I. Introduction.

The constantly changing circumstances of the energy scene since 1973 have produced a variety of government responses. No doubt further changes will produce further responses. The purpose of this article is to examine some legal and political constraints that arise when such responses involve interference with existing agreements. More specifically, it will address the extent to which Canadian governments are constrained from changing the terms of petroleum exploration and production rights after those rights have been issued. For example, can a Canadian government unilaterally increase a royalty rate in a petroleum and natural gas lease it has granted from a specified rate of, say, twelve and one half per cent to, say, fifty per cent? Can it impose, on existing permittees and lessees, a scheme providing for direct government participation, for example through a state oil company?

*This article is based on a paper presented by the author to a seminar sponsored by the Committee on Energy and Natural Resources of the International Bar Association in London, in February, 1980, to examine the topic on a comparative basis between Canada, Denmark, Norway, the United Kingdom and Australia. The papers from that conference are to be published by the I.B.A. in a separate volume.

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1 Florence Mining Co., Ltd. v. Cobalt Lake Mining Co., Ltd. (1909), 18 O.L.R. 275, at p. 279. See further infra, footnote 36.
The general question is not new. However, the increased concern of governments with energy matters has made it more immediately relevant in the specific context of the petroleum industry.

Canadian governments issue a variety of licences, permits and leases with respect to petroleum resources owned by the Crown. While the legal character of these instruments has not been the subject of precise judicial definition, it seems clear that all create a contractual relationship with the Crown, with respect to at least some aspects of petroleum exploration and exploitation. The nature of the contractual rights thereby acquired probably varies with the terms of the individual instrument and of the enabling legislation under which it is issued.

However, it is clear that Canadian governments, so far as the law is concerned, can unilaterally derogate from those contractual rights, whatever their legal character.

In his excellent 1967 analysis of the authorities, under the title "Sovereignty and Natural Resources—A Study of Canadian Petroleum Legislation", Dr. A. R. Thompson pointed out that the Crown enjoys two capacities, one as proprietor of petroleum resources and the other as legislator. In its capacity as proprietor, it can convey interests in petroleum resources by contract, thereby giving rise to contractual rights, with concomitant obligations binding on it as a matter of contract. In its capacity as legislator, however, it can derogate from contractual rights and obligations, including those it has created in its capacity as proprietor. The Crown can be subjected to the will of the legislature. Furthermore, in so doing it can confiscate rights or property without having to pay compensation therefor. The Canadian constitution does not prohibit expropriation without compensation.

This is not to say that the legal character of petroleum rights is unimportant in Canada. On the contrary, it has great significance for two reasons. Both stem from the basic societal value that confiscation without compensation is unjust, no matter how lawful.

First, the courts have made it clear that confiscatory legislation is to be strictly construed and carries with it an implied right to compensation. Hence, the legal character of petroleum rights may impose a manner and form requirement on the legislative capacity of the Crown. In other words, it may have to confiscate rights or property by saying explicitly that that is what it intends to do and, further, that it does not intend to pay any compensation therefor. Any legislative initiative failing to comply with the manner and form

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2 (1967), 1 Valparaiso L. Rev. 284.
requirements would be ineffective as a matter of law, but the defect could be remedied by further legislation.

This legal requirement immediately suggests the second reason for the significance of legal characterization. If the legislature is forced to state explicitly that it is confiscating property without compensation, it will create a political climate favourable to the parties adversely affected. This climate may be used to mitigate the proposed extent of the interference with existing rights.

In summary, the question in Canada is not whether governments can derogate from contractual rights or obligations. Clearly they can. The question is whether in so doing they are confiscating acquired or vested rights. If so, certain manner and form requirements must be complied with and the political consequences must be faced. The legal character of Crown instruments with respect to petroleum is not significant as much for its legal consequences as it is for its political consequences.

These are essentially the conclusions that Dr. Thompson arrived at in 1967. Legislative and political developments since have supported the analysis in every respect.

It is proposed in this article to examine the position in three Canadian jurisdictions, the provincial jurisdictions of Alberta and Newfoundland, and the federal jurisdiction. These three have been selected advisedly. Apart from being the source of some eighty-five per cent of Canada's present oil and gas production with a mature industry, Alberta provides an illustration of a legal mechanism designed to avoid any suggestion of interference with acquired or vested rights. It has been both legally and politically successful. Newfoundland regulations are recent and are designed to deal with an unproven petroleum potential in the early exploration stages. In some respects, the Newfoundland regulations appear to be intended to avoid the creation of acquired or vested rights. In other respects, they expressly give a measure of protection against future changes. They reflect awareness of the problem of acquired or vested rights but do not avoid it by unequivocal adoption of the Alberta mechanism. As will be discussed further, this difference in approach is almost certainly a function of the relative maturity of the industries, and government's experience in dealing with those industries, in the two jurisdictions. The federal jurisdiction provides an interesting comparison inasmuch as the federal government is here and now in the midst of implementing changes to its regulatory regime that are admittedly in derogation of the rights of existing permittees. The method by which it proposes to implement these changes both confirms its view that the law is as stated above and illustrates quite graphically the essentially political nature of the whole problem.
II. The Case Law.

A. The Two Capacities of the Crown.

There are basically two legal aspects to the characterization of petroleum rights issued by the Crown in Canada. First, if the rights are of such a character that subsequent derogation from them would be regarded as confiscatory, an approach of strict construction against the Crown will be adopted. Secondly, confiscation, as a matter of law, implies a right to compensation. These principles are clearly established in Canada by judicial decisions of the highest authority. An analysis of those decisions will set the background against which certain legislative measures have been adopted and will identify the pertinent questions to be asked in characterizing particular petroleum rights.

The leading authorities on the first of these aspects arose from the transfer of natural resources by the federal government to the province of Alberta in 1930. When Alberta was established as a province in 1905, the federal government retained the rights to all natural resources owned by the Crown. These resources were transferred to Alberta in 1930 so as to place it in the same position as those provinces that had not formerly been federal territories and that had always owned unalienated natural resources. The transfer was effected by the British North America Act, 1930, under which the province was bound by the following undertaking:

2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown 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 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 interests therein, irrespective of who may be the parties thereto.

This term of the agreement entrenched the contractual rights of those who had contracted to purchase or lease any Crown lands, mines or minerals from the federal Crown. The necessary corollary was that,

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3 This statement, of course, begs the question of how to determine whether particular rights are of such a character that subsequent derogation from them would be regarded as confiscatory. That question is discussed further infra, at footnote 46 and further at footnotes 55 et seq.

4 The circumstances of the transfer are discussed in La Forest, Natural Resources and Public Property under the Canadian Constitution (1969), pp. 35 et seq.


6 Ibid., Schedule (2) Alberta, Memorandum of Agreement.
if Canada had a contractual right to vary any of the terms of a particular contract, then so too would Alberta have that contractual right. The term prevented the province from making any changes to the terms of a contract but, equally, it could make any changes that were permitted by the contract. Thus, the undertaking restricted the province to such changes in the terms of a contract as Canada may have made as a matter of contract.\(^7\)

When Alberta subsequently made legislative and regulatory changes, inevitably the question was raised of whether certain of the changes applied to those who had acquired their rights from the federal Crown prior to the 1930 transfer. Specifically, the question was whether the Alberta changes were changes that the federal Crown could have made as a matter of contract. If they were not, then Alberta was precluded by term 2 from applying them to those deriving their interests from the federal Crown.

**B. The General Principles.**

The applicable general principles were established clearly by a unanimous Supreme Court of Canada in *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*.\(^8\) They may be summarized as follows.

First, the Crown clearly has a legislative capacity and a separate and distinct contracting capacity. The effect on a contract, to which the Crown is a party, of regulatory changes introduced by the Crown subsequently to the contract must be examined from those two aspects.\(^9\) Regarded as a regulation, that is to say as an exercise of legislative capacity, a subsequent change in the terms of a contract might impose new terms "*ab extra* by the force of law".\(^10\) Regarded as a part of the contract, by force of the contract itself, a subsequent change could take effect by the agreement of the parties, at the time of the contract, that the terms might be altered later by the Crown.\(^11\) A change in contractual terms which takes effect by force of law involves an interference with vested or acquired rights. On the other hand, if the change takes effect as a term of the contract, by definition, there is no such interference.

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\(^7\) By the express wording of the term, the province might also vary contractual terms by consent or by legislation generally applying "*to all similar agreements*". However, those specific exceptions from the general limitation do not affect the discussion that follows.

\(^8\) [1933] 4 D.L.R. 545.

\(^9\) *Ibid.*, at pp. 552 *et seq*.


