

Spring 1967

Sovereignty and Natural Resources-A Study of Canadian Petroleum Legislation

A. R. Thompson

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

A. R. Thompson, *Sovereignty and Natural Resources-A Study of Canadian Petroleum Legislation*, 1 Val. U. L. Rev. 284 (1967).

Available at: <https://scholar.valpo.edu/vulr/vol1/iss2/5>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



SOVEREIGNTY AND NATURAL RESOURCES—A STUDY OF CANADIAN PETROLEUM LEGISLATION*

A. R. THOMPSON†

THE NATURE OF THE PROBLEM

Exploitation of natural resources is a major preoccupation of governments. Industrial nations seek to ensure a full flow of raw materials; newly developing nations seek to provide the underpinnings of an industrial economy. In the United Nations, symposiums have focused attention on resource development.¹ These studies have sought to place the exercise of sovereignty over resources in proper perspective to foster a balance of interests between the developer and the country whose resources are exploited.² In balancing these interests, sovereignty and security of tenure are opposite sides of the scale. In the name of "sovereignty,"³ a country claims to control resource development as the national interest may dictate from time to time; in the name of "security of tenure," developers claim to exercise their acquired rights unimpeded and undiminished.

Petroleum usually is singled out for special legislative treatment. It is said that "[P]etroleum is often the subject of newer special legislation, partly because of the growing size and importance of the petroleum industry as a primary source of energy and partly because of the problems of exploration and production, as distinguished from the conduct of similar activities under a general mining law."⁴ Probably, the need for special legislation is generated as much by the social and political consequences of the exploitation of petroleum as it is by the complicated technology of the industry. In petroleum mining, more than in other mineral

* Submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University.

† Professor, Faculty of Law, University of Alberta, Canada.

1. *Mineral Resources Development Series*, ECAFE annual symposiums.

2. *The Status of Permanent Sovereignty over Natural Wealth and Resources*, U.N. SECRETARIAT, (A/AC, 97/5/Rev. 2; E/3511; A/AC 97/13), (1962). In the United Nations, the right of sovereignty over natural resources has gained recognition in the U.N. Resolution of December 14, 1962. For an analysis of this right, see MUGHRABY, *PERMANENT SOVEREIGNTY OVER OIL RESOURCES* (Lebanon, 1966).

3. The term "sovereignty" is not used in its public international law sense, but, as Mughraby says: "[T]he target of permanent sovereignty is the private international corporation." MUGHRABY, *supra* note 2, at 39. The term is here used in this wider sense as connoting the aspiration of a people or nation to economic independence as well as to political independence.

4. Ely, *Summary of Mining and Petroleum Laws of the World*, U.S. BUREAU OF MINES, INFORMATION CIRCULAR 8017, at 4 (1961).

extraction activities, operations range over extensive land surface areas, especially during the exploration stage. Even in the stage of final development land is used extensively for wells, storage batteries, pipelines, processing plants and refineries.⁵ In settled areas this land use affects day-to-day living, enhancing the social and political impact of resource development.⁶ Almost by definition, the exploitation of petroleum is carried on by foreigners in newly-developing countries.⁷ In consequence, legislators must digest the reality of foreign exploitation of an economically vital resource under conditions necessitating widespread technical operations particularly disturbing to local communities. It is not surprising, then, that issues of sovereignty intrude.

Canada has not escaped from a concern over the issue of sovereignty with respect to resource development. At the provincial level, rural antagonism to the taking and use of land for well-sites and pipelines by large oil companies has been provoked in the name, among other epithets, of "foreign exploitation."⁸ In federal politics, Canadians increasingly debate the question whether it is in the national interest that foreign-controlled corporations should dominate the the resource extraction industries.⁹

The purpose of this study is to examine the means which governments in Canada have used to achieve a balance between the competing claims of sovereignty and of security of tenure in dealing with petroleum

5. This intense involvement in land relationships is further examined in Thompson, *A Perspective on Petroleum Law*, 1 CANADIAN LEGAL STUDIES 152 (1966).

6. At the "grass-roots" level, granger-type movements have been common in North America with respect to petroleum exploitation. Alberta has a "Mineral Rights' Protective Association" which has sought to organize farmers and ranchers to secure a better deal from the oil companies.

7. "There are in fact virtually no examples of petroleum exploration operations not financed by risk capital." See *Petroleum Exploration: Capital Requirements and Methods of Financing*, U.N. DEPT OF ECONOMIC AND SOCIAL AFFAIRS 15 (1962).

8. Mineral Rights Protective Association, see note 6 *supra*.

9. In 1961, non residents controlled 69% of the value of investment in petroleum and natural gas, 59% in mining and smelting, and 59% in manufacturing. The Honorable Walter L. Gordon, former Minister of Finance, is the leading spokesman for the introduction of nationalistic policies with respect to investment. See GORDON, *A CHOICE FOR CANADA* 81, 82 (1966) in which the author singles out the petroleum industry for attack.

Many of our more important industries are now dominated by companies that are controlled by foreign-parent corporations. One of these is the petroleum industry which pays very little tax compared with other industries; it benefits from depletion allowances as well as capital-cost allowances; and the integrated oil companies may offset their development and exploration expenditures against profits earned on distribution. It follows that the larger oil companies are in a position to generate from retained earnings a substantial proportion of the capital they require for further expansion. It is somewhat ironic to think that Canadian motorists and other consumers of petroleum products and Canadian taxpayers are in this way providing the capital for the rapid expansion of an industry which, in large measure, is controlled by foreigners.

exploration and development. For the most part, Canadian petroleum reserves are owned by the various provinces and territories of the country. It is in the agreements and legislation of these regions that the rules governing the disposition of petroleum rights will be found.¹⁰ In this paper, however, only the essentially "legal" aspect of the question will be considered, leaving aside the international trade relations and the fiscal, revenue and taxation measures which operate as incentives or deterrents to foreign participation in the petroleum industry. Only representative agreements and legislation will be dealt with, those of Alberta, the leading petroleum producer, being principally treated.

THE RECORD IN OTHER COUNTRIES

The dimensions of the Canadian situation can be indicated by reviewing the attempts in other countries to resolve the conflict between sovereignty and security of tenure with respect to petroleum development.¹¹

Diversity is the most notable characteristic of these attempts. At one extreme are the concession agreements of the Middle East and of some African countries containing provisions for stabilizing the applicable law in favor of acquired rights, and for settlement of disputes between the developer and the host country by arbitration.¹² The impartiality of the proceedings is ensured by stipulating that a person such as the President of the International Court of Justice will appoint the members to the arbitration tribunal.¹³ At the other extreme are Latin Ameri-

10. For a general statement of the historical background of petroleum legislation in Canada, see Thompson, *Petroleum Land Policies Contrasted*, 36 U. COLO. L. REV. 187 (1964).

11. This record is provided in great detail in the United Nations publication cited in note 2 *supra*.

12. *E.g.*, Algeria, Iraq, Iran, Kuwait, Libya, Liberia, and Saudi Arabia.

13. *Algeria: Evian Agreements of August 28, 1962—Principles of Cooperation for the Development of Sahara's Underground Resources, Section IV:—Arbitration*

Regardless of any provision to the contrary, any dispute or controversy between the public authority and the holders of the rights guaranteed under Section 1A above shall be submitted, in both the first and last instances, to an international arbitration court, in accordance with the following principles:

Each party shall designate an arbitrator, and the two arbitrators shall appoint a third arbitrator, who shall be the chief of the arbitration court; in case of failure to agree on such an appointment, the President of the International Court of Justice shall be asked to make said appointment upon the request of either party;

The court shall render its awards by majority vote;

Recourse to court shall operate as a stay of proceedings;

The court's award shall be binding, without "exequatur," over the territory of the country the parties belong to, and shall be considered fully enforceable outside of said territories, 3 days after the delivery of said award.

Libya: Royal Decree Law of November 20, 1965, Amending Certain Provisions of the Petroleum Law, 1955, Article X—Clause 28 of Schedule II to the Petroleum Law No. 25 of 1955, as amended, is amended to read as follows:

can laws which, by the Calvo Clause, purport to impose the local regime and local courts on the foreign concessionaire without recourse to diplo-

(1) If at any time during or after the currency of this Concession any difference or dispute shall arise between the Government and the Company concerning the interpretation or performance hereof, or anything herein contained or in connection herewith, or the rights and liabilities of either of such parties hereunder and if such parties should fail to settle such difference or dispute by agreement, the same shall, failing any agreement to settle it any other way, be referred to two Arbitrators, one of whom shall be appointed by each such party, and an Umpire who shall be appointed by the Arbitrators immediately after they are themselves appointed.

In the even of the Arbitrators failing to agree upon an Umpire within 60 days from the date of the appointment of the second Arbitrator, either of such parties may request the President or, if the President is a national of Libya or of the Country where the Company was incorporated, the Vice-President, of the International Court of Justice to appoint the Umpire.

(2) The institution of Arbitration proceedings shall take place upon the receipt by one of such parties of a written request for Arbitration from the other which request shall specify the matter in respect of which Arbitration is required and name the Arbitrator appointed by the party requiring Arbitration.

(3) The party receiving the request shall within 90 days of such receipt appoint its Arbitrator and notify this appointment to the other of such parties failing which such other party may request the President or, in the case referred to in paragraph (1) above, the Vice-President, of the International Court of Justice to appoint a Sole Arbitrator and the decision of a Sole Arbitrator so appointed shall be binding upon both such parties.

(4) If the Arbitrators appointed by such parties fail to agree upon a decision within 6 months of the institution of Arbitration proceedings or any such Arbitrator becomes unable or unwilling to perform his functions at any time within such period, the Umpire shall then enter upon the Arbitration. The decision of the Arbitrators, or in case of a difference of opinion between them, the decision of the Umpire, shall be final. If the Umpire or the Sole Arbitrator, as the case may be, is unable or unwilling to enter upon or complete the Arbitration, then, unless such parties otherwise agree, a substitute will be appointed at the request of either such party by the President or, in the case referred to in paragraph (1) above, the Vice-President, of the International Court of Justice.

