

CANADA'S NATIONAL ENERGY PROGRAM: AN ANALYSIS

INTRODUCTION

Two hundred years ago, during the American Revolution, the United States and Canada were at war with each other. In the succeeding eighty years, there were several American efforts to take physical control of Canada through force of arms. These efforts failed, but in the one hundred years after the American Civil War, the United States was successful in gaining a large degree of control—not through military might and imperialism, but through economic and industrial expansion. However, in the last ten years, Canada has begun to fight back. This comment explores this reassertion of Canadian control through governmental regulation with particular emphasis on the new Canadian energy policy, the National Energy Program (N.E.P.).

I. HISTORY

Canada has vast natural resources, but because of its mostly in-temperate climate, it has a small population that lives principally along the Canada-United States border. Historically, because of the small population, Canada has never had a sufficiently large capital investment base to fully exploit its resources.¹ During the 1870's, in order to protect the relatively small Canadian industries from the competition of the relatively large and more efficient British and American companies, the Canadian Conservative, Sir John A. MacDonald, urged the adoption in Canada of a plan known as the National Policy. That Policy's basic premise was the institution of a high protective tariff so as to restrict the importation of British and American goods, thereby ensuring the local market to native companies. With MacDonald's election as Prime Minister in 1878, the tariff policy was put into effect, but it had an unbargained-for result. American companies created Canadian subsidiary companies. These Canadian subsidiaries were not subject to the tariff, and therefore, the American parent companies were able to maintain their access to the Canadian natural resources and to the Ca-

1. For an historical background to the Canadian-American relationship, *see generally* J. MORCHAIN, *SHARING A CONTINENT* (1973). It has been argued that Canadians, as a group, simply prefer to save their money in banks rather than risk it in capital ventures and thereby invite extensive foreign investment. K. LEVITT, *SILENT SURRENDER* 137-39 (1970).

nadian market. The Conservatives were eventually defeated in the 1890's, and the Liberals subsequently lowered the tariff, but the precedent had been set. In 1870, American investment in Canada was approximately \$15 million; by 1899, it was \$160 million and primarily of the direct type through ownership of subsidiaries.² From that time until the 1950's, the tariff rates fluctuated with the rise and fall of political parties and political ideas, but at all times Americans were increasingly and directly investing in Canada.

Americans rushed to fill the investment capital void in Canada for several reasons. The most significant were the availability of surplus capital gained during the post American Civil War industrialization in the United States, the desire to increase the size of the marketplace, the knowledge that Canada had never nationalized any foreign companies, the safety of Canadian banks which had not had a single failure since 1830, the fact of similar cultural backgrounds stemming from British colonialism, and importantly, the increasing expansion of communications and transportation. Since there was no legislation prohibiting *direct* investment, that investment vehicle simply appeared to be the most efficient means of gaining control and it was also free of the fluctuating tariff rate. In subsequent years, with the increasing need for more petroleum, the energy giants created Canadian subsidiaries as a natural expansion of their business.

Until the 1950's, American investment was, generally speaking, a greatly desired commodity in Canada. American companies provided jobs, and the Canadian standard of living was kept on a par with that of the United States. The Second World War had kindled a spirit of cooperation between the two countries and had stimulated the implementation of the mutual defense treaty as well. Yet, despite these growing ties, a great dichotomy arose during the 1950's. On the one hand, Canadians wanted to maintain the standard of living to which they had become accustomed. On the other, they wished to be rid of the social and political costs of being economically dependent upon the United States. An example of the social costs is that 80% of all magazines in Canada are of *American* origin.³ There are also approximately thirty American television stations which reach 80% of the Canadian populace.⁴ An example of the political costs arises from the extraterritorial effect of United States laws which will be discussed more fully below. The dependence itself was fully evidenced by the

2. J. MORCHAIN, *supra* note 1, at 140.

3. Dickey, *The Americanization Syndrome in the United States-Canada Relationship*, 6 CASE W. RES. J. INT'L L. 82, 90 (1973).

4. *Id.*

fact that by the mid-1950's, 60% of Canadian exports went to the United States, and the United States supplied 70% of Canada's imports.⁵ The rumblings of dissatisfaction with American investment had begun.

Between 1957 and 1972, there were commissioned by the Canadian government four separate reports discussing the problem of foreign, and particularly American, investment. Those reports were the Gordon Report in 1957,⁶ the Watkins Report in 1968,⁷ the Wahn Report in 1970,⁸ and the Gray Report in 1972.⁹ Generally, all expressed concern over:

1. the amount of foreign investment in Canada,
2. the growth in the percentage of American investment compared to all foreign investment in Canada,
3. the concentration of the investment in key sectors,
4. the lack of investment opportunities for Canadians from Canadian savings, and
5. the implied political dependence of Canada upon the United States.¹⁰

In total, these reports recommended:

1. restrictions on foreign capital inflow, particularly in the key industries,
2. subsidization of domestic research and technology,
3. establishment of the Canadian Development Corporation (a clearing house to funnel government funds into Canadian controlled businesses),

5. J. PALOMBARA, *MULTINATIONAL CORPORATIONS AND NATIONAL ELITES* 18 (1976).

6. CANADA, *ROYAL COMMISSION ON CANADA'S ECONOMIC PROSPECTS, FINAL REPORT* (1957).

7. CANADA, *TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY, FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY* (1968). This report, co-authored by Stephen Hymer, analyzes the role of multinational corporations in host nations and asserts that their long-term strategies "would eventually conflict with the more limited investment perspectives of the nation state[s] . . . [particularly] over issues of innovation, invention, and corporate political power." S. HYMER, *THE MULTINATIONAL CORPORATION* 278 (1979). The report suggests the establishment of a screening committee to oversee foreign investment enabling the host country to maintain its independence. *Id.*

8. *ELEVENTH REPORT OF THE STANDING COMMITTEE ON EXTERNAL AFFAIRS AND NATIONAL DEFENSE RESPECTING CANADA-U.S. RELATIONS*, 28th Parliament, 2d Sess. (1970). It was said of the Wahn Report:

The danger to Canada . . . was not political absorption by the United States but rather one of drift into such dependency upon the United States that Canada would be unable, in practice, to adopt policies that would displease the United States; such inability might arise from fear of American reaction that would invoke circumstances unacceptable to Canadians.

R. EELS, *GLOBAL CORPORATIONS* 33 (1976).

9. CANADA, *GRAY TASK FORCE, FOREIGN DIRECT INVESTMENT IN CANADA* (1972). For a condensed version of the Gray Report, see also *A Citizen's Guide to the Herb Gray Report*, CANADIAN F. 1 (1971).

10. A. RUGMAN, *MULTINATIONALS IN CANADA* 124 (1980).

4. the establishment of a screening agency, and
5. the need for a new industrial strategy.¹¹

The reports were well received in Canada because Canadian public opinion had turned against American investment and American control.¹² There was frustration and exasperation at the extent of the involvement of American companies in the day-to-day life of virtually all Canadians. Kari Levitt summed up these emotions when she said:

Underdevelopment . . . is perpetuated above all by our collective mentality of dependence and impotence with respect to the supposed superiority of the economic, political and even the cultural institutions of the dominant metropolis. It follows that the first step toward an escape from underdevelopment and hinterland status is the self-definition and self-assertion of a society in its own terms.¹³

The government of Canada and its constituents became determined to define and assert its own culture and society, and that meant the limitation of American involvement.

