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**THE ROLE OF FIRST NATIONS IN OIL & GAS DEVELOPMENT
UNDER FEDERAL REGULATORY REGIMES:
Options for Change & Lessons from New Zealand**

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**Thesis submitted to the Faculty of Law of the University of Ottawa
In partial fulfillment of the requirements
For the Master of Laws (LL.M.)**

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for
Professor Bradford W. Morse**

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ABSTRACT

The Role of First Nations in Oil & Gas Development under Federal Oil & Gas Regimes: Options for Change & Lessons From New Zealand

The objective of this thesis is to determine what role First Nations have under federal oil and gas regulatory regimes and to make recommendations to enable them to participate in oil and gas development. The author argues that there are persuasive legal and policy grounds to support an active role for First Nations in oil and gas development within their traditional territories. This position is supported through a comprehensive analysis of three federal oil and gas regimes (Northern, Offshore and Indian Reserve Regimes), their legislative frameworks, and recent developments in aboriginal jurisprudence and policy. An assessment of what role First Nations have under the federal environmental assessment regime is undertaken to supplement the overall analysis. The thesis is further supported by an international comparative component that highlights contemporary resource management issues in New Zealand.

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INTRODUCTION

First Nations have been largely excluded from sharing in Canada's natural resources.¹ Now more than ever, First Nations are actively pursuing access to their lands and resources and are reasserting their rights to self-determination through political and legal channels. Ownership and control over natural resources provides governments with opportunity to generate revenues and foster economic development thereby creating sustainable economies. A sustainable economy is a vital component of building stronger, autonomous First Nation communities. A vital component to self-determination is decision-making powers. The Grand Chief of the Assembly of First Nations, Mathew Coon-Come, has stated that First Nations must be afforded access to their lands and resources as guaranteed by their treaties.² He argues that without a role in resource management, most First Nations will not be able to create sustainable economies. Without economic self-sufficiency, self-government will not work. Natural resource development is an important part of Canada's economy. Oil and gas is one of Canada's most lucrative industries and has gained prominence in the twenty-first century with growing demand for energy resources.³ Therefore, it is timely that we examine how First Nations can benefit from oil and gas development. In order to establish strong First Nation communities and economies, then we must consider what role First Nations should have with respect to oil and gas management not only on reserve but also in a general

¹ See R.H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland, A Study in Law and History* (Saskatoon: University of Saskatchewan Native Law Centre, 1990) [hereinafter *Homeland*].

² On July 12, 2000 a delegation of over 500 First Nation Chiefs elected Mathew Coon-Come as the Grand Chief of the Assembly of First Nations in Ottawa, Ontario. The term 'First Nation' refers to status Indians and their band councils as defined by the *Indian Act*, R.S.C. 1985, c.I-5 [hereinafter *Indian Act*].

³ See website Canadian Association of Petroleum Producers (CAPP) at <<http://www.capp.ca>>, (last accessed: 16 September 2000). CAPP represents over 150 companies (120 associate company members) that explore for, develop and produce crude oil, natural gas, gas liquids, oil sands and elemental sulphur throughout Canada.

context.

The primary focus of this thesis is to examine the role First Nations play in oil and gas development in Canada and more specifically, to provide a comprehensive analysis of what role First Nations have under federal oil and gas regulatory regimes.⁴ A secondary focus is on discrete areas of oil and gas management. By identifying the key functions of these regimes we can develop options for First Nations to participate more fully in petroleum management in manner that meets the needs of their communities.⁵ In the last decade First Nations have opened communications with other aboriginal groups such the Maori in New Zealand to see what experiences and knowledge can be shared to support self-determination and economic development.⁶ There is a perception among First Nations that the Maori are more advanced than the First Nations in Canada are and that they have been more successful in managing their resources. Accordingly, this theory will be challenged and applied in the context of oil and gas development.

To accomplish these objectives, a comparative analysis of three federal oil and gas regimes will be conducted namely, the Northern, Offshore and Indian Reserve Regimes. The

CAPP members produce 95% of Canada's natural gas and crude oil. CAPP estimates that the oil and gas industry represents over \$40 billion-a-year industry that affects the livelihoods of more than 460,000 Canadians.

⁴ Provincial and territorial oil and gas regimes are beyond the scope of this thesis and will only be addressed in the context of First Nation access to lands and resources and their impact on federal oil and gas regimes.

⁵ In this thesis, the term "petroleum" means oil or gas and is used in a general sense to refer to the oil and gas. The term "oil" refers to crude oil and other hydrocarbons (except coal and gas) oil sand, bitumen, and bituminous sand. The term "gas" refers to natural gas and includes all substances other than oil. There are slight variations in the definition of these terms contained in federal and provincial legislation.

⁶ Having studied law at Victoria University of Wellington in New Zealand in 1994 and worked along side Maori lawyers and scholars it became evident that aboriginal peoples can benefit from sharing our experiences and knowledge with respect to legal, political, economic and social issues. Maori delegations frequently attend the First Nation conferences such as the Assembly of First Nation's Annual General Assembly in Vancouver 1999, and the Native Investment and Trade Association economic development seminars. See the website for

comparative analysis is conducted within a framework that addresses fundamental First Nation social, economic, political, historical and cultural factors. By establishing the operational concepts and theoretical frameworks at the outset, it will be possible to generate recommendations for change. Throughout the comparative analysis the role of First Nations under the federal oil and gas regimes is measured against the Crown's general duties and responsibilities to First Nations.

Part I provides an overview of Canada's aboriginal peoples and sets the cultural, political, legal, economic and social context for analyzing their role in oil and gas development. It identifies their interests and positions regarding oil and gas development in their traditional territories. In addition, it defines key concepts and criteria used to critique the existing federal oil and gas regimes. Understanding the nexus between these fundamental principles is critical to developing options for First Nations to participate in oil and gas management.

Part II sets out the legal and policy framework by identifying relevant federal public policies and jurisprudence that support the premise of this thesis, namely that First Nations should have a prominent role in oil and gas management in Canada. Specifically, it examines the evolution of aboriginal public policy and jurisprudence and doctrines such as treaty rights, aboriginal rights, aboriginal title and fiduciary duty and applies them to federal oil and gas regulatory regimes.

Part III provides some background on the oil and gas industry in Canada and clarifies the

relationship among federal, territorial and provincial governments with respect to petroleum development. Discussion centres on the four stages of oil and gas development and the key functions of the regulatory legislation. The process and basic structure of federal oil and gas regulatory regimes serve as a framework against which factors identified in Part I will be assessed.

Part IV is a critical analysis of First Nation participation in the environmental assessment process associated with federal oil and gas regimes. In Canada, oil and gas management is approached in a holistic manner with environmental management being an integral component of federal oil and gas regimes. Consequently, as part of our review of oil and gas management, we must also scrutinize environmental assessment regimes. This part is supplemented by a comparative analysis of the environmental assessment process in New Zealand as it is particularly instructive to demonstrate how the Crown deals with Maori concerns in the context of environmental management.

The next two parts, Part V and Part VI, provide a comprehensive review of the main two functions of oil and gas regulatory legislation commonly referred to as the Rights Issuance function and the Operations function. The focus is on what role, if any, the First Nations exercise under the Northern, Offshore and Reserve Regimes.

In conclusion, Part VII makes recommendations on how First Nations can best participate in the federal oil and gas regimes. Specifically, it sets out options to increase and improve the role First Nations play throughout all phases of oil and gas development. In particular, it

advises how the Crown can fulfill its fiduciary obligations and honour constitutionally protected aboriginal and treaty rights in exercising its jurisdiction and authority over oil and gas development.

PART I: BACKGROUND and CONTEXT

As the main objective of this thesis is to make recommendations that support meaningful participation by First Nations in oil and gas management, it is necessary to have a basic understanding of First Nation history and cultures. This part provides a brief overview of First Nations and the key factors that will impact subsequent analysis of oil and gas management regimes. First, it provides a background on the aboriginal peoples of Canada. Secondly, it provides an overview of the internal political and governance systems of First Nations. Thirdly, it sets out the interests and aspirations of First Nations in a general sense. Finally, it defines concepts and criteria required to conduct the comprehensive analysis of federal oil and gas regimes. For purposes of the comparative analysis with New Zealand, this part addresses both First Nation and Maori issues.⁷

A. First Nations in Canada

There are three distinct aboriginal peoples in Canada each with their own political organizations, histories and cultures.⁸ First, there are the Inuit, the aboriginal peoples of the North who have occupied their lands for thousands of years.⁹ Secondly, there are the Métis, a

⁷ See especially, Paul Havemann, eds., *Indigenous Peoples' Rights* (Auckland: Oxford University Press, 1999). Havemann notes that the international working group on Indigenous Populations defines indigenous populations by their priority in time; voluntary perpetuation of their cultural distinctiveness; self-identification as indigenous; and experience of subjugation, marginalisation, dispossession, exclusion, and discrimination by the dominant society.

⁸ See Bradford W. Morse, *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*, rev'd 1st ed. (Ottawa: Carleton University Press, 1991) at 1-14.

⁹ The Inuit are beyond the scope of this thesis. Nevertheless, it is interesting to note that Inuit lands and resources issues have been largely addressed through modern treaty making processes. For example, the Nunavut Territory was created on April 1, 2000 based on the *Nunavut Land Claims Agreement* (Ottawa:

unique aboriginal group with both First Nation and European ancestry that identify as Métis.¹⁰ Thirdly, there are the First Nations who have occupied their traditional territories since time immemorial.¹¹ First Nations are comprised of distinct and separate Nations; they are not homogeneous peoples. For example, the Haida Nation of the Queen Charlotte Islands is not related to the Innu Nation of Newfoundland and Labrador, and Québec. Through colonial practices and federal legislation, Canada has created over 600 federally recognized First Nations.¹² This thesis will focus on First Nations; Métis and Inuit are sufficiently distinct to merit separate analysis at a later date.

The *Royal Proclamation of 1763* directed the Imperial Crown to negotiate treaties with the aboriginal peoples to facilitate settlement by establishing a practice of treating with the First Nations for the surrender of title to their traditional territory.¹³ In Canada, the Crown has negotiated numerous treaties with First Nations.¹⁴ There is a tremendous range in the types of treaties and timeframes in which they were negotiated. Initially, the Crown negotiated peace and friendship treaties in the 1600s and 1700s to facilitate peaceful coexistence. These

DIAND, 1993), enacted by the *Nunavut Land Claims Agreement Act*, S.C. 1993, c.29 and *Nunavut Act*, S.C. 1993, c.29.

¹⁰ The Métis are beyond the scope of this thesis. However, it is worth noting that very little land and resources have been provided to the Métis as a distinct group. The exception is Métis groups in the Northwest Territories that are negotiating with First Nation groups and there is no official government policy in place to remedy this problem in the near future. Most Métis groups have no or very little land base and no jurisdiction over oil and gas management. Therefore, there is no immediate oil and gas management potential. For some comments and cases on Inuit and Métis see Thomas Isaac, *Aboriginal Law* (Saskatoon: Purich Publishing, 1999) at c.5.

¹¹ First Nations have been described as Indians, First Peoples, and aboriginal people. It is a general term that refers to all descendants of Canada's aboriginal populations other than those who identify as Inuit or Métis.

¹² The federal government through the Department of Indian Affairs and Northern Development [hereinafter DIAND] administers First Nations under the *Indian Act*.

¹³ The Imperial Crown was directed to negotiate treaties pursuant to the Royal Proclamation of 1763 and other ordinances and directives. *Royal Proclamation of 1763*, reprinted in R.S.C. 1985, App.II, No.1, [hereafter *Royal Proclamation of 1763*] which recognizes aboriginal title and set out a policy for the British Crown to acquire lands while at the same time setting aside lands for First Nations. See also Hamar Foster, "Indian Administration from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights" in Paul Havemann, ed., *Indigenous Peoples' Rights* (Auckland: Oxford University Press, 1999) at 351-377.

agreements served many purposes such as building trade and military alliances. As the number of European settlers and demands of settlement increased, the Crown negotiated treaties aimed at securing the lands and resources in a more definitive manner. From the mid-1700s to the late-1800s, the majority of Canada's colonial and post-confederation treaties were negotiated. From the Crown's perspective, these treaties provided for the peaceful extinguishment of aboriginal title in exchange for lands, annuities, guaranteed harvesting rights and modest compensation such as clothing and farming implements.¹⁵ Although it was the policy of the Crown to negotiate treaties to settle of their new territories, it did not enter into treaties with all of the aboriginal peoples of Canada. As result, large portions of Canada, most notably the Yukon, Northwest Territories, British Columbia and Quebec, were settled without treaties. In fact, many First Nations did not cede their traditional territories to the Crown but were forced onto reserves by other methods such as executive orders.¹⁶ As settlement proceeded, First Nations' traditional lands were ceded with only a small portion set aside or "reserved" for the First Nations.¹⁷ Very little attention was paid to treaties in 1900s until the 1970s ushered in a new era of treaty-making aimed at addressing unfinished business, namely fulfilling the Crown's commitment to negotiate treaties. During the next three decades, treaties were negotiated in Quebec, the North (NWT and Yukon) and British Columbia and continue to be negotiated today.¹⁸

The history of treaty-making has created a patchwork of First Nation land and resource

¹⁴ See Robert A. Reiter, *The Law of First Nations* (Edmonton: Juris Analytica Publishing Inc., 1996) and Robert A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica Publishing Inc., 1996).

¹⁵ See e.g. Treaty No. 6 in *Consolidated Native Law Statutes, Regulations and Treaties 1998* (Scarborough: Carswell, 1998) at 528-531.

¹⁶ See generally *Homeland*, *supra* note 1.

¹⁷ *Ibid.* at 9.

¹⁸ This modern day treaty-making process is discussed in more detail in the Part II, A.

systems. There is a tremendous range in First Nation access to lands and resources across Canada. Consequently, there will be differences in the impact that the three federal oil and gas regulatory regimes have on First Nations. First, in the North, First Nations either are in the process of negotiating or have concluded modern-day treaties (Comprehensive Land Claim Agreements) that have allocated settlement lands and resources to the First Nation. Under this system, the First Nations have ownership and control over their lands and resources (Settlement Lands) as well as limited rights over specific lands and resources in their traditional territory (Settlement Area). Secondly, in Atlantic Canada, First Nations are subject to the *Indian Act* system. The settlement in this region was more complex than the rest of Canada because of its colonial history; the interplay between British and French settlers and the impact of the agreements and treaties among these parties and the First Nation.¹⁹ Under this system, First Nations do not own their lands (Indian Reserves) and have the limited jurisdictions and authorities set out under the *Indian Act* supplemented by specific treaty rights. Thirdly, in the rest of Canada south of the 60° parallel, First Nations are also subject to the *Indian Act* system.²⁰ These First Nations' ownership and jurisdictions are limited to those provided under the *Indian Act* and applicable treaties.

As a result of Canada's treaty-making history, federal oil and gas regimes affect First Nations differently depending on where the First Nation is located. For example, the Nisga'a own

¹⁹ For a full accounting of the colonization of Atlantic Canada and the various categories of treaties see R.H. Bartlett, *Indian Reserves in Atlantic Provinces of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1986). In addition, it provides some analysis of the effect of settlement by squatters and application of British common law on aboriginal and treaty rights.

