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OIL AND GAS UNDER THE NEW CONSTITUTION*

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The Constitution Act, 1982 confirms and enlarges provincial jurisdiction over oil and gas in several important ways. The provinces now have: the undisputed right to legislate with respect to the economic development of a resource, the "exclusive" power to control production up to the refining or manufacturing stage, an unlimited taxing power, and the express power to legislate in relation to the export of oil and gas from the province to the rest of Canada. Although provincial legislative jurisdiction over oil and gas has been materially increased, the power to exercise that jurisdiction in the event of a conflict with federal legislation does not appear to have been significantly affected — the existing federal heads of jurisdiction remain in place and can still override conflicting provincial enactments. The amending formula contains a veto power which will enable a province to protect itself against future erosions of its legislative jurisdiction and proprietary rights over its non-renewable resources.

La loi constitutionnelle de 1982 reconduit et accroît, à bien des égards, la compétence provinciale sur le pétrole et le gaz naturel. Les provinces possèdent désormais: le droit incontesté de légiférer sur la mise en valeur des richesses naturelles du sous-sol, le pouvoir "exclusif" d'en contrôler la production jusqu'au stade du raffinage ou au stade industriel, le pouvoir exprès d'en régler le commerce inter-provincial, et un pouvoir de taxation illimité. Bien que dans le domaine des ressources naturelles la compétence législative des provinces ait été considérablement étendue, le pouvoir de l'exercer en cas de conflit avec la législation fédérale ne semble pas avoir été changé de façon significative—les chefs de compétence au niveau fédéral restent en place et peuvent toujours avoir préséance sur les lois provinciales qui entrent en conflit. La formule d'amendement contient un pouvoir de veto qui permettra à une province de se protéger contre toute érosion future de sa compétence législative et de ses droits de propriété sur ses ressources non-renouvelables.

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Introduction

The Canada Act 1982¹ is the last Act of the Parliament of the United Kingdom that will have the force of law in Canada. It provided that the Constitution Act, 1982, which had been drafted in Canada after protracted and acrimonious negotiations between the federal and provincial governments, would come into force in Canada on a day to be fixed by proclamation. The Queen proclaimed the Constitution Act, 1982 to be in force in a ceremony on Parliament Hill on April 17th, 1982.² Since then, Canada has a Constitution consisting of the Constitution Act, 1982, the British North America Act, 1867³ (renamed the Constitution Act, 1867) and amendments thereto, the Acts and Orders in Council under which various provinces were admitted into the Union after 1867, the Statute of Westminster, 1931, and certain other Acts and Orders listed in the schedule to the 1982 Act.

The new Constitution affects jurisdiction over oil and gas directly through the resource amendment,⁴ indirectly through the operation of the Charter of Rights, and also imposes an important restriction on future constitutional amendments insofar as they relate to oil and gas.

The provisions of the new Constitution, of course, apply to the non-renewable natural resources of all provinces. To date, however, Alberta has been the primary source for Canada's oil and gas and Alberta is the province that has had to come to grips with a growing federal hegemony in energy. In the discussion that follows, I will from time to time use the case of Alberta to illustrate some aspects of the revised constitutional arrangement. However, the comments are also applicable to any province that may find itself producing and exporting oil and gas.

I. Division of Powers.

The resource amendment is contained in section 50 of the Constitution Act, 1982, which adds section 92A to the 1867 Act. The new section deals specifically with the distribution of legislative jurisdiction. The first thing to be noted about section 92A is that subsection (6) provides that nothing in the amendment derogates from any powers or rights that the provinces possessed before the amendment came into force. Thus, the provinces have retained everything they had under the old Constitution, and gained whatever new powers or rights that may have been granted to them under the

¹ 1982, c.11 (U.K.).

² S.23(1) (a) dealing with minority language rights did not come into force in Quebec and will not do so until expressly authorized by the government of that province: S.59 of the Constitution Act, 1982.