II. REGULATION PRIOR TO OCTOBER 1980

The single most important affect of the four reports was the passage of the Foreign Investment Review Act in 1973.¹⁴ It is under this Act that foreign controlled companies have either begun or continued direct investment in Canada since the Act was implemented in April 1974. The functioning arm of the statute is the Foreign Investment Review Agency (F.I.R.A.).¹⁵ The Act requires that all proposed acquisitions of control of existing Canadian businesses,¹⁶ or the establishment of new businesses in Canada (which also includes expansion of established foreign controlled businesses into new, unrelated fields),¹⁷ by "noneligible" persons, must be registered with the F.I.R.A. Only noneligible persons are subject to F.I.R.A. scrutiny.

Generally, a noneligible person is a noncitizen of Canada who is also not a permanent resident of Canada as defined by statute,¹⁸ or who

11. *Id.*

12. Sigler & Goresky, *Public Opinion on United States-Canada Relations*, in CANADA AND THE UNITED STATES 44, 53 (A. Fox, A. Hero & J. Nye eds. 1976). In a poll taken by the Canadian Institute of Public Opinion in 1972, 47% of the Canadian public was in favor of the government taking steps to attain 51% ownership of Canadian industries; only 32% opposed the suggestion. *Id.* at 57.

13. Levitt, *Towards Decolonization: Canada and Quebec*, CANADIAN F. 1, 2-3 (1972).

14. Foreign Investment Review Act, 1973, Can. Stat., c. 46.

15. *Id.* § 7(1).

16. *Id.* § 8(1).

17. *Id.* § 8(2).

18. The definition of a permanent resident is "A person who has been granted landing, . . . has not become a Canadian citizen, and . . . has not ceased to be a permanent resident

is a permanent resident but has not become a Canadian citizen within one year of his being eligible to do so. The Canadian Citizenship Act¹⁹ allows an applicant to become a Canadian citizen after permanently residing in Canada for three years.²⁰ A Canadian citizen is also a noneligible person if he has resided outside of Canada for five or more consecutive years, but there are various exceptions to this rule.²¹

A corporation is a noneligible person if it is controlled by a noneligible person or persons. The Act specifies three tests to determine whether a corporation is so held. A corporation is a noneligible person if:

1. 25% of its voting shares, if it is a public corporation, are owned by noneligible persons,²² or
2. 40% of its voting shares, if it is a private corporation, are owned by noneligible persons,²³ or
3. if any one noneligible person owns 5% or more of the voting shares of either a public or private corporation.²⁴

Foreign governments and their agencies are also noneligible persons,²⁵ and therefore subject to review under the Act.

The Minister of Industry, Trade, and Finance reviews the proposed investment of the noneligible person and determines whether the investment is likely to be of "significant benefit" to Canada according to the following criteria:

1. the effect of the investment on the level and nature of economic activity in Canada,
2. the degree of Canadian participation in the enterprise,
3. the effect upon Canadian productivity, industrial efficiency, technological development, and product innovation and variety,
4. the effect on competition in Canada, and
5. the compatibility with existing Canadian companies and Canadian policies.²⁶

. . . [by] deportation . . . [or by] leav[ing] . . . Canada with the intention of abandoning Canada as his place of permanent residence." Immigration Act of 1976, 1976, Can. Stat., c. 52, §§ 2(1), 24(1).

19. Citizenship Act, 1976, Can. Stat., c. 108.

20. *Id.* § 5(1)(b). Those three years must be completed within four years prior to making the application for citizenship. *Id.*

21. Foreign Investment Review Act, 1973, Can. Stat., c. 46, § 3(1). See also Olson, *Foreign Investment Restrictions on Canadian Energy Resources*, 14 INT'L LAW. 579, 582-83 (1980).

22. Foreign Investment Review Act, 1973, Can. Stat., c. 46, § 3(2)(a)(i).

23. *Id.* § 3(2)(a)(ii).

24. *Id.* § 3(2)(b).

25. *Id.* § 3(1).

26. *Id.* §§ 2(2), 9. This policy discriminates against foreign investors, even if their investment would cause no harm, so long as the investment is not demonstrated to be benefi-

TABLE 1. Reviewable new acquisition cases, outcome of status

	1974*	1975	1976	1977	1978
Reviewable new cases	102	166	171	261	360
Carryover from previous period	—	52	54	65	73
Total from above	102	218	225	326	433
Total resolved	50	164	160	253	327
Allowed	33	116	124	231	282
Disallowed	8	21	19	12	28
Withdrawn	9	27	17	10	17
Carried over to next period	52	54	65	73	106
Allowed cases as per cent of resolved (%)	66	71	78	91	86
Value of assets, all cases (\$000,000)	479	1,070	1,069	1,145	4,491

*Provisions for review of new businesses came into force October 15, 1975.

Source: *Foreign Investment Review*, Spring 1979.

Of the total number of reviewable new acquisition cases, American companies were responsible for 61 in 1974 of which 65% were approved, for 116 in 1975 of which 77% were approved, for 109 in 1976 of which 73% were approved, for 171 in 1977 of which 91% were approved, and for 243 in 1978 of which 87% were approved.

The Minister is expected to negotiate with the potential investor in an effort to extract the best possible deal for Canada based on the above criteria. The Minister then makes a recommendation to the Cabinet which has the power of final approval over the investment. If the Cabinet finds significant benefit, it approves the proposal, issues an Order-in-Council, and the proposal is no longer subject to F.I.R.A. scrutiny.²⁷ If the Minister or the Cabinet finds that the proposal will not significantly benefit Canada, then the investor may amend his proposal or he may negotiate with the F.I.R.A. to discover what is required

cial. Feltham & Rauenbusch, *Economic Nationalism*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 885, 894 (R. MacDonald, G. Morris & D. Johnston eds. 1974).

27. Foreign Investment Review Act, 1973, Can. Stat., c. 46, § 12(1).

TABLE 2. Reviewable new business cases, outcome of status

	1975	1976	1977	1978
Reviewable new cases	6	196	328	331
Carryover from previous period	—	6	58	52
Total of above	6	202	386	383
Total resolved	—	144	334	319
Allowed	—	115	297	273
Disallowed	—	9	12	21
Withdrawn	—	20	25	25
Carried over to next period	6	58	52	64
Allowed cases as per cent of resolved (%)	—	80	89	86
Planned investment, all cases (\$000,000)	5	324	803	323

Source: *Foreign Investment Review*, Spring 1979.

Of the total number of reviewable new business cases, Americans were responsible for 90 in 1976 of which 73% were approved, for 184 in 1977 of which 88% were approved, and for 193 in 1978 of which 86% were approved.

for approval.²⁸

That is the theory. In its first year of operation, the F.I.R.A. and the Federal Cabinet examined eighty-two applications under the Act. Of these, fifty-five were approved, eleven were rejected, and sixteen were withdrawn. It has been argued that, though unknown in number, many other proposals were never submitted for fear of being rejected. However, subsequent years have shown a tendency towards a liberal policy. Of the 1,650 separate cases reviewed by the F.I.R.A. between 1974 and 1978, only 130 cases were disallowed, and about 150 cases were withdrawn. See Tables 1 and 2.

