, the government of Canada announced the decision to implement an oil export tax, in an initial amount of $0.40 per barrel.[39]

The *Oil Export Tax Act*[40] was enacted in January 1974 with retroactive effect to October 1, 1973:

> Part III.1 contained the main charging provision imposing a tax on crude oil exported from Canada, levied on the exporter;
>
> Part II authorized periodic payments out of the Consolidated Revenue Fund to the producing provinces of amounts equivalent to one half the proportionate share of the tax revenue generated by the export of production from each producing province;[41]
>
> The Act contained no provision for fixing a Canadian domestic price; and
>
> Part I of the Act added a new part to the *Excise Tax Act*[42].

For the period of the *Oil Export Tax Act*[43] the export tax was determined by the National Energy Board based on its assessment of the competitive price of crude oil in Chicago adjusted for pipeline tariffs back to Edmonton. The determination was not transaction specific, but was an amount applied on a month-to-month basis, announced at the beginning of the month. The same method of determining the monthly charge or tax applied after the first six months.

At the Federal-Provincial First Ministers' Conference on Energy on January 23, 1974, it was agreed that the price of oil would remain at the September 4, 1973 level (i.e., $3.80 per barrel) until April 1974. In the course of that conference, the Minister of Energy[44] committed the federal government to return all of the export tax earnings prior to January

---

[39] Press clippings.
[40] S.C. 1973-74, c.53, Royal Assent January 14, 1974.
[41] Again, no mention was made of First Nations and it was not specified whether the calculation of provincial production was to include production from Indian reserve lands located in that province.
[42] R.S.C. 1970, c. E-13, c. 10 (2nd Supp).
[43] *Supra* note 40.
[44] Donald S. Macdonald.

31, 1974 to the western oil producing provinces, half directly as general revenues and half to support energy developments yet to be specified.[45] The federal government later decided that its investment in Alberta would be its investment in Syncrude to satisfy this commitment.[46] At least by May 22, 1975, those funds were committed to the Syncrude project by the federal government.[47]

On January 31, 1974, the Minister of Energy Mines and Resources announced to the oil industry that a compensation program would be implemented for importers of crude oil effective February 1, 1974.[48]

The Alberta Petroleum Marketing Commission began operations March 1, 1974. One of its responsibilities was to determine the quality-related price differentials for different crude oils so as to maintain the average field price set in the federal provincial pricing agreements.

In March 1974, Cabinet provided authority for the Minister of Energy Mines and Resources to implement an Oil Import Cost Compensation Program, initially on the basis of a Supplementary Estimates Vote for the period March 31, 1974 and authorized the Minister of Justice to draft legislation for an on-going program.[49]

The *Oil Export Tax Provincial Payments Order*,[50] respecting the making of payments to the provinces under the *Oil Export Tax Act*[51], designated October 1, 1973 to April 1, 1974 as the prescribed period for the purposes of section 4 of the Act. The producing provinces were to receive a 50% share of the export tax revenues generated during that time.[52]

[45] Verbatim Report of Federal-Provincial First Ministers' Conference on Energy, Morning Session, January 22, 1974, Ottawa, p. 154. Once again, there was no reference to First Nations.
[46] On February 3, 1975 the federal government agreed to assume a 15% interest in the Syncrude project.
[47] Letter from Turner (Minister of Finance) to Buchanan (Minister of Indian Affairs).
[48] Press clippings.
[49] March 7, 1974; the Cabinet decision was actually made March 14, 1974.
[50] S.O.R./74-162, P.C. 1974-536, March 12, 1974.
[51] *Supra* note 40.
[52] Again, there was no mention of First Nations.

From April 1, 1974 throughout the 1970's, the price of domestic oil was established by informal agreements between the federal government and the oil producing provinces.

At the Federal-Provincial First Ministers' Conference on Energy on March 27, 1974,[53] it was agreed that the price of oil would increase to $6.50 per barrel and that that price would be maintained until June 30, 1975. At that conference the First Ministers also agreed that 100% of the revenues generated by the oil export charge would flow to the federal government[54] and that the oil import compensation program would be funded out of these revenues. The federal government agreed that it would accumulate a special fund equivalent to 25 cents for each barrel of oil produced in Alberta and Saskatchewan between April 1, 1974 and June 30, 1975. The fund would be spent in each province proportionate to that province's oil production for the period. It was created in recognition of and as compensation for the considerable revenues foregone by Alberta and Saskatchewan in accepting a price of $6.50/barrel. The crude oil production volumes used to calculate Alberta's entitlement included production from Indian reserves located in Alberta.

On April 2, 1974, Bill C-18 was introduced: *An Act to impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain oil import costs and to regulate the price of Canadian crude oil in interprovincial and export trade*. Bill C-18 died on the order paper May 8, 1974 when the government budget was defeated and Parliament was prorogued.

On April 9, 1974, retroactive to January 1, 1974, the Import Compensation Program was set up pursuant to the *Imported Oil and Petroleum Products Compensation Regulations.*[55] Under the regulations, importers of petroleum and certain petroleum products destined for use in Canada were eligible to apply for compensation for what amounted to the change in the FOB cost of imported oil since November 30, 1973, plus the change in

[53] Press clippings.
[54] Indian oil and gas royalties were already being paid to the federal government. Some producers simply wrote one monthly cheque to the Receiver General that included Indian royalties and the export charge.
[55] S.O.R./74-232.

transportation costs for the same period.[56] In order to be eligible for compensation, the importer must have "voluntarily maintained the level of prices for the petroleum products obtained from imported petroleum at the level that was suggest by the Government of Canada for that period".[57]

On April 23, 1974, the *National Energy Board Part VI Regulations* were amended to allow the National Energy Board to attach terms and conditions to export licenses including, without limitation, stipulations as to the pools, field or areas which may be produced for export purposes and the maximum amounts which could be taken from such pools, fields or areas for the purposes of a license.[58]

For the period May 1974 to October 1974 when Parliament was not in session,[59] the Import Compensation Program operated under the authority of five Special Warrants issued by the Governor in Council.[60] Thereafter, until the passage of the *Petroleum Administration Act*[61] in June 1975, the program was operated under various regulations as amended.[62]

On May 9, 1974, the Minister of Energy Mines and Resources sent a telex to the Canadian oil and gas industry asking for voluntary remittance of the export charge at rates determined by the National Energy Board, pending passage of legislation to sanction the charge. A followup telex announced a rate of $5.20 per barrel for the export charge effective June 1, 1974 until further notice.

On October 25, 1974, Bill C-32, which eventually became the *Petroleum Administration Act*[63], was introduced.[64]

---

[56] *Ibid.,* s. 5.
[57] *Ibid.*, s 4.
[58] S.O.R./74-260, P.C. 1974-903, April 23, 1974.
[59] There was a federal election in July 1974.
[60] Pursuant to the *Financial Administration Act*, R.S.C. 1970, c. F-10, s. 23.
[61] S.C. 1974-75-76, c. 47.
[62] From November 5, 1974 until March 12, 1975: S.O.R./74-627, P.C. 1974-2419 (November 5, 1974), amended by S.O.R./74-669, p.c. 1974-2695 (December 10, 1974), S.O.R./74-141, P.C. 1975-546 (March 11, 1975) and S.O.R./75-200, P.C. 1975-745 (April 8, 1975). From March 12, 1975: S.O.R./75-140, P.C. 1975-545 (March 11, 1975).
[63] *Supra* note 61.

On November 18, 1974, the federal government brought down a budget which amended the *Income Tax Act*[65] to eliminate the deductibility of royalties for income tax purposes, "other than an amount or property receivable by Her Majesty in right of Canada for the use and benefit of a band of Indians as defined in the *Indian Act*".

In January 1975,[66] the federal government decided that the world-equivalent price for oil would be applied to production from the Syncrude plant. On February 3, 1975,[67] the federal government agreed to assume a 15% interest in the Syncrude project.

In early April 1975 the First Ministers failed to reach an agreement to extend the crude oil pricing agreement beyond June 30, 1975.[68] In June 1975, the federal government brought down a new budget which provided that the domestic price of crude oil would rise to $8.00 per barrel effective July 1, 1975.[69]

The *Petroleum Administration Act*[70] received Royal Assent June 19, 1975 with retroactive effect to April 1, 1974.[71] Part I of the Act set out the petroleum export charge, Part II dealt with domestic oil price restraints, and Part IV covered import cost compensation.

