

CONSTITUTIONAL CONSIDERATIONS IN THE STRUGGLE FOR OWNERSHIP AND CONTROL OF BRITISH COLUMBIA'S "SUPERPORT"

Introduction

The construction of a "superport" at Roberts Bank in British Columbia presents many fascinating constitutional questions, as evidenced by the struggle now ensuing between the Governments of Canada and British Columbia¹ as to which should own and control the port upon its completion.

At the present time, existing harbour and port facilities are adequate for all purposes. However, the transportation "experts" are beginning to realize the growth potential of modern industry if the handling of cargoes can be accomplished in bulk form—thereby reducing "unit cost." While this normally would remain a thought for the future, the consummation of a 650 million dollar contract between Japan and the Kaiser Coal Company changed the complexion of the proposal. This contract provides for large quantities of coal to be shipped from the Fernie, B.C., area to Japan commencing in 1970, but also requires a port where monstrous ships, 1000 feet long weighing 200,000 tons, will be able to load and depart within two or three days. While existing port facilities are incapable of handling such ships, docks are now being constructed in Japan to handle ships up to 500,000 tons—thereby compelling the completion of a comparable "superport" in B.C.

Initially, both the Governments of Canada and B.C. conducted investigations into possible sites for such a port, they each arrived at the same conclusion. The best possible site was found to be at Roberts Bank, some twenty miles south of Vancouver. The proposals of both governments were remarkably similar, and in essence called for the construction of a fifty acre artificial island to berth ships in sixty-five feet of water, three miles out from the present shoreline. The island will be more than one mile out from the low tide mark, and access to the island will be over a three mile causeway back to the mainland which will be built by using fill dredged from the ocean floor at that point.

This first stage, costing 15 million dollars, will eventually be expanded until there are three "fingers" of reclaimed land jutting out into the sea, with two huge ship basins each dredged to a depth of sixty-five feet between them. Ultimately, all the mudflats and sandbanks normally covered by the tide will be built up with dredged fill. The project will finally result in a dock area of 1360 acres with a vast

1. British Columbia will hereinafter be referred to as "B.C."

area of 3630 acres between the docks and the present shoreline which will be used for stockpiling and the development of related industries.

The obvious advantage Roberts Bank possesses over existing facilities is not merely the ability to handle larger ships, but the facilities for stockpiling and having port-oriented secondary industries close by—which is an essential feature for speedy bulk-loading.

With this factual background,² I propose to deal with the following constitutional considerations:

A. THE PORT SITE

The Government of Canada might be able to claim jurisdiction over the actual site of the wharfs and berths under s. 108 of the British North America Act, 1867,³ which transfers to the Government of Canada such public works and property of each province as are enumerated in the "Third Schedule," which includes "public harbours."⁴ However, it was only those harbours that fell within the description of public harbours on the day the particular province entered Confederation which passed to the Government of Canada under s. 108.⁵ It would seem, therefore, that s. 108 would not afford a possible ground under which the Government of Canada could claim jurisdiction.

There is another aspect to s. 108: Due to the problems inherent in deciding which is or is not federal property under s. 108, the Governments of B.C. and Canada reached an agreement which each validated by virtually identical orders in council in 1924.⁶ The agreement provided that, inter alia, the harbour of Burrard Inlet (Vancouver) was to pass to Federal jurisdiction under s. 108. The Supreme Court of Canada in 1945 in *Att.-Gen. of Canada v. Higbie* unanimously agreed that the orders in council were valid as an admission of a matter in dispute.⁷

In addition, the Government of Canada, in effect, has the power to extend the boundaries of harbours under its jurisdiction⁸ and it appears that it exercised this power in 1967 in the instant case.⁹ There-