(5) The Umpire however appointed or the Sole Arbitrator shall not be either a national of Libya or of the Country in which the Company or any Company which directly or indirectly controls it was incorporated nor shall he be or have been in the employ of either of such parties or of the Government of Libya or of any such Country as aforesaid.

The Arbitrators or, in the event they fail to agree within 60 days from the date of appointment of the second Arbitrator, then, the Umpire, or, in the event a Sole Arbitrator is appointed, then the Sole Arbitrator, shall determine the applicability of this Clause and the procedure to be followed in the Arbitration.

In giving a decision the Arbitrators, the Umpire or the Sole Arbitrator, as the case may be, shall specify an adequate period of time during which the party to the difference or dispute against whom the decision is given shall conform to the decision, and such party shall not be in default if that party has conformed to the decision prior to the expiry of that period.

(6) The place of Arbitration shall be such as may be agreed by such parties and in default of agreement between them within 120 days from the date of institution of Arbitration proceedings as specified in paragraph (2) above, shall be determined by the Arbitrators or, in the event the Arbitrators fail to agree within 60 days from the date of appointment of the second Arbitrator, then by the Umpire, or in the event a Sole Arbitrator is appointed,

matic intervention by his own country.¹⁴ In between is a gradation of devices for balancing the claim to sovereignty against the claim to security of tenure.¹⁵

Differences in historical background account for this diversity of schemes. The authoritative nature of the Middle East regime, where the Sultan or Sheikh both granted the concession and dispensed the law as an exercise of personal sovereignty, coupled with the absence from Moslem law of an adequate counterpart to western commercial law, was incentive enough to induce concessionaires to bargain for the settlement of disputes by international arbitrators applying the "general principles of law recognized by civilized nations."¹⁶ On the other hand, Latin American sensitivity to "gunboat diplomacy," coupled with the successful nationalization of the Mexican petroleum industry,¹⁷ encouraged host countries in Central and South America to include the Calvo Clause in their concession agreements.

In the light of this diversity of approach, it is not surprising that entirely different attitudes prevail in North America.

In the United States, the same problem of balancing the interests of sovereignty and security of tenure does not arise, for domestic rather than foreign investment dominates the exploitation of petroleum. Instead, the conflict occurs between the state and the private entrepreneur, with individual rights and freedom of enterprise carrying the contest. It

then by the Sole Arbitrator.

(7) This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.

(8) The costs of the Arbitration shall be borne by such parties in such proportion and manner as may be provided in the decision.

14. *Peru*—Article 17 of the Constitution of Peru:

In every state contract with foreigners, or in the concessions which grant them in the latter's favour, it must be expressly stated that they will submit to the laws and tribunals of the Republic and renounce all diplomatic claims.

See also, Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Venezuela.

15. For example, Bolivian Petroleum Code, 26 Oct. 1955, Article 19—

All doubt or controversy regarding the fulfillment of the terms of the concessions and the interpretation of this law or its regulations shall be resolved by common accord between the Executive Power and the concessionaire. In the event of lack of agreement between the parties, the matter shall be submitted directly to the Supreme Court of Justice of Bolivia for final decision.

The emerging technique which holds promise for establishing a satisfactory relationship between the host country and the oil company is the Joint Venture Agreement. It is analyzed and advocated by Mughraby, *supra* note 2.

16. Ramazani, *Choice of Law Problems and International Oil Contracts: A Case Study*, 11 INT'L & COMP. L.Q. 503 (1962).

17. BERMUDEZ, *THE MEXICAN NATIONAL PETROLEUM INDUSTRY: A CASE STUDY IN NATIONALIZATION* (1963).

may be generalized that the federal laws governing the leasing of petroleum rights in the public domain treat the United States as if it were a private owner of mineral rights on no higher plane than any other individual freehold lessor.¹⁸

CANADIAN ATTITUDES

In Canada, there are different attitudes again. Unlike the United States, Canada's petroleum industry, along with other industries, is dominated by foreign-controlled corporations.¹⁹ Most of them are Canadian subsidiaries of United States or European companies. Many of them have no Canadian corporate status at all, being purely foreign corporations registered to do business in a Canadian province.²⁰ Notwithstanding this domination of industry by foreign-controlled corporations, domestic law in Canada (except for sporadic instances prompted by nationalist sentiment) has ignored the foreign aspect and treated such corporations as involving no considerations different from those applicable to domestic corporations.

So far as the oil industry in Canada is concerned, the provincial regimes, which administer the petroleum resources, deal with the producing companies, Canadian and foreign alike, domestic or foreign capital notwithstanding, oblivious to any consideration which the foreign nationality of producing companies may entail.

Indeed, most provincial officials would be surprised to learn that their dealings with a foreign oil company concerning mineral rights, should they be in derogation of acquired rights, could give rise to diplomatic intervention at Ottawa on behalf of the foreign oil company and even to claims under international law by the foreign country against Canada for a "denial of justice."²¹

A UNIQUE CANADIAN SOLUTION

In the preface to his study of *Permanent Sovereignty Over Oil Resources*,²² Muhamad A. Mughraby states: "On the municipal level most

18. Thompson, *Petroleum Land Policies Contrasted*, 36 U. COLO. L. REV. 187, 193 (1964).

19. See note 9 *supra*.

20. See note 29 *infra*.

21. *The Status of Permanent Sovereignty over Natural Wealth and Resources*, note 2 *supra*, § 100 at p. 100:

Arbitrary annulment of a contract-concession by executive action has, in some cases, given rise to international responsibility. "Denial of justice" has sometimes been imputed based on the failure of the Government to subject itself to some impartial proceedings in its own established tribunals prior to giving effect to the annulment and also on the patent uselessness of the claimant's seeking judicial redress after the event.

22. The Middle East Research and Publishing Center, Beirut, Lebanon, 1966.

legal systems of oil producing countries have failed to develop effective bodies of rules to control and regulate relations with oil concessionaires, thereby leaving the oil concession document itself as the controlling regime." Mughraby's concern is that the Middle East oil concession document, regarded as a contract, entrenches for a long duration, terms of exploitation of petroleum which a new and enlightened government considers to be detrimental to the public interest. His complaint is that the municipal law in the Middle East has provided no legal means for modifying these terms to make them responsive to the public interest.

In this paper, it is claimed that the oil-producing jurisdictions in Canada have developed a legal mechanism for controlling oil agreements so that the relationship between the government and the oil company can be made responsive to changes which the public interest dictates. This mechanism is a clause in oil agreements requiring the oil company to accept as binding all legislative and regulatory changes which may be enacted or promulgated from time to time in the future.

This claim justifies the analysis which follows. But this legal mechanism must not be given an exaggerated role in terms of sovereignty over oil resources. Legal capabilities do not exist in a vacuum. For a government to reserve the legal power to modify the terms of oil agreements means little if the use of the power impairs the economic viability of the petroleum industry.²³ In the end, the worth of this legal mechanism must be measured in terms of the willingness of foreign investors to participate in the petroleum industry on conditions acceptable to an informed and responsible government.

With this background, the Canadian approach to the conflict between sovereignty and security of tenure is now presented. As might be expected, it is necessary to begin with historical materials. First, an examination will be made of legislative attempts to exclude foreigners from petroleum exploration and development in Canada. Then this mechanism will be analyzed to show that it has subjected all petroleum companies, foreign included, to changes which the public interest has dictated from time to time.

EXCLUSION OF FOREIGNERS FROM PETROLEUM EXPLORATION AND DEVELOPMENT

It was the 1914-18 war which first made North Americans con-

23. Mughraby refers to the nationalization of the Iranian oil industry in 1951 as a failure. He says: "It is beyond dispute that the national governments cannot, at present, afford either the capital, the know-how or the marketing outlets essential for disposing of the oil produced. Hence, it is not a workable solution for many years to come." MUGHRABY, note 2 *supra*, at 53-54.

scious of a national interest in the exploitation of petroleum resources. By then it was recognized that great navies and merchant marines depended on oil-powered ships. In Canada, a regulation was promulgated in 1910 which stipulated that if, in the opinion of the Minister of the Interior, petroleum was required for the use of His Majesty's Canadian navy, then the Minister should have the right of pre-emption of all petroleum production from Crown lands at a price to be agreed, or failing agreement, to be fixed by the Exchequer Court of Canada.²⁴ In the United States, in 1909, the Secretary of the Interior was urging President Taft to support legislative action which would conserve the petroleum supply in public domain lands for the needs of the navy,²⁵ and in 1912 two naval petroleum reserves were created out of the public domain by executive order.²⁶

In Canada, the threat of war brought the first restriction on entry onto public lands for petroleum exploitation. On January 19, 1914, section 40 of the petroleum regulations was enacted providing that a company acquiring by assignment or otherwise a lease "shall at all times be and remain a British company, registered in Great Britain or Canada and having its principal place of business within His Majesty's Dominions and the chairman and majority of board shall at all times be British subjects and the company shall not at any time be or become directly or indirectly controlled by foreigners or by a foreign corporation."²⁷

Shortly after the war, the public interest was once more directed to the stimulation of exploration. The Minister's advisers reported in 1920 that "Whereas s. 40 does not give to the Government of Canada any more effective control over oil than if the provision had not been inserted in the regulations, and because this restriction discourages foreign capital so essential to the exploration and testing of vacant Dominion lands thought to contain oil," therefore section 40 should be re-enacted to stipulate merely that "Any company acquiring by assignment or otherwise a lease under the provisions of these regulations shall be a company

24. P.C. 1951 of Oct. 12, 1910.

25. Prior to the withdrawal orders, R. A. Ballinger, Secretary of the Interior, wrote to President Taft under date of September 17, 1909, stating the navy's needs:

The six largest battleships in commission or under construction are equipped for the use of either oil or coal and the fourteen latest destroyers use oil exclusively.