The substance of Part I preserved the substance of what was instituted in the *Oil Export Tax Act.*[72] A "charge", rather than a "tax" was levied on each barrel of petroleum exported from Canada, commencing April 1, 1974.[73] The amount of the charge was specified in Part I from April 1, 1974 to November 30, 1974. Thereafter the charge was as set out in a tariff of charges made by the Governor in Council and published in either

---

[64] Bill C-32: *An Act to impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain petroleum costs and to regulate the price of Canadian crude oil and natural gas in interprovincial and export trade*.
[65] R.S.C. 1970, c. I-X, s. 12.
[66] Press clipping.
[67] Press clipping.
[68] The matter of rebating the export tax paid in relation to Indian lands was not discussed at the conference.
[69] Peter Tyerman in his article on oil pricing, (1976) 14 Alta. Law Rev. 427, states there were two agreements subsequent to the agreement reached March 27, 1974: one effective July 1, 1975 and one effective July 1, 1976, but provides no citation for these agreements.
[70] *Supra* note 61.
[71] *Ibid*., s.95(1).
[72] *Supra* note 40.

the *Tariff of Charges for Exported Oil other than Oil Products Order*[74] as amended, or the *Tariff of Charges for Exported Oil Products Order*[75] as amended. The amount of the charge was recommended to the Governor in Council by the Minister based on the National Energy Board's determination of a "just and reasonable price", in relation to the public interest for oil in the export market, for exported oil under s. 83 of the *National Energy Board Act*[76] and recommended to the Governor in Council. This just and reasonable price was determined from time to time by adding the export tariff to the Canadian domestic regulated price. The exporter under whose license the oil was exported was liable to pay the export charge.[77]

The price of oil in Canada was regulated under the *Petroleum Administration Act*[78] in Part I. The purpose of this Part was set out in s. 21:

> The purpose of this Part is to provide legislative authority for measures that will, so far as may be practicable, enable the Government of Canada
>
> > to achieve a uniform price, exclusive of transportation costs, for crude oil used in Canada outside its province of production;
> >
> > to achieve a balance in Canada between the interests of consumers and producers in Canada;[79]
> >
> > to protect consumers in Canada from instability of prices for petroleum in the international markets; and
> >
> > to encourage the discovery, development and production of a supply of crude oil adequate to the self-sufficiency of Canada.

---

[73] *Ibid*., s.5.
[74] citation not available
[75] citation not available
[76] National Energy Board Act 1974s.9 [emphasis added].
[77] *Ibid*., s.10.
[78] *Supra* note 61.
[79] *Ibid*. [emphasis added].

The Act provided that the Minister of Energy, Mines and Resources, with the approval of the Governor in Council, may enter into an agreement with the government of an oil producing province for the purpose of establishing mutually acceptable prices for various qualities and kinds of crude oil produced in that province during an agreed period and for other purposes considered expedient to carry out the purpose of Part II.[80] Agreements on oil prices were made between the federal government and the Province of Alberta.

The Act provided that such agreements need not have been expressed in any formal document executed on behalf the parties to it,[81] if the expression of the agreement was contained in reciprocal Orders in Council issued by the governments concerned.[82]

The *Petroleum Administration Act*[83] further provided that where such an agreement was entered into, the Governor in Council may, by regulation, establish <u>maximum prices</u> for the various qualities and kinds of crude oil produced in that province.[84] No such Order in Council appears to have been made. The Act prohibited the sale, purchase, or acquisition of crude oil outside the province of production unless the price paid was below the prescribed price for that quality or kind of crude oil.[85] "Prescribed price" was defined in the Act as "the <u>maximum price</u> established ... under this Part for the purpose of interprovincial and international trade".[86]

In the event that no agreement could be reached as between the producing provinces and the federal government, Division II of Part II of the Act provided for the federal government to unilaterally set prices for crude oil:

---

[80] *Ibid*., s.22(1). Notwithstanding this provision, there do not appear to be any approvals of the Governor in Council with respect to any agreement entered into by the federal government with the government of any oil producing province.
[81] *Ibid., s*.22(2). From April 1, 1974 throughout the 1970's the price of domestic oil may have been established by "informal" agreements between the federal government and the oil producing provinces.
[82] *Ibid.,* s.22(2). There do not appear to be any reciprocal Orders in Council issued by the government concerned, as of April 30, 1998.
[83] *Ibid*.
[84] *Ibid.,* s.23 [emphasis added].
[85] *Ibid* ., s.24.
[86] *Ibid.,* s.19 [emphasis added].

> Where no agreement is entered into pursuant to section 22 with the government of a producer-province, or any such agreement is terminated by the declaration of the parties, or, in the opinion of the Governor in Council, is not effective or is not capable of being effective, the Governor in Council may, by regulation, establish maximum prices for the various qualities and kinds of crude oil to which this Part applies that are produced, extracted or recovered in that province (hereinafter in this Division called the "exporting province"). [emphasis added]

This section was not proclaimed in force until October 1980.[87]

Part IV of the *Petroleum Administration Act*[88] set up the import cost compensation program which was a system for subsidizing importers the cost of importing oil into Canada. From June 1975 to April 1982, the subsidy operated on a flat rate basis, equivalent to the forecast cost of imported crude oil less the cost of equivalent quality domestic oil delivered to Montreal.

In May 1976, at the First Ministers' conference, there was no agreement on oil pricing. The federal government and the producing provinces continued to negotiate privately and later in May announced their agreement to increase the price to $9.05 per barrel on July 1, 1976 and to $9.75 per barrel on January 1, 1977.[89]

The National Energy Board instituted a mid-continent exchange program in 1976. Additional volumes of medium and light crude could be exported to the U.S. provided an equivalent volume was imported elsewhere.[90]

In accordance with the terms and conditions of an agreement embodied in two letters dated October 28, 1976 and November 18, 1976[91], the Governor in Council authorized the first payment of $4 million to Alberta from the special fund which resulted from the

[87] S.I./80-182, as part of the budget.
[88] *Supra* note 61.
[89] Press clippings.
[90] Press clippings.
[91] Letter from Pierre Trudeau to Peter Lougheed dated October 28, 1976 and letter from Peter Lougheed to Pierre

March 27, 1974 pricing agreement[92]. In total, $144 million was paid to Alberta under the terms of this agreement. The crude oil production volumes used to calculate the amount of the payment to Alberta included production from Indian reserves located in Alberta.[93]

The *Federal Provincial Fiscal Arrangements and Established Programs Financing Act, 1977*[94] was given Royal Assent on March 31, 1977. It succeeded the *Federal-Provincial Fiscal Arrangements Act, 1972*[95] and applied to federal-provincial transfer payments for the period 1977 to 1982. Under both Acts, oil and gas royalties, revenues from the sale of oil and gas leases and reservations and other oil and gas revenues were included as revenue sources that were subject to equalization. The 1977 Act[96] revised the calculation of revenues subject to equalization by stipulating that only one half of the revenues from oil and gas would be included in the calculation.

No agreement on oil pricing was reached at the First Ministers conference in April 1977 although the federal government and Alberta eventually arrived at a consensus on pricing in June 1977. The agreement took the form of an exchange of letters dated June 20, 1977 and was for a two year term commencing July 1, 1977. It contemplated four price increases of $1.00 per barrel to be implemented at six month intervals, subject to review if the price increases resulted in prices which exceeded prices in the Chicago area or the Persian Gulf. Three of the four contemplated increases were implemented on July 1, 1977, January 1, 1978 and July 1, 1978 with crude oil reaching $12.75 per barrel on July 1, 1978.[97]

On April 20, 1978 the *Petroleum Administration Act*[98] was amended to allow the Petroleum Compensation Board to designate certain classes of petroleum produced in Canada to be deemed imported petroleum for the purposes of receiving import

Trudeau dated November 18, 1976.

[92] P.C. 1977-4/193, March 30, 1977,

[93] It does not appear that any of these funds were rebated to any Alberta First Nations. However, until relatively recently, the Public Accounts of Alberta included a contingent liability note to this effect.

[94] S.C. 1976-77, c. 10.

[95] S.C. 1972, c. 8.

[96] *Supra* note 94, s.4.

[97] The fourth increase was delayed.

[98] S.C. 1977-78, c. 24.

compensation.[99] Syncrude synthetic oil was designated by an Order in Council of the Governor in Council as a class of petroleum deemed imported and therefore eligible for import compensation.[100] Indian production was <u>not</u> deemed imported. The Act imposed a levy[101] on domestic and foreign petroleum processed or consumed in Canada for the purposes of financing the import compensation[102] on this deemed imported petroleum.

On August 25, 1978 the Minister of Energy, Mines and Resources announced that he and the Minister of Finance would be contacting the producing provinces to obtain their agreement to delay the crude oil price increase scheduled for January 1, 1979.[103] The federal government estimated that the January 1, 1979 increase would exceed the Chicago ceiling set in the 1977 letter agreement.

On November 16, 1978 there was a meeting of federal-provincial energy ministers, followed by a First Ministers' conference on November 27 to 29, 1978. In an exchange of letters dated December 7, 1978 between Alberta and Canada following those meetings,[104] it was agreed that there would be no January 1, 1979 increase in the price of oil, but that there would be increases of $1 per barrel on July 1, 1979 and January 1, 1980, provided that neither increase would result in the domestic price exceeding either the Chicago price or the Middle Eastern price for equivalent crude.

On April 27, 1979 the Minister of Energy Mines and Resources sent a press release to the Canadian oil industry asking them to voluntarily remit export charges in excess of $8.00 per barrel based on monthly advice from the Minister, given that a ways and means motion to increase the maximum level of the export charge from $8.00 to $15.00 per barrel died on the Order Paper with the dissolution of Parliament.

[99] *Ibid* ., s.72(4) which was also added by S.C. 1977-78, c. 24, s. 2.
[100] Petroleum Classes Designation Order, P.C. 1978-1915, June 15, 1978, S.O.R./78-527.
[101] Charge on Domestic Petroleum and Imported Petroleum and Petroleum Products, new Part III.1.
[102] New Part III.1, as stated in s. 65.1.
[103] Press clippings.
[104] Copies obtained from Alberta Legislature Library. December 7, 1978 Gillespie to Getty re pricing of Alberta Crude Oil, December 7, 1978 Getty to Gillespie re pricing of Alberta Crude Oil, response to Gillespie's letter of December 7, 1978 extending agreement to June 30, 1980.