Secondly, there is a presumption against an intention to impose, by the force of law, new terms on existing contractual rights. This is, of course, a form of the presumption against retroactive legislation. In the Spooner Oils case, it was stated in these terms:12

The appropriate rule of construction has been formulated and applied many times. A legislative enactment is not to be read as prejudicially affecting accrued rights, or an "existing status" (Mann v. Stark (1890), 15 App. Cas. 384, at p. 388) unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Co. Inst. p. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

Thus, for a subsequent change "affecting accrued rights" to take effect by force of law, the legislation in question must apply to those accrued rights expressly or "by unavoidable inference".

Thirdly, the contractual right to subsequently alter the terms of the contract, so that a change would take effect by virtue of the contract, similarly must be reserved in clear and precise terms.13 In other words, there is a presumption against a contractual right to unilateral variation:14

[I]f 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 shall become part of the lease as contractual obligations, that intention would have been expressed, not inferentially, but in plain language.

C. The Spooner Oils Case.

Not only did the Spooner Oils case state these principles clearly; the decision on the facts demonstrated the vigour with which they would be applied against the Crown. Spooner was the holder of a petroleum and natural gas lease of a tract of land in the Turner Valley gas field in southern Alberta. The lease had been granted by the federal Crown, prior to 1930, in accordance with the applicable federal regulations of 1910 and 1911. In 1932, Alberta enacted the Turner Valley Gas Conservation Act15 which, if applicable to Spooner, would reduce Spooner's production of naphtha by some ninety-five per cent by restricting the amount of gas that could be

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12 Ibid., at p. 552. For a recent application of this approach, to rights arising out of employment, see O'Donovan v. Burns Foods Ltd., [1977] 3 W.W.R. 206, at p. 210 (Sask. C.A.), citing McCardie J. in Henshall v. Porter, [1923] 2 K.B. 193, at p. 201: "... I think it sound and just in this case to apply the long recognized and useful rule that vested rights are not to be deemed destroyed by a statute unless the enacting words are clear."

13 Ibid., at pp. 554 et seq.

14 Ibid., at p. 556.

15 S.A., 1932, c.6.
flared. The main contention on behalf of Spooner was that the Act affected the provisions of its lease and, therefore, was incompetent to Alberta by virtue of term 2 of the Natural Resources Transfer Agreement. The question for the court then became, in essence, whether the federal Crown could have imposed such a conservation scheme as a matter of contract prior to the transfer of its rights to Alberta in 1930.

The court had little difficulty in concluding that the Conservation Act did "affect" the "terms" of Spooner's lease within the meaning of term 2. Under paragraph 8 of the lease, Spooner had the right of "mining and operating for petroleum and natural gas" subject only to the requirement that the operations would be carried on "in such manner only as is usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands." To substitute for these obligations a discretionary control by an administrative body was clearly an interference with the lessee's rights under the lease. The court said:

Any method of working lands for gas and petroleum which is "usual and customary" among proprietors exploiting their own property, for their own profit, and which, from that point of view, is "skilful and proper", could not be condemned, as in contravention of art. 8, merely because considerations of public policy, as contradistinguished from the interests of proprietors as proprietors, might dictate a different course.

The court, it seems, was of the view that a restriction on the enjoyment of the rights under the lease was sufficient to "affect" the "terms" of the lease and to bring into operation the approach of strict construction.

But the matter did not end there in Spooner. After the grant of the Spooner lease in accordance with the terms of the federal regulations of 1910 and 1911, the federal government had promulgated further regulations in 1928, section 29 of which required lessees to take all reasonable and proper precautions to prevent the waste of natural gas; reserved to the Minister the right to make additional regulations governing the manner in which wells could be drilled and operated; and vested in the Minister the power of cancellation for non-compliance.

Applying the approach of strict construction, the court concluded that section 29 was not intended to take effect upon existing rights of lessees. Nor was it incorporated into the lease as a matter

16 Supra, footnote 6.
17 Supra, footnote 8, at p. 548.
18 Ibid., at p. 549.
19 The provisions of s. 29 are discussed, ibid., at pp. 551 et seq.
20 Ibid., at p. 553.
of contract. The lease declared, expressly, that it was granted pursuant to the 1910 and 1911 regulations “a copy of which is hereto appended”. Section 1 of those regulations contained the following sentence:

The term of the lease shall be twenty-one years, renewable for a further term of twenty-one years, provided the lessee can furnish 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 Regulations in force from time to time during the currency of the lease.

This, it was argued, was sufficient to incorporate future regulatory changes into the contract, but the court was not persuaded:

“The regulations in force from time to time during the currency of the lease” should be read, it is argued, as embracing all subsequent regulations whether incorporated in the terms of the lease, by force of some provision of the lease or of the existing regulations, or not.

We cannot agree with this view of the effect of these words.

We think the better view is that they extend only to regulations made in the exercise of a right reserved by the regulations of 1910 and 1911 or of the lease itself.

This is strict construction indeed.

It is, however, supported by several considerations. First, the actual clause defining the term of the lease itself, as it appeared in the lease rather than in section 1 of the regulations, provided that the lessee would be entitled to a renewal upon furnishing satisfactory evidence that he had fully complied with the conditions of the lease “and with the regulations under which it was granted”. The critical phrase referring to the regulations “in force from time to time” was missing. Similarly it was omitted from the compliance with laws provision contained in paragraph 2 of the lease which referred to “the said regulations”. It is possible the court was influenced by this discrepancy although it did not refer to it.

Secondly, some provisions of the 1910 and 1911 regulations did contemplate future regulations being made in exercise of a right reserved by the original regulations. For example, sections 23 and 24 were in these terms:

23. No royalty shall be charged upon the sales of the 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.

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21 Ibid., at p. 555.
22 Ibid.
23 Ibid., at p. 554.
24 Ibid.
24. A royalty at such rate as may from time to time be specified by Order in Council may be levied and collected on the natural gas products of the leasehold.

The court seems to have been of the view that by being so explicit as to future regulations, these sections militated against giving prospective effect to the phrase "the provisions of the Regulations in force from time to time during the currency of the lease" in section 1.25

Thirdly, the lease itself contained one reservation of the right to apply future regulations expressed in more explicit terms than those found in section 1 of the regulations. Paragraph 9 contained such a reservation.26 Again, the appearance in the lease of one explicit statement of prospectiveness may have influenced the court against giving section 1 of the regulations prospective effect as a term of the contract.

The principles applied in the Spooner Oils case could not have been stated more clearly. Furthermore, their application to the facts of that case indicate that they really mean what they say. If the Crown, in its legislative capacity, is to affect acquired or vested rights, it must do so in the clearest and most explicit language. Similarly, if it is to reserve to itself the contractual right to implement future changes to the terms of a contract, as a matter of contract, again it must do so in plain language.

D. The Subsequent Cases.

The subsequent cases involving the 1930 Transfer Agreement support Spooner Oils. In A.-G. for Alberta v. Majestic Mines Ltd.,27 the predecessors in title to the plaintiff had been issued a patent by the federal Crown in 1908 under which they were granted title to the minerals other than precious metals. The habendum clause provided:28

Yielding and paying into Us and Our Successors, the royalty, if any prescribed by the regulations of our Governor in Council.

25 Ibid., at p. 555.
26 Ibid. Paragraph 9 of the lease, unfortunately, is not set out in the court's reasons for judgment. It provided: "9. That the lessee shall and will during the said term enclose and keep enclosed all abandoned openings or excavations, made in connection with or for the purpose of mining operations on the said lands with fences or walls sufficient to prevent cattle and other animals falling thereinto, such fences or walls to be of a height and character satisfactory to the Minister or to the inspector or other person duly authorized by him as aforesaid, and to comply with any regulations or directions from time to time made or given by the Minister."

I wish to express my appreciation to Mr. Anil Tiwari, of the Law Library staff at the University of Calgary, for obtaining for me a copy of the lease from the records of the court.

28 Ibid., at p. 404.
At the time the patent was issued, a royalty on coal was prescribed by regulation but there was none in respect of petroleum.

A unanimous Supreme Court of Canada rejected the argument that the words "if any prescribed" must refer to the future: 29

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.

While the decision did not refer to the Spooner Oils case, it obviously applied a similar approach.

In A.-G. for Alberta v. Huggard Assets Ltd., 30 the Privy Council was called upon to consider a royalty clause in a federal Crown grant in the following terms:

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.

At the time of the grant, there were no regulations prescribing a specific rate of royalty on petroleum or natural gas. Thus, the question and circumstances were the same as those in the Majestic Mines case but for the addition of the words "from time to time" in the Huggard Assets royalty clause. Were these words sufficient to incorporate future royalty regulations?