The Navy has a further interest in the conservation of the petroleum supply by reason of the absolutely necessary use of petroleum products for lubrication.

The time appears opportune for legislative action that will assure the conservation of an adequate supply of petroleum for the Government's own needs. . . .

26. No. 1 on Sept. 2, 1912, and No. 2 on Dec. 13, 1912.

27. Section 40 of *General Petroleum Regulations*, P.C. 154, Jan. 19, 1914.

registered or licensed in Canada and having its principal place of business within His Majesty's Dominion."²⁸ This provision has been carried forward to current legislation, so that since the transfer of natural resources from the federal government to the provincial governments in 1930, the Alberta regulations and statutes as a provincial example, have stipulated only that foreign companies be registered in Alberta to be entitled to receive grants of petroleum rights from the Crown.²⁹

Meanwhile, in the United States, the congressional debates leading to the enactment of the Mineral Leasing Act, 1920, included sharp contention about the role of foreigners on the public domain. The Chairman of the Senate Committee on Public Lands reported that the Senate bill contained the following provision:

Provided, That no alien shall, by stock ownership or otherwise, own any interest in a lease acquired under the provisions of this act, except as hereinafter provided, and all certificates for stock hereafter issued in any corporation having such a lease shall specifically and clearly show this provision on the face thereof.

His comment was that "[T]his proviso was not put in the bill without the most serious consideration. . . . All men know that the control of oil in a country means a control of the commerce of that country."³⁰ As referred to the House of Representatives, this proviso was changed, so that section 1 of the bill now declared that the public domain minerals were to be subject to disposition:

[To] citizens of the United States, or to any associations of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof . . . *Provided*, that no alien shall, by stock ownership or otherwise, own any interest in a lease acquired under the provisions of

28. P.C. 105, Jan. 29, 1920.

29. THE MINES AND MINERALS ACT, 1962, 1962 (Alta.) c. 49, § 44:

(1) A corporation shall not acquire an agreement in whole or in part by application or transfer unless the corporation is

(a) registered under *The Companies Act* of the Province,
 (b) incorporated by an Act of the Province and approved by the Minister as a corporation that may acquire an agreement,
 (c) incorporated under the *Bank Act* (Canada),
 (d) a railway company incorporated under an Act of Canada,
 (e) a trust company registered under *The Trust Companies Act*, 1960, or
 (f) an insurance company licensed under *The Alberta Insurance Act*.

(2) No syndicate or other association of persons shall acquire an agreement in whole or in part by application or transfer in the name of the association unless it has been incorporated by or under an Act of the Province, and approved by the Minister as an association that may hold an agreement.

30. Senator Smoot, 58 CONG. REC. 4112 (1919).

this Act, except with a specific provision in such lease authorizing the President, in his discretion, to take over and operate such lease, paying just compensation to the owner. . . .³¹

However, in the House less chauvinistic attitudes prevailed. The House Committee on Public Lands amended the proviso "to avoid retaliatory action against America's investors in foreign countries." After all, "the citizens of the United States could largely offset such a result by their own operations in foreign countries [by hindsight, a gross understatement], or, if an acute situation ever developed, a general embargo against exportation would be a sufficient remedy."³² This House proposal carried the day, and appeared in section 1 of the Mineral Leasing Act, 1920, as:

And provided further, That citizens of another country, the laws, customs, or regulations of which, deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.³³

In Canada, forays into the field of restriction on foreign entry into petroleum operations have been occasional, fed by nationalist sentiment. When Prime Minister Diefenbaker was gaining his reputation as "anti-American" in recent years, a factor contributing to this characterization was the inclusion in the Canada Oil and Gas Land Regulations of 1961,³⁴ of a provision said to keep foreign investment out of the federally-controlled northern lands by ensuring that only Canadian citizens and corporations would be granted oil and gas leases. This patriotic provision read as follows:

- s. 55 (1) Upon application to the Minister, a permittee shall be granted an oil and gas lease.
- (2) An oil and gas lease shall not be granted under this section (a) to a person unless the Minister is satisfied that he is a Canadian citizen over twenty-one years of age, and that he will be the beneficial owner of the interest to be granted;
- (b) to a corporation incorporated outside of Canada; or

31. S. 2775, referred to House of Representatives on Sept. 4, 1919.

32. H.R. Rep. No. 398, 66th Cong., 1st Sess. (1919).

33. 30 U.S.C. § 181 (1952).

34. P.C. 1961-797 (am. P.C. 1963-408; P.C. 1961-1614), see 1 LEWIS & THOMPSON, CANADIAN OIL AND GAS, Fed. [4] (1957).

- (c) to a corporation unless the Minister is satisfied
 - (i) that at least fifty percent of the issued shares of the corporation is beneficially owned by persons who are Canadian citizens, or
 - (ii) that the shares of the corporation are listed on a recognized Canadian stock exchange and that Canadians will have an opportunity of participating in the financing and ownership of the corporation; or
 - (iii) that the shares of the corporation are wholly owned by a corporation that meets the qualifications outlined in subparagraph (i) or (ii) of this paragraph.

It is unlikely that this restriction has diminished foreign investment. In many cases it has merely caused a re-organization of the corporate forms by which international oil companies participate in the northern lands.³⁵ The requirement of listing on a Canadian stock exchange to gain the exception from the restriction has not proved difficult to meet, nor has it resulted in any substantial increase in Canadian ownership. In fact, the legislation has meant little more than that United States and other foreign oil companies that were operating in Canada through foreign-incorporated subsidiaries now operate through subsidiaries incorporated in Canada whose shares are listed on the Montreal, Toronto, or Calgary stock exchanges, but are too closely held to be traded on a day-to-day basis.³⁶

In summary, these legislative provisions for the exclusion of foreigners from petroleum exploration and development in Canada have served more as palliatives to patriotism than as purposeful attempts to

35. For example, in 1962 the operations of "Mobil Oil of Canada Ltd.," a Delaware corporation, were transferred to "Socony Mobil Oil of Canada, Ltd.," incorporated pursuant to the laws of Canada. This company has now changed its name to "Mobil Oil Canada, Ltd."

36. The restriction may even have had the reverse effect of increasing foreign investment. To qualify for inclusion in a consolidated return with the parent company for United States income tax purposes, it would be necessary for a Canadian-incorporated subsidiary to show that its northern operations were essential to its overall operation in Canada, and commitments as to the amounts of expenditures to be made on the northern lands would have to be given to the Bureau of Internal Revenue, thereby increasing the investment which the company might otherwise have been prepared to make.

keep the oil resources as a private preserve for Canadian capital. They demonstrate that even in a country as developed as Canada, the requirements for risk capital demand foreign participation in the petroleum industry.³⁷

MECHANISM FOR KEEPING OIL AGREEMENTS RESPONSIVE TO
PUBLIC INTEREST

The Crown as Lessor

Her Majesty the Queen represents the state in Canada, either in the right of Canada with respect to federally-owned petroleum lands, or in the right of a province with respect to provincially-owned petroleum lands.³⁸ Dispositions of petroleum rights are made under a system of enabling statutes and general regulations passed pursuant thereto, the forms of dispositions being exploratory permits, licenses, reservations, and development leases.³⁹ In the Province of Alberta, the grantor of a state lease is:

Her Majesty the Queen in right of Alberta, hereinafter called "Her Majesty," represented herein by the Minister of Mines and Minerals of the Province of Alberta, hereinafter called the "Minister."

Such a lease is called a "Crown lease." Like most leases, the Crown lease operates both as conveyance and contract, containing the usual anatomy of a deed (grant, habendum and reddendum) together with a schedule of covenants and agreements. Using the word "Crown" to signify Her Majesty, the position of the Crown as proprietor and as contracting party must first be stated in general terms.

G. A. Holland, in an article entitled *The Federal Case*,⁴⁰ argues that the Crown, as proprietor of lands, has no power to dispose of mines and minerals otherwise than in accordance with the provisions of the provincial or federal legislation dealing with the disposition of Crown mineral rights. He bases his argument on the rule that the prerogative rights of the Crown may be abrogated or abridged by statute, and that, *a fortiori*, the ordinary proprietary rights of the Crown may be annulled by the

37. The present government of Canada is reported to be taking a more positive approach by offering subsidies to Canadian companies of 40% of exploration costs in northern lands. *The Edmonton Journal*, September 7, 1966, p. 43.

38. For a fuller treatment of this subject, see Thompson, *supra* note 10, at 214.

39. Canadian oil and gas statutes and regulations are published in current text in 2, 3 LEWIS & THOMPSON, *op. cit. supra* note 34.

40. 3 ALTA. L. REV. 393 (1964).

legislature.⁴¹ There seems no doubt that legislative provisions must be complied with by government when dealing with Crown minerals. Some doubt remains whether the proprietary rights of the Crown authorize the imposition by the government of terms and conditions in mineral dispositions which, though not provided for in the legislation, are not inconsistent therewith, in the same way that an ordinary proprietor may impose such terms and conditions as he wishes not contrary to law.⁴²

With respect to contract, the position is that the Crown may enforce contractual rights against ordinary persons, and since the enactment of statutes modeled on The Crown Proceedings Act of 1947 (Great Britain), ordinary persons may, as of right and without fiat, obtain remedies for breach of contract against the Crown.⁴³

It has been held in England that it is not competent for the Crown to fetter its future executive action by contract,⁴⁴ but this doctrine has been criticized,⁴⁵ and in the case in which the doctrine was propounded, it is pointed out that the contract there in question was not a commercial contract, as to which "no doubt the Government can bind itself through its officers. . . ." ⁴⁶ There seems no limit on the power of the Crown to bind itself by contractual terms in dispositions of Crown minerals subject to the restrictions imposed by legislation.