The First Ministers' conference on energy held November 12, 1979 resulted in a partial agreement on oil pricing between the Province of Alberta and the federal government. The domestic price of crude would be allowed to rise slowly: by 1983 all conventional oil was to be priced at 75% of the lower of the Chicago price or the world price. By 1984 the percentage was to increase to 85. This agreement was not concluded because the minority Conservative government with which it was negotiated fell after tabling its budget on December 11, 1979.

Meetings during June, July and early October of 1980 between the new federal government and the producing provinces to establish an oil price were successful (through an exchange of letters between Merv Leitch and Marc LaLonde dated June 26, 1980) only in extending the June 20, 1977 agreement one further month until July 31, 1980. On July 31, 1980, Alberta unilaterally announced a $2.00/barrel increase in the wellhead price for crude oil produced from Alberta Crown lands (the Alberta price then stood at $16.75).[105]

Effective August 1, 1980 the federal government announced a $2.00 per barrel increase in the wellhead price for crude oil, after federal-provincial negotiations in June and July had been unsuccessful in establishing an oil price.[106]

On October 28, 1980:

> the federal government brought down a budget introducing the National Energy Program[107],
>
> Division II of Part II of the *Petroleum Administration Act*[108], which allowed Canada to act unilaterally to set oil prices, was proclaimed in force,[109] and

---

[105] July 31, 1980 Statement by Merv Leitch, Government of Alberta re expiration of pricing agreement, price increase of conventional oil produced from Alberta Crown lands $2/bbl effective August 1, 1980, corresponding price increase in gas September 1, 1980 of 30 cents per MCF.
[106] Meetings during June, July and early October of 1980 between the new federal government and the producing provinces to establish an oil price were unsuccessful. In August that year, Alberta unilaterally announced a $2.00/barrel increase in the wellhead price for crude oil produced from Alberta Crown lands (the "Alberta" price then stood at $16.75).
[107] Budget speech of the Minister of Finance.
[108] *Supra* note 61.

the *Crude Oil Pricing Regulations*[110] were promulgated.

The Budget also stipulated that the government proposed to pay the producing provinces, Alberta and Saskatchewan, 50 per cent of its collections from export charges on oil effective November 1, 1980.[111] The payment to Alberta was subsequently authorized by legislation in 1982 for the period November 1, 1980 and January 31, 1982.[112]

The *Crude Oil Pricing Regulations* were amended to increase the price of crude effective January 1, 1981[113] and for a second time effective July 1, 1981.[114]

The government of Alberta proceeded with the implementation of its intention announced October 30, 1980, to reduce its oil production by 60,000 barrels per day. However, on September 1, 1981, Canada and Alberta signed a Memorandum of Agreement on Energy Pricing and Taxation.[115] The agreement stipulated oil prices for a term commencing September 1, 1981 and ending December 31, 1986.

There was a two tier pricing system for domestic oil: conventional old oil and new oil. The price of conventional old oil (oil from a pool discovered prior to January 1, 1981) was to increase from $18.75 per barrel to $21.25 per barrel effective October 1, 1981. Thereafter, increases were roughly every six months in accordance with the amounts set out in a table to the agreement, subject to a price ceiling of 75% of the actual international price of imported crude at Montreal as determined by the Petroleum Compensation Board.

Effective January 1, 1982, a New Oil Reference Price ("NORP") would apply to "conventional new oil in Alberta".[116] That was defined as including oil discovered after December 31, 1980 and oil recovered by enhanced recovery schemes which commenced

[109] S.I./80-182, October 28, 1980.
[110] S.O.R./80-822, P.C. 1980-2916, October 28, 1980.
[111] Once again, no mention was made of rebates to First Nations.
[112] *Energy Administration Act*, R.S. 1985, c. E-6 s. 17.1(1)(b).
[113] S.O.R./81-7, P.C. 1980-3435, December 18, 1980.
[114] S.O.R./81-493, P.C. 1981-1703, June 25, 1981.
[115] Implemented in Alberta by Alta. Reg. 412/81.
[116] *Ibid*., clause 3.

operation after December 31, 1980. The agreement provided a schedule of base prices for such oil for the years 1982 through 1986[117] and provision for adjustment of those base prices commencing January 1, 1985.

Effective July 1, 1982, Syncrude production was entitled to the greatest of: (i) NORP; (ii) a phased-in Syncrude moving average of international oil prices; and (iii) the average price actually received for June 1982. There was to be a further adjustment in prices for Syncrude production on July 1, 1984.

The New Oil Reference Price apparently applied as well to oil from Canada Lands. "Canada Lands" is a reference to lands administered by the Canada Oil and Gas Lands Administration, under the Minister of Indian Affairs, including the arctic and offshore areas. Royalties paid to the government of Canada as lessor would be paid on the new oil reference price and not on the domestic regulated price.[118]

On October 12, 1983, the Globe and Mail reported that an agreement on terms for the Norman Wells oil project was to be signed shortly by federal Energy Minister Jean Chretien and the project's sponsor, Esso Resources Canada Ltd. The story noted that negotiations between the parties had been "essentially completed" a year earlier, with talks continuing until recently over legal language. Although the project had initially been excluded from federal legislation passed in 1981 setting out new rules for future frontier oil and gas projects, "the agreement effectively put Norman Wells on the same footing as those subject to the legislation". Under the agreement, Esso was to get the "'new oil" price, effectively world price for all production from the project at Norman Wells. It was estimated that when completed in 1985, Norman Wells' production of oil would increase from the current 3,000 barrels per day to 25,000 barrels per day. The story also noted that the price offer was a federal concession since, normally, only incremental new supplies would be eligible for "new oil" prices. The agreement also apparently provided for Ottawa to take a one-third interest in Norman Wells' production

[117] *Ibid*., Table 2 to clause 3.
[118] In other words federal lands would receive the higher price, unless they were Indian reserve lands.

after Esso recovered its investment. It was also agreed at this time[119] that Canada would levy a Petroleum Compensation Charge at a rate sufficient, but not exceeding the amount required, to finance both the oil import compensation program and the NORP (New Oil Reference Price) supplements for the period 1981-1986.

Effective October 1, 1981, the *Crude Oil Pricing Regulations* were amended to reflect the oil price increases agreed upon in the September 1, 1981 agreement between Canada and Alberta on Energy Pricing and Taxation.[120] Block pricing[121] of Alberta crude oil became effective. The *Crude Oil Pricing Regulations* were subsequently amended to reflect the oil price increases agreed upon in the September 1, 1981 agreement, the first effective January 1, 1982[122] and the second effective July 1, 1982.[123]

On April 7, 1982*, An Act to amend the Federal-Provincial Fiscal Arrangements and Established Programs Financing Act, 1977 and to provide for payments to certain provinces*,[124] received Royal assent. The amendment[125] authorized the Minister of Energy, Mines and Resources to pay Alberta out of the Consolidated Revenue Fund a sum not exceeding $174,525,000 with respect to oil produced and exported from Alberta November 1, 1980 to January 31, 1982.[126]

An Act to Amend the Petroleum Administration Act and to enact provisions related thereto[127], assented to July 7, 1982[128], changed the name of the *Petroleum Administration Act* to the *Energy Administration Act*. It made several other changes to the Act including:

> providing for payments out of the Consolidated Revenue Fund[129] to the province in respect of exports of oil from the province during that year,[130] and

---

[119] *Supra* note 116, clause 6.
[120] S.O.R./81-788, P.C. 1981-2719, September 30, 1981.
[121] Pricing of crude oil based on defined categories, e.g. new discoveries, enhanced recovery, etc.
[122] S.O.R./82-3, P.C. 1981-3547, December 17, 1981.
[123] S.O.R./82-657, P.C. 1982-1991, June 30, 1982.
[124] S.C. 1980-81-82, c. 94.
[125] *Ibid*., s.10(1) of Part II.
[126] Indian reserve production was included in the Alberta volumes, but no provision was made for payments to Alberta First Nations.
[127] S.C. 1980-81-82, c. 114.
[128] s. 35(1) of the *Constitution Act, 1982* was in effect at this time; the *Sparrow* analysis is arguably applicable.

transitional provisions to deem payments made under *An Act to amend the Federal-Provincial Fiscal Arrangements and Established Programs Financing Act, 1977 and to provide for payments to certain provinces* to have been payments under the *Energy Administration Act*.

These amendments were subsequently effected by the *Petroleum Administration Act, Part I Regulations*.[131]

This amending Act also legislated the Petroleum Compensation Charge agreed to in September 1981, the purpose of which was stated by the Minister of Energy, Marc Lalonde, in his comments to the House of Commons as follows:

> It is the charge that will be used to ensure that the producers of new oil received the new oil reference price for their production. This ensures that producers receive a <u>fair price</u> for the oil.[132]

Effective January 1, 1983, the *Crude Oil Pricing Regulations* were amended to increase the price of crude oil.[133]

On June 30, 1983 Canada and Alberta signed an Agreement to Amend the Memorandum of Agreement of September 1, 1981 between the Government of Canada and the Government of Alberta relating to Energy Pricing and Taxation. Effective July 1, 1983, the domestic price of conventional old oil was frozen at $29.75 per barrel,[134] with provision for adjustment in the event of certain changes in the international price.

Effective October 4, 1984 the *Crude Oil Pricing Regulations* were amended to increase the price of crude oil.[135]

---

[129] Note that both Indian royalties and the export charge from Indian reserve production were both payable to the Consolidated Revenue Fund and arguably some of which may still be located there.
[130] Supra note 127, s.17.1(1)(b).
[131] C.R.C. c. 1260.
[132] Page 16474 of Hansard [emphasis added].
[133] S.O.R./83-51, P.C. 1982-4008, December 23, 1982; This amendment was pursuant to s. 22 of the *Energy Administration Act*, rather than pursuant to the September 1, 1981 agreement.
[134] *Ibid*., clause G.
[135] S.O.R./84-795, P.C. 1984-3265, October 4, 1984.