The Privy Council thought so, on the basis that any other answer would render the words "from time to time" meaningless. 32 The Majestic Mines case was distinguished on the basis that "the crucial words" were absent therein. However, no disagreement with the Majestic Mines case was expressed and so the Huggard Assets case should be seen as an example of a clause that did meet the requirement of "plain language" in reserving a contractual right to impose a royalty in the future as a matter of contract. It is to be distinguished from the Spooner Oils case on the ground that the words "from time to time" were contained in the Crown grant itself and not merely in the regulations in force at the time the grant was issued, as had been the case in Spooner Oils. 33

E. The Peculiar Relevance of the Natural Resources Transfer Agreement.

The foregoing are the leading Canadian authorities directly on the issue of the dual capacities of the Crown and the implications in

29 Ibid., at p. 405.
31 Ibid., at p. 423.
32 Ibid., at p. 436.
33 Supra, at footnotes 21 et seq.
the context of rights to petroleum resources. Some speculation as to why that is so—why it is that all of these cases arose out of the Natural Resources Transfer Agreement of 1930—may both satisfy general curiosity and serve to identify the real impact and effect of the legal position.

The principles of the Spooner Oils case are not principles that prevent interference with vested or acquired interests. What they mean is that such interference can only be accomplished by the clearest language—by contract if the contract clearly incorporates a term that future regulations should become part of the contract, or by legislation if the legislation clearly states that it is applicable to existing contractual rights or interests. In legal terms, they are manner and form requirements.

The Spooner Oils and Majestic Mines decisions did not preclude any interference with the contractual interests of the respective plaintiffs. The ruling of those cases was that the interference attempted by the province of Alberta was not competent to Alberta because of the savings provisions of term 2 of the Transfer Agreement. Alberta could not cure the defect by legislative action. The federal government, however, could have done so, as an exercise of legislative capacity. But, having gone to such lengths to entrench the contractual rights of its grantees by securing from Alberta the undertaking contained in term 2 in the first place, it could hardly turn around and blatantly nullify that protection. By securing the court declarations in Spooner Oils and Majestic Mines, the plaintiffs, in practical terms, were able to shield their contractual rights from any government interference.

In ordinary circumstances, not involving the two jurisdictions of the federal system, that would not be the consequence of a court declaration that a particular regulation did not bind a particular

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34 The Spooner Oils case was applied in Anthony v. A.-G. for Alberta (No. 2), [1942] 1 W.W.R. 833 (Alta S.C.) in relation to the effect of the Natural Resources Transfer Agreement on timber leases issued by the Dominion. The Huggard Assets and Majestic Mines cases were applied to coal leases in West Canadian Collieries Ltd. v. A.-G. for Alberta (1951), 3 W. W. R. (N. S.) 1 (Alta C. A.). See also, A.-G. for B.C. v. Deeks Sand & Gravel Co. Ltd., [1956] S. C. R. 336. In Canadian Industrial Gas & Oil Ltd. v. Saskatchewan, [1977] 6 W. W. R. 607 (S. C. C.), it was argued that the challenged enactments "very substantially impede on existing contract". At trial, Hughes J. had held that the point did not call for consideration. See [1975] 2 W. W. R. 481, at p. 522 (Sask. Q. B.). The legislation impugned in that case, in addition to changing the terms of existing Crown leases, also expropriated to the Crown the reversionary interest in certain freehold oil and gas leases. In the Court of Appeal, Culliton C.J.S. held that there was nothing impeachable about these provisions. See, [1976] 2 W. W. R. 356, at p. 372. By the time the matter reached the Supreme Court of Canada, the challenge to the expropriation had been withdrawn. See, [1977] 6 W. W. R. 607, at p. 633 per Dickson J. However, it should be noted that the legislation expressly provided for compensation for this expropriation.
lessee as a matter of contract, or that it did not affect existing rights as a matter of legislation. In either case, the simple and quick
government response to such a declaration could be the enactment of
the necessary legislation at the next available opportunity. In other
words, ordinarily a successful court challenge would probably only
delay the inevitable. This may explain why all of the cases that are
directly relevant arose in the peculiar circumstances described. In
those circumstances, the court declarations had more practical effect
than that of mere delay.

F. The Implied Right to Compensation.

There is another legal principle that must be introduced to the
discussion at this point before the real significance of the foregoing
can be assessed. It follows from the Spooner Oils case that the
Crown may be compelled to rely upon its legislative capacity to
interfere with existing contractual rights or interests. This it will
have to do unless it has successfully reserved the contractual right to
effect changes, as a matter of contract. By definition of the problem,
where the Crown is compelled to rely upon its legislative capacity, it
is nullifying existing rights or interests. It is confiscating them.

Canadian jurisprudence adopts the common law position that
there is an implied right to compensation for a deprivation of
property. A unanimous Supreme Court of Canada has affirmed the
proposition recently in Manitoba Fisheries Ltd. v. The Queen\textsuperscript{35},
to which I shall return in a moment. But, just as the Crown may
interfere with existing or acquired rights by using clear and explicit
language, so too it may confiscate property without having to pay
compensation if it clearly manifests its intention to do so. The
principle of the supremacy of Parliament prevails against notions of
due process and fairness.\textsuperscript{35a}

\textsuperscript{35} (1978), 88 D.L.R. (3d) 462.

\textsuperscript{35a} It is possible that Parliament has imposed upon itself something of a
limitation on this principle by the adoption of the Canadian Bill of Rights, R.S.C.,
1970, Appendix III. This is not the place to explore the meaning of the right of the
individual to the "enjoyment of property, and the right not to be deprived thereof
except by due process of law", as recognized by section 1 of the Bill. Suffice it to
say that the Bill is concerned with the rights of "the individual", thus raising a
question as to whether its protection would extend to the rights of corporations which
are, of course, the primary legal personality involved in the present discussion. This
is quite apart from the more general limitations on the operation of the Bill. In any
event, as it recognizes in its own terms, the Bill does not operate as a substantive
curtailment of the power of Parliament and therefore it does not affect the general
principles discussed in this article, even if its potential application to the matters
discussed herein is conceded. In the present context, it would simply operate as one
more manner and form requirement.

Similar considerations would arise in any discussion of the applicability of
provincial Bills of Rights.
In Florence Mining Co., Ltd. v. Cobalt Lake Mining Co., Ltd., Riddell J. said:\footnote{36}

In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights, which I am far from finding, the Legislature had the power to take them away. The prohibition, “Thou shalt not steal,” has no legal force upon the sovereign body. And there would be no necessity for compensation to be given. We have no such restriction upon the power of the Legislature as is found in some States.

G. A Summary of the Legal Rules and their Significance.

The relevant legal rules, then, are these. Acquired or vested rights may be interfered with by the legislature. Indeed, they may be confiscated without any obligation to pay compensation. In both cases, however, the legislature must make its intention manifestly clear. In so doing, it will be running counter to a basic societal value and will thereby be creating a political climate favourable to the holder of the rights affected. The legal character of the various instruments issued by Canadian governments only has real relevance in a political context.

As Dr. Thompson articulated so clearly:\footnote{37}

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 . . . 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.

This fundamentally political significance of legal characterization, in my view, explains the dearth of judicial authority, except for the special circumstances of the Natural Resources Transfer Agreement, discussed above.\footnote{38}

However, this does not mean that to engage in an analysis of the legal character of the various Crown instruments is a wholly academic exercise. The political advantage stems from the legal character of the interests involved and, presumably, varies in extent in some relationship to the nature of the particular interests being interfered with and the extent of the interference with those interests. Not every change in the terms of existing instruments is likely to

I am grateful to Edward J. Brown, Legal Counsel, Dome Petroleum Ltd., for drawing to my attention the possible application of the Bill of Rights.


\footnote{38} Supra, at footnote 34.
provoke outrage, although by the same token not every expression of outrage will be dependent upon a confiscation of vested rights in the legal sense. 39


Having said that, some elaboration should be offered on the implied right to compensation for the confiscation of property. 40 What is the scope of the common law principle with respect to compensation for the confiscation of property? There are several components to this question. Is the principle one of construction only or is it one giving a substantive right to the actual payment of compensation? What is the meaning of "property" for the purposes of the principle? And when is it confiscated by the Crown? The answer to none of these questions is entirely clear.

Is there a substantive right to the payment of compensation for the confiscation of property? One would have thought the answer was clearly "no" and that the principle was one of construction only. 41 This seemed to be the view of Lord Atkinson in Attorney-General v. De Keyser's Royal Hotel, Ltd.: 42

The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.