²⁰ There are several caveats to this general statement. The first being, those First Nations who have concluded Comprehensive Land Claim Agreements in Quebec and British Columbia. The second being those First Nations who have negotiated sectoral agreements to expand their *Indian Act* powers. The term "Comprehensive Land Claim Agreements" refers to modern-day treaties negotiated from 1970s onwards as opposed to the historic treaties.

and control both their Settlement Lands and subsurface resources and have jurisdiction over oil and gas on their Settlement Lands.²¹ In other words, the Nisga'a may enact laws to regulate oil and gas development on their Settlement Lands. While the First Nations in the North have ownership and control over their Settlement Lands and subsurface resources, they do not have jurisdiction over oil and gas.²² Consequently, they cannot enact legislation to regulate their oil and gas. The majority of First Nations do not own their reserves nor do they have jurisdiction over oil and gas located on their reserves.²³

B. First Nation Political and Governance Framework

First Nation political and governance systems vary. Essentially, there are two basic governance systems recognized as legitimate under the laws of Canada: the *Indian Act* system and the Comprehensive Land Claim Agreement system. Other forms of governance based on cultures and traditions coexist along side these official governments such as elders' councils, hereditary chief structures and the customs from the original Nations and Tribes.²⁴ Under the *Indian Act* the members of a First Nation elect their Chief and Council to govern their community. The *Indian Act* sets out the election procedures and itemizes First Nations powers and authorities. The *Indian Act* system is based on colonial legislation with the

²¹ See *Nisga'a Final Agreement* (Ottawa: DIAND, 1999). The term 'Settlement Lands' refers to the land allocated to First Nations, Métis and Inuit under Comprehensive Land Claim Agreements. The term 'Settlement Area' to refer to the traditional territory recognized under these agreements where the First Nation, Inuit and Métis group has defined rights and interests.

²² See for example the *Vuntut Gwitchin First Nation Final Agreement* (Ottawa: DIAND, 1993) or the *Tetsin Tlingit Council Final Agreement* (Ottawa: DIAND, 1993).

²³ The term 'reserve' refers to the lands reserved for Indians that are defined and referred to as "designated lands", "surrendered lands", and "reserves" as defined by the *Indian Act*.

²⁴ The DIAND website at <<http://www.inac.gc.ca>>, (last accessed: 26 February 2001) indicates that there are over 600 federal recognized First Nations. These communities are descendants of the original Nations or Tribes of Canada such as the Cree, Ojibway, Mohawks, Algonquins, Dene, Dogrib and so on. For more information

Minister of Indian Affairs retaining ultimate decision-making authority. Under Comprehensive Land Claim Agreements, members elect or appoint their leadership bodies according to the procedures set out in their agreements. The Comprehensive Land Claim Agreements set out the First Nation's jurisdictions and authorities and identifies their lands and resources.

In addition to local government systems, most First Nations are members of regional First Nation political organizations. These aggregations of First Nations are generally referred to as tribal councils and have broad political, legal and social mandates to promote First Nations interests.²⁵ Membership is voluntary. First Nations frequently change tribal council affiliation depending on their issues and are usually members of more than one regional organization. Tribal councils engage in policy development and political lobbying with a primary focus on social and economic development initiatives.²⁶ In addition there are several national First Nations organizations. The Assembly of First Nations is the leading national organization and recognized and consulted by government most often.²⁷ The key point for our purposes is that there are hundreds of First Nations and First Nation political organizations each with their own set of goals and objectives. First Nation are adamant about retaining their right to define their interests and positions. Therefore, in developing options

on the history of Canada's First Nations see Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, Volume One (Ottawa: Canada Communications Group, 1996) [hereinafter *RCAP Volume One*].

²⁵ Tribal councils receive federal funding to carry out policy research and program and service delivery. For example, DIAND and Health Canada provide funding to tribal councils to carry out social and health programs. See their respective websites for information on their policies to fund tribal councils. Health Canada website at <<http://www.hc-sc.gc.ca>>, (last accessed: 19 February 2001) and DIAND website, *supra* note 24.

²⁶ See DIAND *supra* note 24 for First Nation profiles and select Tribal Council profiles to get a complete list and links to their homepages. In most cases, the Tribal Council will set out its mandate, major initiatives and program and services.

²⁷ Other national organization worth noting are the Native Association of Women and Canadian Aboriginal Peoples Party.

to improve the role of First Nations under federal oil and gas regimes there will be many opinions and goals presented by First Nations and their political organizations. For example, in the North, the First Nations have formed a regional committee to address the proposed pipeline project through the Mackenzie Valley.²⁸ The mandate of this committee does not extend beyond the issue of pipelines as the First Nations represent their own interests with respect to oil and gas development. Likewise, in Atlantic Canada, the Atlantic Policy Congress and the Union of New Brunswick Indians have taken leading roles in advocating for First Nations rights in oil and gas development.

C. First Nation Aspirations

In setting parameters to assess the role of First Nations under federal oil and gas regimes we are faced with the dilemma of balancing the need to respect the ability for each First Nation to decide what their aspirations are with the need to provide some guidance the goals and objectives of First Nations. It is impossible to make definitive statements regarding the interests and positions of First Nations with respect to oil and gas development. That being said, it is helpful to make some general observations. Two common themes have resonated among First Nations since the time of contact: continued access to their lands and resources as well as retaining a degree of autonomy.²⁹ Simply put, First Nations desire to have their ownership and control over their lands, including oil and gas resources, recognized and

²⁸ For a comprehensive overview of the regulatory structure and impact of Comprehensive Land Claim Agreements see *Jurisdictional Responsibilities for Land Resources, Land Use and Development in the Yukon Territory and the Northwest Territories*, Volumes 1 to 4 (Ottawa: DIAND, 1997).

²⁹ See Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Volume Two (Ottawa: Canada Communications Group, 1996) at Part I and Part II [hereinafter *RCAP Volume Two*], wherein governance and natural resource management are specifically recognized as a major goal of First Nations.

respected.³⁰ To accomplish these goals, their objectives are fairly comprehensive and include: jobs, training, education, community and business infrastructure, promotion of economic development on their Indian Reserves and in their Settlement Lands as well as self-government and decision-making powers over their lands, resources and peoples. First Nations are seeking to build their capacities with respect to human resources and governance and business infrastructures. The Assembly of First Nations, a national voice for First Nations, confirms these general objectives and advocates the need for political, social, economic and legal reform to achieve them. The Assembly of First Nation's priorities include addressing historical grievances, honouring treaties, promoting economic development and establishing good governance.³¹ Arguably, the ability for First Nations to exercise management powers over resources such as oil and gas is a critical component to supporting these priorities.³²

The Royal Commission on Aboriginal Peoples (RCAP) is Canada's most comprehensive governmental inquiry into the state of aboriginal peoples.³³ RCAP is a seminal report consisting of five volumes (3,200 pages) that took over six years to complete. RCAP, among other things, itemizes governance, land management and economic development as major First Nation objectives. The federal government's response to findings in RCAP is *Canada's*

³⁰ This sentiment is echoed by First Nations leaders every year at the annual assembly of the Indian Resource Council (IRC), an organization mandated with furthering First Nation oil and gas aspirations. Each year First Nations with oil and gas interests meet to discuss issues such as relationships with provincial agencies, industry, economic development opportunities and training. See for example *1998 IRC Oil and Gas Conference and Annual General Meeting* (Calgary: IRC, 1998) [hereinafter *IRC 1998*].

³¹ See for example the policies and priorities established by the Assembly of First Nations set out in their website at <<http://www.afn.ca>>, (last accessed: 26 August 2000).

³² Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada* (North York: Captus University Publications, 1994).

Action Plan: Gathering Strength (Gathering Strength). *Gathering Strength* is a broad public policy that articulates four general themes: renewing the partnership; strengthening aboriginal governments; developing new fiscal relations; and supporting stronger communities, people and economies.³⁴ This federal public policy recognizes First Nations aspirations and directs the Government of Canada to support initiatives under the auspices of these four themes.

Colonization decimated First Nations.³⁵ Colonization dispossessed First Nations of their governments, culture, lands and resources. Generations of First Nations have struggled to revitalize and restore all aspects of their culture, politics, and economies. It is through activism that First Nations have endeavoured to reassert their rightful position within Canadian society. Activism in its many permutations such as protest, litigation and civil disobedience has effected modest change. Political activism has been integral in raising the profile of First Nation issues domestically and internationally by protecting and building a sense of identity. Harold Cardinal's account of First Nation aspirations is equally poignant today as it was thirty years ago.³⁶ Cardinal urges that that we need to bridge the gap between

³³ *Royal Commission on Aboriginal Peoples, Volumes 1 to 5* (Ottawa: Canada Communications Group, 1996) [hereinafter *RCAP*]. *RCAP* represent the findings from extensive research and public consultations across Canada.

³⁴ *Canada's Action Plan: Gathering Strength* (Ottawa: DIAND, 1998) [hereinafter *Gathering Strength*]. For an update and press releases on the implementation of this public policy by DIAND see <<http://www.ainc-inac.gc.ca/gs>>, (last accessed: 26 February 2001).

³⁵ See *RCAP Volume One*, *supra* note 33 and Havemann, *supra* note 7 at 1-12. Havemann has provided an overview of aboriginal rights in Australia, New Zealand and Canada conducted a comparative analysis of several discrete areas and developed chronologies of the impacts and activities associated with colonialism. Academics from each of the countries have contributed writings on these topics and he has drawn out common themes and differences. I am skeptical of the exercise of classifying aboriginal peoples and their histories, however for historical and legal analysis; it is somewhat helpful in providing a quick overview of the hundreds of years of colonization especially with respect to colonial and subsequent government aboriginal policies.

³⁶ See especially Harold Cardinal, *The Unjust Society, The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig Ltd., 1969) [hereinafter *Unjust Society*] and Harold Cardinal, *The Rebirth of Canada's Indians* (Edmonton: Hurtig Publishers, 1977).

First Nations and modern society.³⁷ He believes economic development will free the Indian from his subservient role.³⁸ He warns there are two options: First Nations must be permitted to realize their potential though the provision of essential resources which are rightfully theirs or face a future where frustrations are deepened by a continued state of deprivation leading to chaos and civil disorder.

In pursuing governance and economic development, First Nations are faced with the challenge of creating governance infrastructures, systems, institutions and laws. First Nations are expending enormous resources to meet these challenges and are progressing at different rates across the country depending on their organizational capacities.³⁹ First Nation organizations support a wide range of economic development and governance initiatives.⁴⁰ More recently, First Nations have been addressing governance and financial accountability issues in their endeavours to create First Nation based governments.⁴¹

The First Nations subject to the three federal oil and gas regulatory regimes examined in this thesis generally support oil and gas development in their traditional territories. It is important to note that while First Nation leadership generally supports oil and gas development, as in the rest of Canada there are First Nation interest groups and individuals that do not support it. Moreover, because of the limited First Nation land-base and close

³⁷ *Unjust Society, ibid.*, at 163.

³⁸ *Unjust Society, ibid.*, at 163.

³⁹ For example, the Federation of Saskatchewan Indian Nations has united the majority of the First Nations in Saskatchewan and acts as an advocate on behalf of its members and has been instrumental in developing policies and governance models. Whereas, in Alberta First Nation are represented by several different tribal councils and are pursuing different priorities.

⁴⁰ *Aboriginal Economic Development Conference Reports* (Toronto: Insight Press, 1999).

⁴¹ John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) *Am. Indian L. Rev* 27 [hereinafter "Frozen Rights"].

proximity of oil and gas projects to First Nation communities it is critical that projects are carried out in a manner that does not threaten their health and safety and preserves the connection of First Nations to their lands, their histories and cultures. First Nations have limited natural resources so it is critical that oil and gas development is 'sustainable' in the sense that the First Nation maximizes the revenues and benefits over the long-term. If the principle of 'sustainable development' is not followed there is a danger that exploitive practices will exhaust the petroleum resources and prevent the First Nation from benefiting from oil and gas development as a viable economic activity and revenue base. The notion of sustainable development under oil and gas legislation is dealt in more detail in Parts III and VI as it is a fundamental principle of environmental assessment processes and of the Operations functions. Under the Northern Regime, First Nations have supported oil and gas development on their Settlement Lands and within their Settlement Area. Specifically, the Gwich'in have a number of projects on their Settlement Lands with drilling projects planned for this year and both the Gwich'in and Sahtu Dene and Métis receive royalties from oil and gas development in the Mackenzie Valley.⁴² In addition, First Nations and Inuit in the Northwest Territories have formed the Aboriginal Pipeline Committee to determine how they can participate in the proposed Mackenzie Valley Pipeline currently being assessed by a consortium of oil and gas companies.⁴³ Under the Indian Reserve Regime, the majority of those First Nations with petroleum resources are actively engaged in oil and gas development

⁴² Interview with Wayne Grenall, Northern Oil and Gas Directorate (16 February 2001). Grenall notes that those First Nations without Comprehensive Land Claim Agreement prefer a moratorium on the issuance of oil and gas interests in their traditional territories until they have concluded their agreements. Nevertheless, several of the First Nations have supported oil and gas development in the Ft. Liard region as agreements have been made to protect their interests.

⁴³ Dwane Wilken, "Where Energy Reserves Meet Nature's Preserves" *Environmental Network News* (31 October 2000) 1.

on their Indian Reserves, with the majority of production taking place in southern Alberta.⁴⁴ However, under the Offshore Regime, First Nations are challenging oil and gas development in an effort to have their aboriginal and treaty rights recognized and respected by the Crown. These First Nations would support oil and gas development provided their concerns and issues are addressed by the federal and provincial governments.⁴⁵

D. First Nation Participation

The primary focus of this thesis is to examine what role First Nations have under the federal oil and gas regimes. Accordingly, the role will be assessed in terms of the level of their participation in governmental decision-making as well as in the regulatory process.

For our purposes there are four distinct degrees of participation. First, a low level of involvement is a situation where First Nations are merely informed about petroleum development within their traditional territory, either directly or indirectly, and possess no decision-making powers. Essentially, the First Nations are excluded from the applicable regulatory processes. Secondly, a moderate level of involvement is a situation where First Nations are consulted on oil and gas development in their traditional territory but have no decision-making powers. In this scenario, First Nations participate in the applicable regulatory process, though their involvement may be fairly limited. Thirdly, a moderate-to-high level of involvement is situation where First Nations exercise decision-making powers pertaining to the oil and gas development either by participating in the regulatory processes

⁴⁴ For a list of the First Nations involved in oil and gas production see *Indian Oil and Gas Canada Annual Report 1998-99* (Ottawa: DIAND, 1999).

⁴⁵ See for example the Confederacy of Mainland Mi'kmaq website at <<http://www.cmm-ns.com>>, (last accessed: 28 February 2001).

as a regulator, or through consultations by possessing a veto or consent power. Fourthly, a high level of involvement is where First Nations exercise decision-making powers over oil and gas development in their traditional territories. In this scenario, First Nations are participating fully in the regulatory process either as regulators or as joint-decision makers.