In Alberta, such legislation on the one hand prohibits the sale of Crown minerals except under the authority of an Act of the legislature,⁴⁷ and on the other hand empowers the Lieutenant Governor in Council

41. The rule is stated in 7 HALSBURY (3rd ed.) § 465, as follows:

Where by statute the Crown is empowered to do what it might heretofore have done by virtue of its prerogative, it can no longer act under the prerogative, and must act under and subject to the conditions imposed by the statute; but the statute may expressly preserve the right to act under the prerogative.

42. The Crown's proprietary rights are probably no different from those of ordinary persons. If they are in any way special powers or privileges over and above those of ordinary persons, they would qualify as prerogative rights, but even these are subject to statutory restriction (see note 41 *supra*). Mr. Holland seems wrong in giving to the Imperial Crown Lands Act of 1702 the effect of depriving the Crown in Alberta of proprietary rights with respect to minerals because the Crown Lands Act was not likely intended to apply to lands in the colonies (see Lord Asquith of Bishopstone in *Attorney-General Alta. v. Huggard Assets Ltd.*, [1953] A.C. 420). However, the Alberta Mines and Minerals Act, 1962, controls the exercise of the Crown's proprietary rights in mines and minerals.

43. 10 & 11 Geo. 6, c. 44 (Imp.). The Canadian statutes are: *Alta.*, THE PROCEEDINGS AGAINST THE CROWN ACT, 1959 (Alta.) c. 63; *B.C.*, CROWN PROCEEDINGS ACT, R.S.B.C. 1960, c. 89; *Sask.*, PROCEEDINGS AGAINST THE CROWN ACT, R.S.S. 1953, c. 79; *Federal*, CROWN LIABILITY ACT, 1952-53 (Can.) c. 30.

44. *Rederiaktiebolaget Amphitrite v. The King*, [1921] 3 K.B. 500 (Rowlatt, J.).

45. *Robertson v. Minister of Pensions*, [1949] 1 K.B. 227 (Denning, J.), criticized in turn in *Howell v. Falmouth Boat Construction Ltd.*, [1951] A.C. 837 (Simonds, L.J.).

46. *Rederiaktiebolaget Amphitrite v. The King*, [1921] 3 K.B. 500, 503 (Rowlatt, J.).

47. MINES AND MINERALS ACT, 1962, 1962 (Alta.) c. 49, § 20.

(the cabinet) to authorize the Minister to make or enter into an agreement applicable to any special case for which no provision is made by the Act.⁴⁸ In result, under cabinet authority, the Minister can make special agreements with respect to the disposition of mines and minerals. Such special agreements are rare exceptions, dealing only with cases that are not provided for in the general regulations.⁴⁹ Because the general regulations deal comprehensively with all types of petroleum substances and all kinds of operations, the rule is that all oil companies operate under terms and conditions of general application, and the government does not grant special concessions.

The Royalty Provisions

Through the years the imposition of gross royalty has been a principal means of providing benefit to the state in Canada in return for production of oil from Crown petroleum resources.⁵⁰ Prior to 1930 the Crown petroleum lands in western Canada were federally owned and administered. In that year their ownership and administration were transferred to the respective provinces.⁵¹

A study of the royalty provisions during the period of federal administration by the Department of the Interior prior to 1930 and during the provincial administrations since then will introduce the mechanism by which even royalty rates are varied as the public interest requires.

The first federal mining regulations promulgated in 1884⁵² did not differentiate petroleum from other minerals. These regulations applied "to all Dominion lands containing gold, silver, cinnabar, lead, copper, petroleum, iron, or other mineral deposit of economic value, with the exception of coal." Provision was made for the grant of forty-acre mineral patents on proof of actual discovery. In 1887 petroleum was singled out with iron ore for special treatment by way of enlarged locations of 160 acres.⁵³ By 1890 it was acknowledged that the requirement of an actual discovery "may operate to retard the development of lands supposed to contain petroleum," and entry might now be made on affi-

48. *Id.*, § 14(b).

49. For example, the Minister of Mines and Minerals in Alberta makes special agreements under this authority in order to dispose of Crown minerals to a farmer who is prepared to operate for his personal use an oil or gas well which is not a commercial producer.

50. Other means are fees, rentals and bonus payments. In addition, oil companies are subject to the same local and federal taxes (including income taxes) as other commercial and mining companies in Canada.

51. See note 69 *infra*. For a detailed statement of this transfer of natural resources from federal to provincial ownership, see Thompson, *supra* note 10, at 214.

52. P.C. 443, March 7, 1884.

53. P.C. 1976, Oct. 5, 1887, Reg. 13.

davit "that from indications he [the locator] verily believes that petroleum exists on the location applied for. . . ." Within five years a mineral patent could be earned by proof of production of petroleum in paying quantities.⁵⁴ The first patents reserved to the Crown a royalty of two and one-half percent on sales of minerals,⁵⁵ but in 1887 a realism not always prevalent in public service prompted the draughtsman of a regulation repealing the reservation of royalties to explain:

The attempt to collect royalties upon gold and silver has proved abortive in British Columbia, as has every form of collecting the same impost in Australia. No charge of the kind being imposed outside the Railway Belt in British Columbia or in the neighboring States of the American Union, it would be impossible to enforce it in our territory. A revenue of equal value, but more easily collectible, and less offensive, because no inquisitorial proceedings are necessary for its collection, can be obtained from the fees required to be paid annually until the issue of patent; and the territorial revenue in the North-West might be largely augmented, as in British Columbia, by requiring miners and prospectors to take out licenses.⁵⁶

The first regulation to deal specially with petroleum was passed in 1898.⁵⁷ It permitted the reservation of 640 acres for six months for prospecting and provided for the sale of the land at one dollar per acre if oil in paying quantities should be found. Royalty to the Crown was reserved at the rate of two and one-half percent. This regulation was replaced by what might be described as the first general petroleum regulations in 1901.⁵⁸ The royalty rate was changed to the formula which has since, in various forms, become the keystone of policy to ensure that the terms of oil agreements can be amended from time to time as conditions and the public interest require. That formula provided that the royalty should be at "such rate as may from time to time be specified by Order in Council." Hence, with respect to royalty, it was then established that there would be no entitlement on the part of an operator to payment only of a fixed royalty of long duration. Instead, such an important element in the agreement as royalty would be left to be stipulated from time to time by the government through the instrumentality of an

54. P.C. 2774, Dec. 18, 1890.

55. P.C. 443, March 7, 1884, Reg. 81.

56. P.C. 1976, Oct. 5, 1887.

57. P.C. 1822, Aug. 6, 1898.

58. P.C. 898, May 31, 1901.

order-in-council.⁵⁹

Possibly this significant change in the regulations was palatable to oil prospectors because in 1901 no royalty was being charged, and, in the infant stage of the industry, with no oil then being produced in western Canada, there was little prospect that a royalty would be exacted in the foreseeable future. Nevertheless, the government must have wished to allay any reluctance on the part of investors which this open-ended royalty provision might induce, for, when introducing a leasing system in the place of patents in 1910,⁶⁰ the regulations continued the royalty on natural gas "at such rate as may from time to time be specified by Order in Council,"⁶¹ but, as to petroleum, gave the assurance that :

[N]o royalty shall be charged upon the sales of petroleum acquired from the Crown under the provisions of the Regulations up to the 1st day of January, 1930, but provision shall be made in the leases issued for such rights that after the above date the petroleum products of the location shall be subject to whatever regulations in respect of the payment of royalty may then or thereafter be made.⁶²

Accordingly, the first petroleum and natural gas leases issued by the Department of the Interior prescribed a royalty as follows :

[A]nd also rendering and paying therefor unto His Majesty a royalty at such rate as may from time to time be prescribed by Order of the Governor General of Canada in Council on natural gas products taken out of the said lands, *and also such royalty on petroleum products taken out of the said lands from and after the year 1930 as the regulations then and thereafter in force may prescribe.* . . . (Emphasis added.)⁶³

The purpose of the new leasing system was explained by the department in retrospect, as follows :

The principal differences between these regulations and those preceding were the substitution of leasing for selling and the acceptance of expenditure in satisfaction of rental. By inserting the latter provision, the Dominion recognized the heavy cost

59. An order-in-council in Canadian parliamentary practice is a cabinet decree made pursuant to legislative mandate. When signed by the Prime Minister and gazetted, it has the force of law. The system is described in Thompson, *Petroleum Land Policies Contrasted*, 36 U. COLO. L. REV. 187, 211-13 (1964).

60. P.C. 414, March 11, 1910.

61. *Id.* at Reg. 24.

62. *Id.* at Reg. 23.

63. Form no. 253-483.

to the lessee of installing machinery and carrying on drilling operations, and in pursuance of the policy of encouraging development relieved him of the necessity of paying rental in cash for the second and third years. *On the same principle the charging of royalty was deferred for approximately twenty years to enable a petroleum industry to be established.* As a matter of fact, it was not until nearly the end of this period that oil in commercial quantity was obtained in the Turner Valley area. (Emphasis added.)⁶⁴

Notwithstanding this solicitude for an infant industry, the federal administrators apparently rued their generosity, for in 1919 they withdrew this twenty-year moratorium on royalties by an order-in-council which re-enacted Regulation 23 of 1910. Now, instead of the moratorium, the regulations provided that:

The sales of the products of any location acquired under the provisions of these regulations shall be subject to the payment to the Crown of such royalty thereon as may from time to time be fixed by the Governor-in-Council. . . .⁶⁵

This open-ended provision continued in the leasing regulations down to 1930 when the provincial authorities took over the administration of Crown resources, and has been continued in provincial regulations and statutes in Alberta and Saskatchewan to this date.⁶⁶ More will be said later in this article as to its operation in current oil and gas agreements.⁶⁷

Though the moratorium was lifted, no royalty was exacted during the period of federal administration down to 1930. It was this factor, together with other evidences of largesse in the treatment of lessees by the federal department,⁶⁸ that contributed to provincial demands in the decade prior to 1930 for the transfer of natural resources in the western provinces from federal to provincial administration. The political settlement, which resulted in the transfer agreement of 1930,⁶⁹ included pro-

64. *Information Prepared for Dominion Counsel*, J. McGregor Stewart, K.C., by Department of the Interior; Lands, Northwest Territories & Yukon Branch, Ottawa, December 30, 1934, Vol. J, ALBERTA RESOURCES COMMISSION, 1934.