On March 27, 1985, the Western Accord between the Government of Canada and the governments of Alberta, Saskatchewan and British Columbia was signed, agreeing *inter alia* to crude oil price deregulation starting June 1, 1985. The *Crude Oil Pricing Regulations* were revoked effective May 31, 1985.[136]

Thus ended the era of government-controlled pricing of crude oil in Canada.

IV. WHO RECEIVED THE ECONOMIC RENTS FROM THE BOOM YEARS: THE EFFECT OF THE FEDERAL OIL PRICING SCHEME ON FIRST NATION ROYALTIES

The federal department responsible during this era for oil produced from Indian reserve lands, the Department of Indian Affairs and Northern Development ("DIAND") took the position, in keeping with the conceptual understanding that the right to oil and gas is an interest in the land itself, that the royalty with respect to oil and gas production from an Indian reserve is the Indian band's physical share of production and not simply a monetary equivalent.[137]

In reality, during this period most First Nations' oil royalties appear to have been monetary calculations computed on the "frozen" domestic price or an "agreed" domestic price. There was little, if any, "taking in kind" of royalties from Indian reserves. At various times this omission of the federal government appears to have been sometimes deliberate and sometimes accidental.

DIAND's view as represented to the First Nations[138], although not apparently the view of the federal government[139], was that while increased royalties were appropriate on Indian

[136] S.O.R./85-502, P.C. 1985-1746, May 30, 1985.
[137] The right to take royalties in kind was a consistent aspect of the *Indian Oil and Gas Regulations*, as amended over the years.
[138] All Chiefs Oil and Gas Conferences, Edmonton, Alberta, 1985 and 1986.
[139] If and how the Crown can present opposing positions to First Nation beneficiaries versus to the public as a whole, is more than just an interesting question.

lands, this was not happening.[140] DIAND believed that price freezes adversely affected royalty revenue and that the oil export tax should have been rebated to the Bands.[141] To date there have been no such rebates. Thus, there was a loss of royalties to Indian bands, the combined result of the export tax not being rebated to First Nations and the domestic price of oil being frozen.

It appears that the federal Crown did not take into consideration production from Indian reserves when fixing the domestic oil price. In discussions between the federal and provincial governments that took place in the latter part of 1973 leading to the splitting of tax revenues and the setting of future oil prices, no one was there representing the First Nations.

The federal Crown was, and probably still is, of the view that the frozen price of oil took effect October 1, 1973, that the agreed schedule of prices took effect April 1, 1974, and that there were subsequent negotiations at various points in time to agreed upon increases or changes to the increases that might occur, but that regulated pricing of oil remained in place until June 1st of 1985. How these "frozen" prices took effect varied from month to month, ranging from government "jawboning" of industry to formally legislated prices.

The economic rents, that is, the royalties on oil production, to the First Nations were based on the domestic price, or more accurately, a mathematical function of the domestic price. The domestic price - the price freeze and the scheduled prices during the regulated pricing period generally - was lower than the price in Chicago, an oil refinery centre to which Canadian crude oil had direct access via pipeline. Canada's position was that the world price of oil at the time was reflected in the Chicago price, since these Chicago refineries could also access crude oil from elsewhere in the world.

In October 1973, Indian oil royalties would typically have been based on the Edmonton "posted price", or a field price if that was in effect at that time, as a result of monthly purchase price offerings by the major refiners. The Edmonton price prior to October of

[140] Report of Indian Minerals West committee.
[141] Correspondence from Indian Mineral West.

1973 would have been based on a posted field price or a posted Edmonton price, the price posted by the companies who were buying the crude oil from the specified fields. The prices were frozen as a result of a "request" to the companies from the federal government in the fall of 1973. The Indian royalty was then calculated on the frozen price, whether or not some of this oil was exported to the United States and sold at a price higher than the "frozen" price. The royalty was also calculated on the FOB Edmonton posted price, deductions being taken for pipeline transportation costs and other charges and fees.

In 1973, the Department of Indian Affairs and Northern Development was aware that the Indian reserve royalty could be taken "in kind" in accordance with the regulations, that is, in barrels of crude oil rather than in the monetary equivalent of these barrels. DIAND also took the position that the royalty in relation to oil and gas produced on an Indian reserve was not subject to taxation pursuant to section 87 of the *Indian Act*[142].

DIAND held the view in 1974 that a charge on the royalty interest by way of taxing the producer or income tax related to that royalty interest could be construed as imposing an indirect tax on Indians contrary to section 87. DIAND apparently took the view that Canada could take the Indian royalty interest in kind to avoid this type of taxation of this royalty interest. However, Canada did not publicly take the position that the oil export tax violated section 87 of the *Indian Act*[143] because it amounted to an indirect tax on the First Nation's interest in reserve lands.

In 1974 DIAND took the position, in making representations to the Department of Finance to allow the lessee on Indian lands to deduct the royalty from income tax payable as an expense, that it is logical that the lessees be allowed to deduct the value of royalties paid to First Nations from the base for calculation of federal income tax, that, otherwise, the rates of royalties as they were then prescribed would have to be reduced and that

[142] R.S.C. 1970, c. I-6.
[143] *Ibid*.

would result in a serious loss of income for the First Nations, and that that could be construed as imposing a tax on the Indians contrary to section 87 of the *Indian Act*[144].

The Department of Finance, in contrast to DIAND, did not consider its role to include assisting First Nations by doing all things possible to support them in their efforts to obtain the greatest economic returns from their oil and gas production.

There is no evidence indicating that prior to September of 1973 Canada had addressed the issue of whether or not the price freeze and the imposition of the export tax was legal in relation to production from Indian reserves. Canada to date does not consider the setting of the domestic price and the export charge or export tax in any way to be an encroachment or an appropriation of First Nations' property. Nor is there any evidence whether the Crown considered a special price for production from Indian lands, as it did with Syncrude.

The calculation of the export tax for which the Province of Alberta was reimbursed pursuant to section 4 of the *Oil Export Tax Act*[145] included the number of barrels (as determined by the National Energy Board) of crude oil produced and recovered or extracted in the province from Indian reserves; it included all production within the Province of Alberta.

Canada viewed its own obligations as those of trustee throughout the relevant period. Today IOGC has stated publicly that IOGC still has an obligation "to ensure market value".[146]

V. QUESTIONS FROM THE PAST THAT MAY IMPACT THE PRESENT

A number of questions arise as a result of the 1970's and 1980's oil pricing regime.

[144] *Ibid*.
[145] *Supra* note 40.
[146] Strater Crowfoot, the then Executive Director of Indian Oil and Gas Canada, quoted in aboriginaltimes, Volume 2, Issue 10, June 1998, p. 16.

Before these questions can be answered, it first must be determined whether there was a lawful regulated price for domestic oil (including the prohibition of exports and the taxation of exports) set by legislation or regulation from 1974 to 1980 or whether producers and governments were simply operating under the assumption that there was a pricing regime. It may be that the pricing regime, as it pertained to production from Indian reserves or to the royalty share of such production, was extra-legal or coercive in nature, and not as a result of any enacted legislation or regulations.

In fact, there may have been no regulated price for this period – "agreements" weren't formal or formalized, no reciprocal Orders in Council were made[147], no Orders of the Governor in Council were made setting maximum prices[148].

If the answer to this preliminary question is that no legislatively-based price regulation was implemented, then it still must be asked whether the federal-provincial agreements purporting to establish domestic regulated prices for the period 1973 to 1985 had any legal force or effect in and of themselves. And if they did, are there any treaty implications to how they were entered into?

Federal-provincial agreements are binding neither *inter partes*, nor on third parties in the absence of any underlying legislation. Even if the federal-provincial agreements have some validity, there is no authority for the proposition that those agreements may infringe treaty rights or justify a breach of fiduciary duty or surrender terms.[149]

Unfortunately, answers to these questions are beyond the scope of this paper.

VI. THE ISSUES

[147] The approval of the Governor in Council per section 22(1) of the *Petroleum Administration Act* authorizing the federal government to enter into the intergovernmental agreements is lacking.
[148] The Order in Council required by section 23 of the *Petroleum Administration Act*, required to establish a maximum price, is also lacking.
[149] All the aboriginal rights infringement cases discuss the effect of legislation or regulation, not federal-provincial agreements.

1. Was the sale of the Indian royalty share of crude oil production from Indian reserves during this era at domestic regulated prices a sale for the "use and benefit" of the First Nations within the meaning of Treaties 6, 7 and 8?

2. Is there an implied term in any or all of the treaties based on oral representations made with respect to other treaties regarding "just and fair" prices to be obtained on sale of resources from Indian reserves, and if so, was it breached?

3. Was the sale of the Indian royalty share of crude oil production at domestic regulated prices a breach of the stipulation in the surrender that the subsequent grant by the Crown be "most conducive to [the First Nation's] welfare and that of [its] people"?

4. Did the Crown have a duty, as a trustee, or a fiduciary with trust-like duties, to ensure that the "best price" was obtained on the sale of the trust assets, that is, the royalty share of oil and gas produced from Indian reserves?

5. Did the Crown have a duty, as a trustee, or a fiduciary with trust-like duties, to take and sell the trust assets, that is, the royalty share of oil and gas produced from Indian reserves, at the "best price"?