This framework will be applied to the Northern, Offshore and Indian Reserve Regimes to assess what role, if any, First Nations are currently exercising under existing federal oil and gas regimes. More specifically, this framework will be applied to the Rights Issuance function, Operations functions, and environmental assessment function in Parts IV, V and VI respectively. Depending on the federal regulatory regime and the First Nation, their role will vary. In most instances, First Nations are excluded from oil and gas regulation and in very limited circumstances, they have high level of participation in petroleum management.

PART II: LEGAL AND POLICY FRAMEWORK

First Nations are demanding governance powers and economic development opportunities.

The courts have developed a strong legal basis to support First Nation aspirations and at the

same time, government has responded by developing public policy to address First Nation

needs. This next section identifies key federal public policy concerns and the legal landscape

that relates to First Nation oil and gas management issues under federal regulatory regimes.⁴⁶

The rationale for outlining these policy and legal arguments is to assist in the overall analysis and to provide a basis for recommendations and options.

A. PUBLIC POLICY

Colonialism has taken its toll. There is ample documentation through commissions and inquiries regarding aboriginal grievances and the devastating impacts of colonialism.⁴⁷

However, the purpose of this thesis is not to focus on the past but rather to assess the present and look to the future. In an effort to understand Canada's history of colonization,

government and academics have attempted to categorize the various periods. The Royal

Commission on Aboriginal Peoples (RCAP) has classified colonial experiences into the

following periods: separate worlds; contact and cooperation; displacement and assimilation;

and negotiation and renewal.⁴⁸ Each period is characterized by Crown policies towards the

⁴⁶ The review of provincial public policy is beyond the scope of this these. Essentially, provinces take the position that Indians are a federal responsibility pursuant to section 92(14) of the *Constitution Act, 1867*, 30 & 31 (U.K.) Victoria, c.3 reprinted in R.S.C. 1985, App.II, No.5 [hereinafter *Constitution Act, 1867*] and have refrained from initiating public policy to address their grievances unless under the duress of legal sanctions and economic ruin.

⁴⁷ *RCAP Volume One*, *supra* note 33.

⁴⁸ Havemann, *supra* note 7 at 22-23.

aboriginal populations. These policies have been characterized as assimilation policies and have received only minor adjustments until recently.⁴⁹ Many Aboriginal groups would argue that assimilation remains an underlying government objective. Aboriginal peoples reject assimilation models as there is no conflict between the maintenance of aboriginal identity and their full participation in society.⁵⁰ First Nations and Maori want to be recognized as distinct peoples with their own culture and heritage. The classification of colonialism under RCAP is appropriate for our analysis and is consistent with time periods developed by other academics to describe colonial patterns in New Zealand and Australia. For example, Havemann in his text on Indigenous Peoples Rights assesses the patterns of colonization in Canada, New Zealand and Australia with similar timeframes.⁵¹ It is the latest period of colonialism that is relevant to our analysis, namely the period of 'negotiation and renewal'.

This modern period began in the late 1960s with aboriginal rights movements following in the path of the civil rights movements in the United States. A number of factors contributed to this new period such as a rise in aboriginal rights activism, a shift in political policies, as well as the emergence of landmark court decisions recognizing aboriginal and treaty rights. In Canada, the federal government delivered the infamous White Paper aimed at assimilating First Nations. It was firmly rejected across Canada by First Nations and acted as a further

⁴⁹ *Homeland*, *supra* note 1 at 137 notes that the *Indian Act* has been amended very little since it was first enacted. For a comprehensive review of the *Indian Act* see R.H. Bartlett, *The Indian Act of Canada* (Saskatoon: University of Saskatchewan, Native Law Centre, 1980).

⁵⁰ J., Metge, *The Maoris of New Zealand Rautahi* (London: Routledge & Kegan Paul, 1976) at 314.

⁵¹ Havemann, *supra* note 7 at 22 outlines a classification of policies towards aboriginal peoples in Canada and New Zealand respectively as follows: 1. Early institutionalized contact and domination (pre-1860); 2. Paternalism: Protection (1860-1920); 3. Paternalism: Assimilation (1920-1960); 4. Integration (1960-1970); 5. Pluralism (since 1975); 1. Era of Acquisition (1840-1870); 2. Era of Consolidation (1870-1935); 3. Era of the Welfare State (1935-1975); and 4. Era of International Capital (1975 onwards).

catalyst to galvanize the aboriginal rights movement.⁵² The First Nations, Inuit and Métis rights movement continues to gain momentum with aboriginal and treaty rights becoming a major focus in Canadian society. For example, the *Marshall* decision on the lobster fishery in Atlantic Canada has emerged as a highly contentious issue even a year after the decision was handed-down by the Supreme Court of Canada in September 1999.⁵³ Likewise, in New Zealand, the Maori experienced a revitalization of their activism with protests and marches in support of their rights. For example, Maori protested against legislation it believed was contrary to the treaty such as the *Maori Affairs Act, 1953*.

The Crown has made effort to put aside assimilation policies and practices. This period is marked by an effort on the part of the Crown to address past wrongs and grievances. Today, the Crown is trying to find ways to work together with aboriginal peoples to address the destructive impacts of colonial policies and practices.⁵⁴ A key challenge is reconciling the Crown's sovereignty with aboriginal rights. Both in Canada and New Zealand there are joint efforts to look at education, child welfare, substance abuse, language and culture. The public has been both receptive and hostile to the change in Crown policies towards its aboriginal peoples. While public polls indicate there is general support to resolve past grievances, there also continues to be opposition to many settlements.⁵⁵ Often these policies are met with accusations of special rights and treatments that result in a position of perceived privilege and

⁵² Havemann, *supra* note 7 at 41-46, Chronology 3 provides a succinct overview of major political and legal events in Canada and New Zealand with respect to aboriginal rights issues.

⁵³ *R. v. Marshall*, [1999] 3 S.C.R. 456; [1999] 4 C.N.L.R. 161 (S.C.C.) [hereinafter *Marshall*] and subsequent application decision *R v. Marshall*, [1999] 3 S.C.R. ; [1999] 4 C.N.L.R. 301 (S.C.C.).

⁵⁴ See Canada's response to the Royal Commission on Aboriginal Peoples findings, *Gathering Strength*, *supra* note 34. See also *Healing the Past, Building a Future: Guide to the Direct Negotiation of Treaty of Waitangi Claims* (Wellington: G.P. Books, 1999) [hereinafter *Direct Negotiations*].

discrimination against the non-aboriginal.⁵⁶ Nevertheless, we are well into this period with First Nations and Maori pursuing access to their lands and resources through negotiation and litigation.

1. Negotiation and Renewal in Canada – Lands and Resources

First Nations have several options available to them to gain access to their lands and resources: litigation, civil protest, negotiation and armed struggle. In Canada, First Nations have used all of these methods in effort to exercise control over their lands and resources.⁵⁷ In most instances, First Nations use a combination of methods to force the Crown to address their grievances and concerns. Litigation works.⁵⁸ If not for landmark decisions like *Calder*, the Crown would not be negotiating with First Nations.⁵⁹ While *Calder* was the impetus for Canada to develop a policy to address aboriginal title, it does not provide instructions on how to go about negotiating agreements as it merely provides guidance on the nature and scope of aboriginal title. Litigation has been instrumental in raising the awareness of aboriginal issues, however, it alone cannot resolve all of the issues. In the past three decades, litigation has provided us with a better picture of the nature and scope of aboriginal rights, aboriginal

⁵⁵ The British Columbia Treaty Process, a comprehensive land claims process in British Columbia is supported by polls but is publicly debated and challenged by special interest groups and the media. See Michael Ash, *Home and Native Land: Aboriginal Rights and the Constitution* (Toronto: Methuen, 1984).

⁵⁶ Metge, *supra* note 50 at 290.

⁵⁷ Havemann, *supra* note 7. For example, the Oka Crisis in 1990, Windspeaker "The Oka Crisis: 10 Years Later" *Windspeaker* (July 2000). See also the Gustafsen Lake Standoff in the mid-1990s, Windspeaker, "Gustafsen Lake" *Windspeaker* (March 1999) and Windspeaker, "Camp Ipperwash Occupation Approaches Seven-year Mark" *Windspeaker* (July 2000).

⁵⁸ *Contra* "Frozen Rights" *supra* note 41 wherein, among other things, he critiques the overall gains of recent aboriginal jurisprudence.

⁵⁹ *Calder v. A.G.B.C.*, [1973] S.C.R. 313 (S.C.C.), [hereinafter *Calder*]. In *Calder*, the court introduced the notion that aboriginal title is derived from the fact that aboriginal people occupied and used lands prior to contact and it has survived contact. It rejected the previous notion that aboriginal title was rooted in the *Royal*

title and treaty rights. We know the legal tests for establishing these rights, determining if these rights have been extinguished, and for justifying infringement of these rights.

Nevertheless, litigation has resolved only a minute fraction of these claims. Litigation is like a war of attrition with some cases lasting decades with exorbitant costs. First Nations are taking a big risk by allowing the courts to define the nature and scope of their rights to own and manage their lands including oil and gas. The court frequently gives with one hand and takes with the other. For example in *Delgamuukw*, the court recognizes and defines the nature and scope of aboriginal title and at the same time elucidates the many things the Crown may do to infringe this right.⁶⁰ Likewise, the Crown is taking a risk by letting the courts decide on what aboriginal and treaty rights exist. From the provincial Crown's perspective, it suffered a great loss in having the court reject their assertion that it had extinguished aboriginal title in British Columbia. The Supreme Court of Canada has repeatedly urged the Crown and First Nations to negotiate the resolution of their grievances. If negotiation or consultation is the route First Nations wish to pursue, then it is imperative to understand how oil and gas management regimes operate in order to negotiate change.

The Crown is trying to address unsolved business and has established numerous processes to

Proclamation of 1763 as held in *St. Catherine's Milling and Lumber Co. v. The Queen*, (1888), 14 App. Cas. 46 [hereinafter *St. Catherine's Milling*]. The court was split on whether or not the Nisga'a still had aboriginal title.

⁶⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14 (S.C.C.) [hereinafter *Delgamuukw* cited to CNLR] among other things, sets out the nature and scope of aboriginal title and the manner in which the Crown may justify the infringement of aboriginal title. The magnitude of the *Delgamuukw* decision goes way beyond the above summary and there is substantial academic writing on the decision. See R.H. Bartlett, "The Content of Aboriginal Title and Equality Before the Law" (1998) 61 Sask. L. Rev. 377 wherein he argues that sound principles should be established to assist in interpreting aboriginal title. See also A. Robertson, "The New Spectrum of Aboriginal Rights in the Wake of the *Delgamuukw* Decision" Insight Conference: Structuring Joint Ventures with First Nations, November 1998, (Toronto: Insight Press, 1999) 71.

address First Nation grievances regarding access to lands and resources.⁶¹ The following is a discussion of Canada's First Nation public policy relevant to oil and gas development. The *Comprehensive Claims Policy* regarding aboriginal title has resulted in dramatic changes.⁶² Under this policy there is an opportunity for First Nations to negotiate a role in natural resource management. Specifically, it contemplates the allocation of lands and resources including subsurface resources such as oil and gas to First Nations. Unfortunately, this opportunity is not available for all First Nations. Before a claim is accepted for negotiation, the First Nation must establish that its aboriginal title has not been extinguished. Hence, those First Nations that are party to earlier treaties dealing with land cessions have been excluded from the process. Those First Nations in Atlantic Canada are still waiting for the Crown to accept their claims on the basis that their historic agreements are merely peace and friendship treaties that did not fully address aboriginal rights and title.⁶³ In addition, there are differences among treaties. This is significant in that the 'numbered treaties' provide First Nations with little in consideration for their land cessions and are vague on the nature and scope of treaty rights. Whereas, the modern-day treaties have addressed aboriginal title and rights in much greater detail and there continues to be improvements on negotiating the resolution of aboriginal claims under the *Comprehensive Claims Policy*. For example, the

⁶¹ See *Outstanding Business: A Native Claims Policy* (Ottawa: DIAND, 1982) sets out the federal government's policy and process for addressing First Nation grievances with respect to the treaties and other government legislation [hereinafter *Specific Claims Policy*].

⁶² See *Comprehensive Land Claims Policy* (Ottawa: Indian and Northern Affairs Canada, 1987) and *Living Treaties: Lasting Agreements: Report of the Task Force to Review the Comprehensive Claims Policy* (Ottawa: DIAND, 1985) outlines comprehensive land claims policy and process [hereinafter *Comprehensive Claims Policy*]. For example, British Columbia abandoned a century old position that Aboriginal title was extinguished in the province and agreed to negotiate land claims agreements with Canada and First Nations. Canada, British Columbia and the First Nation Summit have established a tripartite treaty negotiation process overseen by the British Columbia Treaty Commission. In 1993 negotiations commenced and now there are more than 50 sets of negotiations. The *British Columbia Treaty Commission Act*, S.C. 1995, c.45, *Treaty Commission Act*, R.S.B.C. 1996, c.461 and a First Nation Summit resolution enact the tripartite agreement.

first set of Comprehensive Land Claim Agreements did not include self-government arrangements.⁶⁴ With the introduction of the *Inherent Right Policy* in 1995, the scope of land and resource powers for negotiation has been expanded to include self-government powers. There are two additional examples of government public policy initiatives that address First Nation land and resource management concerns. The first is the First Nation Land Management Agreement (FNLMA) which provides expanded land management powers to First Nations under the *Indian Act* system.⁶⁵ The FNLMA is a sectoral agreement that permits First Nation to replace the existing *Indian Act* land management provisions with their own land management laws. However, at this time only those First Nations party to the agreement may opt to implement it and draft their own land management codes. The second is the Specific Claims Policy aimed at resolving grievances over lands, treaties, and the administration of the Indian affairs. The treaty land entitlement policies are direct spin-offs of this policy. For example, the Saskatchewan Treaty Land Entitlement Framework Agreements provides First Nations with land additions, including ownership of oil and gas resources.⁶⁶ Clearly, ownership, jurisdiction and authority over lands and subsurface

⁶³ See for example the Resolution of the Nova Scotia Mi'kmaq Chiefs dated April 15, 1998 asserting their to participate in offshore oil and gas development as they have never surrendered, ceded or sold their traditional territory.

⁶⁴ For example, the *Nisga'a Final Agreement* is the first comprehensive land claims agreement to include self-government arrangements under the *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: DIAND, 1995) [hereinafter *Inherent Right Policy*]. The *Inherent Right Policy* provides for the negotiation of agreements to set out First Nations jurisdictions and authorities.

⁶⁵ The *First Nation Land Management Agreement* (FNLMA) dated 1996 is bilateral agreement between the federal government and approximately 13 First Nations and is enacted by the *First Nation Land Management Act*, S.C. 1999, c.24. The FNLMA outlines new land management powers that First Nations may exercise over their reserve lands such as environmental powers and the ability to grant interests in their lands.