However, some statements went further. In Belfast Corpn. v. O. D. Cars Ltd., Lord Radcliffe said: 43

On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking". Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it.

This view of the principle clearly involves a right to the actual payment of compensation unless explicitly denied by the legislature.

39 See generally the discussion in Part VI.

40 I am indebted with respect to my discussion of this issue to the valuable comment of David Phillip Jones, No Expropriation Without Compensation: A Comment on Manitoba Fisheries Limited v. The Queen (1978), 24 McGill L.J. 627, and to some personal suggestions of Professor David Mullan, Faculty of Law, Queen's University. However, the opinions expressed are my own.

41 Obviously not all confiscation of property could give a right to compensation. Taxes involve the confiscation of property. Is it to be suggested that there is a right to compensation for the payment of taxes?


In the *Manitoba Fisheries* case,\(^{44}\) the Supreme Court of Canada actually ordered the payment of compensation to the plaintiff and thus must be taken to have shared the view expressed by Lord Radcliffe, at least on the facts before it. However, the statute in question did give some express rights to compensation for the confiscation contemplated by the legislature. The court may have been influenced by this, although the express rights did not extend to compensation for confiscation of the sort of property taken from the plaintiff. Whether its view will be applied generally remains to be seen.\(^{45}\)

If the Supreme Court has established a right to the actual payment of compensation, it would seem that Canadian legislatures will be required to say in so many words that there is to be no compensation for any property confiscated by a particular statute. Not only that. They may also be required to enact that existing rights to compensation arising out of previous confiscation of property are to be abrogated. The potential for political embarrassment is clear.

What is the meaning of "property" in this context? In the *Manitoba Fisheries* case, the property in question was the goodwill of the plaintiff's business. Ritchie J., for a unanimous court, said:\(^{46}\)

> In my opinion . . . goodwill, although intangible in character is a part of the property of a business just as much as the premises, machinery and equipment employed in the production of the product whose quality engenders that goodwill.

This conclusion gives little guidance on the criteria that are relevant to determining whether an interest is one the confiscation of which gives rise to an implied right to compensation. However, it would seem to mean that any interest that is "more tangible" than goodwill would be regarded as property for this purpose. It is submitted that all interests arising by contract are of that character inasmuch as they can be enforced and are regarded by the common law as being at least personal property in the form of choses in action.\(^{47}\) They share

\(^{44}\) (1978), 88 D.L.R. (3d) 462.

\(^{45}\) Jones, *op. cit.* footnote 40, at p. 633, comments: "Despite the obviously just result, one is left wondering precisely what legal basis the Supreme Court of Canada used to uphold the appellant's claim. There is no general legal principle entitling anyone who is harmed by another's action to be compensated therefor; not all *damnatio* are *injuria*. There is likewise no general legal principle which requires Parliament or a Legislature to provide for fair compensation to everyone who is harmed by new legislation. Indeed, Parliament or a Legislature can clearly provide for the expropriation of property without any compensation at all." Thompson, *op. cit.* footnote 2, speaks throughout of "an implied right to compensation" although he does not directly address the question of whether that is a substantive right or really only a rule of construction.

\(^{46}\) *Supra*, footnote 35, at p. 466.

\(^{47}\) They may also, of course, give rise to real property interests.
with goodwill the characteristics of enforceability and personalty. Thus, to the extent that a petroleum licence, permit or lease is a contract, it is property for purposes of the principle under discussion.\textsuperscript{48}

Finally, when is such property confiscated by the Crown? This question is the most easily answered in the present context. It seems to me to be indisputable that a revocation by the Crown of property rights created as a matter of contract by the Crown is a confiscation or taking by the Crown, whether those rights are regarded as real or personal property. By such a revocation, the Crown restores to itself the property in question inasmuch as it, and it alone, can deal with that property thereafter as a matter of contract.

The foregoing analysis well may mean that a legislative interference with the rights of a holder of a petroleum licence, permit or lease would establish a right to compensation. However, such a right could itself be abrogated by appropriate legislation, and almost certainly would be. Again, the significance of the legal rules is political.

The legal restrictions on legislative interference with vested or acquired rights would be irrelevant if the Crown were not forced to rely upon its legislative capacity to effect a change in existing contractual terms. In other words, by reserving unto itself, as a matter of contract, the right to make future changes in the contract, it would remove any legal argument based on confiscation of acquired or vested rights. By definition, the legal argument could not arise. With the disappearance of the legal argument, a string to the political bow would become seriously frayed, although, as will be argued,\textsuperscript{49} that would not render the weapon useless.

\textbf{III. The Legal Source and Nature of Interests in Crown Petroleum Resources.}

The discussion to this point has not focussed directly on the legal nature of interests in petroleum resources granted by the Crown. Do these interests give rise to some vested or acquired interest of the sort that, in turn, brings into operation the rules of strict construction and the common law with respect to the confiscation of property without compensation? The question can be phrased in these terms: are the rights arising from petroleum permits, licences or leases issued by the Crown contractual rights? In simpler form, is a permit, licence or lease a contract?

\textsuperscript{48} See the further discussion \textit{infra}, at footnotes 55 et seq.

\textsuperscript{49} See the further discussion \textit{infra}, at footnote 90.
A. The Statutory Source of Authority.

Interests in Crown-owned petroleum resources in Canada are granted under statutory authority. Typically, that authority empowers the appropriate Minister to grant such interests in accordance with the terms of the enabling legislation and any regulations promulgated thereunder. Thus, the legislation and the regulations will set the general terms in accordance with which the Minister may grant interests.

In view of the adherence of Canadian jurisprudence to the concept of the supremacy of the legislature, there are no restrictions on the scope of such legislation and regulations other than those necessarily imposed by a federal system. Federal constitutional considerations aside, a Canadian government may dispose of its property or any interest therein as it sees fit. It may do so by prerogative act or in accordance with the procedures that it has set out for itself by statute. The latter alternative is explicit in the provincial power to legislate with respect to:

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

and in the federal legislative power with respect to:

1A. The Public Debt and Property.

However, a federal system of government necessarily imposes a constitutional limitation on the scope of the legislative capacity of its constituent members. It is well beyond the scope of this article to undertake any analysis of the various aspects of that limitation in the context of granting interests in petroleum resources. Suffice it to point out that the limitation is one arising from the division of legislative capacity between two levels of government. It is a limitation imposed by a boundary between two assignments of legislative authority and not an absolute withholding of authority.

\[50\] In Alberta, see the Mines and Minerals Act, R.S.A., 1970, c. 238 as am., and the regulations promulgated thereunder. The substantive provisions of the Newfoundland scheme are found in the Newfoundland and Labrador Petroleum Regulations, 1977, Newfoundland Regulation 139/78, under the Petroleum and Natural Gas Act, R.S.N., 1970, c. 294. The federal regime is contained in the Canada Oil and Gas Land Regulations, SOR/61-253 as am., made under the Territorial Lands Act, R.S.C., 1970, c. T-6, and under the Public Lands Grants Act, R.S.C., 1970, c. P-29.

\[51\] Some individual terms are necessarily within the discretion of the Minister by virtue of the nature of the legislative and regulatory schemes.

\[52\] The British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.); R.S.C. 1970, Appendices.

\[53\] Ibid.

\[54\] For an excellent analysis, see Michael Crommelin, Jurisdiction over Onshore Oil and Gas in Canada (1975), 10 U.B.C.L. Rev. 86.
from both levels of government. Its real relevance lies in the arena of federal-provincial dispute rather than in defining relationships between the state and individual grantees of interests in petroleum resources.

For present purposes, it can be assumed that there are no restrictions on the scope of Crown authority to grant interests in petroleum resources, except those arising from self-imposed legislative and regulatory regimes.

To complete the setting for the discussion to follow, it should be added that the Crown can be bound by contract. The Supreme Court of Canada has affirmed as much in its recent decision in J. E. Verrault et Fils Ltée v. A.-G. for Quebec.\(^55\)

B. The Contractual Nature of the Interests.

With this background, the question becomes the following: Do the rights granted in Crown petroleum resources arise from legislative act or do they arise from a contract entered into by the Crown under the authority of a legislative act? Are they granted by the Crown in its legislative capacity or in its contractual capacity? If the former, it could be argued that these rights do not give rise to any vested or acquired interest. The argument would build on the principle that the Crown cannot bind itself in its legislative capacity. Therefore, any rights issued in exercise of that capacity would be subject, *ab initio*, to the possibility of a further exercise of legislative capacity derogating from them. They would exist at the pleasure of the legislature and could hardly be described as vested or acquired. If the latter, then these rights would be vested or acquired in precisely the same way as any other contractual rights.