In short, the F.I.R.A. level of scrutiny seems to reflect the ambivalent sentiment of Canadians and their government toward American investment in Canada. These figures show that a significant amount of

28. *Id.* § 11. For an excellent detailed review of foreign direct investment in the energy industry in Canada, see Olson, *supra* note 21.

investment capital is still charging into Canada, but as will be seen, restrictions are being stepped up to stem the tide.

III. FOREIGN INVESTMENT IN CANADA

The American presence in Canada is colossal. By 1970, Americans held 78% of all foreign investment in Canada. They owned or controlled more than 50% of the Canadian manufacturing, mining, and smelting industries, more than 75% of the chemical and electronics industries, and nearly 100% of the automobile, rubber, and aluminum industries.²⁹ By 1980, American investment in Canada had reached 80% of all foreign investment to the extent of \$33 billion.³⁰

In 1981, the six largest oil companies in Canada are all foreign controlled. They are: Imperial Oil which is 70% owned by Exxon Company U.S.A., Gulf Canada which is 60% owned by Gulf Oil Corporation, Texaco Canada which is 90% owned by Texaco U.S.A., Shell Oil which is 79% owned by the Royal Dutch Shell Oil Company, Amoco Canada which is 100% owned by Standard of Indiana, and Mobil Oil which is 100% owned by the Mobil Oil Corporation.³¹ The seventh largest oil and gas company is Petro-Canada. It was created by the federal government in 1975.³² Its purpose was, and is, to strip away at least a part of the foreign domination in the industry and to vest that interest into the hands of Canadians. Shortly after its formation, Petro-Canada purchased Atlantic Richfield Canada from the Atlantic Richfield Company for \$340 million (Canadian),³³ and it purchased Pacific Petroleum for \$1.5 billion (Canadian).³⁴ In early 1981, Petro-Canada bought out Petro-Fina of Belgium for \$1.3 billion (Canadian).³⁵ The purpose of this last buyout was to gain control of over one thousand retail service stations so as to make Petro-Canada more visible in eastern Canada.

Of the twenty-five largest oil and gas companies in Canada by sales, foreigners control seventeen. In 1979, those seventeen companies had 71.7% of the total sales in the industry equalling over \$6 billion dollars (Canadian). The eight Canadian controlled companies had 18.7% of the total sales equalling just \$1.6 billion (Canadian).³⁶

The extent of the foreign, predominantly American, command

29. J. SAYWELL, CANADA PAST AND PRESENT 38 (1975).

30. A. RUGMAN, *supra* note 10, at 124.

31. *Canada Casts a Shadow*, FORTUNE, Dec. 1, 1980, at 15.

32. Petro-Canada Act, 1975, Can. Stat., c. 61.

33. *Alberta production cut could hit 100,000 b/d*, OIL & GAS J., Feb. 23, 1981, at 44, 44.

34. *Id.*

35. *Id.*

36. ENERGY, MINES, AND RESOURCES CANADA, NATIONAL ENERGY PLAN 20 (1980).

over Canadian industry suggested from these figures is truly staggering. And the breadth of this foreign investment necessarily submits the people and government of Canada to the extraterritorial effect of American laws.³⁷ When, in 1965, the government of Canada made an agreement to sell wheat to Cuba, the United States government ordered American milling companies, including companies in Canada, not to sell wheat to Cuba. As a result, the government of Canada, to its great consternation, was momentarily squeezed in its attempts to fulfill its Cuban commitments.³⁸ Another example of this extraterritorial effect occurred during the wage and price freeze in the United States in 1971. A wage increase owed to Canadian workers at Chrysler Canada, Limited, had to be delayed until the freeze was lifted in the United States.³⁹ It is likely that this extraterritorial effect of American laws, subjecting Canada to American problems and policies, is the major reason for the previously mentioned results of the Canadian public opinion polls and for the establishment of the F.I.R.A. With this history in mind, it is not surprising that the people and government of Canada are anxious to reacquire management over Canadian energy resources. Today, the supply and control of sufficient energy is perhaps the single most important domestic issue of any industrialized country, but even though Canada has more than enough energy for its domestic needs, Canadians cannot control those resources because Canadians do not own those resources. The questions of whether to drill for oil, or build a natural gas pipeline, or cap a well, or invest billions of dollars in tar sands in Canada are not decided by Canadians; these questions are answered in the board rooms of the major oil companies in Houston, Denver, San Francisco, and London. Is it any wonder that Ottawa is trying to change this situation?

IV. THE NATIONAL ENERGY PROGRAM

F.I.R.A. scrutiny of the foreign controlled energy companies has historically been very light. Significant benefit has usually been found because the companies have provided essential capital, jobs, and technology to Canada. To develop its energy resources, Canada has needed these infusions, and therefore, has not unduly hindered the companies in their pursuits. The F.I.R.A. regulations still apply to foreign investment in the Canadian oil and gas industry today, but as will

37. J. BEHRMAN, NATIONAL INTERESTS AND THE MULTINATIONAL ENTERPRISE 86 (1970).

38. *Id.* at 112-13.

39. M. LEVIN & C. SYLVESTER, FOREIGN OWNERSHIP 76-77 (1972).

be seen, these regulations are now secondary to the National Energy Program.

On October 28, 1980, the Canadian Prime Minister, Pierre Elliot Trudeau, announced the new Canadian budget and the new energy policy. These two policies have been inexorably linked by the common denominator of taxes. In 1975, the Ottawa government's deficit was \$5.46 billion (Canadian), approximately 12% of total government expenditures; for 1981, the deficit is estimated at \$12 billion (Canadian), approximately 20% of total government expenditures.⁴⁰ In the current proposed budget for fiscal year 1980-81, the Ottawa government projects total revenues to be \$51.6 billion (Canadian) with total expenditures of \$63.5 billion (Canadian). For fiscal year 1981-82, the government projects total revenues of \$63.6 billion (Canadian) and total expenditures of \$73.6 billion (Canadian).⁴¹ These figures mean that in just two years, the government expects a 130% increase in its already substantial deficit. Somewhere, somehow, someone has to pay for these charges. At least part of the answer lies in the N.E.P.

The N.E.P. is an extensive set of federal regulations, but before these regulations can be understood, the basis of the authority to create these regulations must be explored. This requires a brief look at the Canadian Constitution. The Canadian Constitution is based upon the British North America Act of 1867 (B.N.A. Act).⁴² The center of the current controversy between Ottawa and the provinces concerning the N.E.P. is found in section 109 of the B.N.A. Act. That section specifically states that minerals belong to the provinces in which they are located. The provinces argue that, under section 109, they have the constitutional right to produce and sell energy to whatever extent and at whatever price they so choose. However, section 91 of the B.N.A. Act gives the federal government the power to regulate trade and commerce within Canada. This section 91 is the Canadian version of the U.S. Constitution's Commerce Clause.⁴³ Similarly, it is a very broad grant of power, and Ottawa has used this power to give itself a great deal of control in setting interprovincial prices and for taxing minerals. Now it is using section 91 to implement the N.E.P. upon the provinces and upon the Canada Lands. The Canada Lands are the northern territories not within provincial jurisdiction. Some of the most promising energy finds, those in the Beaufort Sea for example, are on Canada Lands.