⁶⁶ The *Saskatchewan Treaty Land Entitlement Framework Agreement* (Ottawa: DIAND, 1992) is a trilateral agreement and was signed by the federal government, provincial government, and a large number of Saskatchewan First Nations on September 22, 1992. It provides First Nations with the opportunity to take additional lands with a series of different title options including ownership of subsurface resources. See also *Manitoba Treaty Land Entitlement Framework Agreement* (Ottawa: DIAND, 1997). This agreement was signed May 29, 1997.

resources such as oil and gas are up for discussion in parts of Canada. Accordingly, it is important to understand how federal oil and gas regimes operate and what options available to First Nations to gain a role in oil and gas development.

2. Renewal and Negotiation in New Zealand – Lands and Resources

The Maori are the aboriginal people of Aotearoa and have thrived there for hundreds of years.⁶⁷ Aotearoa translates to “Land of the Long White Cloud” and is the name that Maori use to refer to New Zealand. The Maori are organized into tribes, sub-tribes and family units descended from their founding ancestors. The Maori gradually settled Aotearoa in a series of voyages from Hawaiki in sea-going canoes called waka with the last of these voyages occurring in approximately the fourteenth century.⁶⁸ Maori social units, in ascending order are the whānau (extended family), hapū (tribe), iwi (confederation of tribes), and waka (canoe confederation of iwi). “Maori belong to the tradition-oriented world of tribalism with its emphasis on kinship, respect for ancestors, spirituality, and millennial connectedness to the natural world.”⁶⁹

In contrast to colonial practices in Canada, the Imperial Crown in New Zealand negotiated one treaty with the Maori. In 1840, the British entered into the *Treaty of Waitangi*, or in

⁶⁷ See Metge, *supra* note 50. There is a debate over the length of their occupation of Aotearoa among academics and historians. For population statistic see Ian Pool, *Te Iwi Maori, A New Zealand Population Past, Present & Projected* (Auckland: Oxford University Press, 1991).

⁶⁸ See Ranginui J. Walker, *Ka Whawhai Tonu Matou: Struggle Without An End* (Auckland: Penguin Books, 1990). There is debate among archeologists and anthropologists regarding the placing of the Hawaiki, the island of origin for the Maori people. Maori oral history places Hawaiki somewhere in the Polynesian islands.

⁶⁹ Ranginui J. Walker, “Maori Sovereignty, Colonial and Post-Colonial Discourses” in Paul Havemann, ed., *Indigenous Peoples’ Rights* (Auckland: Oxford University Press, 1999) at 108-122 [hereinafter “Maori Sovereignty”].

Maori, *Te Tiriti o Waitangi* to facilitate the settlement of New Zealand.⁷⁰ A notable difference between this treaty and treaties in Canada is that it deals with both land cessions and sovereignty issues.⁷¹ The text is in both English and Maori and consists of a preamble, three articles and a declaration. The Preamble records the British Crown's desire to settle New Zealand. Article 1 brings New Zealand under British rule or in Maori, *kawanatanga*. Article 2 guarantees Maori the right to regulate their own affairs and property rights, referred to in Maori as their *tino rangatiratanga* over their *taonga*. Article 3 extends to Maori the rights and privileges of British citizens. The declaration is the recording of the Chiefs who signed the treaty. The Imperial Crown took the position that the *Treaty of Waitangi* was binding on all Maori tribes whether signatories or not. There is a gulf between the tribal signatories and the Pakeha (non-Maori) regarding the scope and application of the treaty. One of the most contentious issues is what precisely the Maori were ceding.⁷² Maori believe they ceded *kawanatanga*, or external governance to the Crown leaving the Maori with *rangatiratanga* or customary authority of the Chiefs over their own people.⁷³

Maori are also working towards establishing a form of self-governance and economic development for their people.⁷⁴ So far, Maori have been able to influence natural resource management through their participation in mainstream politics at the national level though,

⁷⁰ See Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books Limited, 1993) for a comprehensive chronology of colonization in New Zealand.

⁷¹ P.G. McHugh, *Maori Magna Carta* (Auckland: Oxford University Press, 1991) [hereinafter *Maori Magna Carta*] at 161. Compare with N. Jamieson, "The Maori Magna Carta – Fact or Fiction, Myth or Reality", Book Review of *Maori Magna Carta* by P.H. McHugh [1992] NZLJ 101.

⁷² *Ibid.* at 3.

⁷³ See A.L. Mikaere and S. Milroy, "Maori Issues" (1999) NZ Law Rev 353 [hereinafter "Maori Issues 1999"] at 371 for a Glossary of terms: *kaitiakitanga* means guardianship; *kawanatanga* means governance or delegated authority; *rangatiratanga* and *tino rangatiratanga* means authority, autonomy and sovereignty.

⁷⁴ Tama Potaka, "Agendum for Local Government" (1999) V.U.W. Law Rev. 111. See also Ranginui Walker and his account of the Maori rights movements. In his latest article about sovereignty, he notes that activists

they possess no local governments akin to those of First Nations. Instead, the Maori are organized along tribal lines and use a combination of traditional governance practices and trust boards to govern their lands, resources and peoples.⁷⁵ The trust boards are corporate bodies that manage lands, assets and monies on behalf of the Maori tribes they represent.⁷⁶ One of the objectives of the trust boards is ensures that future generations will have access to lands and resources. A leading Maori activist, Ranginui Walker argues that once the trust boards are economically viable only then will a tribe be able to contribute and participate fully in pan-tribal organizations like the National Maori Congress, New Zealand Maori Council and the Maori Women's League which will in turn provide the strong political voiced required to support self-government initiatives.⁷⁷

The Maori have used litigation, negotiation, civil protest and war in asserting ownership and control over their lands and resources. The era following the signing of the treaty saw the Maori dispossessed of their traditional lands and natural resources. As in Canada, much of the land allocated to the Maori either did not make it to them or was wrongfully taken or confiscated. One result was the devastating Land Wars of 1845-1872.⁷⁸ Consequently,

may well resort to civil disobedience to force government to negotiate "Maori Sovereignty", *supra* note 69 and Ranginui J. Walker, *Years of Anger* (Auckland: Penguin Books, 1989).

⁷⁵ See the Ngai Tahu website at <<http://www.ngaitahu.iwi.nz>>, (last accessed: 28 February 2001). This website provide background information on their Settlement Agreement and the infrastructure Ngai Tahu have set up to govern its people. It has a central governance entity, a development corporation to deliver programs and services, and a holding corporation to manage its commercial interests.

⁷⁶ Trust boards are similar to First Nation tribal councils, in that they are incorporated bodies and represent aggregates of Maori. However, the legislation and agreements that creates them do for purposes of managing Maori assets. See for example the Tai Tokerau Maori Trust Board annual report at <<http://www.webnez.com/tekorero/articles-k/ttb.html>>, (last accessed: 28 February 2001) Tai Tokerau Maori Trust Board.

⁷⁷ "Maori Sovereignty", *supra* note 69.

⁷⁸ For a summary regarding the loss of land and disempowerment of Maori see *Taranaki Report* (Wai 143) Wellington: Brooker & Friend, 1996).

Maori have longstanding grievances over the implementation of the *Treaty of Waitangi*.⁷⁹

The interpretation of the Treaty and what exactly was ceded and given has been disputed since the date it was signed. Only 50 Chiefs signed the Treaty but it was applied to every Chief and all Maori.

The Maori Land Court (MLC) was established to oversee the Maori land holdings including estates involving interests in Maori lands.⁸⁰ The current iteration of the MLC presides over seven regional districts of approximately 3.25 million acres of Maori land with expanded powers from the *Te Ture Whenua Maori Act, 1993*. A recent addition to its jurisdiction includes the monitoring of development trusts in forestry, horticulture and farming.⁸¹ These trusts provide for the administration of Maori land for the benefit of the iwi (tribes). It is a viable mechanism should any oil and gas interests be passed on the Maori through land allocations. The relevance to this thesis is that these trusts are capable managing a full range of land resources such as oil and gas on behalf of tribes.

Not until the mid-1970s did the New Zealand government attempt to address in any real way Maori grievances over land loss and other matters with the establishment of the Waitangi Tribunal.⁸² Prior to its establishment, the Crown dealt with Maori grievances on an ad hoc

⁷⁹ The Maori claim they have ownership and control over their lands and their resources through the *Treaty of Waitangi* most specifically through Article 2.

⁸⁰ The original Maori Land Court was established in 1862 with the predecessor of the current court being established by the *Native Lands Act, 1865*.

⁸¹ *Grievance Resolution in New Zealand, A Background Paper* (Native Title and Trans-Tasman Experience Conference, Sydney, Australia February 24 and 25) Wellington: GP Publications, 1994 at 30 [hereinafter *Grievance Resolution*].

⁸² In response to Maori activism, the Labour Government of New Zealand enacted *The Treaty of Waitangi Act, 1975*. See also W. Renwick, *The Treaty Now* (Wellington: GP Books, 1990) for an overview of the Waitangi Tribunal.

basis and it still retains the right to continue to address grievances in this manner.⁸³ The purpose of the Waitangi Tribunal is to observe and confirm the principles of the *Treaty of Waitangi* by making recommendations to government to redress claims. It does not negotiate settlements, rather, it provides Maori a venue to grieve actions taken by the government that were inconsistent with the principles of the *Treaty of Waitangi*. Originally, the tribunal was established to hear grievances arising from government action dating from after 1975.⁸⁴ In 1985 *The Treaty of Waitangi Act, 1975* was amended and its authority to hear grievances was extended back to February 6, 1840. This was a significant amendment because it enabled Maori to grieve actions taken by the government dating back to the signing of the treaty, which could include grievances regarding land and natural resources. Generally, the Waitangi Tribunal makes non-binding recommendations, which serve as the impetus for the Crown to negotiate a settlement and, or make legislative policy changes.⁸⁵ The tribunal is unique in that it conducts independent research, holds formal inquiries, considers a full range of evidence and is conducted in a manner that is considerate of Maori traditions. It is not bound by strict principles of law, so it has the freedom to consider claims and make recommendations that truly address the grievances.

New Zealand has a settlement process in place through the Office of the Treaty Settlement (OTS).⁸⁶ In 1995, the Crown established the OTS reporting directly to a Minister to deal

⁸³ Andrew Sharp, *Justice and the Maori, Maori Claims in New Zealand Political Arguments in the 1980s* (Auckland: Oxford University Press, 1990).

⁸⁴ Government action includes actions or omissions by or on behalf of the Crown regarding legislation, policies and practices, see *Treaty of Waitangi Act, 1975* s. 6.

⁸⁵ Subsequent amendments in 1988 gave the WT some binding powers with respect to its recommendations with ss. 8A and 8B allowing the WT to order the resumption of land transferred to state-owned-enterprises even if there has been a subsequent transfer to a third party.

⁸⁶ See OTS website at <<http://www.ots.govt.nz>>, (last accessed: 12 September 2000) for publications on negotiation process.

with the growing number of claims. The OTS is tasked with negotiating settlements for claims lodged with the Waitangi Tribunal on behalf of the Crown, as well as implementing settled claims.⁸⁷ There are approximately 12 active negotiations with 22 in the queue and 12 settled since 1992.⁸⁸ The OTS manages over \$130 million in lands and assets for potential settlement purposes.

One significant difference between the claims processes in Canada and New Zealand is the scope of settlements. In New Zealand, the Crown does not have a mandate to transfer nationally owned natural resources.⁸⁹ However, this does not mean that Maori cannot access management powers over oil and gas within their traditional territory. The Crown provides compensation to the Maori. Further, if there is surplus Crown assets, such as an oil and gas facility, it is possible that it can be included in a negotiated settlement along with representation on the appropriate regulatory boards. New Zealand does not have the same degree of structure with respect to its claims processes as Canada does so it has not addressed many of the issues associated with land and resource management for Maori.⁹⁰

Another significant difference with New Zealand is that the Crown has no immediate plans to

⁸⁷ The claims must have been lodged prior to September 21, 1992. See the *Deed of Settlement Te Runanaga o Ngai Tahu* November 21, 1997 [hereinafter *Ngai Tahu*].

⁸⁸ See Office of Treaty Settlement, *Quarterly Report to 30 June 2000* (Wellington: GP Publications, 2000).

⁸⁹ *Direct Negotiations*, *supra* note 54.

⁹⁰ See Caren Wickliffe, *Indigenous Claims and the Process of Negotiation and Settlement in Countries with Jurisdictions and Populations Comparable to New Zealand's*, *Background Report for Environmental Information and the Adequacy of Treaty Settlement Procedures* (Wellington: Office of the Parliamentary Commissioner for the Environment, 1994) [hereinafter *Indigenous Claims*] at 85-93. Wickliffe compares the settlement processes in Canada, the United States and New Zealand. Also see *Environmental Information and the Adequacy of Treaty Settlement Procedures* (Wellington: Office of the Parliamentary Commissioner for the Environment, 1994) a document that focuses on how to deal with environmental issues relating to public land used for settlement [hereinafter *Settlement Procedures*]. Wickliffe argues that New Zealand is grappling with policy development for claims. For an update on treaty settlements see A.L. Mikaere and S. Milroy "Maori Issues" (1998) *NZ Law Rev* 467 [hereinafter "Maori Issues 1998"] at 476-476.

address the issue of self-government. Maori believe that they retained self-government powers by virtue of Article 2 of the Treaty, which guarantees the Chiefs tino rangatiratanga over their taonga. A recent court decision argues for the recognition of self-government powers over fisheries in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission*.⁹¹ Despite the absence of a self-government policy or mandate, the Crown still negotiates a form of self-government powers as evidenced by its approach to settling the fishery claims by including a component that allows Maori to regulate its traditional fishery within the existing legislative structure.

In 1994 the government introduced the Fiscal Envelope or Full and Final Settlement Policy placing a time limit and dollar cap on all Maori grievances. Maori have categorically rejected the Fiscal Envelope as inadequate to address all outstanding claims.⁹² Maori opposed the imposition of this policy because it will negatively impact on the equitable settlement of claims. Currently, there are over 700 claims before the Waitangi Tribunal mainly dealing with land and natural resources. The government has deducted the costs for the 1989 Fisheries Settlement and other claims already settled thereby reducing an already low \$1 billion settlement cap from the outset.⁹³ In fact, the OTS Quarterly Report indicates that over \$532.5 million has already been allocated to settle claims. Given the fact that only 12 claims have been settled since 1992 and there are 700 outstanding, there will be significant fiscal pressure on the Crown.⁹⁴ This policy has severely strained the already tenuous Crown-Maori

⁹¹ *Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 284.

⁹² See A.L. Mikaere, "Settlement of Treaty Claims: Full and Final Settlement, or Fatally Flawed" (1997) VUWLR 250.

⁹³ A. L. Mikaere, "Maori Issues" (1995) NZ Law Review 137 at 153-155 [hereinafter "Maori Issues 1995"].

⁹⁴ For a discussion on the fiscal pressures see the *1999 Ministry of Justice Post-Election Briefing for the Incoming Minister, Chapter 4 Maori Relations* (Wellington: Ministry of Justice, 1999) [hereinafter *Briefing Note*].

relationship.