The answer must depend upon the particular legislation and it is, therefore, perhaps rash to generalize. However, as a general proposition, it can be stated that interests in Crown petroleum resources in Canada arise from contract and do give rise to vested or acquired interests. Several considerations point to this conclusion.

First, the whole premise of the Spooner Oils and subsequent cases was that the rights in issue in those cases were contractual rights.\(^56\) There would have been no issue unless that were the case.

Secondly, support is to be found in the Privy Council decision in *In re Timber Regulations*.\(^57\) This case was concerned with the


\(^{56}\) See *supra*, at footnotes 8 *et seq*.

effect of the Natural Resources Transfer Agreement on certain timber permits issued by the federal Crown in accordance with regulations under the then Dominion Lands Act. In the course of delivering the opinion of the Judicial Committee, Lord Wright said:

Before considering the effect of regulations 47(e) and (f) ... it may be useful to consider what is the position of the entrant between the date of his entry and the time at which in virtue of the letters patent he becomes owner in fee of the plot. The transaction under which he acquires his right as entrant is not easy to bring under the precise description of contract. In one aspect the terms of the Dominion Lands Act and the regulations may be regarded as constituting an invitation to qualified persons to tender, so that a qualified applicant by making an application and tendering the fee, makes an offer which the Government, by giving the receipt, accepts; thus there is the consensual element which justifies the application of the term "arrangement" even if the term "contract" is not strictly appropriate.

Despite the semantic difficulty with the appropriateness of the term "contract", it is clear that His Lordship regarded the permittee's rights as arising from his consensual "arrangement" with the Crown rather than from an exercise of legislative capacity by the Crown. Indeed, he went on to hold that the permittee's right to cut for sale and sell timber off the land was "itself not merely a licence, but an interest in lands". Whether regarded as a contract or not, such an interest, it is submitted, would clearly be a vested or acquired right.

Finally, in some cases at least, the wording of the instruments issued by the Crown reflects the view that they are contracts. The Alberta Crown Petroleum and Natural Gas Lease, for example, contains the following clauses:

The Minister is empowered to dispose of petroleum and natural gas rights that are the property of the Crown in right of Alberta in accordance with the provisions of Part 5 of The Mines and Minerals Act, as amended, and in accordance with other provisions of the said Act as they are applicable to dispositions of petroleum and natural gas rights.

Therefore, in consideration of the rents and royalties payable, and subject to the terms and conditions expressed in this Lease, the Minister grants to the lessee the exclusive right to explore for, work, win and recover petroleum and natural gas within and under the lands described in the attached Appendix, excepting from the lands described any petroleum or natural gas rights not granted under this lease.

This is the language of a private contract, simply reciting in the first paragraph the source of the Minister's authority to enter into the contract.

58 See supra, at footnotes 4 et seq.
59 R.S.C., 1927, c. 113.
60 Supra, footnote 57, at p. 613.
61 Ibid., at p. 614.
62 Alberta Energy and Natural Resources Form No. 160-C 1/7/76.
One final point before leaving this part of the discussion. It does not necessarily follow from the conclusion that interests in Crown petroleum resources are contractual interests that every legislative act affecting those interests will be an interference with acquired or vested rights in such sense as to trigger the rules of strict construction discussed earlier.\footnote{See supra at footnotes 8 et seq.} We know from the \textit{Spoonier Oils} case that the right to produce is an acquired or vested right.\footnote{Ibid.} And we know from the \textit{Majestic Mines} case that the right not to have to pay royalty except in accordance with the lease terms is such a right.\footnote{Supra, at footnote 27.} But would the statutory imposition of a general conservation scheme, for example preventing the flaring of natural gas, be an interference in the sense described? The exception to Term 2 of the Natural Resources Transfer Agreement\footnote{Supra, footnote 6.} is revealing on this question. It provided that the provinces might alter lease terms "in so far as any legislation may apply generally to all similar agreements \ldots irrespective of who may be the parties thereto". This reflects the view that the possibility of legislation of general application did not call for any special protection for the rights of lessees. Presumably the basis of this view was that legislation of that sort would not amount to an unwarranted interference with vested or acquired rights and might have been adopted without concern by the federal Parliament prior to the transfer. However, it is impossible to say whether the view was a reflection of political or legal acceptability.

C. Some Considerations with Respect to Permits.

It seems sound to conclude that Crown leases give rise to contractual interests. But what of the interests that precede the issue of a lease. The federal\footnote{Supra, footnote 50.} and Newfoundland\footnote{Ibid.} regulatory regimes adopt a two stage system for the disposition of interests in Crown petroleum resources. The first stage, a permit in the case of the federal regime and an exploratory permit in the case of Newfoundland, may result in the subsequent issue of a lease but the permittee’s rights at the first stage are relatively quite limited. For example, there is no right to proceed to commercial production under permit.\footnote{See the Canada Oil and Gas Land Regulations, supra, footnote 50, s. 34, and the Newfoundland and Labrador Petroleum Regulations, 1977, \textit{ibid.}, s. 43.} Is such a permit a contract? There has been no judicial consideration of the nature of a permit as distinguished from a lease.
However, several considerations support the conclusion that it is a contract.

First, a permit is in essence an option to acquire a lease. This is expressly so in the case of the federal regulations.70 The position under the Newfoundland regulations is not as clear but even there a permittee has at least the exclusive right to apply to convert his permit to a lease.71 Canadian courts have considered the nature of an option to acquire interests in mining claims72 and an option to renew a freehold oil and gas lease73 and have inclined to the view that such options to acquire interests in land are themselves interests in land. As already discussed, it seems clear that a lease granted by the Crown is a contract.74 By analogy, would not an option to acquire a contractual interest itself have to be characterized as contractual, just as an option to acquire an interest in land is itself an interest in land? The one holding does not necessarily involve the other but, it is submitted, there is a strong analogy.

Certainly the United States courts have considered a permit to have at least some of the characteristics of the lease that might flow from the permit. In Aronow v. Bishop, Justice Angstman said in the Supreme Court of Montana:75

"The permit is itself an act of the Land Department, final so long as it lasts, and though in its inception a mere license conveying no estate in the land, it is a final grant of a valuable right pursuant to law which ought to be secured to the person to whom the law gives it". Witbeck v. Hardeman (C.C.A.) 51 F.2d 450, 452, affirmed 286 U.S. 444, 52 S.Ct. 604, 76 L.Ed. 1217. This "grant of a valuable right" does not differ from the grant contained in the ordinary oil and gas lease executed by the individual owner, and, whatever the rule may be in other states, in this jurisdiction such a right is held to take "the character of an interest or an estate in the land itself. It is an interest in the land, although incorporeal". Marias River Syndicate v. Big West Oil Co., 98 Mont. 254, 38 P.2d 599, 601 and is sufficiently an "interest in real estate" to support an attachment. Willard v. Federal Surety Co., 91 Mont. 465 8 P.2d 633. Herigstad v. Hardrock Oil Co., 101 Mont. 22, 52 P.2d 171, 174.

But one does not have to conclude that a permit gives rise to an interest in land to invoke arguments of interference with acquired or vested rights. All that is necessary for that argument to have merit is some contractual right.

70 Canada Oil and Gas Land Regulations, ibid., s. 35(1).
71 Newfoundland and Labrador Petroleum Regulations, 1977, ibid., ss 43 et seq.
74 Supra, at footnotes 55 et seq.
75 (1938), 86 P. (2d) 644.
Secondly, it seems clear that the interests of the permittee flow from the issue of the permit and not from the legislation empowering the Crown to issue that permit. As with the lease, the permit is issued by the Crown as owner of the resource in question, the legislation, generally speaking, being concerned with establishing the terms on which the Crown may dispose of its interests. Indeed, in the case of Newfoundland the scheme of the regulations is such that several terms remain to be imposed by the Minister in the permit. For example, section 51(1) provides that the Minister "shall prescribe in every permit a work program". That the work programme becomes an obligation of the permittee as a matter of contract, rather than as a legislatively imposed duty, is implicit in paragraph 3 of the permit:

The permittee shall, in accordance with the Regulations, conduct the work program set out in Schedule "B" hereto. The obligation follows from the permit and not from the exercise of legislative capacity by the Crown. That this was the intention is supported by the terms in which most provisions of the regulations are drafted. While the precise wording varies to some extent, all "obligations" imposed on a permittee, or lessee, are imposed in terms such as "it is a condition of every permit that . . ." rather than in terms such as "every permittee shall . . .".