³ 30-31 Vict., c.3 (U.K.).

⁴ S.92A deals with non-renewable natural resources, forestry resources and electrical energy. This article is concerned only with the impact of the new Constitution on oil and gas which fall within the category of non-renewable natural resources.

amendment. They have gained a surprising amount under the resource amendment, considering the magnitude of the stakes involved in oil and gas and how reluctant governments have been in recent years to make even the smallest concession concerning these substances.

The opening words of subsection (1) track the opening words of section 92 of the 1867 Act in that the powers they grant are *exclusive* to the legislature. The exclusive power includes the making of laws in relation to: (a) exploration for non-renewable natural resources; and, (b) development, conservation and management of those natural resources, including the rate of primary production therefrom.

The provinces already possess many of the powers now embodied in section 92A(1). Traditionally, they have found jurisdiction for their oil and gas legislation under the following sections of the 1867 Act: section 92(5), management and sale of public lands belonging to the province; section 92(13), property and civil rights in the province; section 92(16), all matters of a merely local or private nature in the province; and section 109, the ownership of all lands, mines and minerals and royalties.

The specific reference to exploration in section 92A(1)(a) is new in the sense that the word "exploration" does not appear in the 1867 Act. However, that power would appear to be subsumed under the existing heads of section 92. For example, the disposition of Crown minerals, including the right to explore, falls within subsection (5).

In contrast, section 92A(1)(b) contains not only new words, but may well have conferred a wider scope for provincial legislative jurisdiction. It refers to "development, conservation and management" of non-renewable natural resources. One of those words, namely "management", is to be found in the existing section 92(5). However, there it refers to the "management of public lands" which is not the same thing as the management of the natural resources themselves. Since oil and gas are non-renewable natural resources par excellence, it seems to implicitly follow that the provinces in their role of "managers" have much broader powers than formerly.

The word "conservation" is not to be found in the 1867 Act, but it may not actually add anything to existing provincial powers. It has long been held that provincial legislation *bona fide* designed to physically conserve the resource and maximize ultimate recovery is valid.⁵ The question of whether conservation can be based on economic as well as physical considerations is still somewhat moot. There is dicta by the Supreme Court of Canada in the *Central Canada Potash* case⁶ that seems to

⁵ *Spoooner Oils Ltd v. Turner Valley Gas Conservation Board*, [1933] 4 D.L.R. 545, [1932] 3 W.W.R. 477 (S.C.C.).

⁶ *Central Canada Potash Co. Limited et al. v. Government of Saskatchewan et al.* (1979), 88 D.L.R. (3d) 609, [1978] 6 W.W.R. 400 (S.C.C.).

indicate the wider connotation should be used. This dicta would tend to validate Alberta's long standing oil pro-rationing scheme, although it did not help Saskatchewan when it attempted to pro-ration potash. In the *Central Potash* case the Supreme Court found that the Saskatchewan legislation was an attempt to regulate interprovincial and international trade, which is a federal matter under the trade and commerce power.

The word "development" is also new and has sufficient scope to guarantee that sooner or later the courts will be called upon to define its limits. The concept of "development" would seem to include the planning and staging of mega projects such as oil sands plants in an orderly fashion, and may go so far as to include planning for broad economic goals. It should also have the effect of supplementing a province's power in relation to conservation of a non-renewable resource and to justify consideration of economic factors.

Section 92A(1)(b) also contains the first of two references to "primary production". The exclusive power to make laws in relation to development, conservation and management of oil and gas specifically includes the power to make laws in relation to the rate of primary production therefrom. There is a lengthy definition of "primary production" added by the 1982 Act as the Sixth Schedule to the 1867 Act. This definition would include the rate of production from the wellhead and the rate of production of the product resulting from processing or refining of some, but not all, natural resources. It does not include products resulting from the refining of: crude oil, upgraded heavy crude oil, or synthetic crude oil. When one unpacks this definition, it appears that the province now has the exclusive jurisdiction to legislate with regard to the rate of production of crude oil, oil sands, natural gas and natural gas by-products such as sulphur, ethane and liquid petroleum gases.