6. Did the Crown have a duty, as a trustee, or a fiduciary with trust-like duties, to ensure that the calculation of the royalty on the sale of the trust assets, that is, the royalty share of oil and gas produced from Indian reserves, was based on the "best price"?

7. Finally, if the Crown did in fact have any or all of these duties, were there means available to the Crown to ensure the "best price" for the First Nations' royalty share?

8. Was the Crown in a conflict of interest, as a trustee, or a fiduciary with trust-like duties, in enacting legislation without excepting the Indian royalty share from the scope of such regulation?

9. Was the scheme of domestic price regulation of oil imposed by the government of Canada:

   i. a dispossession of, a hindering of the untrammeled enjoyment of, or an alienation of the Indian land base,

   ii. an interference with Indian property on a reserve, or

   iii. contrary to the aboriginal or treaty rights of the First Nations?

10. Was the scheme of domestic price regulation of oil imposed by the government of Canada a diminution of the ostensible value of treaty benefits of the First Nations?

11. Should the scheme of domestic price regulation of oil imposed by the government of Canada have been “read down” so that it was interpreted as not applying to Indian lands or property or any interest therein?

12. Was the scheme of domestic price regulation of oil imposed by the government of Canada a tax on Indian lands or property or any interest therein contrary to the aboriginal or treaty rights of the First Nations?

13. Are the treaty rights or aboriginal rights set out above protected by s. 35 of the *Constitution Act, 1982*?

14. Was the scheme of domestic price regulation of oil imposed by the government of Canada a tax on an interest in Indian lands or property within the meaning of section 87 of the *Indian Act*?

15. Was the scheme of domestic price regulation of oil imposed by the government of Canada a charge or levy on Indian lands or property or any interest therein within the meaning of s. 89 of the *Indian Act*?

16. Were prices for oil produced from Indian reserves in Alberta set by the government of Alberta and not by the federal government?

VII. ARGUMENT OF THE ISSUES

1. Was the sale of the Indian royalty share of crude oil production from Indian reserves at domestic regulated prices a sale for the "use and benefit" of the First Nations within the meaning of the treaties?

Arguably, since crude oil sales were at prices or values lower than what could have been obtained outside Canada, then the sale of crude oil production at domestic regulated prices was not a sale for the "use and benefit" of the First Nations and such sale was a breach of the treaties. The argument in this regard is based on an analysis of the terms of the treaties, statutory provisions in the *Indian Act*[150], and case law. In addition, in light of the interpretation in *Badger*[151] it is appropriate to look at the terms of other treaties and oral representations made in connection with them in determining the intent of the wording in the treaties.

For example, Treaty 6 provides:

> . . .the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the <u>use and benefit</u> of the said Indians entitled thereto, with their consent first had and obtained . . . .

The import of the phrase "use and benefit" is illuminated by the discussion by the Supreme Court of Canada of that phrase as it appears in subsection 18(1) of the *Indian Act*. Subsection 18(1) reads as follows:

> 18. (1) Subject to this Act, <u>reserves are held by Her Majesty for the use and benefit</u> of the respective bands for which they were set apart and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands

[150] *Supra* note 2.
[151] *R. v. Badger*, [1996] 1 S.C.R. 771 [***Badger***].

> in a reserve are used or are to be used is for the use and benefit of the band.

In *Guerin*[152], Wilson J. discussed the meaning of the phrase "use and benefit" as it appears in subsection 18(1). She characterized it in terms of protecting the Indian interest in the reserve, and not derogating from or interfering with it:

> I think that when s. 18 mandates that reserves be held by the Crown for the use and benefit of the Bands for which they are set apart, this is more than just an administrative direction to the Crown. I think it is the acknowledgment of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it.
>
> . . .
>
> But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree. I believe that in this sense the Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put and that s. 18 is a statutory acknowledgment of that obligation. It is my view, therefore, that while the Crown does not hold reserve land under s. 18 of the Act in trust for the Bands because the Bands' interests are limited by the nature of Indian title, it does hold the lands subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction.[153]

Dickson J., speaking for the majority, summarized the effect of subsection 18(1) as it relates to the Crown's discretion to determine where the Indians' best interests lie:

---

[152] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [***Guerin***].
[153] *Ibid*. at 349-50 [emphasis added].

> Through the confirmation in the Indian Act of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.[154]

Both Wilson J. and Dickson J. referred to the historic context of the Crown obligation and Indian interest. That would include the Treaty and its provisions as set out above.

On the basis of these views in *Guerin*[155], it is apparent that the domestic regulated price regime, under which the price of the Indian royalty share of oil was lower than the price which might have been obtained in the absence of such regulation, may be characterized as an interference with, or a derogation from, the Indian interest in land and not in the "best interests" of the First Nations. Accordingly, the mineral interest cannot be said to have been sold or disposed of for the "use and benefit" of the First Nations within the meaning of Treaty 6.

Furthermore, the duty to hold the lands for the use and benefit of the First Nations is a <u>continuing</u> duty and the Supreme Court of Canada's interpretation of s. 18(1) in *Derrickson*[156], would equally apply to the "use and benefit" wording in Treaty 6:

> The purpose of [s. 18(1)] is to ensure that lands reserved for Indians are and <u>remain used</u> for the use and benefit of the band.

The domestic price regulation scheme of the federal government was enacted to strike a balance between producers of crude oil <u>and</u> consumers and to protect consumers from instability of prices in the international market.[157] No mention is made in the legislation as to the interests of the owners of petroleum. To the extent that the *Petroleum Administration Act*[158] sought to benefit consumers through the imposition of a domestic

---

[154] *Ibid.* at 383 [emphasis added].
[155] *Ibid.*
[156] *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 [***Derrickson***].
[157] Supra note 61, s. 21.
[158] *Ibid*.

regulated price lower than the price of oil in the international market, the Act derogates from and interferes with the First Nations' use and benefit of their reserve land by denying them the right to receive royalties based on the world price. Accordingly, the scheme of domestic price regulation was not in the "best interests" of the First Nations.

The Concise Oxford Dictionary defines "derogate" as "take away a part from: detract from (a merit, a right, etc.)". The scheme of domestic price regulation takes away from the First Nations a part of the royalty to which they would otherwise be entitled.

Furthermore "use and benefit" in Treaty 6 means "sole use and benefit, and to the best advantage", as that phrase appeared in the Robinson Superior and the Robinson Huron treaties. The many assurances given to Indians across Canada in the treaty-making process to the effect that all were being treated alike[159], lead to the conclusion that "use and benefit" should be interpreted in the context of other similar provisions in other treaties. In particular, the phrase "sole use and benefit, and to the best advantage" is the most complete statement of the Crown's intention and it is based on the acknowledged model for the other numbered treaties.[160]

This view of the Crown's intention is affirmed by Morris' own statement on the conclusion of the treaty process that:

> the allotment of lands to the Indians, to be set aside as reserves for them for homes and agricultural purposes, and which <u>cannot be sold or alienated without their consent</u>, and then <u>only for their benefit</u>; . . . .[161]

2. Was there an implied term in the treaties based on oral representations made with respect to other treaties regarding "just and fair" prices to be obtained on the sale of resources from Indian reserves, and if so, was it was breached?

[159] See facts as set out above.
[160] See facts as set out above.
[161] Morris, *supra* note 4 at 287 [emphasis added].

Based on oral representations made with respect to other treaties that "just and fair" prices would be obtained on the sale of minerals from the surrendered lands, there may in fact have been an implied term in the treaties.

This approach, of examining a treaty as if it were a contract, is justified on the basis that treaties are analagous to contracts in certain respects, as noted by the Supreme Court of Canada in *Badger*:

> Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. <u>Treaties are analogous to contracts</u>, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be <u>interpreted in accordance with the principles enunciated</u> by this Court.[162]

Those principles by which treaties are to be interpreted as related to the issue of the incorporation of terms into a treaty include the following:

> Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians.[163]

Promises made in the context of other treaties are relevant to the proper interpretation of the treaty at hand.[164]

> When considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement.[165]

---

[162] *Supra* note 138 at 76 [emphasis added].
[163] *Nowegijick v. The Queen,* [1983] 1 S.C.R. 29 [***Nowegijick***] at p. 36.
[164] This is the approach taken by Cory J. in *Badger* at 55, 56, 57, wherein the court refers to promises made in the making of Treaty 1, Treaty 4 and Treaty 6, in examining what the Indians would have understood, in its interpretation of Treaty 8. The Crees' awareness of what had happened with earlier treaties.
[165] *Supra* note 152 at 52, *R. v. Taylor and Williams* [1981] 3 C.N.L.R. 114 (Ont. C.A.).

The Indian people made their agreements orally and recorded their history orally. Thus, the oral promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation.[166] Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.[167] Crown representatives told the Indians gathered to sign each of the numbered treaties that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty.[168]

At Blackfoot Crossing in relation to Treaty 7, Lieutenant-Governor Laird told the Blackfeet and other Indian groups gathered that they were entitled to just and fair prices on the sale of coal from their reserves to be set aside:

> . . . and should you desire to sell any portion of your land, or any <u>coal</u> or timber from off your reserves, <u>the Government will see that you receive just and fair prices</u>, and that you can rely on all the Queen's promises being fulfilled.[169]

Although there is no mention of the sale or lease of minerals in the written form of Treaty 7, in light of the principles set out above, the oral promise to see that the Indians obtained just and fair prices on the sale of resources, including hydrocarbons, from the reserve is a substantive term of Treaty 7 itself. Furthermore, on the basis of the principle that all treaty signatories are to be treated the same, that promise is an implied term of Treaty 6 as well.