65. P.C. 2433, Dec. 3, 1919.

66. MINES AND MINERALS ACT, 1962 Alta. c. 49, § 31(2); THE MINERAL RESOURCES ACT, 1959 Sask. c. 84, § 17(1).

67. See notes 107-11 *infra* and accompanying text.

68. For example, defaults in payments of rentals and in performance of work commitments were normally waived by the Department of the Interior, see, Dominion exhibits 17D and 18D in Vol. V. *Information Prepared for Dominion Counsel*, ALBERTA RESOURCES COMMISSION, 1934.

69. ALBERTA NATURAL RESOURCES ACT, 1930 Can. c. 3, 1930 Alta. c. 21; SASKATCHEWAN NATURAL RESOURCES ACT, 1930 Can. 1. 41, 1930 Sask. c. 87; MANITOBA NATURAL

vision for the establishment of Royal Commissions for Alberta and Saskatchewan before which the federal authorities would give an account of their stewardship of resources.⁷⁰ The Commissions could then determine the compensation which the federal government should pay to the provinces for the period of federal administration.⁷¹

In this atmosphere of critical appraisal by the provinces of federal policies with respect to Crown lands, it is not surprising that the provincial authorities immediately established regulations requiring the payment of royalties—in Alberta, a five percent royalty for a period of four years, a ten percent royalty for the following five years, and a twelve and one-half percent royalty thereafter on production from Crown leases acquired under the petroleum and natural gas regulations.⁷²

Nor is it surprising that those who had obtained patents or leases of Crown minerals during the federal administration should anticipate more grasping landlords under the provincial regimes, and should ask federal authorities to include “savings” clauses in the 1930 transfer agreements.

The federal authorities were mindful of the commitments which they had given during their administration, and they, too, were distrustful of the willingness of the provincial regimes to honor them. Therefore, they used their bargaining position to exact from the provinces undertakings that:

2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown

RESOURCES ACT, 1930 Can. c. 29, 1930 Man. c. 30; BRITISH NORTH AMERICA ACT, 1930 Imp. c. 26.

70. Section 1 of the schedule to the ALBERTA NATURAL RESOURCES ACT reads:

1. In order that the Province may be in the same position as the original provinces of Confederation are in virtue of section 109 of The British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this Agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this Agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said land, mines, minerals, or royalties before the coming into force of this Agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

71. Alberta Natural Resources Commission, 1934.

72. O.C. 687/31, June 18, 1931 (Alta.).

lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interest therein, irrespective of whom may be the parties thereto.

By 1936, following a change of government in Alberta,⁷³ and with the Turner Valley field providing the first flush production of oil in the province,⁷⁴ the royalty regulations were revised to provide for a ten percent royalty on production, including products obtained by separation, absorption, etc. This new regulation was to apply to "any location acquired under the provisions of the regulations for the disposal of petroleum and natural gas rights in provincial lands, *whether made by Canada or the Provinces. . . .*" (Emphasis added.)⁷⁵

Thereafter, royalty regulations in Alberta and Saskatchewan attempted to carry provincial jurisdiction as far as possible in the way of imposing royalties on Crown grantees who had acquired their rights during the federal period.⁷⁶

73. The first Social Credit government was elected to office in August, 1935.

74. Turner Valley Royalties No. 1 well came in on June 16, 1936, beginning the fourth phase of the Turner Valley field which, by 1939 established a yearly production of 7,594,411 barrels. See F. K. Beach and J. L. Irwin, *The History of Alberta Oil*, The Dept. of Lands and Mines, Alberta.

75. O.C. 440/36, March 30, 1936 (Alta.).

76. The MINES AND MINERALS ACT, 1962 Alta. c. 49:

5. Notwithstanding anything in any agreement or certificate of record made or entered into
 (a) under the former Act or the regulations thereunder, or
 (b) under the *Provincial Lands Act* or the *Dominion Lands Act* or the regulations under those Acts and relating to a mineral,
 every such agreement or certificate of record and any renewal or re-issue thereof is in every respect subject to this Act and the regulations made under this Act.

31. *Royalty*

(1) A royalty is reserved to the Crown in right of Alberta on the mineral that may be won, worked, recovered or obtained pursuant to any agreement or certificate of record made or entered into under this Act.
 (2) The royalty, to be computed, levied and collected on the mineral won, worked, recovered or obtained pursuant to any agreement or certificate of record made or entered into under this Act, the former Act or *The Provincial Lands Act* shall be the royalty prescribed from time to time by the Lieutenant Governor in Council.
 (3) Where the payment of a royalty has been reserved to the Crown in right of Canada in any patent, agreement for sale, lease or other agreement that conveys a mineral or the right to win, work, recover or obtain the same, there is payable to the Crown in right of Alberta,

These provincial attempts to foist royalties on Crown lessees were, expectedly, resisted, and there followed a series of court cases construing the effect of the "savings" clause in the Natural Resources Acts. The decisions in these cases, at the highest level of authority, provide the only judicial pronouncements in Canada dealing with a clash between government policy and the acquired rights of petroleum producers.

The Case Law

The issue of security of the acquired rights of the Crown grantees arose in the royalty cases in the following way: the province prescribed a royalty by regulation and sought to exact payment of it from a Crown grantee who had acquired his rights under the federal administration prior to 1930; the Crown grantee resisted payment on the ground that the attempt to exact royalty was a violation of the saving provision in section 2 of the schedule of the Natural Resources Act; the province answered that, while no royalty had been levied during the federal regime, the rights of the Crown grantee prior to 1930 were subject to regulations prescribing royalties which might from time to time be made, and, therefore, the province, when now prescribing a royalty, was not doing anything which the federal authorities could not have done prior to the transfer of natural resources. In this answer lies the contention that the rights of the Crown grantee were subject to variation from time to time by unilateral regulatory action of the grantor, the Crown. This contention requires examination.

In *Attorney-General for Alberta v. Magestic Mines Ltd.*⁷⁷ the plaintiff's mineral patent, issued in 1908, contained the following words: "Yielding and paying unto Us and Our Successors, the royalty, if any, prescribed by the regulations. . . ." The province argued that the phrase "if any prescribed" must refer to the future. Dismissing the province's claim to royalty, Mr. Justice Hudson speaking for the Supreme Court of Canada, said:

and there shall be computed, levied and collected.

- (a) the royalty prescribed from time to time by the Lieutenant Governor in Council in accordance with the Transfer Agreement, or
- (b) the royalty at the rate in effect immediately prior to the coming into force of the Transfer Agreement.

THE MINERAL RESOURCES ACT, 1959 Sask. c. 84, § 17(3) provides:

If and in so far as any of the provisions of this section are at variance with any of the provisions of the agreement between the Government of Canada and the Government of Saskatchewan, set forth in the schedule to chapter 87 of the statutes of 1930, as amended, the provisions of the said agreement as amended, govern but this section shall nevertheless stand and be valid and operative in all other respects.

77. [1942] S.C.R. 402.

The real question in the appeal is whether or not the provisions of the patent were such as to reserve to the Crown a right to impose new royalties in the future. I think that if the Crown, like any other vendor, wishes to reserve such rights, such reservations must be expressly stated.

Parliament, and the Legislature within its jurisdiction, of course, have power to impose new taxes, but the imposition of a royalty on lands or goods of a subject by Executive order could be justified only by the clearest, and most definite authority from the competent legislative body.⁷⁸

The requirement of clear and explicit language had been stated by Mr. Justice Duff in the earlier Supreme Court case of *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*.⁷⁹ There, the issue did not concern royalties, but whether or not the province could impose a gas conservation scheme on lessees who had acquired their rights during the federal regime. Section 1 of the regulations of 1910 conditioned a renewal on a showing by the lessee that "during the term of the lease he has complied fully with the conditions of such lease and with the provisions of the Regulations in force from time to time during the currency of the lease." Denying the province's contention that the lessee was bound by the lease terms to comply with the new gas conservation regulations, Mr. Justice Duff said:

It is difficult, no doubt, to think it could have been intended that the lessee's right of renewal should be conditioned upon the performance, during the term antecedent to its renewal, of obligations which the lessee was not required to observe as contractual terms of the lease. But to us it seems clear that, if it had been intended to incorporate, as one of the terms of the lease, a stipulation that all future regulations touching the working of the property should become part of the lease as contractual obligations, that intention would have been expressed, not inferentially, but in plain language.⁸⁰

Apparently, the words of a patent issued in 1913 "Yielding and paying unto Us and Our Successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of

78. *Id.* at 405.

79. [1933] 4 D.L.R. 545.

80. *Id.* at 556. Mr. Justice Duff's approach to the problem is followed with similar results in the dissenting judgment of Mr. Justice Estey in *Attorney-General for Sask. v. Whiteshore Salt and Chemical Co.*, [1955] 1 D.L.R. 241, 258.

our Governor in Council" were plain enough. In *Huggard Assets Ltd. v. Attorney General for Alberta*,⁸¹ the Privy Council held that such words authorized the province, as standing in the shoes of the Dominion, to levy royalties by a regulation, or a succession of regulations, made after the date of the patent. Because this power was reserved in the patent, the action of the province was not a violation of the savings provision in section 2 of the schedule to the Natural Resources Act. Nor was the reservation of a royalty which might be varied in the future at the whim of the grantor void for uncertainty.⁸²

In summary the Crown agreement by express and plain language can provide that the rights conferred on the grantee shall be subject to change from time to time in accordance with regulations made by the grantor (the Crown) in its legislative capacity.⁸³

This summation recognizes the Crown as enjoying two capacities, one as legislator exercising authority to regulate which is delegated to the lieutenant-governor in council (the cabinet) by the Legislative Assembly, and the other as proprietor making a conveyance of minerals and contracting with respect thereto through the office of the Minister of Mines and Minerals and his Deputy Minister. This dual position of the Crown has been expressly noted in the cases. Mr. Justice Duff, in the *Spooner* case, first held that nothing in the 1928 order-in-council bringing into force section 29 of the regulations (dealing with the waste of gas) gave section 29 retroactive legislative effect so as to modify leases granted under the regulations of 1910 and 1911. He then added: "The other aspect, from which this point must be considered, presents for examination the question whether s. 29 constitutes a part of the contract between the Crown and the lessee by force of the contract itself."⁸⁴

In *Attorney General for British Columbia v. Deeks Sand & Gravel Co.*⁸⁵ the distinction between the two capacities of the Crown in contract

81. [1953] A.C. 420, 8 W.W.R. (NS) 561, [1953] 3 D.L.R. 225 (P.C.). This case was one of the last appeals to the Privy Council before its authority as a final appellate tribunal for Canada in civil causes was vested in the Supreme Court of Canada.