The concept of "primary production" clearly attempts to draw a line between what might be called the first stage of processing, and the manufacture of an upgraded product. In the case of crude oil, the jurisdiction stops at the wellhead, while in the case of synthetic crude it stops at the outlet of the oil sands extraction plant. When it comes to natural gas, however, the power to control the rate of production extends to the products resulting from processing. For example, a province would have the power to control the rate of production of ethane which is a feedstock for the petrochemical plants, but would not have the same control over ethylene which is the next step in the chain.

The government of Alberta obviously believed it already possessed the power to control the rate of primary production of crude oil from Crown lands when it cut back production of crude oil in an attempt to force the federal government's hand during the recent period of confrontation over oil and gas pricing. Freehold minerals were specifically exempted from the cutback, indicating that the provincial government was relying for jurisdic-

tion on the basis of its mineral ownership. The new amendment would now appear to entitle Alberta to legislate with respect to the rate of production from freehold lands as well as Crown.

Section 92A(1) has increased the *exclusive* power of the province, and section 92A(2) also enhances the provincial power, although not on an exclusive basis. Section 92A(2) enables a province to make laws in relation to the export from the province to another part of Canada of the primary production of a resource, with the qualification that such laws may not discriminate either in prices or in supplies of a resource exported to another part of Canada. It is worth noting that this power is confined to exports to other parts of Canada. In other words, it does not extend to exports to international markets such as the United States or Japan. It is also limited to primary production, which means it does not extend to manufactured or refined products. This subsection seems to allow a province to venture into interprovincial trade, a field which was previously sacrosanct to the federal government. Among other things, it should put beyond all question the competency of Alberta to enact its Gas Resources Preservation Act,⁷ at least so far as domestic Canadian markets are concerned. The main thrust of the foregoing Act is to require a permit before gas can be removed from the province.

The prohibition against discrimination contained in section 92A(2) relates to prices or supplies exported to another part of Canada. Therefore, it would prevent Alberta from discriminating between, say, Saskatchewan and Quebec, but it would not prevent Alberta from making special arrangements for production not exported from the province. Accordingly, industrial users of gas in Alberta can continue to enjoy a discount price which is substantially lower than the Alberta border price and Albertans can also be granted a priority of supply.

The non-discriminatory aspect of section 92A(2) is somewhat analogous to the free-trade aspect of section 121 of the 1867 Act. That section provides that all articles of growth, production or manufacture of any one of the provinces shall be admitted free into the other provinces. It is somewhat doubtful that oil and gas would fall within the category of articles of growth, production or manufacture, and section 121 seems to be primarily directed against the imposition of customs duties by an importing province. The new provision unquestionably applies to oil and gas and is directed to the exporting provinces which cannot discriminate in price or supplies among the other provinces. It would not prevent Alberta from imposing an export tax on gas destined for other parts of Canada, so long as the tax applied equally to all provinces.

It is possible that the non-discriminatory proviso may impose a new limitation on what the province can do with respect to its natural resources

⁷ R.S.A. 1980, c. G-3.

that are sold in other parts of Canada. It would seem to mean, for example, that all gas removed from Alberta for sale in other parts of Canada must leave the province at a uniform price. This could have serious repercussions on any plans to offer a discount price, directly or indirectly, to develop new markets in eastern Quebec or the Maritimes.

Discrimination in the matter of supplies could turn out to be much more difficult to avoid than the straightforward matter of price. In the past there has not been a problem with allocation of supply because of Alberta's continuing surplus of natural gas and the availability of foreign oil. Assuming that all or most of the present surplus of natural gas will be removed from Alberta as a result of applications now awaiting approval, Alberta's future available surplus will become only the one or two exajoules that are discovered each year over and above production. Thus the issue of supply and its allocation to the various parts of Canada could become highly contentious and raise the spectre of discrimination.