40. DEP'T OF FINANCE CANADA, THE BUDGET 23, 37 (1980).

41. *Id.* at 23.

42. British North America Act, 1867, 30 & 31 Vict., c. 3.

43. U.S. CONST. art. I, § 8, cl. 3.

The N.E.P. has three primary objectives: to cause a substantial shift in the ownership of the energy industry in Canada by increasing the Canadian share; to secure self-sufficiency in energy by 1990; and to provide an equitable share in the profits from energy for all Canadians.

The objective of increasing Canadian ownership and control is broken down into three subparts. Those are:

1. to increase Canadian ownership of oil and gas production from its current rate of 25%, to 50% by 1990,
2. to acquire a "significant number" of the larger oil and gas companies, and
3. to stimulate the rapid growth of Petro-Canada in the oil and gas industry.⁴⁴

There are several means for squeezing foreigners out of the Canadian oil and gas industry.⁴⁵ Prior to the announcement of the N.E.P., the depletion allowance tax write-off applied to all oil and gas companies in Canada. The benefit was a reduction of about 1/3 in taxable income.⁴⁶ However, the N.E.P. will phase out the depletion allowance. The taxable income deduction will decrease from its current rate of 33% to 20% in 1982, to 10% in 1983, and to 0% in 1984.⁴⁷ The depletion allowance is to be replaced by the Petroleum Incentives Program.⁴⁸ Under this Program, oil and gas *exploration*, whether in the provinces or on Canada Lands, undertaken by companies that are at least 50% Canadian owned will qualify those companies to an incentive payment of 10% of approved costs⁴⁹ for 1982 and 1983. The percentage will rise to 15% thereafter.⁵⁰ For companies at least 75% Canadian owned⁵¹ the payment is a full 35% of approved costs. Oil and gas *development*, anywhere in Canada, and capital expenditures for the upgrading of heavy oil refineries⁵² will return a 10% incentive payment to companies with a

44. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 49.

45. Some would agree with J.G. Stabback, former chairman of the National Energy Board, that "the policy doesn't just push foreign owners out, it shoves them." Bott, *Barrels of trouble*, CANADIAN BUS., Feb. 1981, at 30, 121.

46. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 38.

47. *Id.* at 39.

48. *Id.*

49. *Id.* at 39-40. Approved costs will be determined by the Petroleum Incentives Board. The term "approved costs" refers to necessary expenditures in exploration for oil and gas. *Id.* at 41.

50. *Id.* at 39-40.

51. This 75% minimum was reduced to 65% by Energy Minister Lalonde in February 1981, after getting bombarded by not only the major foreign energy companies but also by the Canadian controlled companies as well. *Canada eases rules on ownership*, OIL & GAS J., Feb. 23, 1981, at 44, 44.

52. These upgraders convert the thick oil sands products into lighter oils. Currently, Canada has no working heavy oil upgraders. All heavy oil produced is exported to the United States. The purpose in categorizing this processing activity with the exploration ac-

minimum 50% Canadian ownership. The payment is 20% to companies with a 75% Canadian ownership.⁵³ In addition to these incentives, the federal government will give an incentive payment of 25% of approved costs to *all* oil and gas companies, both foreign and domestically owned. However, companies at least 50% Canadian owned will get a further increment of 10%. Companies with 75% Canadian ownership get an additional 20%.⁵⁴ The net effect of this policy is that on Provincial Lands, the 75% Canadian owned company has after tax and after incentive costs of \$0.34 for every one dollar expended.⁵⁵ A foreign company with less than 50% Canadian ownership has after tax and after incentive costs of \$0.53 for every dollar expended.⁵⁶ On Canada Lands, the 75% Canadian company has after tax and after incentive costs of \$0.07 for every one dollar expended.⁵⁷ The foreign company with less than 50% Canadian ownership has after tax and after incentive costs of \$0.28 for every dollar expended.⁵⁸

The second measure designed to limit foreign control is even more direct. A minimum 50% Canadian ownership is required of any company, whether public or private, to produce any energy from any new discoveries in the Canada Lands.⁵⁹ In short, all of the major foreign energy companies will not be allowed to reap profits from future discoveries in the Canada Lands unless they change their ownership status.

A third means for increasing Canadian control of the industry is Petro-Canada's automatic right to 25% of all new discoveries made on Canada Lands.⁶⁰ Fourth, and most importantly, Petro-Canada intends to buy out certain foreign controlled energy companies. "The Government of Canada is a willing buyer, at fair and reasonable prices."⁶¹ This buy-out option is designed to placate those companies which believe that the new regulations are too onerous. However, more importantly, it is the federal government's desire that at least some foreign energy companies will execute this option and sell to Petro-Canada. Ottawa wants to increase its share of control of the energy pie.⁶²

tivities is to spur development of heavy oil upgraders. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 36, 41.

53. *Id.* at 40.

54. *Id.* at 40-41.

55. Vasoff, *Breathing through the fumes*, C.A. MAGAZINE, Jan. 1981, at 17, 18.

56. *Id.*

57. *Id.*

58. *Id.*

59. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 47.

60. *Id.*

61. *Id.* at 52.

62. Though Ottawa wants to increase its share of control, it has no ready cash to pay the purchase price. The previous purchases of Atlantic Richfield Canada and Pacific Petroleum

The F.I.R.A. is also mentioned in the N.E.P. as a restriction on foreign investment. The N.E.P. states that the federal government does not want foreign controlled energy companies to either increase their share of new production or buy out already discovered oil and gas reserves. Ottawa entrusts this task to the F.I.R.A.⁶³

To pay the costs of the N.E.P., Ottawa is changing the tax structure. In 1979, of total energy revenues of \$11.7 billion (Canadian) the federal government received in taxes only \$1.4 billion (Canadian) which is less than 10% of the total. The industry itself received revenues of \$4.6 billion (Canadian) which is approximately 41% of the total. The provinces received \$5.7 billion (Canadian) which is approximately 49% of the total.⁶⁴ Under the N.E.P., of projected revenues of \$89.5 billion (Canadian) from 1980 through 1983, Ottawa is to receive \$24 billion (Canadian) which is 27% of the total, industry will receive \$27.5 billion (Canadian) which is 30% of the total, and the provinces will receive \$38.0 billion (Canadian) which is 43% of the total expected revenue.⁶⁵ The revenue that the federal government expects to receive between 1980 and 1983 will come from four principal sources. Ottawa anticipates \$9.7 billion (Canadian) from corporation taxes on the energy industry, \$7.3 billion (Canadian) from taxes on natural gas production and the production of liquefied petroleum gases, \$5.2 billion (Canadian) from a new petroleum and gas revenue tax of 8%,⁶⁶ and \$1.8 billion (Canadian) from an oil export tax.⁶⁷ Of this \$24 billion that Ottawa expects to receive by 1983, it projects its own costs of \$21.9 billion in managing energy programs, providing incentives, creating a natural gas bank,⁶⁸ creating substitutes for oil and converting consumers to natural gas, research and development, building a natural gas pipeline to the Maritime Provinces, and much more.⁶⁹ The \$2.1 billion remaining will go to the general revenue fund to help ease the deficit. The government expects this surplus to grow in the future so as to further help all Canadians.

by Petro-Canada were financed by foreign loans, principally from the United States. Indeed, it has prompted one observer to comment, "In the end, patriation and nationalization could turn out to be expensive and meaningless. We may be forking out a lot of money to trade in Exxon for the Chase Manhattan Bank." Bott, *supra* note 45, at 121.

63. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 50.

64. *Id.* at 108.

65. *Id.*

66. This tax is not deductible from income taxes. *Id.* at 38. Because it is non-deductible, it has been estimated that the tax will reduce profits by 25%. *Canada's policy in disarray*, 47 PETROLEUM ECONOMIST 510, 511 (1980).

67. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 112.

68. This "bank" is to buy excess natural gas from small Canadian producers so as to give the small producer the knowledge that he will have a market.

69. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36.

The second stated purpose of the N.E.P. is to secure energy self-sufficiency by 1990. The ironic aspect of this is that Canada is currently a net exporter of energy. Canada exports heavy crude oil to the United States for which Canada has no refineries, and natural gas to the United States for which Canada has no domestic market.⁷⁰ The natural gas has no market because there is a greater supply of natural gas than there are consumers with the appropriate hookups to use natural gas. The major problem is that there is no natural gas pipeline east of Montreal, therefore the Maritime Provinces are dependent upon imports of foreign oil. The N.E.P. proposes to simply decrease the demand for oil by instituting conservation measures and to cover any shortfalls by substituting natural gas.⁷¹ In 1979, Canadians consumed 1,823,000 barrels of oil per day (bpd) while producing 1,608,000 bpd. The N.E.P. projects that by 1990, demand will be 1,475,000 bpd with production of 1,520,000 bpd.⁷² In 1980, Canadians consumed 1.65 trillion cubic feet of natural gas while producing 3.94 trillion cubic feet. The N.E.P. projects that in 1990, Canadians will consume 2.57 trillion cubic feet of natural gas while producing 3.58 trillion cubic feet.⁷³ Should these figures be attained, the need for imports of oil will be past and Canada could actually be an exporter of energy for profit.

The third purpose of the N.E.P., to share energy profits more equitably, will be achieved by increasing the federal share of the revenue at the expense of the energy companies and the individual provinces. But most importantly, it is the pricing policy for energy resources that the government considers to be the N.E.P.'s most equitable quality. The N.E.P. has created what is known as the Canadian blended price.⁷⁴ In essence, this price is the base price of domestically produced conventional oil with a surcharge known as the Petroleum Compensation Charge levied by Ottawa on all refineries that use domestic oil. This surcharge is paid over to the refineries that use the far more expensive imported oil. This way the price of refined oil from both types of refineries is the same. In 1973, the wellhead price for a barrel of domestic Canadian conventional oil was only \$3.40 per barrel,⁷⁵ in December 1980, the price was \$16.75 (Canadian) per barrel.⁷⁶ Yet this is less than one-half of the world price of oil. In December 1980, the Petroleum

70. However, natural gas exports to the United States are also on the decline because of the increased prices and concomitant increase in production in the United States.

71. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 101.

72. *Id.* at 98.

73. *Id.* at 101.

74. *Id.* at 25.

75. *Id.* at 24.

76. *Id.* at 30.

Compensation Charge was \$2.55 (Canadian) per barrel totalling a blended price of \$19.30 (Canadian) per barrel.⁷⁷

The federal government realizes that prices for energy must and will rise, but it intends to do so without any of the violent shocks that occurred in either 1973 or 1979 from OPEC demands. Also, because of Canada's relatively favorable energy position, Ottawa has promised that the Canadian blended price will never exceed 85% of the international price or the average price of oil in the United States, whichever is lower.⁷⁸

The wellhead price of domestic conventional oil will rise at an ever increasing rate. Beginning January 1, 1981, the price will rise \$1.00 (Canadian) per barrel every six months until the end of 1983. In 1984 and 1985, the price will increase \$2.25 (Canadian) per barrel every six months. Beginning in 1986, that rate is increased to \$3.50 (Canadian) very six months.⁷⁹ This escalation will continue until the domestic price of conventional oil reaches the "reference price." The reference price is the price of unconventional oil, more specifically, the products from the tar sands. Unconventional oil is currently priced at \$38.00 (Canadian) per barrel, just under the world price.⁸⁰ The reference oil price will escalate in accordance with the Consumer Price Index (Canadian) or the world price, whichever is lower.⁸¹ However, *prima facie*, these figures may not be in accord with the promise to keep the blended price at 85%, or below, the international price. Presumably, what is meant is that conventional oil will never exceed 85% of the reference price if that price is based on the international rate. The projected reference price (of unconventional oil) for January 1, 1990, is \$79.65 (Canadian) per barrel. The projected wellhead price for conventional oil for the same date is \$63.25 (Canadian) per barrel.⁸²

The price of natural gas creates a real problem to those who set the rates. On one hand, the price must be high enough to encourage production, particularly since Canada's energy future so vitally depends on natural gas. On the other hand, the price must be sufficiently low to encourage consumers to trade in their oil burners for natural gas burners. Therefore, the N.E.P. will raise the price of natural gas, but will do so at a rate even slower than that for conventional oil.

When the N.E.P. was announced, there was no domestic tax, though there was a federal export tax, on natural gas. The N.E.P. re-

77. *Id.*

78. *Id.*

79. *Id.* at 27.

80. *Id.* at 28.

81. *Id.*

82. *Id.* at 26.

places the export tax with a tax on all production of natural gas, even for domestic use. On November 1, 1980, the tax on one thousand cubic feet of natural gas (Mcf) was set at \$0.30 (Canadian). This tax will increase to \$0.75 (Canadian) by January 1, 1983. The basic price of natural gas in Canada is \$2.60 (Canadian) per Mcf. This price will rise to \$3.20 (Canadian) per Mcf by August 1, 1983.⁸³ However, as compared to the price of oil, natural gas will cost only 71% as much as oil in 1981, and it will cost only 67% as much by 1983.⁸⁴

The price of energy in Canada is very cheap, but the issue of energy pricing is still a politically volatile one. The Conservative Party leader, and former Prime Minister, Joe Clark, was quickly booted out of office when he proposed a much faster rise in Canadian energy prices, and to the full world price.⁸⁵ Prime Minister Trudeau has no intention of making the same mistake. He justifies the early slow pace in the rise of prices on the fact that Canadians have lived for generations on the assumption of future cheap energy; that to rapidly increase prices would be both unfair and unrealistic to the pattern of life in Canada.⁸⁶ The Prime Minister now believes that he has given fair warning to the Canadian public of what the future holds. Yet not everyone is happy with the pricing policy or the N.E.P. As will be seen, the Prime Minister is caught between the proverbial rock and hard place.