This leads to a third consideration supporting the conclusion that a Newfoundland permit operates as a contract. Under the permit, the permittee specifically undertakes to conduct a particular work programme, to relinquish certain areas covered by the permit and to spend fixed sums of money on education and training and research and development programmes. Surely the Newfoundland government would deny any suggestion that these undertakings were not contractual obligations. If they are contractual obligations binding the permittee, there must be concomitant or correlative contractual rights binding on the Crown as the other contracting party.

There is a fourth consideration in the case of the Newfoundland permit. Paragraph 2 of the permit is in these terms:

2. The rights set out in paragraph 1 hereto shall be subject to the Act and the Regulations as they from time to time may be, except that the length of the reconnaissance phase, the exploration period and the appraisal period and the

76 See the discussion supra at footnotes 55 et seq.
77 Supra, footnote 50.
78 Ibid., Schedule "C".
79 See, for example, ss 46 and 120(1).
80 Para. 3.
81 Para. 4.
82 Para. 5.
83 See the further discussion on this provision infra at footnote 97.
basic royalty, the additional royalty and the rate of terms of participation applicable to that part of the permit area converted to lease by the permittee shall remain as at the date of issuance of this permit, subject to section 60 of the Regulations.

This provision\(^{84}\) must have been intended to have effect as a contractual rather than legislated term. As a legislated term, it would be an attempt by the Crown in its legislative capacity to bind itself as to its future legislative capacity and that, of course, it cannot do. Thus, paragraph 2 can only have any substantive effect as a contractual term.

For all these reasons, the conclusion seems compelling that federal and Newfoundland permits do create contractual rights.

With this background, it is time to turn to an examination of the law in operation.

IV. Alberta.

Alberta provides a striking illustration of sophisticated, legal anticipation. The Alberta Crown Petroleum and Natural Gas lease provides:\(^{85}\)

The Lessee and the Minister agree with each other as follows:

1. The lessee shall comply with the provisions of The Mines and Minerals Act, as amended, and any Act passed in substitution therefor, and with any regulations now made or that at any time may be made under the authority of the said Acts, and all the provisions and regulations that prescribe, relate to or affect the rights and obligations of lessees of petroleum and natural gas rights that are the property of the Crown in right of Alberta. The provisions of any other Act of the Province of Alberta that prescribes, relates to or affects the lessees of the said petroleum and natural gas rights, shall be deemed to be incorporated into this Lease and shall bind the lessee from the date it comes into force. In the event of conflict between any regulation made after the execution of this Lease and any regulation previously made, the regulation last made shall prevail.

By virtue of this provision, future regulatory changes take effect by operation of the contract itself. It is a term of the contract that the terms of the contract may be changed unilaterally.\(^{86}\) Shielded by that reservation, the government of Alberta can defend itself against any suggestion of interference with or confiscation of acquired or vested rights. Alberta lessees have all agreed to accept future regulatory changes as binding on them.

\(^{84}\) S. 60 deals specifically with renewals of appraisal periods, upon terms and conditions the Minister may prescribe, and does not amount to any general reservation of a right to impose future changes.

\(^{85}\) Supra, footnote 62.

\(^{86}\) This was even more explicit in an earlier version of the "Compliance with Laws" provision which is set out in Thompson, \textit{op. cit.}, footnote 2, at p. 311.
The technique amounts to a unilateral power to vary the terms of the contract between the Crown and the lessee. That, of course, raises the question of whether such a contract truly is a contract or whether the courts might exclude the basic, core terms of the contract from the reach of such a unilateral power. But, as Dr. Thompson put it:

87 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".

Furthermore, the Privy Council has expressly upheld the validity of a variable royalty where the right to impose such a royalty has been properly reserved as a matter of contract.88 However, some support for the argument is to be found in *Anthony v. A.-G. for Alberta (No. 2)*89 where O'Connor J. held that the dues payable on renewal of a timber licence could not be prohibitive even though the province had the discretion to fix the dues in accordance with "the regulations in force at the time the renewal is made".

But in view of the essentially political relevance of the whole issue of legal characterization, the question is of little practical interest. Alberta has served notice that it reserves the right to implement future changes to the terms of leases issued by it. The oil industry has accepted those terms. Even if a court might subsequently determine some legal restriction on the province's ability to do as much as a matter of contract, the government could as always, deal with the situation by legislative action. Its political ability to do so would certainly be enhanced by the presence of the above provision in its leases, notwithstanding that a court might determine that the provision does not legally accomplish quite what it appears to.

Certainly in the case of its most recent variation of existing lease terms the Alberta government faced no resistance based on alleged interference with acquired or vested rights. In 1974, it successfully imposed a revised royalty system to appropriate the bulk of the increased price for oil that resulted from the international events of 1973.90

89 *Supra*, footnote 34.
90 See Petroleum Royalty Regulations, Alta Reg. 93/74. See also s. 132 of the Mines and Minerals Act, *supra*, footnote 50. am. by 1978, Bill 39, s. 52(13). S. 132(3) provides that any provision in a lease granted before December 14th, 1973, prescribing a maximum royalty rate "is void". Enactment of this provision was probably technically unnecessary in view of the "compliance with laws" provisions in those leases. But the point here is that there was no outburst from industry that the new royalty regime interfered with acquired or vested rights. Rather the response was one of disgruntled resignation.
One must hasten to point out, however, that in practical terms even such a wide reservation as the Alberta provision does not give a government carte blanche to implement whatever arbitrariness it chooses. The provision might enable it to do so with respect to existing leases but it would be unwise not to have an eye to the future impact of such action. That impact might well be the withdrawal of investment in petroleum exploration and exploitation. In other words, even though the government of Alberta may have succeeded, in legal terms, in reserving the right to apply future changes to existing rights, there is a practical limitation on the extent to which it can use that legal power. The overall success of such a reservation has to be measured against a background of the impact of any exercise of the reserved power. Again in Dr. Thompson's words: 91

[T]he 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.

The record of investor confidence in the petroleum industry in western Canada speaks for itself. While written in 1967, that conclusion is equally as valid with respect to Alberta in 1980. It is also valid if the qualification "foreign" is deleted from "investors".

Furthermore, the Alberta government has always acknowledged that this is the case. In a paper presented to an audience of United States oil men in 1949, the then provincial Mines Minister said: 92

However, I can assure you that in spite of the legalistic considerations with which I have been dealing, there is not the slightest insecurity in Alberta in the relations, contractual or otherwise, between the owners of oil and gas rights on the one hand and the corporations and persons, either Canadian or foreign, who come into our Province intent upon searching for and developing those minerals. The legal fiction that "The King can do no wrong" has long since passed into the "Limbo" of forgotten things in so far as it can have any application to the administration of Crown oil and gas properties in Alberta. Those charged with the development of the mineral resources as trustees for the people of the Province find themselves in the position where they must at all times be fair and just both to the people and to those persons who risk their money in providing the means whereby the resources are developed. In the very nature of things, there could not be prolonged failure in the discharge of that trust. The rate at which development has been and is being carried on in Alberta today by Companies that have operated there for years, as well as Companies which have come in during the last two years, is evidence of the satisfaction and feeling of security which they enjoy.

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92 Hon. N.E. Tanner, The Oil and Gas Law of the Province of Alberta, Canada (1949), First Annual Institute on Oil and Gas Law, Southwestern Legal Foundation 313, at pp. 319-320. For many years, Alberta steadfastly honoured its commitment to revise its royalties only every ten years. See A.R. Thompson, Basic Contrasts between Petroleum Land Policies of Canada and the United States (1964), 36 U. of Colorado L. Rev. 187, at pp. 212-213.
What the foregoing indicates is that the petroleum industry has to have a measure of confidence that the legal mechanism for imposing change will not in fact be used arbitrarily. But more than that. In my view, the very ability to include such a reservation in the first place is a reflection of that confidence. Such confidence, of course, is only developed over time. Hence, the legal mechanism may not be available to a government that is unproven so far as the oil industry is concerned.

This is a point that seems to me, with respect, to be overlooked in Dr. Thompson's implicit recommendation that the legal mechanism should always be employed. Alberta can maintain an acceptable level of petroleum industry investment because the industry has confidence that its legal right to impose future changes will not be abused. But would the industry submit to the same mechanism in Newfoundland? Would it have the same confidence? The answer is almost certainly "no", not because of any view that Newfoundland is likely to abuse any reservation to impose future changes, but because there is no established record on which to build confidence that it will not. In addition, the territory with which the Newfoundland regulation is concerned is unproven, frontier territory requiring more inducements in lease terms than is the case in areas of proven potential, such as Alberta. One such inducement may be a measure of protection against the impact of future changes.