82. The opinion of Their Lordships on this second point was expressed obiter.

83. A similar result has been reached in Western Australia where the government in 1886 contracted to grant railway subsidy lands in fee simple "in accordance with and in the form prescribed by the Land Regulations of the Colony." The Privy Council held that the agreement "imposes on the Crown no more than an irrevocable obligation to grant a fee simple of the surface of the land in whatever might be the form current at the date when any particular grant was called for, without the addition of a further obligation to ensure that the legislature will not at any time during the currency of the contract alter the prescribed form of grant." In this case, a statute of 1936 reserved petroleum to the Crown. See *Midland Ry. of W. Australia, Ltd. v. W. Australia*, [1956] 3 All E.R. 272 (P.C.).

84. [1933] 4 D.L.R. 545, 553.

85. [1956] S.C.R. 336.

and in legislation was carried to the point where an agreement between the Crown and the company was upheld although legislation of similar purport would have been ultra vires as violative of the Railway Belt Agreement (similar to the Natural Resources Agreements for Alberta and Saskatchewan). The ruling was that the Crown had power to impose royalties under a compromise agreement whereby a Crown lease was renewed "subject to adjustment for each successive five year period both with regard to rental and royalty," notwithstanding that the Crown could not have validly imposed royalties by statute or regulation in view of the savings clause in the Railway Belt Agreement. In effect, a claim (the right to prescribe a royalty by statute or regulation) which might subsequently be determined to be unfounded in law, could validly form the basis of a compromise agreement by the Crown just as it could by any ordinary contracting party.

In light of the case authority, which has upheld at the highest level the variable royalty clause in the face of the savings clause in the Natural Resources Agreements, it is clear that domestic law in the Canadian jurisdictions recognizes as binding by force of contract any clause in an oil agreement with the Crown that subjects its terms and conditions to any changes subsequently to be made by statute or regulation. Legal advisers to the Crown would have been remiss in their responsibilities not to have advocated use of this technique of legislation by contract were there no firm resistance from grantees.

To complete this paper, it is proposed to examine the use which has been made of such clauses, and to comment on their legal efficacy as well as their role in balancing the claims of sovereignty and of acquired rights.

The Federal Leases Prior to 1930

Beginning with the first lease form, adopted under the regulations of 1910 which introduced the leasing system, the development of three parts of the lease reveals the evolution of this phenomenon of contract by legislation. These three parts are:

1. Renewal:

[R]enewable for a further term of twenty-one years provided the lessee furnishes evidence satisfactory to the Minister of the Interior to show that during the term of the lease he has complied fully with the conditions of such lease and with the provisions of the regulations under which it was granted. . . .

2. Royalty:

[A]nd also rendering and paying therefor unto His Majesty a royalty at such rate as may from time to time be prescribed by Order of the Governor General of Canada in Council on natural gas products taken out of the said lands, and also such royalty on petroleum products taken out of the said lands from and after the year 1930 as the regulations then and thereafter in force may prescribe. . . .

3. Compliance with laws:

That the lessee shall and will well, truly and faithfully observe, perform and abide by all the obligations, conditions, provisos and restrictions in or under the said regulations imposed upon lessees or upon the said lessee.

In 1914, the "compliance with laws" provision was reinforced with the following additional clause:

And provided further and it is hereby declared that this lease is subject in all respects to the regulations of the Governor in Council, relating to petroleum, and to any regulations that may be issued in amendment of and in substitution therefor.

In 1920 the royalty provision was altered to read:

[A]nd also rendering and paying therefor unto His Majesty a royalty at such rate as may from time to time be prescribed by Order of the Governor General of Canada in Council on the products taken out of the said lands. . . .

During the period of federal administration, this 1920 alteration was the final change in the lease form which had any bearing on the question of variation of the lease contract in accordance with changing statutes and regulations. Apart from the matter of royalties, the position of the lessee at this time may be summed up as secure in the usual sense that the position of a contracting party is safeguarded, namely, that the ambit of his rights and obligations is expressly and finally delimited in the contract document. Of the "renewal," "royalty" and "compliance with laws" provisions, only the "royalty" provision referred to future regulations. Only the additional "compliance with laws" provision, inserted into the lease in 1914, suggested that the lessee might be expected to comply with not only current but also future regulations. But applying the strict approach to construction of such clauses which is required by the case law, it is probable that this additional clause had no

more effect than to stipulate that the lease was subject to future regulations, *if such regulations were, proprio vigore, applicable thereto*. Stating the matter another way, if a future regulation should be made applicable retroactively to existing agreements by the order-in-council bringing it into force, then the clause made it clear that the lease was subject to it. The binding force of the new regulation would be derived from its status as legislation and not by reason of the provision in the lease, which would merely serve as notice to the lessee that his rights were no different from those of any other contracting party who runs the risk under Canadian law of having his rights adversely affected by retroactive legislation. Canadian constitutional law, under the rubric of supremacy of parliament, does not recognize a fundamental right to due process or to the continuance of acquired rights notwithstanding the will of the legislature. But like any other contracting party whose rights are retroactively affected by legislation, the lessee would have the benefit of a political climate which views retroactive legislation as confiscatory, to be resorted to only in extreme cases, and of legal rules which require retroactive legislation to be given a strict construction and to carry with it an implied right to compensation should there be a deprivation of property.⁸⁶ As an example of the strict construction given to purported retroactive legislation, Mr. Justice Duff, in the *Spooner* case,⁸⁷ refused to find in the 1928 order-in-council any language which required the court to hold that it was intended to apply retroactively to leases granted under the 1910 regulations.

Alberta Leases After 1930

The transition from federal to provincial administration in 1930 following the Natural Resources Acts⁸⁸ caused few immediate changes to be made in either the petroleum and natural gas regulations⁸⁹ or in the lease forms. The first Alberta lease continued the same "renewal" and "royalty" clauses as in the Dominion lease. Only the "compliance with laws" provisions revealed the touch of a new draughtsman. The first such "compliance" provision read:

[T]he lessee will at all times perform, observe and comply with all the provisions of the regulations made pursuant to The Provincial Lands Act and of the regulations made pursuant to The

86. Even this right to compensation may be taken away by express language in the expropriating statute.

87. [1933] 4 D.L.R. 545, 553.

88. See note 69 *supra* for the statutory references.

89. O.C. 669-31, June 18, 1931, made under the authority of the PROVINCIAL LANDS Act, 1931 (Alta.) c. 43, basically continued the federal regulations.

Oil and Gas Wells Act, 1931, or any regulations which may at any time hereafter be made under the authority of the aforesaid Acts or either of them, or of any Act passed in substitution therefor and all such regulations shall be deemed to form a part of these presents which shall be read and construed as if such regulations had been set out and incorporated herein.

The second :

[I]n construing this lease and the regulations which are expressed to be incorporated herein, the same shall be read and construed as if all regulations had been set out herein and been made part and parcel hereof, and in the event of there being any conflict between the provisions of any regulation and any provision set out in this lease, other than the covenants on the part of the lessee for the payment of rents and royalties, the provisions of the regulations shall prevail.

Obviously these changes in wording created substantive changes in the effect of the lease contract. The "compliance with laws" provisions not only stipulated that the lease was subject to applicable laws, but also incorporated as part of the contract the present and future regulations made under the Provincial Lands Act⁹⁰ and the Oil and Gas Wells Act.⁹¹ A legal consequence was that future petroleum and natural gas regulations, even though not applicable retroactively as legislation, would bind the lessee by contractual force. Now it was true that the terms and provisions binding under the lease contract could be altered from time to time by the incorporation by reference into the contract of the unilateral changes in the regulations made by the lessor. Reading these two provisions together, however, a court would probably conclude that the exception of "covenants on the part of the lessee for the payment of rents and royalties" to the stipulation that regulations would prevail over the lease provisions in the event of conflict, gave a protected status to the duties to pay rent and royalties so that these obligations as stated in the lease would be immune to change by force of the contract.

In 1948, the provincial grip was tightened.⁹² The "compliance with laws" provisions were divided to deal separately with the regulations

90. 1931 (Alta.) c. 43.

91. *Id.* at c. 46.

92. A revision and consolidation of the petroleum and natural gas regulations was established by O.C. 308-48 of March 29, 1948. These regulations were the last issued as a complete code for the disposal of the Crown's petroleum and natural gas. Thereafter the subject was dealt with in the statute itself, with regulations supplementing the statutory provisions. See THE MINES AND MINERALS ACT, 1962 (Alta.) c. 49, and in particular, Part V.

made under the Provincial Lands Act and those made under the Oil and Gas Wells Act, and they were expanded to deal with the subject matter covered by the second “compliance with laws” provision.⁹³ The “renewal” provision was bolstered to make clear that the renewal lease would be granted under the regulations in force at the time of renewal and that the right of renewal was conditioned on observance by the lessee of the regulations in force not only at the beginning of the lease but also from time to time during the currency of the lease.