Between 1973 and 1980, the wellhead price of conventional oil in Canada quadrupled. Under the N.E.P., by 1990, the price is expected to quadruple today's price. But it is the provinces' and the energy industry's position that the rate of increase is too slow, and that this slow rise will endanger Canadian energy production more than it will help the Canadian consumer.

V. THE PROVINCES

It is the province of Alberta that is most disturbed with the prices and federal taxes as espoused in the N.E.P. because Alberta produces 1.2 million barrels of oil per day, totalling 85% of all the oil produced in Canada.⁸⁷ Sixty per cent of Alberta's revenues are derived from oil and gas, and almost half of the work force is in the industry.⁸⁸ The Alberta Heritage Fund, which is geared for the future development of

83. *Id.* at 35.

84. *Id.* at 32.

85. *Trudeau is backing off on canadian energy*, BUS. WEEK, Jan. 19, 1981, at 25, 26.

86. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 72.

87. Houston Chronicle, Nov. 30, 1980, § 2, at 27, col. 1.

88. *Id.*

Alberta once the energy resources run out, gets one-third of all provincial oil and gas revenues from the provincial taxes.⁸⁹ By 1981, this fund held \$8.5 billion (Canadian).⁹⁰ Clearly, the Albertans have a critical interest in any energy plan, and their actions, incited by the Prime Minister's pronouncement, present their evident anxiety with the N.E.P.

Most of Alberta's current oil production is conventional in nature, therefore the provincial government complains bitterly over the pricing and taxing standards espoused in the N.E.P. As Provincial Energy Minister Merv Leitch said, Albertans "will continue to be asked to sell their rapidly depleting resources at less than half their [world] value."⁹¹ Alberta's Premier, Peter Lougheed, wants conventional oil prices immediately raised to 85% of the average American oil price.⁹² By 1984, Premier Lougheed wants conventional oil to be priced at \$47.00 (Canadian) per barrel.⁹³ The N.E.P. projects the price of conventional oil in Canada to be \$25.00 (Canadian) per barrel on January 1, 1984.⁹⁴ Premier Lougheed argues that the \$47.00 price is reasonable for a depleting resource that is *currently* selling around the world for \$40.00 (Canadian) per barrel. Premier Lougheed can also argue that Albertan conventional oil is far superior to imported crude. It takes 1.4 - 1.6 barrels of foreign oil to produce the same quantity and quality of refined products as one barrel of Albertan conventional oil.⁹⁵

The province has taken two drastic steps in its effort to convince Ottawa to change the pricing scheme. The first occurred in November 1980, when Premier Lougheed announced that the province would make successive cuts of 5% in production to a total of 15%,⁹⁶ and would continue this slowdown until a new and fair price was set with Ottawa.⁹⁷ Premier Lougheed stated that Ottawa's alternatives were to increase the importation of the far more expensive foreign oil, or negotiate with Alberta for a new price "instead of trying to club Alberta into submission."⁹⁸ The successive cuts were announced to occur on March 1, 1981, June 1, 1981 and September 1, 1981. On March 1, Premier Lougheed more than fulfilled his promise and reduced production by 104,000 bpd to 908,000 bpd.⁹⁹ After the production cut, Ottawa

89. Murray, *Battle Over Alberta's Energy Riches*, DUNN'S REV., Oct. 1979, at 126, 127.

90. *Alberta's heritage fund*, THE ECONOMIST, May 16, 1981, at 79, 79.

91. *New Canadian energy policy draws fire*, OIL & GAS J., Nov. 3, 1980, at 34, 34.

92. *Canada's oil policy is starting to hurt*, BUS. WEEK, Dec. 8, 1980, at 24, 24.

93. *Alberta, Ottawa to open energy policy talks*, OIL & GAS J., Apr. 6, 1981, at 61, 61.

94. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 26.

95. Bott, *supra* note 45, at 30.

96. Premier Lougheed has since stated that the 15% cut could go higher. Toronto Globe and Mail, Feb. 28, 1981, at 13, col. 4.

97. *Alberta to cut production in budget tiff*, OIL & GAS J., Nov. 10, 1980, at 158, 158.

98. *Id.*

99. *Alberta chops crude production to 908,000 b/d*, OIL & GAS J., Mar. 9, 1981, at 60, 60.

announced a new "special temporary levy" on all petroleum products at the rate of two cents per gallon. The purpose of the tax is to help pay for increased imports.¹⁰⁰ Due to this cut, Alberta is losing \$750,000 (Canadian) per day from lost tax revenues.¹⁰¹ On June 1, 1981, Alberta announced the second cutback of an additional 60,000 bpd. Presumably, the special temporary tax will rise an additional two cents per gallon making a total of four cents per gallon. As of the time of this writing, the author can only presume that a further reduction will occur in September 1981, unless Alberta and the federal government are able to compromise their pricing differences.

The second step taken by the Alberta government was the withholding of production licenses upon the multi-billion dollar tar sands projects at Cold Lake and Alsands, Alberta. The result of the provincial action was the shutdown of construction. Each one of these two projects has a projected capital cost of \$8 billion (Canadian), and Imperial Oil and Shell Canada have made it clear that the projects will be scrapped unless they can continue in the very near future.¹⁰² The energy companies have projected that these two projects alone can produce 250,000 bpd by 1985.¹⁰³ It is obvious that the Ottawa government considers the production from these two plants to be crucial for Canada to reach energy independence by 1990. However, Texaco Canada, a partner in Alsands, stated that that project was already two years behind schedule because of the continuing dispute between Ottawa and Alberta.¹⁰⁴ The ironic aspect of the closing of these two plants is that Alberta is quite happy with the price set by the federal government for tar sands oil. Because it is synthetic oil, and therefore, the wave of the future, the set price is \$38.00 (Canadian) per barrel and the price is linked with the domestic inflation rate.¹⁰⁵ The purpose behind Alberta holding out is only as another bargaining chip to get the price of conventional oil raised. The Canadian Energy Minister, Marc Lalonde, argues that a substantially higher price is needed for unconventional oil because production of such oil is more costly, but more importantly, because this is the energy of the future, and therefore, incentives by favorable pricing should be directed toward this type of energy.¹⁰⁶

100. *Id.*

101. *Id.*

102. Dizard, *Canadianization comes to the energy business*, INSTITUTIONAL INVESTOR, Feb. 1981, at 157, 160.

103. *Canadians mull strategy under new energy policy*, OIL & GAS J., Nov. 24, 1980, at 43, 44.

104. *Canada oil, gas continues slowdown*, OIL & GAS J., Jan. 26, 1981, at 104, 104.

105. *Alsands cuts tar-sands development budget*, OIL & GAS J., Dec. 15, 1980, at 43, 43.

106. *Canadians mull strategy under new energy policy*, *supra* note 103, at 45.

Though this may be a sound and logical argument, it still keeps money out of Alberta's coffers, and that is the point of the impasse.