Alberta's Gas Resources Preservation Act⁸ allows natural gas to be removed from the province if authorized by the Lieutenant Governor-in-Council on the recommendation of the Alberta Energy Resources Conservation Board. There are no restrictions on what the provincial cabinet can take into account and the Conservation Board appears to direct itself to a consideration of the public interest of Alberta. Section 92A(2) speaks of making laws in relation to export and provides that such laws may not authorize or provide for discrimination. Does this mean that the only thing that is prohibited is a discriminatory *law*? Or does it impose a positive duty on regulatory tribunals such as the Conservation Board not to discriminate when authorizing removal of a resource from the province for sale in other parts of Canada?

Hard upon the heels of section 92A(2) we find a statement in subsection (3) that nothing in subsection (2) derogates from the authority of the federal government to enact laws in relation to the same matters. Subsection (3) also provides that where a law of Parliament and a law of the province are in conflict, the federal law prevails. This is a legislative expression of the judicial concept of federal paramountcy which was enunciated by the courts early on in the interpretation of the 1867 Act.⁹

Even with the limitation imposed by subsection (3), subsection (2) does have some positive effect on the provincial position. It offers a valid ground for provincial legislation in the absence of conflicting federal enactments and thereby lessens the possibility of provincial legislation being struck down for lack of legislative competency.

The most significant increase to provincial jurisdiction is found in section 92A(4), which expands the taxation power in respect of non-

⁸ *Ibid.*

⁹ *Huson v. South Norwich* (1895), 24 S.C.R. 143; *A-G Can. v. A-G B.C.*, [1930] 1 D.L.R. 194, [1929] 3 W.W.R. 449 (P.C.).

renewable natural resources. Prior to the amendment, the province was limited to direct taxation within the province to raise revenue for provincial purposes. Now it is empowered to make laws in relation to the raising of money by any mode or system of taxation in respect of non-renewable natural resources. This means that the province can now levy indirect, as well as direct, taxes on the resources. One result is to overturn the *CIGOL* case¹⁰ which held a Saskatchewan mineral tax to be invalid because it was meant to be passed on by the producer, thereby amounting to an indirect tax.

To circumvent that decision, the Saskatchewan government enacted a horrendously complicated Oilwell Income Tax Act¹¹ which was designed as a direct tax on oil and gas revenues. Now that a province can collect indirect taxes on natural resources, Saskatchewan is returning to a simpler form of taxation based on production. The way is also open for Alberta to replace its cumbersome freehold mineral tax system with a more streamlined collection of revenue based on production rather than on an assessment of value.

It may now be said that, with respect to a provincial natural resource, a province has taxing powers which are as unrestricted as those of the federal government, except that there can be no difference between the tax on production exported to another part of Canada and production not exported from the province. The prohibition against differentiation in tax treatment applies only between production not exported from the province and production exported to another part of Canada. It may be possible to argue that the exporting province can impose different taxes on oil and gas serving Canadian markets from that imposed on gas which supplies markets outside of Canada. However, when dealing with internationally destined gas, the province may still be constrained by section 92A(2) as that section does not appear to confer any jurisdiction on the provinces with respect to international exports.

It is clear the resource amendment has both confirmed and enlarged provincial resource jurisdiction. That is only part of the equation, however. The real question is whether or not the provincial power to exercise that jurisdiction vis-à-vis the federal government has also been enlarged.

The formidable array of federal powers is still in place;¹² there is nothing in the new Constitution which displaces it. The major relevant federal legislative powers are:

¹⁰ *Canadian Industrial Gas and Oil Ltd v. Government of Saskatchewan et al.* (1978), 80 D.L.R. (3d) 449, [1977] 6 W.W.R. 607 (S.C.C.).