The actual position with respect to the ability of the Newfoundland government to impose changes as a matter of contract supports this analysis.

V. Newfoundland.

Newfoundland has no producing oil or gas fields and has not granted any petroleum leases. Under the terms of the Newfoundland and Labrador Petroleum Regulations, 1977, it issues exploratory permits. The permits are in a form prescribed by the regulations. In this prescribed form, the permittee is expressly granted the following rights with respect to his permit area:

1. the non-exclusive right to carry out any reconnaissance surveys;
2. the exclusive right to drill for petroleum to any depth; and
3. the exclusive right to convert to lease parts of the permit area in accordance with the Act and the Regulations.

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94 Supra, footnote 50.
95 Ibid., s. 43(2).
96 Ibid., Schedule "C".
The permit deals explicitly with the application of regulatory changes, but in somewhat schizophrenic terms. It is set out again here for convenience:97

2. The rights set out in paragraph 1 hereto shall be subject to the Act and the Regulations as they from time to time may be, except that the length of the reconnaissance phase, the exploration period and the appraisal period and the basic royalty, the additional royalty and the rate of terms of participation applicable to that part of the permit area converted to lease by the permittee shall remain as at the date of issuance of this permit, subject to section 60 of the Regulations.

There are two points about this term of the permit to be discussed further.

The first, and by far the more important, is the obvious one: paragraph 2 of the Newfoundland exploratory permit does not purport to make all future changes applicable to existing permittees as a matter of contract. On the contrary. It provides quite explicitly that certain terms of the permit "shall remain as at the date of the issuance of this permit". The provision does not simply leave the question to be resolved by application of the legal rules of strict construction discussed above. It entrenches certain terms. And it will not have escaped notice that these entrenched terms are the more important ones comprising the core of the contract.

The government of Newfoundland could, of course, abrogate even those entrenched terms by exercising its legislative capacity. However, there would be no doubt that it was confiscating acquired or vested rights in so doing. Indeed, the argument would be far more compelling than it would be if the permit said nothing about the application of future changes. As we have seen, even in that case it would be compelling enough to have political significance. In practical terms, the core terms of the Newfoundland permit are immune from future change.

The second point about paragraph 2 is this. Even to the extent that the paragraph purports to apply future regulations it may well be legally defective. What the paragraph does is subject the rights set out in the permit to the Act and the regulations "as they from time to time may be". However, the approach of strict construction so clearly articulated by the courts may mean that such future regulations will thereby apply to the permit only if such regulations themselves purport to apply thereto in the most explicit terms.98 And even then the legal position may be that they would so apply as legislation and not by virtue of the contract. If applicable as legislation, by definition, they would be interfering with vested

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97 See supra, at footnote 83. The paragraph is based on s. 6 of the regulations.
98 See further Thompson, op. cit., footnote 2, at pp. 307-308.
rights. It is to be noted that paragraph 2 of the permit, insofar as it does purport to apply future regulations, does not incorporate those future regulations as terms of the contract, as the Alberta mechanism does.99

On the basis of legal analysis, there can be no doubt that the fundamental terms of a Newfoundland exploratory permit can only be varied by reliance on the legislative capacity of the Crown. Because of the particular wording of paragraph 2, the government simply could not deny that in so exercising its legislative capacity it was completely abrogating the guarantees that it itself had given. Whether such guarantees were legally classified as mere statements of intention or, as is more likely, as contractual obligations would not matter that much in the political arena.

Why, then, would the government issue its permits on such terms if the legal effect and the potential consequences are so clear? As already intimated, in my view the answer is to be found in the fact that the permits in question are permits for unproven, wildcat territory issued by an unproven government. The legal mechanism employed by Alberta in practical terms is simply not available to Newfoundland. The name of the game is the art of the possible.

VI. Canada.

An examination of federal Canadian petroleum rights provides a striking example of an actual political effect arising from the foregoing conclusion that the real relevance of legal characterization of those rights in Canada is political. More than that. The history of events with respect to federal petroleum rights supports the legal analysis itself.

Consider the following provisions of Bill C-20, introduced in the federal Parliament in 1977 to enact the proposed Canada Oil and Gas Act:100

\[
\begin{align*}
\text{Former Permits} \\
\text{Rights terminated} & \quad 31. \text{Notwithstanding anything in this or any other Act of the Parliament of Canada, the former regulations or any former permit or former lease, the holder of a former permit shall, on the coming into force of this Act, have} \\
& \quad (a) \text{no right or option whatever to obtain an oil and gas lease for any lands under the former permit; and} \\
& \quad (b) \text{only such rights in relation to the former permit as are provided by or pursuant to this Act.}
\end{align*}
\]

99 See supra, at footnote 85.
100 The Bill lapsed. It will be reintroduced in a revised form.
Termination of Acquired Rights
Without Compensation

Construction 58. Notwithstanding this or any other Act of the Parliament of Canada and any regulations made pursuant thereto,

(a) the rights and interests in Canada lands provided by or pursuant to this Act are intended to replace all rights and interests in Canada lands, or prospects thereof, acquired or vested prior to the coming into force of this Act and divested, terminated or otherwise affected by or pursuant to this Act; and

(b) no person shall have any right whatever to claim or receive compensation, damages or indemnity from Her Majesty in right of Canada or any servant or agent thereof for any acquired or vested right or interest or any prospect thereof that is divested, terminated or otherwise affected by or pursuant to this Act or for any duty or liability imposed on that person by or pursuant to this Act.

Few legislative provisions could be more distasteful than these appear to be on first reading. Why, then, would the Canadian government propose them to Parliament? A second, associated question should be considered in the course of examining the answer to the first: to what extent would acquired or vested rights actually be confiscated without compensation?

The existing federal regulatory regime is found in the provisions of the Canada Oil and Gas Land Regulations, first promulgated in 1961.101 This regime became the subject of widespread criticism arguing that it failed to protect Canada’s medium to longer term interests.102 By the early 1970’s, the government was persuaded and undertook a sweeping revision. However, if a new scheme was to bring about any significant change, it would have to be applied to permits that had been issued in the meantime under the 1961 regulations.

There was little doubt that the proposed changes could not be applied to existing permits as a matter of contract. The permits as originally issued did not contain a general compliance with laws provision and thus, in accordance with the approach of strict construction, would not be subject to future changes in the regulations as a matter of contract. Indeed, the permits tended to corroborate that conclusion in the following terms:

This permit may be renewed pursuant to the said Regulations.

This permit may be cancelled pursuant to the said Regulations.

“[T]he said Regulations” referred to the Canada Oil and Gas Land Regulations and inferred the regulations as they were at the date of

101 Supra, footnote 50.

the permit. But there was absolutely no doubt about the option to lease and the royalty provisions:

The above permittee has the exclusive option to obtain an oil and gas lease for the said lands for a term of twenty-one years subject to the payment of the royalty specified on the back hereof and to the said Regulations. (Emphasis added.)

The back of the permit set out the royalty provisions of the regulations. Clearly the royalty could only be changed by retroactive legislation.

The government agreed that this was the law and that the terms of existing permits could only be changed by legislation. Speaking to a conference in February, 1977, just before the introduction of Bill C-20, a federal official said:

Why is it that we have taken so much flak from both sides, one side that says we are being too repressive, and the other side that says we are not going far enough?

First of all, this new oil and gas legislation will be retrospective in nature. We are going to alter the terms of the oil and gas contracts that have already been issued in the offshore and in the Territories by the federal government of Canada. This is a very unusual thing to do in Canada. In Canada, a contractual relationship entered into is, or has been, usually thought of as more or less sacrosanct. This will be an exception. In order to change the terms and conditions of all those contracts, we have to pass retroactive legislation. It is understandable that this should be somewhat shocking to industry, but we see no other way to accomplish the desired result. The fact of the matter is that although perhaps only a quarter of our continental margin is presently covered by permits, nevertheless this represents the bulk of the prospective area from the standpoint of technology as it exists today. Thus, if we are going to have a new regime, to make it meaningful there has to be retroactive legislation so as to be able to bring into line the terms and conditions of the contracts already covering extensive offshore areas. I think that this concept is now widely accepted, although it did cause a tremendous reaction and quite understandably so when it was first introduced.

However, the government did not have to rely on such draconian legislative measures to implement all of its proposed changes. Indeed, some have been implemented already by regulation by a technique as sophisticated as the Alberta mechanism discussed earlier, yet quite different in its operation. The technique is perhaps best described as one of gentle persuasion by offering an inducement to accept the proposed changes as binding upon existing permits. That inducement is, essentially, an offer by the Crown to forego strict application of the existing regulations (by which the permittee is admittedly bound). In a word, the permittee is offered a choice as to the lesser of two evils.