Other provinces have their own squabbles with Ottawa and the N.E.P. Newfoundland is the site of the potentially enormous Hibernia energy reserves, but these are offshore, and Ottawa claims, under section 91 of the B.N.A. Act of 1867, that Newfoundland does not have the right to manage and control these resources. Generally, under the B.N.A. Act of 1867, Ottawa would be correct, but Newfoundland did not become a province until 1949, and it entered the Dominion not under the B.N.A. Act of 1867, but under the B.N.A. Act of 1949.¹⁰⁷ Under term 33 of the latter Act, Newfoundland was granted all lands and minerals belonging to it at the date of union. Whether the offshore resources belonged to Newfoundland at that time is currently being decided in the courts.¹⁰⁸ The offshore oil recovered from Hibernia will be sold at the unconventional price since it will require steam injection to get it out.

Until the question of ownership is resolved, the Newfoundland Premier, Brian Peckford, has refused to issue any production permits (though exploration is still being allowed). Ottawa plans to take 25% of the gross revenues for itself from offshore energy development through taxation. Petro-Canada already has a 25% stake in Hibernia.¹⁰⁹ Newfoundland wants 40% for itself. These figures would leave just 10% of the revenues to the actual producers.¹¹⁰ The producers will not agree to that figure,¹¹¹ and so no production will be had unless Ottawa and Newfoundland can settle the question of ownership. This is yet another example of delay in energy self-sufficiency.

The province of British Columbia is a major producer of natural gas, but because of the previously mentioned natural gas glut, it has a difficult time in selling its production. On top of the problems experienced in trying to sell its excess to the now glutted United States, in November 1980, an excise tax was imposed on natural gas exports increasing the natural gas export price to \$4.94 (Canadian) mmbTU by April 1981.¹¹² This figure makes Canadian exports very uncompetitive.

107. British North America Act of 1949, 12 & 13 Geo. 6, c. 22.

108. For a more thorough examination of the offshore question, see Ballem, *The Energy Crunch and Constitutional Reform*, 57 CANADIAN B. REV. 740 (1979).

109. *Jurisdictional flap fogs outlook for Hibernia development*, OIL & GAS J., Dec. 29, 1980, at 48, 48.

110. The Hibernia oilfield is 28% owned by Mobil Canada, 25% by Gulf Canada, 25% by Petro-Canada, 16.5% by Chevron (Standard of California) and 5.5% by Columbia Gas Development. Stewart-Gordon, *A World of Oil*, WORLD OIL, Jan. 1981, at 29.

111. *Jurisdictional flap fogs outlook for Hibernia development*, *supra* note 109, at 48.

112. *Canada oil, gas continues slowdown*, *supra* note 104, at 104. Due to a previous agreement with the United States, Canada must give 90 day advance notice to the United States

As a result, the British Columbia Premier, Robert McClelland, ordered two provincially owned natural gas companies not to pay the federal excise tax on export sales. Rather, the money is being collected in trust, and is now pending court action on the legality of the tax.¹¹³ Premier McClelland argues that, realistically, instead of the tax being garnered from increased prices, it has to come from the profits of the companies because to tack on the excise tax would make Canadian natural gas even less competitive and less desirable.

The N.E.P. has exacerbated the deep-set, historical, regional distrusts of Canada. Today, the political power struggle between Ottawa and the provinces has been intensified because of the fantastically high economic stakes; each side is doing its utmost for survival. The provinces that have the oil and gas are unyielding in their claims of independent control, and the have-nots plead the exigency of unified control in Ottawa. All of this is paired with a constitutional controversy over repatriation of the B.N.A. Act of 1867 from Britain, thereby creating an extremely unfavorable investment climate in Canada. This Armageddon atmosphere is intensely dangerous to a country that needs literally scores of billions of dollars¹¹⁴ if it is ever to reach its goal of energy independence. As will be seen below, it appears that if the dispute is not resolved quickly, the eventual winner may find it to be a Pyrrhic victory.

VI. THE ENERGY INDUSTRY

The responses of the various foreign controlled energy companies to the pronouncement of the N.E.P., and the resulting political battles, were immediate, homogenous, and expensive to Canada. The foreign energy companies have voiced their reluctance to provide the necessary capital and technology until Ottawa and the provinces get together and settle their differences. The investors have two major concerns. First, they have watched the crumbling of what was once a very favorable investment climate. They fear either nationalization of the energy industry on the one hand, or the political fragmentation of Canada on the other. They are unsure with whom they should deal and whether those deals will be honored and enforceable. A country with longtime geographic animosity, with sharply split political camps, and with a fractious constitutional struggle, all being stirred up by the common desire

before it can increase its export price for natural gas to the United States. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 35.

113. *Canada moves to ease energy policy impact*, OIL & GAS J., Jan. 5, 1981, at 64, 64.

114. Capital requirements for energy development in the 1980's must rise, according to one source, from 4.5% of the gross national product (GNP), to 9% of the GNP—an increase of \$300 billion (Canadian). Bott, *supra* note 45, at 116.

of each side to wrest control of the boundless wealth of energy, is a country in which an investor must be exceedingly cautious.

The second major concern is over the amount of return to be gained on an investment dollar. The amount of return after costs and taxes is called netback. In the United States, the netback on a barrel of produced oil is \$27.75 (U.S.); this is over \$10.00 a barrel more than the *selling* price of Canadian oil!¹¹⁵ Before the enactment of the N.E.P., the netback on Albertan conventional oil was \$7.00 (Canadian) per barrel; now, with the new 8% petroleum and gas tax, the netback is only \$5.00 (Canadian).¹¹⁶ And so, while the N.E.P. promises a four-fold increase in the netback by 1990, the energy companies see that they can get a five-fold increase in netback *now* just by crossing the border!

Of course this does not consider the likelihood of discovering oil or gas in the United States. One estimate is that the likelihood of drilling a successful well in the United States is about half that of Canada,¹¹⁷ but even so, now the return would be two and a half times greater in the United States than in Canada in 1990. Therefore, with the embittered political climate, the delay in licensing of construction at Cold Lake and Alsands, the new incentive program which greatly disfavors the foreign energy companies, and the extremely low netbacks,¹¹⁸ it would be astonishing to find any foreign controlled energy companies making investments of any substantial amount in the Canadian energy industry. Indeed, those companies are decreasing their Canadian involvement.

All of the major foreign oil companies have announced substantial reductions in their energy expenditures since the pronouncement of the N.E.P. Gulf Canada cut its 1981 exploration budget by 15%,¹¹⁹ Hudson's Bay Oil and Gas Company cut its 1981 capital budget by more than 45%,¹²⁰ Esso (Imperial Oil) shelved its \$400 million production enhancement project at Judy Creek, Alberta,¹²¹ and also cut capital expenditure by 25%,¹²² Amoco Canada Petroleum Company reduced expenditures by more than 55%,¹²³ Shell Canada cut its exploration

115. *Id.*

116. *Id.* at 32.

117. *Id.*

118. Even Dome Petroleum, Limited, the largest privately owned Canadian controlled firm questions the levels of the netbacks. Dome predicts that if netbacks were increased to the levels found in the United States that energy self-sufficiency could be reached by 1984!
Id.

119. *Canadian energy policy slowing action*, OIL & GAS J., Dec. 22, 1981, at 36, 36.

120. *Id.*

121. *Id.*

122. *Canada oil, gas continues slowdown*, *supra* note 104, at 104.