Added for the benefit of the lessee was a provision in the *reddendum* clause stipulating that “the maximum royalty payable on the petroleum during the first term of this lease shall not exceed one-sixth of the gross recovery from the lands herein described.”⁹⁴

Alterations of style and clarity have occurred in these Crown lease clauses since 1948. They appear in the twenty-one-year lease form applicable under the Mines and Minerals Act prior to 1962 as follows:

1. Renewal:

[R]enewable for further terms each of twenty-one years so long as the location is capable of producing petroleum or natural gas in commercial quantity, provided the lessee furnishes evidence satisfactory to the Minister to show that during the term of the lease he has complied fully with the conditions of such lease and with the provisions of The Mines and Minerals Act in force from time to time during the currency of the lease. The lease and any such renewals thereof shall be subject to all such provisions of The Mines and Minerals Act and the regulations in force from time to time during their currency and each renewal shall be in accordance with the provisions of the said Act and the regulations in force at the time of the granting of such renewal.

2. Royalty:

[A]nd also rendering and paying therefore unto Her Majesty a royalty on all petroleum and natural gas taken from the said lands . . . at such rate as is now or may hereafter from time to time be prescribed by the Lieutenant Governor in Council. . . . The maximum royalty payable on the petroleum during

93. Nevertheless, this second provision was continued in the lease—a typical example of the conservatism of legislative draughtsmen. It was omitted from the lease form on the next revision.

94. This provision follows § 20(b)(i) of the Petroleum and Natural Gas Regulations, 1948, O.C. 308-48, March 28, 1948.

the first term of this lease shall not exceed one-sixth of the gross recovery from the lands herein described.

3. Compliance with laws :

That the lessee at all times shall perform, observe and comply with the provisions of The Mines and Minerals Act, and any regulations that at any time may be made under the authority of the said Act or any Act or Acts passed in substitution therefore, and all such provisions and regulations that prescribe, relate to or affect the rights, obligations, privileges and restrictions of and upon lessees of petroleum and natural gas rights, the property of the Crown, shall be deemed to be incorporated into these presents and shall bind the lessee in the same manner and to the same extent as if the same were set out herein as covenants on the part of the lessee ; provided that each and every provision, order or regulation hereafter made shall be deemed to be incorporated into these presents and shall bind the lessee as and from the date it is made, and in the event of conflict between any order or regulation hereafter made and any order or regulation previously made the order or regulation last made shall prevail.

The 1962 revision of the Mines and Minerals Act,⁹⁵ which introduced a new ten-year lease in the place of the former twenty-one-year lease, provides for a renewal after the ten-year term "for so long thereafter as this lease is permitted to continue under and by virtue of the said Act," but otherwise continues these clauses unchanged.

Position of Crown Grantee in Alberta

The clauses in the Alberta Crown agreements which bind grantees to changes introduced by statute or regulation are clear and explicit, and with the case law supporting them, leave little room for argument in support of the original rights vested under the terms of the agreement. However, certain arguments may be advanced to entrench at least some basic provisions of the agreements.

The first argument involves the interpretation of conveyancing instruments. The contention is that the term of the lease and the maximum royalty are entrenched provisions because they are stated in the conveying portions of the lease separate from the covenants and conditions of the lease where the "compliance with laws" provisions appear. Therefore, the "compliance with laws" provisions are to be read as dealing

95. 1962 (Alta.) c. 49.

only with the subject matter contained in the covenants and conditions, and not with the grant, habendum and reddendum provisions. Such a construction, though it violates the rules that the instrument is to be read as a whole⁹⁶ and that a grant by the Crown is to be construed most strongly against the grantee,⁹⁷ peacefully resolves what would otherwise be a conflict between repugnant provisions—on one hand, the stipulation of a certain term of years and a maximum royalty, and on the other hand, the stipulation that the rights of the lessee are subject to variation from time to time by the incorporation of legislative changes. Therefore, if, for example, the Alberta Legislature were to amend the Mines and Minerals Act⁹⁸ by deleting section 142(1), which provides that the maximum royalty shall not exceed one-sixth, and if a royalty regulation were then promulgated which exacted a royalty in excess of one-sixth, this argument would lead to the conclusion that the regulation would not bind the lessee by force of the lease contract. Any binding force would have to derive from the legislative character of the regulation, and would require an express enactment that the regulation was to apply retroactively to leases previously granted. It would then, of course, be confiscatory, with the benefits previously stated accruing to the lessee.⁹⁹

The second argument is founded on basic considerations of contract law. No doubt a contracting party may submit the standards of performance of a contract to the subjective discretion of the other contracting party, and, at the most, the court will require the latter to be honestly satisfied on a reasonable assessment of the situation.¹⁰⁰ Also, it is permissible to refer the settlement of contract terms to arbitration.¹⁰¹ But there seems to be a strong objection in principle to the proposition that one contracting party may agree to be bound by such terms as the other contracting party may from time to time decide. Although such an agreement may be defended on the principle of freedom of contract, to so defend extends the principle to such extreme that the consensual nature of contract becomes a mockery. While no argument along this line of reasoning was directed to the courts in the cases cited, there has developed in recent years a doctrine in commercial cases which provides a parallel. It is a doctrine which recognizes a "core of the contract," so that no exemption clause, however sweeping, can protect a contracting party from

96. 11 HALSBURY (3rd ed.) § 638.

97. *Id.* at § 642.

98. 1962 (Alta.) c. 49.

99. See note 86 *supra* and accompanying text.

100. Egbert, J. in *Hudson's Bay Oil & Gas Ltd. v. Dynamic Petroleum Ltd.* (1958) 26 W.W.R. 504.

101. *Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] S.C.R. 253, 17 D.L.R. (2d) 1; see also LEWIS & THOMPSON, *CANADIAN OIL AND GAS*, § 142.

the legal consequences of a fundamental breach by him of its terms. For example, a clause in an equipment lease stating that "the lessor makes no representations or warranty (express, implied, statutory or otherwise) as to any matter whatsoever, including without limitation, the condition of the equipment, its merchantability or its fitness for any particular purpose" cannot be relied on to relieve the lessor from the fundamental obligation of providing equipment that works for a reasonable time. Therefore, in the case of a five-year lease of a showcase with a motorized selector device, a succession of break-downs in the selector motor within the first few months entitled the lessee to return the showcase and to be relieved from the rental obligations of the lease.¹⁰²

By analogy, it may be argued that, notwithstanding a clause binding a party to the contract to comply with such changes as may from time to time be introduced by the other party, there is a core to the contract which is unalterable and must be performed. This core of the contract is sometimes reached as a matter of construction of the contract by rejecting as repugnant any clauses of the contract which would whittle it away.¹⁰³ In terms of the Crown lease, the doctrine would require the court to identify certain fundamental terms of the lease as unalterable by the Crown by the incorporation of future statutory provisions or regulations. Such fundamentals might include the duration of the term of the lease, the right of renewal, the rental and royalty clauses, and the basic rights to produce and to market the leased substances.

It should be noted, however, that the doctrine has most frequently been invoked in aid of a party to a so-called "adhesion" contract in order to grant him a remedy otherwise denied to him by the "fine print" in a standard contract form.¹⁰⁴ An underlying assumption has been that the inequality of bargaining power in favor of the party proffering the form justifies a departure from the traditional concept of the binding force of all the terms of a written contract. This appeal to the protective sentiments of the court would have a hollow ring when made on behalf of oil companies which have been accepting Crown leases for many years fully cognizant of the "fine print."

At this point, one may sum up by saying that only arguments of tenuous analogy can be advanced to undermine the incorporating effect of the contract as to statutes and regulations which would change funda-

102. Canadian-Dominion Leasing Corp. v. Suburban Superdrug Ltd. (1966), 55 W.W.R. 396 (Alta. C.A.); see *АТІУАН, THE SALE OF GOODS* 23, 79-81 (2d ed. 1963); see also *Knowles v. Anchorage Holdings Co.* (1964), 46 W.W.R. 174, 43 D.L.R. (2d) 300 (B.C.); *Western Processing & Cold Storage Ltd. v. Hamilton Construction Ltd.* (1965), 51 W.W.R. 354 (Man. C.A.).

103. *АТІУАН, op. cit. supra* note 102, at 80-81.

mental terms of the Crown lease. The advantage of discrediting the binding effect of the Crown's statutes and regulations through contract when they may be made binding as retroactive legislation destroying vested rights is, as previously stated, mainly a political one. If the government can answer a charge of confiscation by showing that its action in shortening a lease term or in increasing a royalty is fully justified by the lease contract, then this action is more politically feasible than if the only answer to the charge is that vested rights must be violated in the public interest.¹⁰⁴ In addition, there are the legal rules previously mentioned that require retroactive statutes and regulations to be strictly construed and give an implied right to compensation if property rights are expropriated.

Current British Columbia, Saskatchewan and Federal Crown Leases

An examination of Crown leases from other Canadian jurisdictions reveals the British Columbia form to be similar to the Alberta form from the point of view of permitting changes in a lease's terms and provisions so as to be in accord with the public interest. The Saskatchewan and federal leases favor the grantee in this respect.

The British Columbia lease must be admired for its frankness in approach. No attempt is made to disguise it as similar to private conveyances. It simply grants Crown petroleum and natural gas subject to the statutes and regulations in force from time to time. The totality of the lease clauses follow:

The lessor doth hereby demise unto the lessee, in accordance with and subject to the provisions of the *Petroleum and Natural Gas Act*, all Crown petroleum and natural gas in the location herein described, and the lessee doth hereby covenant and agree at all times to perform, observe, and comply with the provisions of the said Act, and amendments made thereunto from time to time enacted, and the provisions of any regulations which may from time to time be made under the authority thereof, and all such provisions as are from time to time enacted or made shall be deemed to be incorporated into these presents and shall bind the lessee in the same manner and to the same extent as if the same, as they are enacted, made or amended, were set out herein as covenants on the part of the lessee.

104. Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481 (1962). Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964).