B. Legal Landscape

The courts in Canada and New Zealand recognize aboriginal and treaty rights though the terminology, scope and content vary. There are several common themes among aboriginal rights discourse. First, there are two basic types of aboriginal rights: aboriginal rights including aboriginal title, and treaty rights. Aboriginal and treaty rights have a direct link to the ability of aboriginal groups to access their lands and resources. For our purposes, aboriginal and treaty rights directly impact federal oil and gas regimes. Secondly, the Crown has a fiduciary relationship with aboriginal people. Accordingly, the doctrine of fiduciary duty directly impacts First Nations and access to their lands and resources. The objective of the following analysis is to assess how treaty rights, aboriginal rights and the doctrine of fiduciary duty interact with federal oil and gas regimes. A secondary objective is to determine if New Zealand jurisprudence assists our overall analysis. In other words, does the New Zealand approach add to our analysis and development of options to support the participation of First Nations in oil and gas management?

Canadian jurisprudence references aboriginal and treaty rights both of which are constitutionally protected by section 35 of the *Constitution Act, 1982*:

35.(1) Recognition of existing aboriginal and treaty rights – The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) Definition of “aboriginal peoples of Canada” – In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) Land claim agreements – For greater certainty, in subsection (1) “treaty rights”

includes rights that now exist by way of land claims agreements or may be so acquired...⁹⁵

New Zealand jurisprudence references Maori rights in much the same manner as Canada, but without constitutional protection. Essentially there are two categories, treaty rights and the common law doctrine of aboriginal title rights.⁹⁶ The constitution of New Zealand is unwritten and based on different statutes and conventions as it is a unitary state with no entrenched constitution.⁹⁷ Consequently, Maori rights are not constitutionally protected.⁹⁸ The legal basis underpinning the analysis of treaty and aboriginal rights is based on different legal principles that reflect the unique constitutional structures of Canada and New Zealand.

1. Treaty Rights

Determining the nature and scope of treaty rights is largely an exercise of treaty interpretation. Distinct interpretation principles have been developed in both Canada and New Zealand. Treaty rights refer to the collection of rights set out in treaty agreements between the Crown and aboriginal peoples, the most common category of treaty rights are the hunting, fishing and gathering rights.⁹⁹

⁹⁵ *Constitution Act, 1982*, s.35 being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11, [hereinafter *Constitution Act, 1982*]. See P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997).

⁹⁶ *Indigenous Claims*, *supra* note 90 at 85-93. See also *Maori Magna Carta*, *supra* note 71 wherein McHugh comments that there are treaty based claims most of which are based on statutes, aboriginal title claims and international law claims. McHugh uses an expanded category of claims.

⁹⁷ See especially Mai Chen and Sir Geoffrey Palmer, *Public Law in New Zealand* (Auckland: Oxford University Press, 1993).

⁹⁸ *Indigenous Claims*, *supra* note 90 at 90.

⁹⁹ For a comprehensive digest of aboriginal and treaty rights cases see generally Shin Imai, *The 2000 Annotated Indian Act and Aboriginal Constitutional Provisions*, (Toronto: Carswell, 2000) at 311-465. Compare J.

The recent Supreme Court of Canada decision, *Marshall* provides a succinct summary of treaty interpretation principles. The court examines the evolution of treaty interpretation noting that the court has distanced itself from a strict and narrow interpretative approach.¹⁰⁰ When interpreting treaty rights the honour of the Crown is always at stake with ambiguous and doubtful expressions resolved in the favour of the First Nation.¹⁰¹ The court adopted a broad approach to treaty interpretation. Mr. Justice Binnie held “in the context of a treaty document that purports to contain all of the terms, this Court has made [it] clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty”.¹⁰² He went on to say “given the history surrounding treaties and the relationship between the Crown and First Nations it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms.”¹⁰³ Accordingly, in Canada the court’s approach to treaty interpretation considers the First Nation’s perspective and forms of evidence. Treaty rights jurisprudence applies to the various categories of treaties in Canada including peace and friendship treaties, pre-confederation treaties, post-confederation treaties and modern treaties.¹⁰⁴

There are several schools of thought regarding the constitutional position of the *Treaty of*

Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 Sask. L. Rev. 241 at 282-300 for a First Nation perspective of treaty rights.

¹⁰⁰ In *R. v. Horse*, [1988] 1 S.C.R. 187; [1988] 2 C.N.L.R. 112, (S.C.C.) the court adopted a narrow approach to interpreting the expressed some reservations about the use of extrinsic materials, such as the transcript of negotiations surrounding the signing of Treaty No. 6, except in the case of ambiguity.

¹⁰¹ *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.) [hereinafter *Badger*] wherein the court sets out guidelines relating to the interpretation of treaty rights. Some of the leading cases on what constitutes a treaty are *R. v. Sioui*, [1990] 1 S.C.R. 1025; [1990] 3 C.N.L.R. 127 (S.C.C.) [hereinafter *Sioui*], *Simon v. The Queen*, [1985] S.C.R. 387; [1986] 1 C.N.L.R. 153 (S.C.C.) and *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; [1983] 2 C.N.L.R. 89 (S.C.C.).

¹⁰² *Marshall*, *supra* note 53 at 11, Mr. Justice Binnie notes that “the proposition is cited with approval in *Delgamuukw* and *Sioui*”.

¹⁰³ *Ibid.* at 12.

¹⁰⁴ *Morse*, *supra* note 8.

Waitangi.¹⁰⁵ McHugh examines this debate in detail in his book the *Maori Magna Carta*.

The Maori believe that the *Treaty of Waitangi* is superior law and absolute over non- Maori law. Whereas, the Pakeha (European settlers) believe that the *Treaty of Waitangi* is merely a subordinate document. The orthodox view is that it is only enforceable in the courts if a statute references it.¹⁰⁶ In other words, there are no laws that permit Maori to enforce the terms and conditions set out in the treaty, although some argue that it may be reviewable on administrative law principles independent of express statutory reference.¹⁰⁷ Statutory interpretation is the basis for most claims with several prominent statutes expressly incorporating references to principles of the Treaty. For example, section 9 of the *State-Owned Enterprises Act, 1986* (SOE Act) states “nothing in this Act shall permit the Crown to act in a manner inconsistent with the principles of the *Treaty of Waitangi*.”¹⁰⁸ The conservative view argues the Crown has obligations under the Treaty and must be understood and given effect within the legal system.¹⁰⁹ The Waitangi Tribunal has held that the Crown’s jurisdiction and authority is constrained by the *Treaty of Waitangi* however the courts have yet to determine if the Crown enjoys a limited sovereignty.¹¹⁰

The principles of the *Treaty of Waitangi* have not been defined exhaustively much like aboriginal and treaty rights have not been fully considered. Rather the jurisprudence and Waitangi Tribunal Reports (Reports) concentrate on interpreting the Maori version in the context of each claim. The Reports have been influential in generating fundamental

¹⁰⁵ *Maori Magna Carta*, *supra* note 71.

¹⁰⁶ *Hoani Te Heuheukukino v. Aotea District Maori Land Board* [1941] A.C. 308.

¹⁰⁷ R.P. Boast and D.A. Edmunds “The Treaty of Waitangi and Maori Resource Management Issues” in *Resource Management*, loose leaf (Wellington: Brooker’s, 1991).

¹⁰⁸ *State-Owned Enterprises Act, 1985* [hereinafter SOE Act].

¹⁰⁹ F. M. Brookfield, “Revolutions, Referendums and the Treaty” (1997) N.Z. Law J. 328.

principles regarding the treaty.¹¹¹ Most Reports contain a chapter on treaty interpretation espousing the basic principles of reciprocity, partnership, and the Crown's duty to act fairly and impartially.¹¹² In turn, these principles have been considered by the courts, such as the principle of reciprocity in the context of fiduciary obligations.

As in Canada where the court considers the interpretation of the treaty from the First Nation perspective, the court considers the Maori interpretation and has given more weight to the Maori version to determine distinction between text and meanings. In *NZMC (1987)* the court notes that there are several major issues open for debate in the treaty between the Maori text and corresponding English text.¹¹³ First, the term 'rangatiratanga' is referred to as chieftainship and is interpreted to mean governance by the Maori. Secondly, the term 'kawanatanga' is referred to as complete government and is interpreted by the Maori to mean the sovereignty that was given to the Queen. Thirdly, the term 'taonga' is referred to as treasures and other properties and is interpreted by Maori to mean their lands and resources.¹¹⁴ Some examples of taonga include such things as the Maori language, culture, sacred sites and fisheries.¹¹⁵

¹¹⁰ *Indigenous Claims*, *supra* note 90 at 87 and Rt. Hon. Sir Douglas Graham, "Reflections on the Constitution" (1999) Part IV NZ Law Review 561 at 564.

¹¹¹ See the WT website for a list of reports and publications at <<http://www.knowledge-basket.co.nz/waitangi>>, (last accessed: 17 September 2000).

¹¹² See *Ngai Tahu Claim (Wai 27)* (Wellington: Brooker & Friend, 1991) at 221-236 and *Maori Development Corporation Report (Wai-350)* (Wellington: Brooker & Friend, 1993) at c.6, c.8.

¹¹³ *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.) [hereinafter *NZMC (1987)*].

¹¹⁴ *Ibid.* at 641.

¹¹⁵ See for example, the *New Zealand Maori Council v. Attorney-General* [1996] 3 N.Z.L.R. 140 (C.A.) [hereinafter *Broadcast No. 2*] and the *New Zealand Maori Council v. Attorney-General* [1994] 1 NZLR 513 (P.C.) [hereinafter *Broadcast No. 1*]. The court found that the Crown sale of its commercial radio assets owned to a state-owned-enterprise *Radio New Zealand Ltd.* is a breach of the SOE Act, breach of treaty obligations to protect Maori language. Section 9 of the SOE Act states that nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the *Treaty of Waitangi*. Maori argue that Article 2 of the Treaty of Waitangi guarantees Maori undisturbed possession of their taonga and that the *Maori Language Act*

There are similarities and difference between the approach to treaty interpretation in New Zealand and in Canada. It appears both countries adopt a liberal approach that considers the First Nation and Maori perspective regarding the terms and conditions of the treaty both written and oral. This is even more so in New Zealand where the court routinely relies on the Maori version of the treaty. A major difference is that New Zealand has elected to generate basic principles from the treaty to guide the relationship between the Maori and the Crown. In Canada, treaties are interpreted in a more restrictive manner usually considering the terms and conditions of the document rather than considering its impact on First Nation–Crown relations.

With respect to the impact of treaty rights on federal oil and gas regimes the impacts vary depending on the treaty. For example, the numbered treaties do not have an express recognition of the right to develop oil and gas. Nevertheless, as noted in the previous Part, First Nations take the position that land rights associated with the treaties include the right to own and control natural resources including oil and gas. The fact that Chief Justice Lamer, in *Delgamuukw* considers aboriginal title to include subsurface resources bolsters this argument. Consequently, the Natural Resource Transfer Agreements are under dispute.¹¹⁶ In contrast, modern treaties specifically address oil and gas issues.¹¹⁷ Treaty rights impact

1987 held taonga included culture and language. See related WT claim, *Te Reo Maori Report* (Wellington: Brooker & Friend, 1986).

¹¹⁶ *Constitution Act, 1930* R.S.C. 1985, Appendix II, No. 26. See R.H. Bartlett, *Resource Development and Aboriginal Land Rights* (Calgary: Canadian Institute of Resources Law, 1991) [hereinafter *Resource Development*] at 50-90. Cases on NRTA e.g. *R. v. Sundown* [1999] 2 C.N.L.R. 289 (S.C.C.) wherein the court found that Treaty No. 6 and the NRTA permitted the accused to build a shelter in the park to exercise his treaty right to hunt. Currently, the IRC continues to be a clearing house of information related to the NRTA. Treaty 8 joins Treaty 7, FSIN and Assembly of Manitoba Chiefs in the dispute over the NRTA.

¹¹⁷ There is only one reported case on petroleum disputes and modern treaties, *Sahtu Secretariat Inc. v. Canada* [1999] F.C. 41 (F.T.D.) wherein the court held pursuant to the Final Agreement, the Sahtu were entitled to payment of royalties from Norman Wells projects.

federal oil and gas regimes directly and indirectly. An example of a direct impact is the requirement to provide a percentage of the royalties to the First Nation as will be discussed in the next Parts. An example of an indirect impact is when a treaty right to hunt influences the terms of development such as the location of a petroleum project.

2. Aboriginal Rights

From the First Nation perspective the test to prove their aboriginal rights is based on their oral histories as a people.¹¹⁸ The Aboriginal test stands in stark contrast to non-Aboriginal tests. Aboriginal rights encompass a broad range of rights including aboriginal title, which is a distinct species of aboriginal rights.¹¹⁹ In Canada, the *Van der Peet* trilogy sets out the tests to prove aboriginal rights.¹²⁰ Establishing an aboriginal right does not require proof of aboriginal title.¹²¹ In *Van der Peet*, Chief Justice Lamer held that “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”¹²² He elaborates on several factors to consider when ascertaining if an aboriginal right exists.¹²³ The perspective of the First Nation and its relationship to the land are two such factors as is the element of

¹¹⁸ “Frozen Rights”, *supra* note 41 at 40.

¹¹⁹ *Delgamuukw*, *supra* note 60 at 2.

¹²⁰ *R. v. Van der Peet*, [1996] 2 S.C.R. 507; [1996] 4 C.N.L.R. 177 (S.C.C.), [hereinafter *Van der Peet*] wherein the court establishes the test to prove aboriginal rights and set outs ten factors to consider in determining if an aboriginal right exists. The other two cases considered were *R. v. NTC Smokehouse Ltd.*, [1996] 2 S.C.R. 672; [1996] 4 C.N.L.R. 130 (S.C.C.) and *R. v. Gladstone*, [1996] 2 S.C.R. 723; [1996] 4 C.N.L.R. 65 (S.C.C.), [hereinafter *Gladstone*].

¹²¹ See *R. v. Côté*, [1996] 3 S.C.R. 139; [1996] 4 C.N.L.R. 26 (S.C.C.), [hereinafter *Côté*] wherein the court recognised free-standing aboriginal rights despite the fact that there was not sufficient evidence to establish aboriginal title. In the companion decision, *R. v. Adams*, [1995] 4 S.C.R. 707; [1996] 4 C.N.L.R. 1 (S.C.C.) [hereinafter *Adams*] the court held there was a free-standing aboriginal right to fish regardless of extinguishment of aboriginal title which was not proved at trial.

¹²² *Van der Peet*, *supra* note 120 at 46.