123. *Government policy slashes spending plans in Canada*, OIL & GAS J., Feb. 16, 1981, at 60, 60.

budget by 25%,¹²⁴ and Mobil Canada cut its investment budget by nearly 50%.¹²⁵ The cuts from these six foreign controlled companies equal nearly \$2 billion (Canadian) lost for 1981 alone.

A third reason for these cuts is the lack of operating capital. Shell Canada, Limited, Chairman William Daniel claims, that with the assessment of the 8% petroleum and natural gas tax, the N.E.P. reduces the industry's share of revenues from production not to the 30% as claimed in the N.E.P., but to 24%; and as a result, the energy companies are facing cash flow reductions of 20% - 30%.¹²⁶

In sum, the N.E.P. and its resulting political battle, instead of creating the incentive for industry to invest and increase production, has caused retrenchment and the lowering of expectations. It is evident that the path toward energy independence for Canada is impassable until the economic and political issues are resolved. The diversion from Canada to the United States of *Canadian* investment money¹²⁷ and drilling rigs¹²⁸ must be added to the problem of reduced investments by foreign controlled companies. This is occurring at a prodigious rate because of the natural gas glut in Canada and because of the more favorable energy investment atmosphere in the United States, and particularly related to American price decontrol. Canadian energy investors are exploring the United States for the same reason that American investors are returning: it is simply more lucrative.

The fleeing rigs have become a symbol to many Canadians of all that is wrong with the N.E.P., but while the effects of that symbol are powerful, the symbol is at least partially based on inaccuracy. The N.E.P. did not create the glut of natural gas in Canada by itself. Even if the export prices were lower, the United States would have no immediate need for the imports because of increased domestic production. In fact, even before the pronouncement of the N.E.P., the drilling industry in Canada was predicting a southward movement across the border of some rigs due to the glut. Therefore, the truth behind the exodus is likely based on both the N.E.P. and simple economics. But regardless of cause, it is fostering alarm on both sides of the battle. With the substantially reduced capital investments and the concomitant

124. *Id.*

125. *Id.*

126. *Canadians mull strategy under new energy policy, supra* note 103, at 43.

127. One estimate is that in just six months, *Canadians* have invested \$2 billion in the United States' oil and gas industry. *Canadian drilling exodus boosting effort in U.S.*, OIL & GAS J., May 4, 1981, at 96, 96.

128. Due to the exodus of Canadian drilling rigs to the United States, it is predicted that nearly 40,000 Canadians will lose their energy-related jobs. *Companies slap new Canadian energy policy*, OIL & GAS J., Jan. 12, 1981, at 33, 34.

reduction in the drilling of wells, energy independence for Canada by 1990 is becoming increasingly unreachable.

To summarize, the federal government is trying to attain more Canadian control over the oil and gas industry in Canada (from 25% to 50%); is attempting to reach energy independence for Canada (being now only 75% independent) by 1990 through increased production, conservation, and by switching from oil to natural gas; is planning to distribute the wealth accruing from energy resources more equitably;¹²⁹ and is hoping to raise sufficient revenue to not only pay the costs involved but to also slice into its general budget deficit. The government is suggesting a gradual rise of the low Canadian energy prices through 1990,¹³⁰ at which time the price will be approximately 85% of the world or average American price, and it wants high federal taxes on the revenue from production.

The provinces, which have the constitutional right of control in their favor under section 91 of the B.N.A. Act of 1867, also want to see increased production, but the provinces believe that raising the prices¹³¹ rapidly is the best incentive to increase production (and also to give them more revenue to tax). The provinces also want the federal taxes lowered since they are a disincentive to investment (though they do not mention the disincentive created by their own taxes).

The oil and gas companies simply want this pitched political battle between Ottawa and the provinces to stop, and even more, they are demanding that the netbacks be quickly increased before they will risk further billions of dollars in providing Canada's energy needs. To rapidly increase the netbacks will require a rapid rise in price, and so the industry is mostly on the side of the provinces.

VII. CONCLUSION

The Ottawa government has hinted that it is willing to make some minor concessions on the wellhead price of conventional oil.¹³² One report suggested that Ottawa would be willing to raise the wellhead

129. The single province of Alberta had tax revenue from the oil and gas industry of \$6.3 billion (Canadian) in 1980. The federal government of Canada received tax revenue from the entire Canadian oil and gas industry of only \$2.3 billion (Canadian) in the same year. ENERGY, MINES, AND RESOURCES CANADA, *supra* note 36, at 108.

130. Indeed, Ian Waddell of the N.D.P. claims that "[t]he Liberals' biggest problem is that they've boxed themselves in with election promises" to keep the price of energy low. *Trudeau is backing off on Canadian energy*, *supra* note 85, at 26.

131. The price of oil in Canada when mixed with inflated dollars, is actually cheaper today than in 1960. Why should Canadians conserve when they are getting such a bargain? *Marc Lalonde responds*, CANADIAN BUS., Feb. 1981, at 35, 41.

132. In December 1980, Energy Minister Lalonde suggested that Ottawa would raise the wellhead price of conventional oil anywhere from \$0.50 to \$1.50 per barrel if Alberta would agree. *Canadian policy takes further industry toll*, OIL & GAS J., Dec. 29, 1980, at 48, 48.

price by as much as 20%.¹³³ So far, this has not occurred. Alberta is intransigent in demanding a significant price increase. As this battle continues, the hopes of the N.E.P. are rapidly fading. It is becoming apparent that Premier Lougheed holds the trump card. Even at reduced production levels, Alberta generates a great deal of wealth. The province could likely continue at these reduced levels indefinitely. In the interim, Canada has had to increase its foreign imports at a far higher price (even during the current world oil glut), and the Cold Lake and Alsands projects are falling so far behind that even if Imperial Oil and Shell Canada do complete the projects, they will not be up to full production until long after 1990. Also of concern to the federal government is the diminishing supply of capital and technology that is so vital to the N.E.P.

Shortly after the pronouncement of the N.E.P., Energy Minister Lalonde stated: "We are prepared to force the short-term consequences of a long-term policy for which there is no alternative."¹³⁴ In fact, it would appear to be just the opposite. The federal government is unwilling to face the short-term political ire resulting from substantially increasing the energy prices which should be the long-term policy. Therefore, the time has come for the citizens of Canada to realize that the days of cheap energy are forever gone. They must face the reality of world energy prices, and it is the responsibility of the national government to deliver that message. The prices must be increased to give the industry incentive to invest. The prices must be increased to give the provinces sufficient revenue to tax. The prices must be increased to allow Ottawa to enact an otherwise perfectly viable energy plan, and also to pay its substantial deficits. The prices must be increased to force the consumers to truly conserve energy. The higher prices can be instituted if the federal government simply faces reality and forces its constituents to do the same. Surely the short-term result will be unpopular politically, but if the government wants to be fondly remembered in 1990 or 1995, it must act now, and that action must be bold. The N.E.P. can work. Ottawa will achieve "Canadianization," self-sufficiency, and equity in the distribution of wealth, but it must first increase the price of conventional oil, satisfy the Albertans, and satisfy the industry. If it does so, the government will soon satisfy itself.

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133. *Trudeau is backing off on Canadian energy*, *supra* note 85, at 25.

134. *Canada's oil policy is starting to hurt*, *supra* note 92, at 25.

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