2. Facts gathered from the following sources:

- a) newspaper articles (Winnipeg Free Press) in the period 1966-68.
- b) article in *Western Business and Industry*, Summer, 1968, 22.
- c) answering letter from the Hon. F. Richter, Minister of Transport, B.C.
- d) Hansard—House of Commons Debates 1966-68 period.
3. 30 and 31 Vict. c. 3 (Imp.), hereinafter referred to as "B.N.A. Act."
4. For a definition and characteristics of a "public harbour," see *Holman & Green* (1881) 6 S.C.R. 707 at 718, *Att.-Gen. of Can. v. Ritchie Contracting and Supply* (1915) 52 S.C.R. 78 at 103 (per Duff J.).
5. *Att.-Gen. of Can. v. Ritchie*, *ibid* note 4, per Davies J. at 94.
6. P.C. 941, of June 7th, 1924; B.C. O. in C., No. 507, of May 6, 1924.
7. [1945] S.C.R. 385, [1945] 3 D.L.R. 1.
8. See the National Harbours Board Act, R.S.C., 1952, c. 187, s. 6 (2) and the Canada Shipping Act, R.S.C., 1952, c. 29, s. 600.
9. See Hansard, May 19, 1967, 451.

fore, jurisdiction over the Roberts Bank area might be claimed by the Government of Canada under s. 108, due to the 1924 agreement and due to the 1967 extension of the boundaries.

However, one basic fallacy in this argument exists in that the site of the new "superport" is situated in the zone of the territorial sea, where neither the province nor the Dominion initially had any rights whatsoever. The Supreme Court of Canada in *Reference Re Ownership of Off-Shore Mineral Rights*¹⁰ has recently interpreted the Canadian position in this field. The case involved a reference by the Governor-General in Council concerning the ownership of, and jurisdiction over, off-shore mineral rights in B.C., and is closely analogous to the "superport" situation in its discussion of seabeds, continental shelf and territorial seas. In general, the Court's findings were that B.C. has at no time—either as a province or as a colony—had property in the bed of the territorial sea adjacent to B.C.; the lands under the sea do not fall within any of the heads of s. 92 of the B.N.A. Act, since they are not within the province's boundaries. Conversely, Canada does have legislative jurisdiction over such sea-beds either under s. 91 (1A), or under the residual power in s. 91.

The Court followed the *Fisheries Case*¹¹ and *Att.-Gen. of Canada v. Western Highbie*¹² in finding that:

"1. Before Confederation, all unalienated lands in B.C. including minerals belonged to the Crown in right of the Colony of B.C.

2. After union with Canada, such lands remained vested in the Crown in right of the Province of B.C."¹³

But, the Court then came to the conclusion that:

"in our opinion in 1871, the Province of British Columbia did not have ownership or property in the territorial sea and the Province has not, since entering into Confederation, acquired such ownership or property."¹⁴

Finally, in expressing its finding that Canada has jurisdiction in this area, the Court stated:

"Canada has now full constitutional capacity to acquire new areas of territory and new jurisdictional rights which may be available under international law . . . Canada is recognized in international law as having sovereignty over a territorial sea three nautical miles wide. — The sovereign state which has the property in the bed of the territorial sea adjacent to B.C. is Canada."¹⁵

If the *Offshore Mineral Rights Case* is to be followed, it seems likely that the sea-bed which is being dredged to form the port site is the property of Canada. This was the contention of the Hon. Paul Hellyer while he was Minister of Transport, as evidenced by his con-

10. [1967] S.C.R. 792; 65 D.L.R. 353.

11. [1898] A.C. 700 (P.C.).

12. *supra*, note 7, at pp. 409 and 21, respectively.

13. *supra* note 10, at 360 (Joint opinion).

14. *ibid*, at 367.

15. *ibid*, at 375.

stant reiteration that the Government of Canada intends to build and control the port site without any assistance from B.C.

Premier Bennett, on the other hand, maintains the port site is owned and is under provincial jurisdiction on the basis that Roberts Bank is a deposit of B.C. river silt (similar to nearby Sturgeon Bank) which, although under water, is still legally real estate of the province.¹⁶ In support of such an argument is the fact that the Government of Canada in effect acknowledged B.C.'s ownership of Sturgeon Bank by entering into an agreement to lease it in 1924 from Victoria.¹⁷ Running contrary to such a contention is the finding that the province has rights only up to the low-water mark.¹⁸ It is submitted that Premier Bennett's argument as to ownership is fraught with difficulties. Firstly, the proposal that Roberts Bank consists of B.C.'s river silt would be difficult to prove. Secondly, if proveable, what has been gained? To extend the argument to its logical conclusion, one could argue that river silt covers the bed of the ocean for hundreds of miles! Who is to know where the line of demarcation is to be, once the initial idea is accepted? Thirdly, surely the jurisdiction over the sea-bed is vested in the bed itself—regardless of the nature of the soil forming the bed. Therefore, while the 1924 agreement leasing the similar Sturgeon Bank would imply a federal concession that such lands are in fact owned by the province, on the basis of the *Offshore Mineral Rights Case*, the port site would likely be held under federal jurisdiction—not falling within s. 108, but rather within either s. 91 (1A) or the residual power.