¹²³ *Ibid.* note 120 at 48-75.

continuity associated with the practice of the aboriginal right. In determining if an aboriginal right exists, the court must determine the precise nature of the claim and adjudicate on a specific rather than general basis.¹²⁴ There is no restriction on what constitutes an aboriginal right provided the First Nation asserting the right can satisfy the test set out in *Van der Peet*.¹²⁵ An interesting prerequisite to establishing an aboriginal right is that it must predate colonial contact. While there are no confines to asserting aboriginal rights, what evidence and weight the court affords evidence will impact on establishing aboriginal rights. Recent jurisprudence seems to indicate that there is some difficulty moving past the concept of frozen rights despite the fact that the Supreme Court of Canada has held aboriginal rights are not frozen in time but rather evolve with the passage of time.¹²⁶

In New Zealand the court and academics refer to aboriginal rights as 'aboriginal title rights'. Aboriginal title rights are based on the common law and distinct from treaty rights. It is an emerging area of law being advanced by fisheries cases.¹²⁷ It recognizes that there are Maori rights based on common law principles associated with customary title.¹²⁸ The court is now struggling with issues associated with the impact of Maori customary law 'tikanga' on state laws.¹²⁹ There is no universal test for establishing these rights. There are no consistent principles associated with the rights yet other than they are communal, linked to the land and

¹²⁴ Patrick Macklem, "Aboriginal Rights and State Obligations" (1997) Alta. L. Rev. 97.

¹²⁵ Imai, *supra* note 90 at 279 - 298 for a comprehensive summary of aboriginal rights cases.

¹²⁶ "Frozen Rights", *supra* note 41 and B.W. Morse, "Permafrost rights: aboriginal self-government and the Supreme Court in R. v. Pamajewon" (1997) McGill L Journal 1011.

¹²⁷ *Te Weehi v. Regional Fisheries Officer*, [1986] 1 NZLR 680 wherein the court held the Maori have a property right in the coastal fishery.

¹²⁸ *Grievance Resolution*, *supra* note 81 at 38-41.

¹²⁹ *Maori Magna Carta*, *supra* note 71 at 130-132.

linked to the Maori's tino rangatiratanga over their taonga.¹³⁰ In other words, aboriginal rights in New Zealand are recognized in terms of their relationship to Maori sovereignty regarding their property and possessions.

The application of New Zealand jurisprudence on aboriginal rights is not particularly helpful to this thesis for the simple reason that it is underdeveloped and reflects earlier Canadian judicial thinking. For example, in Canada the court is differentiating between categories of aboriginal rights and developing jurisprudence that recognizes an aboriginal right such as a right to fish at a specific location as independent from aboriginal title.¹³¹ However, it appears that the New Zealand court is developing jurisprudence on the right to self-government as part of the doctrine of customary title. For example, in *Te Weehi* there is some recognition of the right for Maori to regulate their traditional fishery as part of their tino rangatiratanga over their taonga.

What is the impact of aboriginal rights on federal oil and gas regimes? A potential impact could be the recognition of an aboriginal right to oil and gas management. If an aboriginal right to oil and gas development was established it would have to be reconciled with federal oil and gas regimes as well as provincial oil and gas regimes depending on the lands in question. A claim would have to establish an oil and gas right is an activity that is an element of a practice, custom or tradition integral to the First Nation claiming the right. The First Nation would have to prove that it has engaged in an activity prior to contact, maintained continuity in the practice, and that the practice has evolved into a right to develop

¹³⁰ *Te Runanganui o Te Ika Whenua Incorporated Socs v. Attorney General*, [1994] 2 N.Z.L.R. 20 (C.A.) [hereinafter *Te Runanganui o Te Ika Whenua*].

petroleum resources. It is difficult to imagine what integral practice has evolved into oil and gas development. Moreover, an aboriginal right to oil and gas development in the territorial sea or continental shelf would be even more difficult to prove. A more relevant impact is the effect of other constitutionally protected aboriginal rights on federal oil and gas regimes. This issue will be discussed further in the next part under the doctrine of fiduciary duty. In this context, it is aboriginal rights to hunt, fish, trap and other such activities that need to be considered in terms of oil and gas development and overall responsibilities and duties of the Crown.

3. Aboriginal Title

Aboriginal title is a right in land that includes activities that are parasitic on the underlying aboriginal title. The activities do not need to be aspects of practices, customs or traditions integral to the First Nation rather, there is a general right to use the land for diverse activities provided those activities are not irreconcilable with the First Nations tie to the land.¹³² The leading case on aboriginal title is *Delgamuukw*, which chronicles the evolution of aboriginal title. The first major Canadian case was *St. Catherine's Milling* wherein the court characterizes aboriginal title as being 'personal and usufructary'.¹³³ This decision was not altered until *Calder* wherein the court adopted the inherent rights approach and held that aboriginal title is not dependent on the *Royal Proclamation of 1763* but is based on First Nations' prior occupation of North America. This decision characterized aboriginal title in terms of inherent rights. In *Delgamuukw*, Chief Justice Lamer elucidates further on the scope

¹³¹ *Adams, supra* note 121.

¹³² *Delgamuukw, supra* note 60 at 111.

and content of aboriginal title and the manner in which aboriginal title may be proven. The test to prove aboriginal title may be summarized as follows:

... First Nation asserting aboriginal title must demonstrate that it occupied the territory prior to the Crown's assertion of sovereignty; the First Nation must establish continuity in its occupation and use of its territory; and the occupation must have been exclusive at the time of sovereignty.¹³⁴

To prove each of these elements, First Nations may present evidence from archeological, anthropological, historic, oral histories and other cultural and traditional sources.¹³⁵ The *Delgamuukw* decision is particularly significant because the court articulates the scope and content of aboriginal title including land uses and activities. Aboriginal title encompasses the right to use the land for different activities that need not be integral to the distinctive culture of the First Nation, provided the uses do not destroy the First Nation's attachment to the land.¹³⁶ A First Nation may not put the land to uses that will prevent the First Nation, and future generations, from carrying out its customs, practices and traditions on the land. In *Delgamuukw*, as an example of a non-permissible use, the court suggests that a strip mine may be inconsistent with hunting rights.¹³⁷ The court goes on to say that First Nations must surrender their lands before activities that are not consistent with aboriginal title can be carried out.¹³⁸ Consequently, there are inherent limits on aboriginal title activities. The court has provided some principles regarding uses but has left the category of permissible uses open. Chief Justice Lamer suggests that aboriginal title includes subsurface minerals and

¹³³ *St. Catherine's Milling, supra* note 59.

¹³⁴ *Delgamuukw, supra* note 60 at 143.

¹³⁵ *Delgamuukw, supra* note 60 at 107-108. See also Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37 *Osgoode Hall L J* 775.

¹³⁶ *Delgamuukw, supra* note 60 at 117.

¹³⁷ *Ibid.* at 128.

¹³⁸ *Ibid.* at 131.

may include the right to exploit the oil and gas.¹³⁹ It is arguable that aboriginal title includes the ability to engage in sustainable oil and gas development in a manner that ensures the use and enjoyment of the lands for future generations. This is because aboriginal title implies the right to use the lands for two categories of activities. First, those activities that are integral to the First Nations. Secondly, those activities that are not, but nonetheless constitute permissible activities because they do not destroy the First Nation's link to its traditional territory. For the most part, oil and gas development can be carried out in an environmentally responsible and sustainable manner with careful attention to conservation and safety.

An interesting aspect of aboriginal title is whether it includes bodies of water. Does aboriginal title to a traditional territory include land and water bodies? The court is silent on what the content of land includes. This is somewhat relevant to this thesis in that First Nations in British Columbia and Atlantic Canada are claiming they possess un-extinguished aboriginal title over their traditional territories including the oceans. An aboriginal title claim to the offshore would face several other obstacles. First, does aboriginal title include bodies of water? Secondly, how do common law and international law legal principles regarding resource development in the territorial sea and continental shelf impact upon a claim to aboriginal title? Thirdly, does aboriginal title to the offshore include the right to develop subsurface resources? Aboriginal fishing rights cases do not require proof of aboriginal title

¹³⁹ *Ibid.* at 122, Chief Justice Lamer makes the proposition that aboriginal title to land includes subsurface resources and aboriginal title itself includes the right to exploit the resource, he relies on (1) the *Indian Oil and Gas Act*, R.S.C. 1985, c.I-7; (2) *River Indian Band v. Canada*, [1995] 4 S.C.R. 344; [1996] 2 C.N.L.R. 25 (S.C.C.) [hereinafter *Apsassin*], wherein the court held the Crown had a fiduciary duty when dealing with the surrendered land and minerals; and (3) *Guerin v. The Queen*, [1984] 2 S.C.R. 335; [1985] 1 C.N.L.R. 120 (S.C.C.) [hereinafter *Guerin*]. Indian reserve land, includes subsurface mineral rights and that oil and gas

or proof title extends to the territorial sea where the right is being carried out.¹⁴⁰

Consequently, aboriginal rights cases do not help resolve the issue. A series of band by-law fishing cases shed some light on this issue. In *R. v. Lewis*, the court considered whether a band by-law regarding fishing extended to the river based on the common law principle of *ad medium filum* which extends property ownership to the middle of a river bed.¹⁴¹ The court held that *ad medium filum* did not apply to reserve lands or to navigable waters. In *R. v. Nikal*, considering the same issue the court noted that it was the practice of the Crown to exclude water when creating reserves.¹⁴² Nevertheless, these cases may be distinguished from a claim to aboriginal title to the offshore for two reasons. First, ownership and rights to water are considered in the context of the *Indian Act* regulatory regime. Secondly, the principle of *ad medium filum* does not apply to the territorial sea. According to the offshore reference cases, claims to the territorial sea or continental shelf may be based in common law or international law.¹⁴³ The provinces did not succeed in establishing a right to explore and exploit the continental shelf resources for two reasons. First, international law was not firmly established prior to 1958, the time when the United Nations established laws, protocols and declarations on these issues. Secondly, they were not recognized as external sovereign states with extra-territorial powers.¹⁴⁴ The offshore reference cases also address ownership and jurisdiction over the territorial sea. The provinces failed to prove at the time of confederation

exploitation is consistent with aboriginal title. Conversely, Mr. Justice La Forest is unable to assume that the *Indian Oil and Gas Act* applies off reserve to aboriginal title lands, *Delgamuukw*, *supra* note 60 at 91.

¹⁴⁰ *Adams and Côté*, *supra* note 121 stand for the principle an aboriginal right to fish is not dependent on proof of aboriginal title.

¹⁴¹ *R. v. Lewis*, [1996] 1 S.C.R. 921; [1996] 3 C.N.L.R. 131 (S.C.C.).

¹⁴² *Ibid.* at 86.

¹⁴³ The boundaries of the territorial sea are from the low-water mark to 12 nautical miles offshore. The boundaries of the continental shelf extend beyond the limits of the territorial sea.

¹⁴⁴ *Reference re Ownership of Offshore Mineral Rights*, (1967), 65 D.L.R. (2d) 353 (S.C.C.) [hereinafter *BC Offshore Reference*]. Other offshore cases include *Reference Re Strait of Georgia*, [1984] 1 S.C.R. 388 (S.C.C.), *Reference re Mineral and Other Natural Resources of the Continental Shelf*, (1983), 145 D.L.R. (3d) 9

that their boundaries included the territorial sea. Absent an express acknowledgement of title, ownership and jurisdiction accrued to Canada.¹⁴⁵ The common law test applied in the offshore reference cases is not applicable to First Nations as aboriginal title is not based on common law proprietary principles, rather it is *sui generis* and based on the First Nation's prior occupation of the land.¹⁴⁶ In addition, under aboriginal title the First Nation has the right to use the land but does not own the land.

In order for a First Nation claim to the continental shelf to succeed at international law, the First Nation must establish that they were independent nations with external sovereignty after 1958.¹⁴⁷ American jurisprudence has expressly recognized American Indians as sovereign dependent nations, whereas Canadian jurisprudence has not yet recognized First Nations as sovereign nations.¹⁴⁸ From the First Nation perspective they have an inherent right to self-government as they are independent nations with their own governance systems and have been so since time immemorial. The inherent right to self-government may be an indicator sufficient to establish First Nations as sovereign both internally and externally. The courts have not decided if there is an aboriginal right to self-government and the *Inherent Right Policy* does not explicitly recognize First Nations as sovereign nations in an international

(N.C.A.), *Reference re The Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, (1984), D.L.R. (4th) 385 (S.C.C.).

¹⁴⁵ *B.C. Offshore Reference*, *supra* note 144 at 394.

¹⁴⁶ *Delgamuukw*, *supra* note 60 at 112-115.

¹⁴⁷ *Ibid.* at 388 states international law rights are not proprietary and may not be applied retro-actively.

¹⁴⁸ See the American 'Marshall trilogy', the foundation of federal native law in the USA: *Johnson v. M'Intosh*, 21 U.S. (8Wheat.) 543; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1; and *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 establish the notion of domestic independent nations. But see *R. v. Pamajewon*, [1996] 2 S.C.R. 821; [1996] 4 C.N.L.R. 164 (S.C.C.), [hereinafter *Pamajewon*] wherein the court considered high stakes gaming within the context of an aboriginal right to self-government and held the First Nation did not establish an aboriginal right to gaming and declined to consider a general right to self-government. For a discussion on governance at the time of contact, see Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992) 21 Man. L.J. 343 and Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983).

sense.¹⁴⁹ Alternatively, the content of aboriginal title may support the argument that First Nations are sovereign nations. In proving aboriginal title, First Nations confirm they have occupied and used their traditional territory in an exclusive manner since contact. In any event, the issue may be moot because proof of aboriginal title does not require the First Nation to demonstrate it is a sovereign nation with extra-territorial powers.

The issue of aboriginal title is addressed in the *Comprehensive Claims Policy*. In fact, comprehensive land claims have considered rights and ownership to water bodies including the ocean.¹⁵⁰ In the Labrador Inuit Land Claims Agreement-in-Principle (AIP), title to Labrador Inuit lands includes the seabed for specified areas and lands covered by water.¹⁵¹ Chapter 5 of the AIP addresses water management and Inuit water rights.¹⁵² With respect to offshore development, the Crown must consult with the Labrador Inuit prior to any petroleum development in ocean areas adjacent to their settlement lands. The purpose of comprehensive claims negotiations is to address aboriginal title and rights. Therefore, an inference may be drawn from these arrangements that aboriginal title may include the land as well as the adjacent water bodies. The exercise of aboriginal title over their traditional territory may include rights over the offshore resources. Additionally, recognition of aboriginal title will advance claims that may include offshore oil and gas rights.

¹⁴⁹ In *Delgamuukw*, *supra* note 60, the court did not decide the issue because of a defect in the pleadings. In *Pamajewon*, *supra* note 148, the court refrained from considering a general right to self-government.

¹⁵⁰ See Janet Keeping, *The Inuvialuit Final Agreement* (Calgary: Canadian Institute of Resource Law, 1989) for a discussion on the impacts of the final agreement on oil and gas development on Settlement Lands and within the Settlement Region of the Inuvialuit. Keeping notes that there are significant oil and gas deposits located onshore and in the Beaufort Sea and that under the Final Agreement the Inuvialuit have interests and rights to the offshore. *Inuvialuit Comprehensive Land Claims Agreement* (Ottawa: DIAND, 1983) enacted by the *Inuvialuit Claims Settlement Act*, S.C. 1984, c.24.