¹¹ R.S.S. 1978 (Supp.), c. 0-3.1.

¹² I have discussed these federal powers on various occasions in the past, see Ballem, *The Energy Crunch and Constitutional Reform* (1979), 57 Can. Bar Rev. 740; *Oil and Gas and the Canadian Constitution on Land and Under the Sea*, Special Lectures, The Law Society of Upper Canada (1978), p. 251; and *Constitutional Validity of Provincial Oil and Gas Legislation* (1963), 41 Can. Bar Rev. 199.

- trade and commerce,
- peace order and good government,
- interprovincial and international works and undertakings,
- the declaratory power with respect to provincial works,
- taxation.

In addition to the above powers, the federal government's position is enhanced by the doctrine of paramountcy which makes valid federal laws prevail over conflicting provincial enactments.

One way to assess the position of the two governments under the new Constitution is to identify the most critical problem currently facing the oil and gas industry and then examine what each level of government could do in the absence of agreement between them.

There is no difficulty in identifying the problem—it is to find markets for the shut-in reserves of natural gas. Due in large measure to government incentives that were in place during the mid to late '70's, the industry has discovered large volumes of natural gas. The problem facing both the industry and the country is to somehow transform these shut-in reserves into revenue, which means that new markets, both domestic and export, must be found.

This search for new markets comes at a time when even the existing export markets are collapsing. The current level of exports to the United States is well below fifty percent of the authorized level. There are three principal reasons for this disastrous reduction: the high price of Canadian gas; increased domestic United States supplies; and, reduction of United States demand due, primarily, to the economic downturn. The latter two are clearly beyond the power of any Canadian government, whether federal or provincial, but the crucial matter of price is entirely within their jurisdiction. The federal government, originally in consultation with the American government, has established a uniform border price, currently \$4.10 U.S. per gigajoule, for all Canadian gas entering the United States. This government imposed price has proven to be non-competitive in many United States markets and there have been instances where state commissions have intervened to limit the amount of Canadian gas which may be purchased by United States importers.

The marketing crisis has attracted a great deal of interest and concern in recent months, in government as well as industry circles. At the moment, there is no unanimity of opinion as to the best solution. The federal government has taken a public stance of adhering to the uniform border price at current levels and tempting the United States buyer with long term permits. On the other hand, the Alberta government, in its recently released discussion paper, advocates a flexible approach to pricing to ensure that gas will be competitive in the various United States markets. One hopes that an agreement on a common strategy will eventually be worked out before it is too late. But, assuming this does not happen, what scenarios could evolve?

To start with, there can be little question that the federal government, under its trade and commerce power, can fix the price of a commodity exported from the country. Once it has been determined that the basic power over export pricing falls within federal jurisdiction, the question then becomes whether there is anything Alberta could do to force Ottawa to alter its position. The most obvious weapon for the province to deploy would be to limit the amount of gas leaving the province. This has been done once before, during the height of the last energy confrontation. In that instance, Alberta cut back the volume of crude oil exports to the rest of Canada. This move was not challenged, either legislatively or in the courts, so we are still in the dark as to what the final outcome would have been. In the case of natural gas, the province could control the rate of production of natural gas in at least two ways: pass laws to review and reduce existing removal permits for export to other parts of Canada under section 92A(2), or cutback the flow at the wellhead under section 92A(1)(b). The fact that both provincial stratagems could be initially justified under the new resource amendment is a good indication of its importance.

There is one significant difference between the markets for Alberta oil and those for its gas, and that difference complicates the province's position. Alberta crude oil is dedicated to the Canadian market, while forty percent of the gas normally goes into the export market. This means that an across the board cutback would have to be very drastic before it would really impact upon the rest of Canada, as the likely response of the federal government would be to prohibit exports and allocate the entire volumes to domestic markets. However, the province might attempt to make selective cutbacks by taking such steps as decreeing that certain removal permits will be suspended, or that export from the province shall take place only at certain points. If, for example, all the gas had to leave the province through the existing export point in the southwest corner of the province, as the volumes destined for California presently do, the result would be to effectively shut out the Canadian markets.