B. TIDAL FLATS AND INDUSTRIAL ESTATES

The tidal flats area involved in the plans for the development of the "superport" is unique in that the distance between the high-tide and low-tide marks is roughly two miles. This area will be initially important only in that the causeways for transportation to and from the actual site must be constructed thereon. But eventually the area between the three proposed causeways will be reclaimed and the resulting 3630 acres of tidal flats used for storage and stockpiling facilities, and mainly for the location of secondary industries related to the operation of the port itself. The port would then become literally ringed with a large industrial park.

The ownership of such lands is obviously important for the future as they likely will become a large source of revenue. Further, the immediate advantage of ownership would appear to be the control of

16. As quoted in an article carried by The Winnipeg Free Press, March 8, 1968. See also Fisheries Case, supra note 11.

17. See an article entitled "Clam Flats 'Prize' in Government Struggle," The Winnipeg Free Press, March 23, 1968.

18. *Offshore Mineral Rights Case*, supra, note 10.

access to and egress from the port site, should that be considered to be federally owned (which appears probable).

Ostensibly, the B.C. Government owns the foreshore, i.e. the area between high and low-water marks, through s. 92 (13) of the B.N.A. Act. The only argument which the Government of Canada might use to support a claim of ownership thereof through s. 108 and the transferral of a public harbour at Confederation would undoubtedly fail, as the case of *Montreal City v. Montreal Harbour Commissioners*¹⁹ indicated that only if that particular part of the foreshore had indeed been used for harbour purposes before Confederation would it be transferred to the Government of Canada.

Attesting to the validity of this proposition is the fact that the Government of Canada sought a truce with the B.C. Government and accepted a temporary easement granted by the province which allows the National Harbours Board access to the site over the tidal flats (therefore implying that the Government of Canada recognizes the provincial ownership of that area).²⁰ The easement is for an eighteen month period running up to December 31, 1969, and is only to cover a wedge-shaped 115 acre slice of the flats—the line of the proposed causeway which is to be built first.

In answer to a question in the House of Commons concerning the easement, the Hon. Paul Hellyer replied:

"It is a temporary arrangement but that was all that was required to get on with construction of the port. There are a number of options open to the government as to the final solutions."²¹

What might these "option" be? As to the foreshore dispute, Viscount Haldane in the *Montreal Harbour Commissioners Case* denied the argument that s. 91 (10) would suffice as a jurisdictional head in these situations, stating that while in general, navigation and shipping is to be construed widely, the right of the Dominion does not extend far enough to allow occupation of provincial property or the erection of works thereon without compensation.²²

Viscount Haldane's views also present the only other possible "option"—that of federal expropriation of provincial land. That this is being considered is evidenced by statements made by Northern Affairs Minister Arthur Laing on May 9, 1968, to the effect that if it became necessary, there would be federal expropriation of provincial land for the Roberts Bank project.²³ In an interview several days later, Prime

19. [1926] A.C. 299 (P.C.)

20. See the Canada-B.C. Joint Development Act, p. 479, as reported in the B.C. Gazette of Sept. 26, 1968.

21. Hansard, Dec. 6, 1968, 3585. See also a comment in Hansard by M. Rose, Nov. 27, 1968, 3282.

22. *supra*, note 19, at 313.