This is the basis on which the First Nations' ancestors would have understood the oral representations and the context of the treaty-making process -- that they should be entitled to the use and benefit of the reserve and all promises made by the Crown, with respect to the sale of resources therefrom to their best advantage – this is the representation made to other First Nations.

---

[166] *Badger, ibid*. at 55.
[167] *Jones v. Meehan,* 175 U.S. 1 (1899) as quoted in *Nowegijick, supra* note 164.
[168] See references to Morris' account above with respect to Treaty facts.
[169] Morris, *supra* note 4 at 270.

What is the meaning of "just and fair"? The words "just" and "fair" and "reasonable" can be used interchangeably, as they are the words used to define each other.[170]

It is instructive to examine how the federal government has used these words itself, in legislation dealing with the price of oil in Canada and internationally. During the period of domestic regulated prices, the *Petroleum Administration Act*[171] provided for sales of oil produced in Canada into the international market. In that scheme, the National Energy Board was charged with the responsibility of determining "a just and reasonable price in relation to the public interest for oil in the export market". [172] The Minister of Energy then recommended to the Governor in Council a tariff of charges on oil ("export charge") based on the NEB's determination and other factors.[173]

In practical application, the regulated domestic price, plus the export charge, constituted the international market price for oil, which in the scheme was the "just and reasonable price" determined by the National Energy Board.

In another context in the scheme for the regulation of the price of oil in Canada, the "new oil reference price" or "NORP" was introduced as part of the National Energy Program in 1981 as an incentive to encourage the exploration for as yet undiscovered conventional oil reserves in Canada. This new oil reference price was more closely related to world prices than to the domestic price at the time. Marc Lalonde, Minister of Energy responsible for introducing the National Energy Program, described NORP as being "fair".[174]

---

[170] See Black's Law Dictionary, Revised Fourth Edition:"just" is defined as " . . . Reasonable . . . ."; "fair" is defined as ". . . just. . . ."; "reasonable" is defined as "Just . . . fair . . . . "

[171] *Supra* note 61.

[172] *Ibid*., s.9(1) [emphasis added].

[173] *Ibid*., s.9(3).

[174] It should be noted that Syncrude was entitled to NORP or phased in international prices or the actual price received in June 1982, whichever was the greatest. The federal government had a 15% interest in Syncrude at the time. NORP also applied to Canada lands administered by the Canada Oil and Gas Lands Administration, under the Minister of Indian Affairs including arctic and off-shore areas. It appears that the federal government assured Esso in lease negotiations at Norman Wells that Canada's own lease to Esso would be subject to NORP.

By contrast, Canada claims First Nations' royalties were calculated on the domestic regulated price for the entire period of the regulation of the price of oil,[175] which price was, at all relevant times, less than the NEB's price determination of the export price of oil or the NORP price. By the Canada's own criteria of just, fair and reasonable prices for oil, it is submitted that the implied treaty right to just and fair prices on the sale of hydrocarbon resources from Indian reserves has been breached.

3. Was the sale of the Indian royalty share of crude oil production from Indian reserve lands at domestic regulated prices a breach of the stipulation in the surrender that the subsequent grant by the Crown be "most conducive to [the First Nations'] welfare and that of [its] people"?

The form of mineral surrenders the Crown has taken over the years are a form of contract, a solemn promise[176]. Any change in the "deal" requires the consent of the other party. To deal otherwise it is a breach of the obligations resulting from the surrender.

From the time of the majority of mineral surrenders in Western Canada in the 1920's to the 1950's, until the time of the *Oil Export Tax Act*[177] in 1974, the price on which Indian royalties calculated was the world oil price, the market price of oil.

The Crown's authority under these mineral surrenders does not go beyond the scope set out in the surrenders[178]. The Crown is obligated to enter into arrangements that are "most conducive" to the beneficiaries.

The *Indian Act*[179] in effect during the initial development of the major Canadian oil pools sets out in section 41:

> A surrender shall be deemed to confer all rights that are necessary <u>to enable</u> His Majesty to carry out the terms of the surrender [this provision is currently located in section 41, R.S.C. 1985, 4th Supp., c. 17, s. 4].

---

[175] See above and attendant footnote.
[176] *Blueberry River Indian Band v. Canada (DIAND),* [1995] 4 S.C.R. 344 [***Apsassin***].
[177] *Supra* note 40.
[178] *Guerin, supra* note 153.

If the Crown was of the view that it was unable to carry out the terms of the surrender, it ought not to have accepted the surrender.

4. Did the Crown have a duty, as a trustee, or a fiduciary with trust-like duties, to ensure that the "best price" was obtained on the sale of the trust assets, that is, the royalty share of oil and gas produced from Indian reserve lands?

It is submitted that the Crown had a duty, as a trustee, or a fiduciary with trust-like duties, to ensure that the "best price" was obtained on the sale of the trust assets, that is, the royalty share of oil and gas produced from Indian reserves.

A trustee has an overriding duty to obtain the best price he can for his beneficiary.[180] A trustee must sell trust property such that every possible advantage accrues to the beneficiary and he must use all reasonable diligence to obtain the best price.[181]

The Crown has an overriding duty to secure, for the Indian people affected, a sum of money that represents to them the value of their interest in the land.[182]

5. Alternatively, did the Crown have a duty, as a trustee, or a fiduciary with trust-like duties, to take and sell the trust assets, that is, the royalty share of oil and gas produced from Indian reserve lands, at the "best price"?

It is submitted that the Crown had a duty, as a trustee, or a fiduciary with trust-like duties, to take and sell the trust assets, that is, the royalty share of oil and gas produced from IndianReserve, at the "best price".

---

[179] S.C. 1951, c. 29.

[180] *Buttle* v. *Saunders,* [1950] 2 All E.R. 193 (Ch. D.) at 195 per Wynn-Parry J.

[181] *Krendel* v.*Frontwell Investments Ltd.,* [1967] 2 O.R. 579 (H.C.J.) at 584 per Stewart J., quoting Lewin on Trusts, 16th ed. at 580, and *Ord* v. *Noel* (1820), 5 Madd. 438 at 440-1, 56 E.R. 962; see also *Re Leslie* (1972), 3 O.R. 297 (H.C.), *Redmond v. Mitchell Estate* (1995), 33 Alta. L. R. (3d) 87 (Surr. Ct.), *Re Ballard Estate* (1994), 20 O.R. (3d) 189 (Gen. Div.).

[182] *Kruger* v. *The Queen,* [1985] 2 C.N.L.R. 15 (F.C.A.) [***Kruger***] at 55 per Stone J.A. (leave to appeal to S.C.C. dismissed 7/31/85).

A lease of oil and gas rights on Indian lands typically "reserves" the royalty to Her Majesty;[183] the lessee sells the royalty share as the agent for Her Majesty[184]. Consistent with this, the *Indian Oil and Gas Regulations* provide for oil royalties to be paid in barrels.[185] The *Indian Oil and Gas Regulations* also provide for the taking in kind of royalties.[186]

6. Alternatively, did the Crown have a duty, as a trustee, or a fiduciary with trust-like duties, to ensure that the calculation of the royalty on the sale of the trust assets, that is the royalty share of oil and gas produced from Indian reserve lands, was based on the "best price"?

It is submitted that the Crown had a duty, as a trustee, or a fiduciary with trust-like duties, to ensure that the calculation of the royalty on the sale of the trust assets, that is the royalty share of oil and gas produced from Indian reserves, was based on the "best price".

The *Indian Oil and Gas Regulations* also provided for a royalty price to be "deemed".[187] This power could have been used alone or in conjunction with some compensatory

[183]See above.

[184] *Indian Oil and Gas Regulations 1958*, s. 36(4) and all subsequent *Indian Oil and Gas Regulations*: 1958: "Any sale of the products of a lease, until otherwise ordered by the Minister, shall include the royalty share of such products"; 1977, s. 21(3): "Every sale of oil or gas obtained from or attributable to a contract area shall, unless otherwise directed by the Manager in writing, include the <u>oil or gas that **is** the royalty payable</u> under this section" [emphasis added].

[185] e.g., 1966, s. 31(1); 1977, Schedule I, s. 1(1), (2); since 1977 for <u>basic</u> royalty calculated in terms of barrels only but the supplementary royalty is calculated pursuant to a formula based partly calculated on barrels and partly on selling price.

[186] S.O.R./66-300 as amended by S.O.R./74-206, effective April 1, 1974, adding s. 31(4.1); 1977, s. 21(5).

[187] *Indian Oil and Gas Regulations* 1977, s. 21(7): "Where <u>oil or gas that **is** the royalty payable</u> under these Regulations, as amended from time to time, is sold or to be sold and , in the opinion of the Manager, the sale was or will be at a price that is <u>less than the fair market value</u> of the oil or gas, the Manager shall, by notice in writing addressed to the lessee, specify the dollar value of the oil or gas that would be realized if it were sold in a business-like manner, at the time and place of production in an arm's length transaction; and the lessee shall, in his royalty payment next following the receipt by him of the notice, account for and pay to the Manager the deficiency between the dollar value specified in the notice and the actual dollar value obtained by the lessee on the sale of the oil or gas." [emphasis added].

scheme similar to the import compensation scheme under the *Petroleum Administration Act.*[188]

7. If the Crown had a duty with respect to 4, 5 or 6 above, were there means available to the Crown to ensure the best price for the First Nations' royalty share?