Such actions by a provincial government would be tantamount to open warfare, and Ottawa would then be politically justified in responding with all its legislative firepower. Their most likely "first strike" weapon would be the general power under the peace, order and good government clause. The courts have held that this head of jurisdiction can be invoked with regard to a matter of national concern,¹³ or where there is a real or apprehended emergency.¹⁴ Under the circumstances of a drastic reduction in the natural gas supply, it would appear that the use of this power could be supported under either the emergency doctrine or the national concern aspect.

¹³ *A-G Ontario et al. v. Canadian Temperance Federation et al.*, [1946] 2 D.L.R. 1, [1946] 2 W.W.R. 1 (P.C.).

¹⁴ *Reference Re: Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 (S.C.C.).

When it imposed the oil cutback, the Alberta government anticipated this type of attack and took care to provide that the volumes would be increased if the overall supply to the Canadian consumer was threatened. Thus, the real result of the oil cutback was not to endanger the crude oil supply of Eastern Canada, but rather to force the country to import additional quantities of expensive foreign crude. Whether this strategy on the part of the Alberta government to head off a federal attack would have been upheld in the courts was never put to the test. It might succeed in neutralizing the emergency aspect, but it is questionable whether it would prevent the matter from becoming one of national concern.

It would also be open to the federal government to invoke the dreaded declaratory power under section 92(10)(c) and declare all natural gas wells in Alberta, together with the NOVA pipeline system that transports gas within the province to be "works" for the general advantage of Canada. Declarations under section 92(10)(c) have been made at least 470 times¹⁵ in the past, but if the 471st time were to be with respect to these Alberta "works", it might well signal the end of our collective history.

Be that as it may, such a declaration would enable the federal government to assume complete control over the natural gas within Alberta from the wellhead to the border. Short of outright rebellion, there would appear to be little that the province can do about it.

The foregoing analysis demonstrates that, while the legislative jurisdiction of the provinces has been increased, the overall balance of legislative *power* between the two levels of government remains essentially the same.

II. *Charter of Rights.*

In addition to the changes created by the resource amendment, the new constitution may also impact on oil and gas activities through the ramifications of the Charter of Rights.¹⁶ The Charter is embodied in and forms part of the Constitution Act, 1982, and there are several areas where it may become relevant. Among other guarantees, it provides in section 6(2)(b), that every citizen has the right to pursue the gaining of a livelihood in any province. This was a very sensitive point in the negotiations leading up to the new Constitution, principally because of the initiatives taken by Newfoundland in decreeing employment priorities for residents of that province in the offshore oil operations.¹⁷

The only reason that the mobility guarantee remained in the Charter was the inclusion of an exception that effectively removed its application to

¹⁵ Hogg, *Constitutional Law of Canada* (1977), p. 330.

¹⁶ For a general discussion of these rights, see McDonald, *Legal Rights in the Charter of Rights and Freedoms* (1982).

¹⁷ *Petroleum and Natural Gas Act, R.S.N. 1970, c.294, Newfoundland and Labrador Petroleum Regulations, 1977, Nfld Reg. 139/78.*

Newfoundland. The exception is found in section 6(4) and exempts any law that has as its objective the amelioration of conditions of individuals who are socially or economically disadvantaged, provided that the rate of employment in the enacting province is below the rate of employment in Canada. Under existing economic conditions it probably will be some considerable time before the Newfoundland legislation runs afoul of the Charter. In contrast, the more prosperous provinces such as Alberta would be prohibited from granting preferential rights of employment to their residents.

Section 7 is the Canadian counterpart of the American "due process" clause. The Canadian version addresses itself to the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Unlike the Fifth Amendment to the Constitution of the United States, it does not protect the enjoyment of property. There is, however, a reasonable possibility that section 7 may shortly be amended to include the right to enjoy property.