23. See an article in *The Winnipeg Free Press*, May 9, 1968.

Minister Trudeau reinforced this view very subtly in stating that "while this would not be the course the Federal Government would *want* to follow, the port has to be built."²⁴

How might the expropriation of the tidal flats be justified by the federal authorities? The Government of Canada is competent within its own legislative jurisdiction—either pursuant to specific provisions in s. 91 or pursuant to the residual power,²⁵ to expropriate either provincial or private property subject to what was said in the *Reference Re Water Power Case*,²⁶ namely that the Government of Canada must have some regard for the preservation of provincial property provisions in ss. 102-126 of the B.N.A. Act. The "pith and substance" doctrine is a useful tool here to determine if in fact the Government of Canada exercises such a power properly. Therefore, in the case of provincially owned lands, as is likely on B.C.'s foreshore, the Government of Canada can only expropriate such lands if it does so pursuant to a constitutionally valid head and such lands are "necessarily incidental" to such an exercise. Here, assuming the tidal flats to be provincial property, it obviously becomes "necessarily incidental" to the exercise of the federal power insofar as access to the port site is concerned.

Statutory authority exists under the Expropriation Act,²⁷ s. 3(b) whereby the Minister may:

"enter upon and take possession of any land, real property . . . the appropriation of which is, in his judgment, necessary for the use, construction . . . of the public work, or for obtaining better access thereto."

Section 15 of the same Act makes it clear that it embraces the taking of provincial Crown land, and s. 2(g) defines "public work" as including:

". . . harbours, wharfs, piers, docks and works for improving the navigation of any water . . . and also the works and properties . . . constructed . . . at the expense of Canada."

Therefore, the Act not only gives the power to expropriate where navigation is concerned, but also goes further to extend such power to situations where federal money is expended. Justification conceivably is found for this under s. 91 (1A) and would appear to be a rather sweeping power²⁸ (exercisable by the National Harbours Board in this instance).

The only fetter foreseeable is the reluctance of the Courts to cut down the provincial property provisions in the B.N.A. Act, but it is

24. See an article in *The Winnipeg Free Press*, May 22, 1968 (Italics here are the writer's).

25. *Shepherd v. The Queen* [1964] Ex. C.R. 274.

26. [1929] S.C.R. 200 at 218; [1929] 2 D.L.R. 481 at 489.

27. R.S.C., 1952, c. 106.

28. B. Laskin, *Canadian Constitutional Law*, 3rd ed., 566; as to the constitutionality of the Expropriation Act, see Dumoulin J. of the Exchequer Court of Canada in *Shepherd v. the Queen*, supra, note 25, at 278; also as to powers given the National Harbours Board, see the National Harbours Board Act, R.S.C., 1952, c. 187, s. 10 (1).

submitted that in a clear instance of national importance such as the construction of a "superport," the Courts would uphold any exercise by the Government of Canada of its expropriation power.

Another avenue exists whereby the Government of Canada could possibly expropriate the tidal flats. In *National Capital Commission v. Munro*,²⁹ the Exchequer Court held that an agency of the Government of Canada could expropriate land around existing federal land by an act of Parliament, and the authority for doing so was to be found in the federal power to legislate for the "peace, order and good government" of Canada. Through using this device, it is apparently open to the Parliament of Canada to expropriate more land than it otherwise might be able to, under other relevant specific heads of jurisdiction such as navigation. Yet even this valuable tool would necessarily be subject to a claim that it was but a "colourable device" to deprive the province of B.C. of its proprietary rights.

The final question arising from the expropriation aspect of the "superport's" tidal flats is whether or not compensation need be paid to the province for such an expropriation. If the Government of Canada could justify its actions under a specific head of jurisdiction in s. 91, it would not need to repay B.C., but it would be otherwise if the Government of Canada could only find an ancillary power under s. 91. In such a situation, compensation would have to be paid as the expropriation would only be valid due to the "double-aspect" doctrine. Such an extension was suggested in the *Reference Re Water Power Case*³⁰ by way of an explanation of Viscount Haldane's dicta in the *Montreal Harbour Commissioners Case*³¹ whereby he had said that no right of expropriation existed for the Government of Canada to extend Montreal Harbour pursuant to the federal statute based on "Navigation and Shipping," but that if any right did exist in any circumstance, compensation must be paid.

Here, the possibility exists that the Government of Canada could expropriate using its statutory authority under s. 91(10); but, if an attempt was made to justify taking a larger portion under the *Munro Case* principle, compensation would necessarily be required as there would then exist undoubtedly a "double aspect" between s. 92(13) and the "peace, order and good government" power under s. 91.

C. THE RAIL LINE

Understandably, a major factor in the successful operation of the "superport" is commensurate rail facilities linking the "superport" with points clear across Canada to the eastern seaboard.