The lessee shall keep the lessor indemnified against all actions, claims, and demands that may be brought or made against the lessor by reason of anything done by the lessee, his servants, workmen, or agents, in the exercise or purported exercise of the rights, powers, and privileges hereby granted.

IN WITNESS WHEREOF the lessor and lessee have hereunto set their hands and seals the day and year first above written.

The Saskatchewan Crown lease employs a phraseology in the "compliance with laws" provision that suggests a result totally different from that of the Alberta provisions. The Saskatchewan clause reads:

The lessee shall at all times fulfill, perform, observe and comply with all the provisions of The Mineral Resources Act, 1959, The Oil and Gas Conservation Act, and any regulations thereunder that are applicable or that may be by future enactment or amendment in any manner whatsoever applicable to his operations, plant, works, business or undertaking, and other statute or regulation that may be, by future enactment or amendment in any manner whatsoever, applicable to such operations, plant, works, business or undertaking.

This clause seems to require the lessee to comply only with those statutory provisions and regulations, present and future, which are "applicable to his operations, plant, works, business or undertaking." A strict construction would require the statutory provision or regulation to be *applicable* by its own force as legislation operating retroactively. Therefore, the clause would add no obligation to which the lessee would not be subject in any event. Further, the enumeration of "operations, plant, works, business or undertaking" would limit the clause so that the fundamental matters of duration of term of the lease, renewal, rents, and royalties would be outside its scope.

Like the Saskatchewan Crown lease, the federal lease under the Canada Oil and Gas Land Regulations¹⁰⁸ bears a construction more favorable to the lessee. Its "compliance with laws" provisions are:

105. If the conversion of leases and renewals under the 1962 Alberta Mines and Minerals Act to ten-year terms from twenty-one-year terms had been opposed by the petroleum industry rather than supported by it, then the industry's opposition could have been met by the answer that the change in no way prejudiced vested rights, and this answer would have been technically correct if the operation of the "compliance with laws" provisions of the leases were not limited to exclude such a fundamental term of the lease as its duration.

106. P.C. 1963-408.

5. The lessee will comply with the Canada Oil and Gas Land Regulations.
6. The lessee will comply with the provisions of any statute and regulation made thereunder with respect to the exploration for, the drilling, production, storage, processing and transportation of oil and gas and all such provisions as are from time to time enacted or made shall be deemed to be incorporated in this oil and gas lease and shall bind the lessee in the same manner and to the same extent as if the same, as they are enacted, made or amended, were set out herein as covenants on the part of the lessee without prejudice to any rights of the lessee under the Canada Oil and Gas Land Regulations.

The Canada Oil and Gas Land Regulations are defined in clause 12 of the lease to mean the regulations in force at the date of the lease and any order made thereunder. Being limited to the existing regulations, the effect of clause 5 is not so far-reaching as the Alberta counterpart. Clause 6 uses language which incorporates future statutory provisions and regulations into the lease, but these are limited to those dealing with "exploration for, the drilling, production, storage, processing and transportation of oil and gas," and therefore, the clause does not affect the fundamental terms of the lease.

EFFECTIVENESS OF MECHANISM IN ALBERTA

Considering the widespread attempts to wrest sovereignty over petroleum resources from the containment of concession agreements made in the past, it is remarkable that there should have developed in Canada a mechanism which frees oil agreements from fetters. That this mechanism has in fact permitted changes as the public interest required can readily be shown.

First, in 1930 when provincial administrations in western Canada gained control over their natural resources from the federal regime in a political struggle which some have likened to the emergence of new nations from colonial rule,¹⁰⁷ the new provincial administrators found in the variable royalty clause a means to remedy what they considered to be a "give-away" of resources by the federal regime. Their efforts to increase royalties and fees gained only partial success, but at least the contest resolved itself peacefully in the courts.¹⁰⁸ Once again in 1936, at a time of

107. BRAMLEY-MOORE, CANADA AND HER COLONIES, OR, HOME RULE FOR ALBERTA (1911).

108. See note 76 *supra* and accompanying text.

political change in Alberta (then the only province producing oil), the variable royalty clause enabled a new government to exact a higher royalty schedule.¹⁰⁹

In fact, the variable royalty clause could not be tolerated by the oil industry were its powers to be exercised with every wind of political change. Rather, in a period of long political stability in the western provinces, an accommodation has been reached between the governments and the oil industry which provides stable royalty rates while recognizing the need for periodic revisions. In Alberta, the government, through the Premier of the province, has given a verbal commitment to the oil industry that it will review and, if desirable, change the royalty schedule only every ten years. Faithful to this agreement, the government made changes in 1952 and 1962, this last variation producing a sharply augmented royalty scale as the rate of production increases.¹¹⁰

This mechanism for legislation by contract has also enabled government policy to respond rapidly to changes in the environment of the oil industry. By 1961 it had become generally recognized in the industry that, despite the millions of acres of Crown petroleum lands under control of the Alberta government, a "tight" land position had developed in the province. This situation was blamed on the long twenty-one-year terms of Crown leases, and on the provisions for renewal of all the acreage under a lease if the lessee gained production anywhere on the leased lands. Further, a one-dollar-per-acre-lease rental was an insufficient spur to joint venture arrangements which would lessen the concentration of large holdings among a few major oil companies.

Because of the legislation by contract mechanism, the government was able to revise the Mines and Minerals Act¹¹¹ in 1962, so as to accomplish basic changes not only with respect to new agreements but also with respect to existing ones. Not a single complaint was raised in the name of vested rights. Thus, the primary term of new Crown leases and of renewals of existing leases was changed to ten years instead of twenty-one years. At the expiration of the ten years, instead of the former twenty-one-year renewal of all the lands, the term would be continued as to the producing and unitized acreage only under a "thereafter" clause

109. See notes 73-75 *supra* and accompanying text.

110. The last revision was made under O.C. 256/62 of February 21, 1962. It provided an upgraded schedule as follows:

<i>Monthly Production</i>	<i>Crown Royalty</i>
0- 750 barrels8% of total
750-2700 barrels60 barrels plus 20% of output over 750 barrels
2700 barrels and over16 2/3% of total

111. 1962 (Alta.) c. 49.

similar to those found in freehold oil and gas leases. The existing leases were affected not only as to renewals. Formerly, the one-year drilling commitments contained in the leases were not enforced. Now, the changes included a schedule whereby these drilling commitments would be enforced over a period of five years, beginning with the oldest leases, so that in 1967 and thereafter, the existing twenty-one-year leases would be brought to an end after ten years if the lessee had not drilled and gained production or unitized his lease.¹¹²

CONCLUSION

It was said earlier in this paper that the worth of the legal mechanism for submitting oil agreements to the dictates of the public interest must be measured in terms of the willingness of foreign investors to participate in the petroleum industry on conditions acceptable to an informed and responsible government.¹¹³

The record of investor confidence in the petroleum industry in western Canada speaks for itself.¹¹⁴ Whether the terms and conditions of oil agreements have been in the public interest can best be measured by the popular support enjoyed by the governments responsible for setting them. By this test, again the record in western Canada speaks affirmatively.¹¹⁵ It is submitted that these long records of investor and public confidence in the management of the petroleum resources owe no small measure of indebtedness to the fact that lawyers have been able to devise a legal mechanism that has forestalled the straitjacketing of public policy by oil agreements. The absence of adequate legal mechanisms for accommodating change exaggerates the need for change, and leads to immoderation in demands. Public administrators, aware that they have

112. REPORT OF ALBERTA OIL AND GAS LAW REVISION COMMITTEE, 1962. The writer was a member of the committee. The preamble to the recommendations of the committee read as follows:

It is the opinion of your committee that the present system of tenure and Crown reserves tends to curtail primary exploration by the greatly increased number of companies anxious to participate in the discovery and development of oil and gas resources in the Province.

The system recently seems to have definitely contributed to the spending of money in drilling of development wells in marginal areas instead of in primary exploration in the locating of new oil and gas fields. Your committee's recommendations are largely aimed at a system which will permit a more rapid turn-over of undrilled acreage so as to encourage more primary exploration and the discovery of new oil and gas reserves.

113. See note 23 *supra* and accompanying text.

114. See, *e.g.*, HANSEN, DYNAMIC DECADE (1958).

115. The governments of Alberta, British Columbia and Saskatchewan have enjoyed unprecedented popular support. In Alberta, the Social Credit government has been in power since 1935. In British Columbia, the Social Credit government took office in 1951. Saskatchewan had a socialist party, the Co-operative Commonwealth Federation in power from 1944 to 1964, when a Liberal government took office.

the power to introduce and implement new policies, are the more prone to be cautious and responsible to change.

In terms of sovereignty over resources, it must be admitted that critics of the Canadian record make their case when measured by the percentage of petroleum development controlled by foreigners.¹¹⁶ But their case is oversimplified for it ignores a significant aspect of sovereignty. In a federal state so widespread geographically as Canada and so diverse in its economic regions, the urge for sovereignty manifests itself not only at a national level. Indeed, in western Canada the provincial regimes historically have directed their aspirations for economic independence against the federal government in Ottawa. Today, a usual posture of provincial governments is opposition to nationalistic federal policies which would impede the flow of investment, whether domestic or foreign, into resource development.¹¹⁷ The truth about sovereignty over resource development in Canada is that there is yet no national consensus that would place the case for restraints on foreign investment upon a higher plane than the case for rapid development of resources.

At the very least, however, it may be claimed for this legal mechanism that it permits the exercise of sovereignty over natural resources. The extent to which this sovereignty will be exercised depends on the political will of the time and place.

116. See note 9 *supra*.

117. For example, the government of Alberta opposes the recent decision of the federal government to refuse a permit to Trans Canada Pipe Lines to construct a major gas pipeline which would pass through the United States on its way from the western gas fields to eastern Canadian markets. The federal position is that such an important carrier should not be placed under foreign control even for part of its journey. The provincial position is that the natural gas industry should be encouraged to develop under the most favorable economic conditions.