The oil and gas industry is one of the most highly regulated economic activities in Canada today, with tiers of regulatory agencies exercising jurisdiction over virtually every aspect of its operations. It is this heavy regulatory presence which is most likely to be affected by the basic rights guaranteed by section 7. If that section were held to be applicable to the proceedings of regulatory tribunals dealing with oil and gas matters, it could have a considerable impact. At the very least, it would make it more difficult to carry out a streamlining or "fast tracking" of regulatory procedures to reduce the regulatory burden under which the industry now labours. The majority of Canadian regulatory bodies conduct their proceedings in accordance with "natural justice" with its underlying principle that a person is entitled to a fair hearing which entails, as a minimum, proper notice, the right to present one's case and to meet the opposing case, freedom from bias, real or apprehended, on the part of the regulator, and a reasoned decision. The reference in section 7 to the principles of "fundamental justice" would seem to include natural justice and probably something more. In the meantime, however, the present language of section 7 is directed towards the life and liberty of an individual rather than a way of life, or economic and social considerations. Unless and until the language is broadened to include property, it is doubtful that the clause will have much effect on the regulation of oil and gas.

Oil and gas activities, especially in the frontier areas, may also be affected by the Charter's provisions respecting aboriginal rights. Section 35 expressly recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. While these rights are not defined, and are carefully limited to "existing" rights, the mere act of embodying them in the Constitution which is declared to be the "Supreme Law of Canada", could materially assist the aboriginal peoples in advancing their claims. At

the very least, the native peoples should no longer be faced with the onus of establishing the concept of aboriginal rights.

Section 25 provides that the guarantee in the Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty, or other rights or freedoms that pertain to the aboriginal peoples, including any rights or freedoms that they may acquire by way of land claims settlements. Preferential employment for native peoples, the right to vote and other rights based on residence or racial qualifications, are at the very core of land claims. If the aboriginal peoples succeed in negotiating such terms as part of their settlements, it would appear that they will not be constrained by any guarantees under the Charter, such as the right of mobility and the right to earn a livelihood. Any such preferences conferred upon natives and limitations imposed upon non-natives will, of course, impact directly on oil and gas operations in the affected areas.

III. *The Amending Formula.*

Legislative powers, no matter how extensive, and ownership over natural resources would not be of much benefit to the provinces if they could be reduced or eliminated by subsequent amendments to the Constitution. However, the amending procedure under the new Constitution now has a built-in safeguard against any undermining of the provincial position.

An amendment that derogates from the legislative powers or proprietary rights of a province requires a resolution supported by a majority of members of each of the Senate, the House of Commons, and the legislative assemblies of at least two-thirds of the provinces having at least fifty per cent of the population of all the provinces.¹⁸ There is not much comfort or protection to be found there for an oil-rich province like Alberta or one with the dazzling potential of a Hibernia type oilfield, like Newfoundland. However, section 38(3) provides that an amendment derogating from provincial legislative powers or proprietary rights shall have no effect in a province where its legislative assembly by a majority vote expresses its dissent. The result is that both levels of government have what amounts to a veto power over any changes in the Constitution that would affect their jurisdiction over, or ownership of, oil and gas. The federal veto arises because the approval of the House of Commons is a necessary precondition to any amendment, while the provinces have the right to opt out under section 38(3).

The existence of the double veto, combined with the extraordinary importance of oil and gas both monetarily and politically, could mean that, insofar as oil and gas are concerned, the "new" Constitution may well turn out to be the "last" Constitution.

¹⁸ S.38 of the Constitution Act, 1982. The power of the Senate to block an amendment is limited by s.47 which provides that the approval of the Senate may be dispensed with if it has not approved the amendment within one hundred and eighty days of it being passed by the House of Commons, provided the House of Commons again adopts the resolution.