29. [1965] Ex. C.R. 579.

30. *supra*, note 26, at 486.

31. *supra*, note 19.

Interesting questions may be posed concerning who has control over the rail line between Crows Nest and Roberts Bank, and the questions themselves suggest many serious ramifications for the success of the whole system: Who will set the freight rates in general over this stretch of the line? Who is going to set the freight rates in particular with regard to the Japan-Kaiser contract and by how much will these rates add to the cost of a ton of coal?

The provincial government has given the British Columbia Hydro and Power authority the right to build a railway to serve the "superport" by linking the site with existing Canadian Pacific Railway lines. The importance of such a rail link between the port site, which is likely under federal jurisdiction, and the interprovincial rail lines of Canada (also federal) clearly involves constitutional problems which require attention by the Government of Canada.³²

The failure of the Government of Canada to act in this regard (or at least by leaving the matter with federal railway authorities) has caused difficulties. Initially there was a large outcry as to the location of the proposed line. Premier Bennett finally acceded to the pressure and had another study performed which altered the location slightly, but satisfied neither the people of B.C. nor the national railway authorities.³³ However, the rail authorities seem content to subordinate their views because: (i) they want to ensure for themselves access to the port at a later date, and (ii) they consider the "superport" to be premature.

The Government of Canada then, by its reluctance to act, is assisting Premier Bennett and losing its authority in a vital matter. Once this process is completed, it may encounter some difficulty in recapturing its authority.

The ultimate control of that connecting link will apparently come under the aegis of the provincial authorities and not under the aegis of the Government of Canada (where perhaps it should be). To what device could the Government of Canada resort at this time so as to resume control of the rail line in question? Under s. 92(10)(c), it could be declared to be a work for the general advantage of Canada.³⁴

The only difficulty in such a declaratory power is that it only makes the work subject to federal legislation, but does not affect proprietary rights. However for the purposes required in the instant

32. Yet the Hon. Paul Hellyer unequivocally stated that the siting of and responsibility for the connecting rail line was a provincial matter: see Hansard, Sept. 13, 1968, 24.

33. See Hansard, Nov. 27, 1968, 3280-4.

34. As to s. 92 (10) (c)'s discretionary nature, see *The Queen v. Thumlert* (1960) 20 D.L.R. (2d) 335 at 337; The fact that the line is not yet in existence is irrelevant—see *Luscar Collieries Ltd. v. McDonald* [1925] S.C.R. 460 at 483, affirmed [1927] 3 W.W.R. 454 (P.C.); as to the effect of the power, see the *Montreal Street Railway Case* 1912 1 D.L.R. 681 at 685.

case, all objections to provincial control over the railway link would certainly be removed by the mere power to legislate. Thus, while the province would collect freight rates, the Government of Canada would be able to *set* the rates to be charged—thereby regulating the unit cost.

Another possibility is that s. 92(10)(a) could give the Government of Canada jurisdiction in that the rail line is one connecting the province of B.C. with the other provinces, even though it is wholly within the province. In the *Luscar Collieries Case*,³⁵ Lord Warrington agreed with Duff and Rinfret JJ. in stating:

“It is in their view, impossible to hold as to any section of that system which does not reach the boundary of a province that it does not connect that province with another. If it connects with a line which itself connects with one in another province, then it would be a link in the chain of connection, and would properly be said to connect the province in which it is situated with other provinces.”

However, this argument might be rebutted successfully in two ways:

(i) *The Luscar Case* involved a situation where by agreement some control over the provincial line had already been given to the C.N.R. thus, the case could be distinguished in that here the federal authorities (possibly as represented by the C.N.R.) have no control as yet;

(ii) While the declaratory power under s. 92(10)(c) is exercisable over works “before or after their execution,” s. 92(10)(a) includes no such clause. This possibly would put a proviso on the power, even if (i) fails, to the extent that such a line would not be under federal jurisdiction until after it was built. However the practical effect of such reasoning would be devoid of all sensibility in that in such situations, the province would construct the work, and once completed it would become federal property.

I submit that the sole method of escaping the effect of the *Luscar Case* would be to distinguish the case on its facts.