Let us consider the Oil and Gas Land Regulations as they were before 1977. In general terms, the regime established by those regulations provided for a two-stage system. In the initial years, the operative instrument was a permit which, as already discussed,\(^{104}\) gave the permittee the option to lease. With the extensions provided for in the regulations, these permits could be extended for a maximum twelve years. Extensions thereafter were in the discretion of the Minister and subject to such conditions as he may prescribe.\(^{105}\) Thus, the regulations did provide a means by which, effectively, some terms could be changed so as to apply to existing permits, without raising any sound legal basis for arguments of interference with vested rights. This is not to say, however, that interference in such a way as to impose a radically different scheme would not provoke an outcry of "foul". And, indeed, a tenuous legal argument could be erected to limit the conditions that the Minister might impose, as a term of renewal of a permit, to such conditions as did not interfere with the core or fundamental terms of the original permit,\(^{106}\) such as the specified rate of royalty. But where permittees had used up all their renewals as of right, a means of varying at least some terms was available if a permittee applied for a renewal.

What alternative did a permittee have under the pre-1977 regulations? His only alternative was to exercise his option, granted by the permit, to go to lease. A lease was available to a permittee as of right\(^{107}\) and so that might appear to be an attractive alternative at first blush. However, there was a catch. A permittee was entitled to a lease of only one half of the permit area.\(^{108}\) In 1977, the areas covered by federal permits had not been explored nearly enough to enable an informed lease selection to be made in most cases and, therefore, the leasing alternative was not an attractive one at all for many permittees.

To summarize. Under the pre-1977 regulations, and as permitted by the regulations, the federal government had two options open to it in attempting to impose new terms on existing permittees. First, it could impose new conditions as a term of any permit renewal that was sought after a permittee had exhausted his renewals as of right. Secondly, it could insist that permittees proceed to lease.

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\(^{104}\) Supra, at footnotes 70 et seq.

\(^{105}\) S. 40 as it was then.

\(^{106}\) See the discussion supra, at footnotes 87 et seq.

\(^{107}\) S. 55(1) as it was then.

\(^{108}\) S. 56(2) as it was then.
The technique that it adopted from this position of strength was to offer a third option, namely, "voluntary" acceptance of the proposed new regime. The 1977 amendments to the regulations provide:

PART II
Option
114. On the coming into force of this Part,
(a) any permittee whose permit is valid and subsisting and
   (i) who has applied for an oil and gas lease pursuant to section 55 and has not withdrawn that application, or
   (ii) whose permit has been renewed six times and does not, or has ceased to, qualify for an extension under section 39;
(b) any permittee whose permit has expired and who, before the expiration thereof, applied for an oil and gas lease pursuant to section 55, and has not withdrawn that application, and
(c) any permittee whose permit was renewed prior to the coming into force of this Part, pursuant to section 40, as that section then read,
shall have the additional rights provided in sections 115 to 117 according as they apply to his case.

The most significant of these "additional rights" in the present context is the right to withdraw an application for a lease and apply instead for a "special renewal permit for such term and subject to such conditions . . . as the Minister may determine".

As already stated, a permittee could choose the lesser of two evils. He could proceed under the old regulations (in the knowledge, by the way, that these too could be changed by legislative action) or he could voluntarily accept the new regulations. From industry's point of view, it was a Hobson's choice, but from a legal point of view it was a rather neat answer to the legal arguments based on interference with vested rights.

Two of the main changes that the federal government wished to impose on existing permittees were, first, to grant the state-owned oil company Petro-Canada an interest in permits and, secondly, to replace the fixed royalty system under the old regulations with a sliding scale royalty, termed a "progressive incremental royalty". The first of these was put in place by the 1977 amendment to the regulations but the second awaits the enactment of Bill C-20. It is interesting to consider why these two changes are being implemented in different ways.

It will be recalled that the original permits issued under the Canada Oil and Gas Land Regulations left absolutely no doubt that future changes in royalty provisions could be applied to existing

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109 SOR/61-253 as am. by 77-666 and 77-979.
permits only by retroactive legislation. Could the Hobson’s choice technique be used to circumvent this? In a strict legal sense, the answer is probably “yes”. One says “probably” as there is the possible argument that the power of the Minister to impose conditions, on renewal of permits after exhaustion of renewals as of right, would not extend to changes in the fundamental terms of the permit arrangement. But in any event, new royalty arrangements imposed in this way would not apply to leases that a permittee opted to take out under the old regulations. Thus, legislation is necessary to apply the proposed new royalty arrangements to all production.

However, even if the progressive incremental royalty could be implemented in a way that would technically undermine the vested rights argument, the fact would remain that the government would be reneging on its express undertaking that any lease arising from the permit would be subject to the royalty rate specified therein. Better, perhaps, to seek the support of Parliament to do that, even if not technically necessary in all cases.

Two points emerge from the foregoing discussion. First, the “confiscation” provisions of Bill C-20 are nowhere near as extensive in their actual interference with acquired or vested rights as might appear at first. At least some of the changes proposed for the federal regulatory regime can be, and have been, implemented without, in strict legal terms, confiscating the rights acquired under the original federal permits. Secondly, this suggests that even where a Canadian government is prepared, overtly, to take such distasteful legislative measures as confiscation of rights without compensation, it will exhaust all other means open to it first, such as utilization of what I have termed the Hobson’s choice technique. The confiscatory provisions of Bill C-20 remove any legal impediment to the implementation of whatever new regime the federal government wants. Yet it has chosen to implement as much of that regime as possible without reliance on those provisions of Bill C-20. It is suggested that the reasons are not entirely attributable to the expediency of being able to implement some changes by amendment to the regulations without having to go to Parliament for the enactment of those confiscatory provisions. In other words, the federal government’s approach seems to be one of employing its power to confiscate only for the implementation of those parts of the proposed new regime for which there is no other possible method.

This underscores the essentially political relevance of the whole question of legal characterization. Early in this article it was said:

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110 Supra, following footnote 102.
111 Supra, in Part I, italics added.
If the legislature is forced to state explicitly that it is confiscating property without compensation, it will create a political climate favourable to the parties adversely affected. This climate may be used to mitigate the proposed extent of the interference with existing rights.

"No one knows what goes on behind closed doors." However, certain inferences can be drawn.

The federal government first announced its intention to overhaul the Canada Oil and Gas Land Regulations in April, 1970. As at the date of writing in early 1980, only some parts of the outcome of that overhaul had been implemented and Bill C-20 had not been enacted. Why has the whole process taken so long and why, even after some specific proposals were announced publicly, were they revised subsequently? There are many reasons no doubt, not the least significant of which being that the whole petroleum scene has changed so dramatically over that time.

Another reason may be that all would be for naught if the impact of any new regime were to depress exploration activity to an unacceptably low level. Presumably there has been something of a bargaining process at work. The major consideration in that process is obviously the acceptability of the proposed new regime to the government and to the industry. But it seems only reasonable to assume that acceptability to industry has to be measured to some extent by reference to its previous position and the extent to which the new system involves an interference with its rights under that old system. If so, the relevance of legal characterization may be political but it may be none the less important in its impact on the outcome of events for that.

VII. Conclusion.

Canadian law is clear. Governments can derogate from their contractual obligations and unilaterally impose new terms on licences, permits and leases issued by them. However, in so doing, they must state their intention clearly because of the legal presumption against finding an intention to interfere with acquired or vested rights. Even where that intention is found, there may be a further presumption with respect to compensation for the confiscation of those rights. Whether that presumption is one of a right to the actual payment of compensation or one of construction, in either

112 In May, 1976, the government published a Statement of Policy: Proposed Petroleum and Natural Gas Act and New Canada Oil and Gas Land Regulations. On June 20th, 1977, in a speech in Calgary, the then Minister of Energy, Mines and Resources announced a number of significant changes to the 1976 Statement of Policy.

113 Supra, at footnotes 40 et seq.
event a political climate is created, favourable to the holder of the acquired or vested rights. That climate may be exploited so as to mitigate the proposed extent of the interference with existing rights.

Canadian law is equally clear that governments can avoid the vested or acquired rights issue by reserving in their contracts the right to make future changes binding upon the contracting party as a matter of contract. Again, this right must be reserved in the clearest and most explicit language. However, the ability of a government to submit contracting parties to such a power of unilateral variation no doubt varies with the degree of confidence industry has that it will receive fair treatment. And even if a power of unilateral variation is reserved, there are practical limitations on the extent to which it can be employed.