How could Canada have ensured best price was obtained for Indian royalties? The *Indian Oil and Gas Regulations*, the pricing regulatory scheme itself - remission orders, Petroleum Compensation Payments (PCPs) under the *Petroleum Administration Act* - could have been applied conjunctively or modified so as to apply to production from Indian reserve lands. As well the NORP[189] price could have been applied to Indian royalty production or the government could simply have credited amounts to the First Nation's capital account in the Consolidated Revenue Fund.

8. Assuming there was a regulated domestic oil price, was the Crown in a conflict of interest, as a trustee, or a fiduciary with trust-like duties, in enacting it without excepting the Indian royalty share from the scope of such regulation?

Clearly, the Crown may act in the national interest or have competing political obligations to various constituents. But when the Crown is acting in the national interest and finds itself in a conflict of interest position with respect to its trust or fiduciary duties (specifically in this instance with respect to the First Nations' royalty interest), the Crown must resolve that conflict with the Indian interest in mind.

Leonard Rotman in *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*,[190] has stated that where the Crown finds itself in the situation where its fiduciary obligations to native peoples conflicts or potentially conflicts with its

[188] *Supra* note 61.
[189] See also *Moco* where judge noted options available [to lessee?] but did not decide which of those possible alternatives should have been followed.

other duties or interests, it must resolve the conflict with the best interests of its beneficiaries in mind.[191]

McLachlin, J., as she then was, in *Apsassin*,[192] found the trial judge in that case was correct regarding a fiduciary involved in self-dealing, i.e. that such a situation may give rise to a conflict of interest:

> The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J. C. Shepherd, The Law of Fiduciaries (1981), at pp. 157-59; and A. H. Oosterhoff: Text, Cases and Commentary on the Law of Trusts (4th ed. 1992). The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.[193]

The trial judge in *Apsassin*[194] in turn had made reference to Heald J.[195] in *Kruger*:

> Bearing in mind that it is the Crown which owes the fiduciary duty to the Indians, the facts of this case clearly raise the issue of conflict of interest, in my view. It seems evident that two departments of the Government of Canada were in conflict concerning the manner in which the Indian occupants of Parcel A should be dealt with. The evidence seems to unquestionably establish that the officials of the Indian Affairs Branch were diligent in their efforts to represent the best interests of the Indian occupants. On the other hand, the Department of Transport was anxious to acquire the additional lands in the interests of air transport. This

[190] (University of Toronto Press, 1996), pp. 264 et seq.
[191] *Kruger supra* note 183, *Sparrow*, *Apsassin, supra* note *177.*
[192] *Apsassin, supra* note 177 at 379; McLachlin J., writing for the minority, was the only Justice to address at all the concept of conflict of interest on the part of the Crown in this case.
[193] *Ibid.* at 53, per McLachlin.
[194] *Ibid*.

> situation resulted in competing considerations. Accordingly, the federal Crown was in a conflict of interest in respect of its fiduciary relationship with the Indians. The law is clear that "one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside" and that "Equity fashioned the rule that no man may allow his duty to conflict with his interest." [See Note 1 below] On this basis, the federal Crown cannot default on its fiduciary obligation to the Indians through a plea of competing considerations by different departments of government.[196]

What are the ways in which this conflict of interest could have been resolved? The Crown could have exempted Indian royalty production from domestic price regulation, it could have made Petroleum Compensation Payments under the *Petroleum Administration Act*[197], it could have exempted from export tax the Indian share (using the lessees on Indian lands as agent),[198] and it could have used a NORP price for Indian royalty production.

There are many examples of conflicts of interest in the Crown's actions related to oil pricing. An explicit concern of a potential conflict of interest voiced by Indian Minerals West, to proposed increases in Indian royalty rates seems by implication to extend to the retention by the federal government and the provinces of the proceeds of the export tax.

> Based on the January differential and our proposed royalty schedule, the loss to the … Bands from oil alone could amount to 2 million dollars for every month that the amendments to the regulations are delayed.[199]

…

---

[195] In dissent on this issue.

[196] *Kruger, supra* note 183. Note 1 referred to in quote: "Note 1: The above quotations are to be found on pages 618 and 619 of the Law of Trusts in Canada, Waters, (1974). To the same effect is the case of *City of Edmonton v. Hawrelak et al*., [1972] 2 W.W.R. 561 per Kirby J. at pp.583-592 inclusive (affirmed [1973] 1 W.W.R. 179 (Alta.S.C., App.Div.))."

[197] *Supra* note 61.

[198] Remission orders under the *Financial Administration Act* and the *Petroleum Administration Act*.

[199] Memorandum from Indian Minerals West to oil producing First Nations.

> In view of the direct conflict between the Federal and some of the Provincial Governments, some direction must be given to the Indian Minerals Section as to where we stand, i.e., are we to uphold the Federal, Provincial, or Indian point of view? In the past we have taken the view that we were to advise the Indians as to their rights and do all things possible to assist them in their efforts to obtain the greatest economic returns from their resources. If we attempt to obtain the highest royalties, we will no doubt soon be in direct conflict with other Federal Departments, particularly the Department of Energy Mines and Resources.[200]

As another example, as to whether consideration was given by the Crown to establishing a marketing board for the marketing of oil and gas produced from Indian reserves, Canada has stated: "DIAND did not attempt to establish a Marketing Board as the overriding view was that the Crown would not allow DIAND to export the oil at a higher price by any means".[201]

9. Assuming there was a regulated domestic oil price, was the scheme of domestic price regulation of oil imposed by the government of Canada a dispossession of, a hindering of the untrammeled enjoyment of, or an alienation of, the Indian land base, or an interference with Indian property on a reserve, contrary to the aboriginal or treaty rights of the First Nations?

In *Mitchell*[202], LaForest, J. stated:

> I take it to be obvious that the protections afforded against taxation and attachment by ss. 87 and 89 of the Indian Act go hand-in-hand with these restraints on the alienability of land. I noted above that the Crown, as part of the consideration for the cession of Indian lands, often committed itself to giving goods and services to the natives concerned. Taking but one example, by terms of the "numbered treaties" concluded between the Indians of the prairie regions and part of the Northwest Territories, the

[200] *Ibid.,* p. 2.
[201] Taken from the Opening Statement of the Plaintiffs in *Buffalo v. The Queen*.

Crown undertook to provide Indians with assistance in such matters as education, medicine and agriculture, and to furnish supplies which Indians could use in the pursuit of their traditional vocations of hunting, fishing, and trapping. The exemptions from taxation and distraint have historically protected the ability of Indians to benefit from this property in two ways. First, they guard against the possibility that one branch of government, through the imposition of taxes, could erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian affairs. Secondly, the protection against attachment ensures that the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled enjoyment of such advantages as they had retained or might acquire pursuant to the fulfillment by the Crown of its treaty obligations. In effect, these sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like . . . .

…

In support of my view that Indians will have perceived that their treaty benefits were given unconditionally, I would point to the following extract from the report of the Treaty Commissioners in respect of Treaty No. 8. The passage is eloquent testimony to the fact that native peoples feared that the imposition of taxes would seriously interfere with their ability to maintain a traditional way of life on the lands reserved for their use, and, additionally, leaves no doubt that Indians were promised that their entitlements would be exempt from taxation:

> There was expressed at every point the fear that the making of the Treaty would be followed by the curtailment of the hunting and fishing

[202] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.

> privileges, and many were impressed with the notion that the Treaty would lead to taxation and enforced military service.
>
> We assured them that the Treaty would not lead to any forced <u>interference</u> with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. [Treaty No. 8, 1899 (Queen's Printer, Ottawa), as quoted in Bartlett, supra, at p. 5.]

> In summary, I conclude that an interpretation of s. 90(1)(b), which sees its purpose as limited to preventing non-natives from hampering Indians from benefiting in full from the personal property promised Indians in treaties and ancillary agreements, is perfectly consistent with the tenor of the obligations that the Crown has always assumed vis-à-vis the protection of native property.

Where a claimant challenges the application of a federal regulation under s. 35, the characterization of the right alternatively as an aboriginal right or as a treaty right will not be of any consequence once the existence of the right is established, as the *Sparrow* test for infringement and justification applies with the same force and the same considerations to both species of constitutional rights.[203]

10. Assuming there was a regulated domestic oil price, was the scheme of domestic price regulation of oil imposed by the government of Canada a diminution of the ostensible value of treaty benefits of the First Nations?

The Supreme Court of Canada had occasion to consider the tax exemption of certain personal property under s. 90 of the *Indian Act*[204] in *Mitchell*.[205] Justice LaForest, for the majority, noted that if treaty promises are to be interpreted in the sense one might assume they would have been understood by the Indian signatories, the Indians would have

[203] *R. v. Cote* [1996] 3 S.C.R. 139 at 164, paragraph 33, citing *Badger* at 37, 77, 78 and 79.
[204] *Supra* note 2.