A result similar to that in the *Luscar Case* was reached in *Att-Gen. of Ont. v. Winner*³⁶ wherein the Privy Council held that under s. 92(10)(a) no restriction whatsoever could be imposed upon an extra-provincial carrier by a province. Some of the relevant arguments from that case are applicable to the B.C. rail line:

(i) In the *Winner Case*, the province claimed they owned the highway and had jurisdiction over the traffic thereon—consequently they must also have the power to allow traffic in on terms. This argument's truth was admitted, but while the highways were in existence,

35. [1927] 3 W.W.R. 451 at 458 (P.C.).

36. [1954] A.C. 541 (P.C.).

they formed part of an extra-provincial system and therefore fell within federal jurisdiction.

Similarly in the instant case, once the rail line is built, it also forms part of a dominion-wide rail system and so must fall within federal jurisdiction;

(ii) Again in the *Winner Case*, the provinces claimed even if there was federal jurisdiction over the interprovincial traffic, the province still has jurisdiction over the roads and therefore there was overlapping jurisdiction until a conflicting federal act was passed. The Privy Council also denied this contention, claiming the provincial restrictions were aimed at hampering inter-provincial traffic—a federal matter—and were invalid as a result.

Similarly, if the B.C. government were to impose unfair restrictions on unit trains carrying bulk shipments from another province to Roberts Bank, such enactments could also be challenged on the grounds of hampering such traffic.

(iii) A third contention was that surely if all else fails, the provinces have the power to interfere with purely internal traffic. The Privy Council rejected this as well (although the Supreme Court of Canada had agreed to this proposition), saying that while true, such a matter was inextricably bound up with inter-provincial traffic, and as “severance” was not possible, the provinces failed here as well.

This conclusion might be more difficult to reach in this case, but I submit that a court would recognize the logic in such an argument—for if the Japan-Kaiser contract (strictly internal) ran into problems of this nature through exorbitant charges by the B.C. Government, the future success of the port itself might be jeopardized.

Legally then, there would seem to be no difficulties or impediments barring the Federal Government's use of either its declaratory power or s. 92(10)(a) to take jurisdiction over the provincial rail line. In reality, however, more than mere constitutional jurisdiction is involved. The political question looms large over the whole breadth of the “superport” project, and, suffice it to say at this point, such considerations must of necessity weigh heavily on the Government of Canada as evidenced by the fact that declaratory power has not been used in recent times by the Government of Canada to obtain jurisdiction.³⁷

D. ADMINISTRATION AUTHORITY

The final question to be considered is that of the administration of the “superport” system and its attendant facilities. Premier Bennett

37. K. Hanssen, *The Federal Declaratory Power under the British North America Act*, (1968) 3 Man. L.J., 87 at 95.

claims that such a vital port need not be entirely under federal jurisdiction. In 1967, the B.C. Government enacted the British Columbia Harbours Board Act,³⁸ the purpose of this legislation was to set up a Board to rival the National Harbours Board,³⁹ and the Act gave the provincial Board authority to borrow 25 million dollars to start port development.

However, the validity of this Act may be seriously doubted. As discussed earlier, some harbours in B.C. are definitely by agreement within the federal Board's jurisdiction, while others are left to provincial management. Therefore, on the surface at least, the B.C. Act could be constitutionally valid providing it does not affect the federal harbours—in other words, providing it does not conflict with the National Harbours Board Act. If the respective Acts are inconsistent, the federal Act takes effect to the exclusion of the other under the "double-aspect" theory. But the framers of the B.C. Act were careful to couch the whole Act in general terms.

Since the Act is constructed carefully, I submit that under the "double-aspect" theory, both the federal and provincial Acts can exist side-by-side. However, should the B.C. Government attempt to use its Act in regard to the "superport," two other steps might follow:

(i) As each section in the Act which provides for some action to be taken by the Board is couched with such phrases as "with the prior approval of the Lieutenant-Governor in Council," it is open for the Lieutenant-Governor to refuse assent to any particular procedure which would infringe upon a harbour or port of federal jurisdiction (it is doubtful if this would ever happen);

(ii) The constitutionality of the Act could be challenged on a reference to the Supreme Court of Canada, and the probable result would be a finding that in pith and substance the Act was aimed at a federal work, and consequently ultra vires the provincial legislature.