¹⁵¹ See also the Labrador Inuit Association, *Labrador Inuit Land Claims Agreement-in-Principle* (Nain: LIA, 1999) at 76-85, c.6.

¹⁵² *Ibid.* at 65-74, c.5.

In New Zealand, jurisprudence on aboriginal title is somewhat helpful since it has considered offshore fisheries cases though the doctrine remains underdeveloped.¹⁵³ Aboriginal title, referred to as Maori customary title or native title, has always been recognized in New Zealand and dealt with through various colonial and statutory instruments. The first notable case on aboriginal title was *R. v. Symonds* wherein the court held aboriginal title is a burden on the Crown's primary title.¹⁵⁴ The Crown takes the position that on acquisition of New Zealand, whether by settlement, cession or annexation, it acquired a radical underlying title, which goes with sovereignty. In the absence of special circumstances displacing the principle the radical title is subject to existing native rights. These native rights cannot be extinguished otherwise than by free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes. In contrast, a subsequent decision that has endured time despite its dubious nature is *Wi Parata* wherein the court held aboriginal title exists at the pleasure of the Crown and that the treaty was a mere nullity.¹⁵⁵ Fortunately, *Wi Parata* has been eclipsed by the *Te Runanganui* decision wherein President Cooke stated "aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the aboriginal or established inhabitants of a country up to the time of its colonization".¹⁵⁶ *Te Runanganui* was a claim of aboriginal title to Rangitaiki and Wheo Rivers and the Bay of Plenty wherein the iwi (tribe) alleged that the existing and proposed dams as well as legislation would interfere with their rights. President

¹⁵³ *Grievance Resolution*, *supra* note 81 at 38-40.

¹⁵⁴ *R v. Symonds* [1840-1932] N.Z.P.C.C. 387 (S.C.).

¹⁵⁵ *Wi Parata v. The Bishop of Wellington* (1872) 2 N.Z. (C.A.) [hereinafter *Wi Parata*]. It is interesting to note that this case is the same timeframe as the *St. Catherine's Milling* decision in Canada which relegated Aboriginal title as something that exists at the pleasure of the Crown.

¹⁵⁶ *Te Runanganui o Te Ika Whenua*, *supra* note 130.

Cooke notes that there is a broad spectrum of aboriginal title - at one end almost full proprietorship and at the other end it is a mere permissive revocable interest.¹⁵⁷ In this case, the court rejected a claim to generate hydroelectric power based on aboriginal title, as it was simply not contemplated at the time of the treaty, nor had any statutes preserved or assured to Maori any right to generate electricity by the use of waterpower.¹⁵⁸ Accordingly, aboriginal title is characterized as fiduciary in character and cannot be extinguished other than by voluntary relinquishment of the tribal owners to the Crown (the right of pre-emption found in the English version of the *Treaty of Waitangi* or by explicit expropriation legislation).

While the doctrine of aboriginal title is in development in New Zealand, a recent briefing note to the Minister of Justice emphasizes that the issues of aboriginal title to water bodies is being pursued through litigation and Waitangi Tribunal claims and cannot be avoided in the near future.¹⁵⁹ Hence, the Crown is considering several options including taking the position that either aboriginal title does not include lakes, rivers, oceans or the seabed, or negotiating a resolution of the matter outside of court that respects the historic relationship between Maori and their lakes, rivers and oceans.¹⁶⁰ The fact that the WT is considering the issue and previous WT Reports indicate that it is likely going to recognize aboriginal title includes lakes, rivers and oceans places pressure on the Crown to develop options to address this issue rather than simply litigate against it.

¹⁵⁷ *Te Runanganui o Te Ika Whenua*, *supra* note 130 at 24 references *Mabo v State of Queensland No. 2* (1992) 175 CLR 1, subsequent decision to the landmark aboriginal title case, *Mabo v. Queensland*, [1992] 5 C.N.L.R. (H.C.).

¹⁵⁸ *Ibid.*

¹⁵⁹ Waitangi Tribunal reports are: *Whanganui River Report (Wai-167)* (Wellington: Booker & Friend, 1999) and *Te Ika Whenua Rivers Report (Wai-212)* (Wellington: Brooker & Friend, 1998). "Maori Issues 1999", *supra* note 73 at 353-361.

A prominent Maori lawyer, David Tapsell has developed an aboriginal title argument to oil and gas. He believes Maori have jurisdiction and ownership over oil and gas.¹⁶¹ Tapsell argues that Maori have two options to claim oil and gas. First, Article 2 of the Treaty guarantees the Maori their sovereignty over their property and possessions. Maori have interpreted this to mean that taonga includes their lands and resources. Both court decisions and WT Reports support this position though the precise scope and nature of taonga has not been established. Much like the issue of aboriginal rights, taonga is defined in a case by case basis using basic common law and aboriginal rights principles. Accordingly, taonga may be interpreted to include the subsurface resources of the land and may well include the ability to develop the resource. This is consistent with previous interpretations that have included subsurface resources such as coal.

Secondly, he relies on an aboriginal title argument developed in *Delgamuukw*. Both methods include the right to develop and manage the resource. A point of interest in Tapsell's argument is that he uses examples of where the courts and WT have found that aboriginal title included oceans (inshore and offshore). He says it is easy to prove occupation and possession of the ocean consistent with fisheries and rivers. He also notes common law principles regarding water do not work with Maori concepts of taonga and principles regarding water something the Waitangi Tribunal has iterated in the Whanganui and Te Ika Whenua River Reports. A case that supports his thesis is *Tainui Maori Trust Board* wherein the court recognized that Maori interests in land included both the land and the subsurface

¹⁶⁰ Briefing Note, *supra* note 94 at c.4.

¹⁶¹ David Tapsell, "Maori Claims to Petroleum" (2000 New Zealand Petroleum Conference held in Auckland March 19-22, 2000) Ministry of Natural Resources, 2000. The premise of Tapsell's article is that Maori have a claim to oil and gas resources that are supported by law.

resource coal.¹⁶² The court stated:

Not only have Tainui made an important contribution to the growth of the industry but also the industry is of course built on the exploitation of a natural asset, which was part of their land. In that way the coal case differs to some extent from the use of land for growing exotic pine forests. It also differs of course from sea fishing as the nature of the resource is not truly comparable.¹⁶³

Taranaki sought an injunction to stop the transfer of Crown land and assets from Petrocorp to Fletcher Challenge, however, it was not subject to the SOE Act. Taranaki was unsuccessful in its injunction application but the issues await a full assessment at trial.¹⁶⁴ In addition, they have filed a claim with the WT claiming among other things, ownership and control over oil and gas.

There is a potential for aboriginal title to impact federal oil and gas regulatory regimes in two ways. First, if a First Nation establishes aboriginal title to their traditional territory including the offshore, it is arguable that they possess the right to engage in oil and gas development. This fact will need to be reconciled with the applicable federal oil and gas regulatory regime. Secondly, if a First Nation establishes aboriginal title *Delgamuukw* suggests that any infringement of this title by the Crown must be justifiable. Arguably, oil and gas development on lands subject to aboriginal title constitutes *prima facie* infringement. Accordingly, this too will need to be reconciled with the applicable regulatory regimes.

¹⁶² *Tainui Trust Board v. Attorney General* [1989] 2 NZLR 513 (CA) [hereinafter *Coalcorp*].

¹⁶³ *Ibid.* at 527.

¹⁶⁴ Tapsell, *supra* note 161, *Love v. Attorney-General*, Unreported, 17 March 1988 (H.C.), Reg. CP135/88 and *Nga Ruahine Claim (Wai)* submitted July 1999.

4. Fiduciary Relationship

The Supreme Court of Canada decision in *Guerin* firmly established that there is a fiduciary relationship between the Crown and First Nations.¹⁶⁵ When a First Nation surrenders its interest in lands to the Crown, a fiduciary duty takes hold that regulates the manner in which the Crown exercises its discretion in dealing with the surrendered land on behalf of the First Nations. In *Guerin*, Madame Justice Wilson refers a three part test to determine if a fiduciary duty exists that she set out in dissent in *Frame v. Smith* which has been adopted by the courts in subsequent Supreme Court of Canada decision on fiduciary:

Fiduciary duty is marked by the following characteristics (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and (3) a peculiar vulnerability to the exercise of that discretion or power.¹⁶⁶

While *Guerin* is a seminal case on fiduciary duty, the doctrine has been expanded in light of section 35 of the *Constitution Act, 1982*.¹⁶⁷ Consequently, *Sparrow* is the leading case on fiduciary duty.¹⁶⁸ In *Sparrow*, Chief Justice Dickson stated "the [Crown] has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the [Crown] and aboriginal people is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of

¹⁶⁵ *Guerin*, *supra* note 139 wherein the court recognizes aboriginal title to reserve land gives rise to a fiduciary duty on the part of the Crown when it is dealing with surrendered reserve land for the benefit of the First Nations. See e.g. Leonard I. Rotman "Provincial Fiduciary Obligations to First Nations: The Nexus between Governmental Power and Responsibility"[1994] Osgoode Hall L. J. 735 and Leonard I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

¹⁶⁶ Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.) at 136.

¹⁶⁷ Although it is not the leading case on fiduciary duty see *Fairford First Nation v. Canada*, [1999] 2 C.N.L.R. 60 (F.T.D.) provides a succinct overview of fiduciary duty jurisprudence in the Aboriginal law context. The court held the concept of fiduciary is not limited to surrendered lands, however, there must be circumstances that give rise to a fiduciary duty on the part of the Crown to do something

¹⁶⁸ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160 (S.C.C.) [hereinafter *Sparrow*].

this historic relationship.”¹⁶⁹ A fiduciary duty falls along a spectrum depending on its legal and factual context and it may be articulated in many ways.¹⁷⁰ It is arguable that the Crown has both a general fiduciary duty and a specific fiduciary duty based on the historic nature of the trust-like relationship between the Crown and First Nations. The general fiduciary obligation can be characterized as a general duty to uphold the honour of the Crown and conduct itself with the utmost good faith and loyalty when dealing with First Nations. The specific fiduciary obligations arise on a case by case basis depending on the facts. Notwithstanding, there are limits on the scope and content of the Crown’s fiduciary duty.¹⁷¹ In certain circumstances the general fiduciary duty gives rise to specific fiduciary obligations like when the Crown deals with surrendered lands.¹⁷² The courts have applied a very high standard of fiduciary duty on the Crown when it is dealing with surrendered lands. In *Apsassin* the Supreme Court of Canada held that the Crown, through the Department of Indian Affairs and Northern Development (DIAND), had a fiduciary duty to act in the best interests of the First Nation with respect to its dealings with surrendered Indian reserve lands.¹⁷³ Specifically, DIAND had breached its fiduciary duty by selling the mineral interests for well below fair market value as well as for selling the interests rather than leasing the interests. Not surprisingly, there is wide spread debate over the nature and scope of the fiduciary duty. Depending on the nature of the fiduciary duty, the degree of scrutiny required by the fiduciary will vary.¹⁷⁴

¹⁶⁹ *Ibid.* at 180.

¹⁷⁰ *Delgamuukw*, *supra* note 60 at 76.

¹⁷¹ See e.g. *Chippewas of Nawash First Nation v. Canada*, [1997] 1 C.N.L.R. 1 (F.T.D.) wherein the court held that the Crown did not have a fiduciary duty to keep band council resolutions secret.

¹⁷² *Guerin*, *supra* note 139.

¹⁷³ *Apsassin*, *supra* note 139.

¹⁷⁴ *Delgamuukw*, *supra* note 60 at 77.

In New Zealand, the courts have recognized that the Crown has a fiduciary duty vis á vis the Maori. The *Treaty of Waitangi* has created a partnership between Pakeha and Maori requiring each to act reasonably toward the other and in good faith. The first time the New Zealand courts considered the doctrine of fiduciary duty was in *NZMC(1987)* wherein the court recognized a local version of the fiduciary doctrine.¹⁷⁵ The basis for recognizing the doctrine was the express statutory incorporation of the treaty principles. The SOE Act prohibited the Crown from acting in a manner that was inconsistent with the principles of the *Treaty of Waitangi*.¹⁷⁶ The court considered the implications of the proposed statutory scheme aimed at transferring Crown assets and government functions to fourteen state enterprises.¹⁷⁷ Preliminary assessments by the Waitangi Tribunal suggested that the scheme would prejudice claims and violated the treaty. The court held the fact that the Crown had not established a system to consider whether or not its actions were inconsistent with the treaty principles constituted a breach of its fiduciary duty to Maori. McHugh argues that the New Zealand should adopt the Canadian approach that recognizes the fiduciary duty based on the historic relationship between the Crown and Aboriginal peoples.¹⁷⁸

In *NZMC(1987)* a full quorum of the CA held that “the treaty created a relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably.”¹⁷⁹ In *NZMC Broadcast No. 1* the court considered whether the restructuring of the NZ broadcasting and proposed transfer of assets violated

¹⁷⁵ *NZMC (1987)*, *supra* note 113. *Maori Magna Carta*, *supra* note 71 at 248 and c.9.

¹⁷⁶ *State Owned Enterprises Act, 1985*, s.9 [hereinafter SOE Act].

¹⁷⁷ The SOE Act applied to over 14 million hectares of Crown land with 10 million hectares marked for transfer most of which was subject to Maori claims.

¹⁷⁸ *Maori Magna Carta*, *supra* note 71 at 249.

section 9 of the SOE Act.¹⁸⁰ The court held it did not breach its fiduciary obligations to Maori based on the fact that each case had to be considered in light of what was reasonable under the circumstances and recognized that the Crown needs to balance the interests of New Zealanders:

The Treaty refers to this obligation [to protect taonga such as Maori culture and language] in the English text as amounting to a guarantee by the Crown. This emphasizes the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute or unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship that the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps, which it is reasonable for the Crown to take, change depending on the situation, which exists at any particular time.¹⁸¹

WT has characterized the fiduciary duty as a partnership.¹⁸² *NZMC (1987)* recognized this partnership has yet to be defined. The government has expressed a commitment to honour the treaty principles. In New Zealand the Crown must act with the utmost good faith when dealing with Maori. Aboriginal title protects tribal use rights over ancestral lands, which are exercised according to customary law. The fiduciary duty is a standard of accountability incumbent upon those who have a regulatory and discretionary (including, perhaps, the legislative) power over assets, subject to an aboriginal claim. President Cooke has indicated that a breach of the fiduciary duty may result in accountability and damages on the part of the Crown.¹⁸³ The court has affirmed that the duty on the Crown is not merely passive but

¹⁷⁹ *NZMC (1987)*, *supra* note 113 at 664, 673, 681-682, 693 and 701. Reaffirmed in subsequent decisions *Te Runanga o Wharekauri Rekohu Inc. v. Attorney General*, [1993] 2 N.Z.L.R. 301(C.A.) at 304 and *Ngai Tahu Maori Trust Board v. Director General of Conservation*, [1995] 3 NZLR 553 at 561 [hereinafter *Ngai Tahu*].

¹⁸⁰ *Broadcast No. 1*, *supra* note 115.

¹⁸¹ *Ibid.* at 517.