"taken it for granted" that property given them by treaty would be protected, in that case, "regardless of *situs*":

> Simply put, if treaty promises are to be interpreted in the sense in which one may assume them to have been naturally understood by the Indians, one is led to conclude that the Indian signatories to the treaties will have taken it for granted that property given to them by treaty would be protected regardless of situs. In the case of chattels, I am aware of no historical evidence that would suggest that Indians ever expected that their ability to derive the full benefit of this property could be placed in jeopardy because of the ability of non-natives to impose liens or taxes on it every time it was necessary to remove this property from the reserve. Similarly, when the Crown acquits treaty and ancillary obligations through the payment of moneys relating to assistance in spheres such as education, housing, and health and welfare, it cannot be accepted that Indians ever supposed that their treaty right to these entitlements could be compromised on the strength of subtle legal arguments that the property concerned, though undoubtedly property to which the Indians were entitled pursuant to an agreement engaging the honour of the Crown, was notionally situated off the reserve and therefore subject to the imposition of taxes or to attachment. It would be highly incongruous if the Crown, given the tenor of its treaty commitments, were permitted, through the imposition of taxes, to diminish in significant measure the ostensible value of the benefits conferred.

LaForest J. was clear that Indians have a full, absolute interest in the treaty property itself, owed to them as Indians, distinguishing treaty property from other types of property that may be acquired in the course of commerce:

> To my mind, it makes no sense to compare it [i.e. personal property acquired in the marketplace] with the property that enures to Indians pursuant to treaties and

[205] *Supra* note 203. .

> their ancillary agreements. Indians have a plenary entitlement to their treaty property; it is owed to them *qua* Indians.

In the context of that case, LaForest J. held that sections 87 and 89 of the *Indian Act*[206], upon which the deeming provision of s. 90 applies, constitute part of a legislative "package" reflecting the fiduciary obligation of the Crown, derived from the Royal Proclamation of 1763, that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base:

> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act,* the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base.[207]

A fortiori, the principle of the protection of the Indian land base from diminution by virtue of actions by the Crown itself should apply as a treaty right. Thus, the scheme of domestic price regulation of oil imposed by the government of Canada diminished the value of the treaty benefits acquired by the First Nations under Treaty 6, Treaty 7 and Treaty 8[208], constituting a treaty breach on the part of the Crown.

11. Assuming there was a regulated domestic oil price, should the scheme of domestic price regulation of oil imposed by the government of Canada be "read

[206] *Supra* note 2.
[207] *Supra* note 203, at p. X.
[208] *Quare*: what are the treaty benefits - the oil and gas in situ or the Indian share of production at any point in time?

down" so that it is interpreted as not applying to Indian lands or property or any interest therein.

If s. 18(1) of the *Indian Act*[209] is a statutory acknowledgement or confirmation[210] that First Nations have a treaty right to obtain world oil price ("[sole] use and benefit"), then s. 18(1) affords protection against any claim the Crown makes that the *Petroleum Administration Act*[211] validly infringed treaty rights prior to 1982. The relevant provisions of the *Petroleum Administration Act*[212] have to be read in conjunction with both sections 18(1) and 87 of the *Indian Act*[213]. *Nowegijick*[214] applies to the interpretation of the *Indian Act*, giving those provisions a broad and liberal interpretation and resolving ambiguities in favour of the Indians.

The application of s. 18(1) to surrendered lands is by necessary implication a result of the wording of the section (". . . subject to the terms of any . . .surrender. . .") and a result of the definition of "reserve" and "surrendered lands"[215] in the 1970 In*dian Act* (i.e. the Act in force when the oil pricing regime came into effect).

In *Derrickson*[216] provincial matrimonial property legislation was held to not apply to reserve lands and must therefore be read down.

12. Assuming there was a regulated domestic oil price, was the scheme of domestic price regulation of oil imposed by the government of Canada a tax on

[209] *Supra* note 2.
[210] *Guerin*, *supra* note 153 per Wilson J. and Dickson J. as set out in issue I above.
[211] *Supra* note 61.
[212] *Ibid*.
[213] *Supra* note 2.
[214] *Supra* note 164.
[215] R.S.C. 1970, c. I-6, s. 2(1):

> "reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band; . . ."; "surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart."

[216] *Supra* note 157.

Indian lands or property or any interest therein contrary to the aboriginal or treaty rights of the First Nations?

In the *Natural Gas Reference* case[217] it was held that the federal and provincial Crowns both have property interest in Indian reserve lands – the province has the underlying title per the *Constitution Act, 1930*; the federal Crown has administrative and legislative jurisdiction, which when the Indian interest is surrendered constitutes the *plenum dominium.* Section 125 of the *Constitution Act* provides that "no lands or property belonging to Canada or any province shall be liable to taxation".

Again in *Mitchell*[218], per LaForest, J.:

> I take it to be obvious that the protections afforded against taxation and attachment by ss. 87 and 89 of the *Indian Act* go hand-in-hand with these restraints on the alienability of land. I noted above that the Crown, as part of the consideration for the cession of Indian lands, often committed itself to giving goods and services to the natives concerned. Taking but one example, by terms of the "numbered treaties" concluded between the Indians of the prairie regions and part of the Northwest Territories, the Crown undertook to provide Indians with assistance in such matters as education, medicine and agriculture, and to furnish supplies which Indians could use in the pursuit of their traditional vocations of hunting, fishing, and trapping. The exemptions from taxation and distraint have historically protected the ability of Indians to benefit from this property in two ways. First, they guard against the possibility that one branch of government, through the imposition of taxes, could erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian affairs. Secondly, the protection against attachment ensures that the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled enjoyment of such advantages as they had retained or might

[217] Also s. 125 of the *Constitution Act, 1867* applies according to this decision.
[218] *Supra* note 203.

acquire pursuant to the fulfillment by the Crown of its treaty obligations. In effect, these sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like . .. .

…

In support of my view that Indians will have perceived that their treaty benefits were given unconditionally, I would point to the following extract from the report of the Treaty Commissioners in respect of Treaty No. 8. The passage is eloquent testimony to the fact that native peoples feared that the imposition of taxes would seriously interfere with their ability to maintain a traditional way of life on the lands reserved for their use, and, additionally, leaves no doubt that Indians were promised that their entitlements would be exempt from taxation:

> There was expressed at every point the fear that the making of the Treaty would be followed by the curtailment of the hunting and fishing privileges, and many were impressed with the notion that the Treaty would lead to taxation and enforced military service.
>
> We assured them that the Treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. [Treaty No. 8, 1899 (Queen's Printer, Ottawa), as quoted in Bartlett, supra, at p. 5.]

In summary, I conclude that an interpretation of s. 90(1)(b), which sees its purpose as limited to preventing non-natives from hampering Indians from benefiting in full from the personal property promised Indians in treaties and ancillary agreements, is perfectly consistent with the tenor of the obligations that the Crown has always assumed vis-à-vis the protection of native property.

13. Were these treaty rights or aboriginal rights protected by s. 35 of the Constitution Act, 1982?

Delgamuukw[219] stands for the proposition that these rights were not extinguished prior to 1982.

14. Assuming there was a regulated domestic oil price, was the scheme of domestic price regulation of oil imposed by the government of Canada a tax on an interest in Indian lands or property within the meaning of s. 87 of the *Indian Act*?

Based on the *Nowegijick*[220]*, Natural Gas Reference, Mitchell*[221] and *Williams*[222] decisions, it is submitted that the domestic pricing regime for oil as applied to Indian reserve production, was a tax contrary to section 87 of the *Indian Act*[223].

15. Assuming there was a regulated domestic oil price, was the scheme of domestic price regulation of oil imposed by the government of Canada a charge or levy on Indian lands or property or any interest therein within the meaning of s. 89 of the *Indian Act*?

Again, based on *Mitchell*[224] and *Nowegijick*[225]*,* it is submitted that the pricing regime was contrary to section 89.

---

[219] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [***Delgamuukw***].
[220] *Supra* note 164.
[221] *Supra* note 203.
[222] *Williams v. Canada*, [1992] 1 S.C.R. 877.
[223] *Supra* note 2.
[224] *Supra* note 203.

16. Were prices for oil produced from Indian reserves set by the government of Alberta and not by the federal government?

The answer to this question is dependent on the particular production and how it was priced from month to month. At certain periods of time, particular facts may show that prices set by the Alberta Petroleum Marketing Commission were the prices used for the purposes of Indian oil royalty calculations.

VIII. CONCLUSION

Even if <u>any or all</u> of the above questions are answered in the affirmative, this does not mean that First Nations automatically have a claim for additional royalties arising from oil production in the 1970's and 1980's. There are many "justifications" or defences for the Crown's actions during the era of regulated pricing. An exploration of these is beyond the scope of this paper.

However, if any of the above questions are answered in the affirmative, all parties currently involved in oil and gas production from Indian reserves must ask how those answers impact current and future pricing of their oil and gas for royalty and other purposes.

The price of oil and gas in Canada is not presently overtly determined or regulated by governments. However, while pricing may be much more transparent and market sensitive than it once was, there are still important questions.

Transfer pricing and non-arms length transfers, gas processing charges, transportation charges and the location of the determination of market value, deductible marketing and administrative fees, whether there should be any "deductions" whatsoever from the market price, commodity and value-added taxes. These are all issues that are heavily

[225] *Supra* note 164.

impacted depending on the characterization of the federal Crown's role in owning and managing reserve lands and its obligations to account to First Nations, both qualitatively and quantitatively. The answers to the questions posed in this paper, although originating from an era of regulated pricing, will have a profound impact on current pricing of oil and gas for royalty purposes.

The economic rents taken from oil and gas production on reserve lands are not simply the royalties reserved and eventually rebated to the First Nations. It may be that the federal and provincial governments are not entitled or are limited in their legal ability to take a portion of these economic rents, be it through severance taxes, commodity taxes, income taxes, user fees, price controls, sales restrictions, or whatever. If so, the bottom line for the beneficiary First Nations may be much greater than what they are presently realizing.