Therefore, while any attempt to utilize the Act to administer facilities unilaterally at Roberts Bank will, I submit, render it invalid, the passage of the bill really only reflected the anxiety of the B.C. Government lest the "superport" not be constructed in time to fulfill the terms of the Japan-Kaiser Coal contract, and was used as a vehicle both to motivate the Government of Canada into immediate action and to impress upon them the desire for some provincial share in the operation of the port.

38. S.B.C., 1967, c. 4.

39. Which was set up under the National Harbours Board Act, R.S.C. 1952, c. 187 and to which the Government of Canada has delegated control and administration of harbours under its jurisdiction.

Intertwined in this dispute exist two competing interests:

(i) that of the B.C. Government which feels that this project could be the largest commercial transportation development on the continent in decades, and which consequently wants "a piece of the action"; and

(ii) that of the nation as a whole, which in the future could have a large stake in the project. This concern was evidenced early in the reservations which the Premiers of the Prairie Provinces expressed about B.C.'s desire to share in the operation of the port.⁴⁰ Premier Bennett has repeatedly proposed that the federal and provincial governments share in a joint Crown corporation for the development of the port. The Hon. Paul Hellyer has just as repeatedly rejected the offer, using as a partial excuse a pending report on port facilities in Canada and management thereof.⁴¹ This report was tabled in the Commons on December 20, 1968, and its import is to effect that there is a world-wide trend towards semi-autonomous port authorities, responsible to their national government but functioning with specific duties and powers that give them scope to run the daily port operations, to plan capital improvements, and to promote the use of the port.⁴²

What will be the effect of the report? In the immediate future, it is unlikely that any change will occur. But within a few years, there may begin a gradual restructuring of port authorities. In practice this would likely work eventually in the same manner as control over inter-provincial traffic has, in that while ultimate authority remains vested constitutionally in the Government of Canada, in fact the power has been delegated back to the provincial motor boards, and has been upheld as a valid delegation.⁴³

Similarly, the National Harbours Board would be the ultimate authority for the "superport," while the B.C. Harbours Board would manage the port in practice.

E. A PROJECTED VIEW

The project began in the minds of men whose thoughts were tuned to future needs. With the consummation of the Japan-Kaiser contract, what began as idle thought suddenly became transformed in to a requirement for immediate action. The B.C. Government, with less bureaucratic (and other) shackles, as well as the impetus of local gain and

40. See an article in *The Winnipeg Free Press*, Mar. 21, 1968, entitled "Superport Meeting Proposed."

41. See Hansard, March 12, 1968, 7519.

42. See an article in *The Winnipeg Free Press*, Dec. 21, 1968 entitled, "More Local Authority Suggested for Ports."

43. *Ex Parte Coughlin* (1965) 53 D.L.R. (2d) 30 (Ont. H.C.).

improvement, drove the Government of Canada into a political corner from which recovery is difficult.

I submit that the end result of this transportation revolution, from a constitutional standpoint, will be:

(i) The federal authorities will own and develop by themselves the actual site between deep water and foreshore—most likely on the basis of the *Offshore Minerals Rights Case*, but possibly also on the extension of Vancouver Harbour's boundaries:

(ii) The tidal flats will be reclaimed and industrial estates arranged, likely on a cost-sharing basis between the Government of B.C. and Canada, and ownership will vest in the Government of B.C. with federal expropriation of land required for causeways possible should the two governments not be able to arrive at an amicable agreement;

(iii) The rail link will be provincially owned but freight rates and the like will be under federal control due to s. 92(10)(a)—or should that head fail, the declaratory power in s. 92(10)(c);

(iv) Finally, management will initially remain with the National Harbours Board, but a very real likelihood exists for at least partial control to eventually vest with the B.C. Harbours Board.

Up to the present, there has been an almost total lack of co-ordination between the federal and provincial jurisdictions. The entire dispute has revolved around provincial political control of the lower mainland railway and port facilities—an understandable desire to protect one's property and interests. However the very concept of federalism dictates the need for federal ownership and control of a project with such national and international dimensions and ramifications. Even though these interests compete, a constitutional confrontation is avoidable, while yet satisfying the desires of the discontent.

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