¹⁸² See P.G. McHugh, "A new role for the Maori Courts in the resolution of Waitangi claims?" (1993) N.Z. Law J. 229 at 231.

¹⁸³ *NZMC (1987)*, *supra* note 113. Tapsell, *supra* note 161 at 6.

requires the Crown to take active and positive steps for the protection of the Maori language for instance. The court has also held the Crown is required to take affirmative action to redress past breaches.¹⁸⁴

The relevance of New Zealand jurisprudence on the doctrine of fiduciary duty is somewhat informative in its treatment of the issue of partnership. Despite the fact that there is no constitutional protection of the treaty rights and fiduciary obligations have been largely grounded in statutory incorporations, the Crown still engages in a quasi-justification test to determine if the Crown has fulfilled its obligations. Specifically, the cases indicate that the Crown's actions are measured against what is reasonable in all of the circumstances. In fact, the Crown's fiduciary duty requires consultation in certain circumstances:

In fulfilling its duty to act reasonably and in good faith, the Crown is obliged to make informed decisions so that proper regard is had to the impact of the treaty. Particular circumstances may require the Crown to consult with Maori. Consultation and cooperation may be necessary in some cases while in other cases the Crown may have sufficient information in its possession for it to act consistently with its obligations under the treaty without specific consultation.¹⁸⁵

The inference that can be drawn from this is that the Crown must consider the impact of oil and gas development on Maori. A necessary step in this consideration is consultation with those Maori affected.

What are the implications for the Canadian Crown's fiduciary duty on federal oil and gas regimes? In the case of federal oil and gas regimes, the Crown must consult with First

¹⁸⁴ *Te Runanganui o Te Ika Whenua*, *supra* note 130 at 169. Also see *Broadcast No. 1*, *supra* note 115 at 664, 674, 693, 702 and 716-718 and *Ngai Tahu* *supra* note 179 at 560-561.

¹⁸⁵ *Broadcast No. 2*, *supra* note 115 at 169. However, in *NZMC (1987)* *supra* note 113 at 655 President Cooke rejects the duty to consult in stating in any detailed or unqualified sense this elusive and unworkable in the context of any legislative or administrative step by government.

Nations regarding the impacts on their aboriginal and treaty rights. The duty to consult is derived from the fiduciary relationship between the Crown and First Nations. Through consultation, the Crown and First Nations can fairly assess the impact of proposed government action on aboriginal and treaty rights and discuss what mitigative or compensatory measures may be taken to address the infringement.

The concept of consultation is open to interpretation and there are divergent views with respect to when and how consultation is conducted. Other than the courts, who should make the determination that there is an existing aboriginal or treaty right that is being infringed - the First Nation asserting the right or the Crown? First Nations take the position that the mere assertion of aboriginal or treaty rights compels the Crown to consult with First Nations. The Crown takes the position that First Nations must prove aboriginal or treaty rights exist, and that they are being infringed before there is a duty to consult.¹⁸⁶ In *Nunavik*, the court held there was always a duty to consult.¹⁸⁷

In Canada, the duty to consult arises when the federal or provincial government infringes an aboriginal or treaty right.¹⁸⁸ In the *Sparrow* decision, the Supreme Court of Canada sets out the 'justification test' for infringing aboriginal rights.¹⁸⁹ The onus is on the First Nation to first prove that the aboriginal or treaty right exists and demonstrate a *prima facie*

¹⁸⁶ In *Kelly Lake v. Canada*, [1999] 3 C.N.L.R. 126 (B.C.S.C.) 126 [hereinafter *Kelly Lake*] at 134 the Crown took the position that the duty to consult only arises when aboriginal or treaty rights have been determined to exist by the courts or by acknowledgement by the Crown. This issue was not directly before the court. However, the court seemed endorse this argument at 157.

¹⁸⁷ *Nunavik Inuit v. Canada*, [1998] 4 C.N.L.R. 68 (F.T.D.) [Hereinafter *Nunavik*] at 98.

¹⁸⁸ *Sparrow*, *supra* note 168 at 182-187. *Delgamuukw*, *supra* note 60 at 75-80 takes the justification test and applies it to aboriginal title.

infringement of their constitutionally protected right. An infringement may be said to exist if the legislative act or omission is unreasonable, causes undue hardship or denies the First Nation their preferred means of exercising their aboriginal or treaty right.

The onus then shifts to the Crown to justify the infringement. The justification test is a two step process.¹⁹⁰ First, the Crown must prove the infringement furthers a legislative objective that is compelling and substantial. Secondly, the Crown must prove that the infringement is consistent with its fiduciary relationship with First Nations. Justification must also address the underlying principles of section 35 of the *Constitution Act, 1982*. First, there is the recognition that First Nations have occupied Canada from time immemorial. Secondly, there is the recognition that the Crown needs to reconcile this prior occupation with the assertion of the sovereignty of the Crown.¹⁹¹ The second step of the justification test, demonstrating that the legislation is consistent with the Crown's fiduciary obligations, requires the Crown to consult with First Nations. The principles of consultation are eclectic and are derived from several sources of law including constitutional law, aboriginal law and administrative law.¹⁹² Arguably, all of these consultation principles apply to the Crown's duty to consult given the Crown's fiduciary relationship with First Nations. The court speculates in *Delgamuukw* that economic development through agriculture, mining, forestry and

¹⁸⁹ Though some academics question the validity of infringing constitutionally protected rights see Kent McNeil, "How can Infringement of the Constitutional Rights of Aboriginal peoples be Justified?" (1997) 8 Constitutional Forum 33.

¹⁹⁰ *Sparrow*, *supra* note 168 at 183-184. *Delgamuukw*, *supra* note 60 at 75-80.

¹⁹¹ *Delgamuukw*, *supra* note 60 at 75.

¹⁹² For a practitioner's view of consultation, see Robertson, *supra* note 60 and Malcolm Maclean, "Legislative Framework Affecting First Nations and Resource Development" Insight Conference: Structuring Joint Ventures with First Nations, November 1998, (Toronto: Insight Press, 1999) 49. Also see C. Sharvit, M. Robinson, and Monique M. Ross, *Resource Development on Traditional Lands: The duty to consult*, (Calgary: Canadian Institute of Resources Law, 1999).

hydroelectric power may qualify as valid legislative objectives.¹⁹³ Therefore it is arguable that the Crown could justify the infringement of aboriginal and treaty rights.¹⁹⁴ However, in order to justify any infringement the Crown must consult with First Nations. By not consulting with First Nations, the Crown is at risk of failing to justify its actions with respect to oil and gas development. Accordingly, it is arguable that the Crown must consult with First Nations in carrying out its functions under the federal oil and gas regulatory regimes. In other words, there is a legal obligation for the Crown to consult with First Nations on any oil and gas development within their traditional territories. If Chief Justice Lamer is correct, there may even be a requirement for the Crown to get First Nation consent before major oil and gas projects are approved.

C. Observations

The focus of public policy in Canada has certainly changed its focus from 'assimilation' to 'negotiation and renewal' as illustrated by *Gathering Strength* and supported by the findings in the *RCAP Report*. More specifically, there are several federal public policies that support First Nation aspirations to access their lands and resources. The *Comprehensive Claims Policy*, *Inherent Right Policy*, *Specific Claims Policy*, *Treaty Land Entitlement* and sectoral

¹⁹³ *Delgamuukw*, *supra* note 60 at 78, Chief Justice Lamer states that First Nations are part of a broader social, political and economic community and Mr. Justice La Forest affirms this approach to justification at 92-93. In *R. v. Little*, [1996] 1 C.N.L.R. 136 (B.C.C.A) the court held a complete prohibition on food fishing is not a justifiable infringement regardless of the conservation objectives. In appropriate contexts, safety may be a justifiable legislative objective, but in the case where the legislation also creates no-hunting zones, the infringement cannot be justified see *R. v. Noel*, [1995] 1 C.N.L.R. 78 (N.W.T. Terr. Ct.).

¹⁹⁴ *Contra* Kerry Wilkins, "Of Provinces and s.35 Rights" (1999) 53 Dal. L. J. 185 for an analysis of federal and provincial law and regulation activity and the justification test from *Sparrow*. The author argues that the provinces cannot justify an infringement of s.35 because it is beyond their jurisdiction. I tend to disagree with this article given the fact that provinces appear to be regulating natural resources quite effectively without regard to the existence of aboriginal and treaty rights.

initiatives like the *First Nation Land Management Agreement* represent a movement away from the draconian *Indian Act* system. The broad auspices of *Gathering Strength* should be thoroughly exploited by First Nations to find innovative solutions to meet their aspirations with respect to the management of oil and gas resources within their traditional territories much like the regimes created by Comprehensive Land Claim Agreements in the North.

The legal landscape in Canada has evolved tremendously since the times of *St. Catherine's Millings* with the development of aboriginal jurisprudence and doctrines. The entrenchment of aboriginal and treaty rights by section 35 of the *Constitution Act, 1982* has altered the regulatory environment for the Crown. The 'justification test' established by the Supreme Court of Canada in the *Sparrow* decision and applied to aboriginal rights represents a major breakthrough for First Nations. Its application was expanded to treaty rights and aboriginal title by the *Badger* and *Delgamuukw* decisions respectively. The justification test requires the Crown to justify any infringement of aboriginal rights, treaty rights or aboriginal title. This doctrine directly impacts federal oil and gas regulatory regimes. If First Nations establishes un-extinguished aboriginal rights, treaty rights or aboriginal title and that they are being infringed by oil and gas development under federal regulatory regimes the onus shifts to the federal Crown to justify the infringement. Moreover, the Crown's fiduciary duty requires it to act with the utmost honour and good faith when dealing with First Nations which necessitates the reconciliation of these infringements. The reality is, oil and gas development in Canada exists in a complex framework of public policy and aboriginal jurisprudence. First Nations, Industry and the Crown are aware of this environment and should be mindful of the need to resolve the disputes.

PART III: OIL AND GAS REGULATORY REGIMES

One of the challenges of managing oil and gas is to promoting 'sustainable development' which takes on a different meaning in the context of non-renewable resources. This Part provides an overview of the oil and gas industry in Canada in order to provide some context to our analysis. In addition to outlining the basic functions of a federal regulatory regime, it also describes the various stages of development. The regulation of oil and gas is complex. Federal oil and gas regulatory regimes do not operate in a vacuum. Rather, a regime involves inter-disciplinary functions and multiple jurisdictions. There are several discrete functions associated with oil and gas development. For example, environmental assessments are a statutory prerequisite to any oil and gas activity and will be addressed in more detail in Part IV. As well, the regulation of oil and gas includes corporate and commercial regulation, regulation of transportation, production facilities, marketing and trading, petroleum import and export, and pipelines.¹⁹⁵ Industry always contrasts federal regulatory regimes with provincial regulatory regimes and Alberta's regulatory regime is Canada's leading system.¹⁹⁶ Accordingly, effective and efficient oil and gas management require co-operation among the federal, provincial and territorial governments and agencies. In addition, it requires considerable financial and human resources to operate oil and gas regulatory regimes.

¹⁹⁵ John B. Ballem, *Oil and Gas Law*, 2nd ed. (Toronto: University of Toronto Press, 1985) and G.R. Morell, ed., *Petroleum exploration in Northern Canada a guide to oil and gas exploration and potential / Northern Oil and Gas Directorate, Indian and Northern Affairs Canada* (Ottawa: Indian and Northern Affairs Canada, 1995).

¹⁹⁶ CAPP, *supra* note 3.

A. Canada's Oil and Gas Industry

Canada is the thirteenth largest producer of oil and the third largest producer of natural gas in world.¹⁹⁷ There are three main oil and gas producing areas in Canada: the Western Canada Sedimentary Basin, the Arctic and the Offshore. Oil and gas development is concentrated in the Western Canada Sedimentary Basin with just under 80% of activity occurring in this region. The other two regions are relatively unexplored with current exploration data indicating a huge potential for commercial development.

There are three basic types of production.¹⁹⁸ The first, conventional production is the most common and is undertaken primarily in the Western Canada Sedimentary Basin.

'Conventional production' is the development of traditional oil or gas reserves by traditional exploration, drilling and production methods. The second, 'non-conventional production' denotes the development and production of non-traditional petroleum reserves such as 'crude bitumen' and 'oil sands'. Non-conventional production requires modified development and production methods because the resource extracted is in forms not easily produced. As technologies have advanced and business costs reduced, non-conventional production has become a viable option.¹⁹⁹ In fact, some of the largest 'oil sand' deposits are found in northeastern Alberta.²⁰⁰ For example, Syncrude Canada is operating a massive oil sand

¹⁹⁷ See Canadian Association of Petroleum Producers, *Backgrounder* (Calgary: CAPP, 2000) at Fast Facts [hereinafter *CAPP Backgrounder*].

¹⁹⁸ *Ibid.* at Production.

¹⁹⁹ CAPP, *Oil Sands Activity: A Look Back at 2000* (Calgary: CAPP, 2001) notes that Canada's oil sands are among the largest in the world with 2.5 trillion barrels of which 300 billion are ultimately recoverable.

²⁰⁰ Bergman, B., "Alberta Bound" *Maclean's Canada's Weekly Newsmagazine* 114:7 (12 February 12, 2001) 14 at 17 [hereinafter "Alberta Bound"].

project near Fort McMurray.²⁰¹ It is estimated that between 1996 and 2010 Industry will invest more than \$40 billion in new oil sands projects in Canada. Industry predicts it can produce 200,000,000 barrels per day of crude oil from these oil sands. The third, 'frontier production' refers to the development and production of oil and gas reserves located in the Offshore.²⁰² This type of production is being pioneered in Atlantic Canada and has enormous potential in the Arctic Region.

There are four stages of petroleum development under federal oil and gas regimes: exploration, development, production and reclamation. The following is brief summary of these stages and examples of sustainable development practices.²⁰³ Exploration is the first stage of oil and gas development. During this stage, companies look for petroleum deposits using geophysical activities such as 2D and 3D seismic programs. Seismic programs involve the cutting of horizontal and vertical patterns on the surface lands covered by the exploration permit. Holes are drilled at set intervals to a specified depth and charges are inserted into the holes. Technical equipment is then set out over the surface lands to record the subsurface patterns created when the charges are set off. Seismic programs provide detailed information or subsurface maps that help locate oil and gas deposits. Once this is completed, proponents use this information to drill exploration holes to finalize the details of deposits. An example of sustainable development practice for this stage is using narrower cut-lines and offsetting them to minimize negative impacts to the vegetation and wildlife. The second stage is the development stage. It involves those activities required to ascertain if there is a commercial

²⁰¹ "Alberta Bound" *ibid.* notes that there is a booming economy is drawing workers from across Canada.

²⁰² The term 'frontier production' refers to offshore projects and should not be confused with the term 'frontier lands' used in federal legislation to refer to federal lands located in the North and Offshore.

quantity of gas or oil capable of production. Typically it involves addition drilling programs and detailed analysis of the data. Sustainable practice requirements are often set out in the environmental assessment report such as the specifics of the construction and drilling site. Once a viable commercial quantity is found then the next stage commences. The third stage is the production stage and refers to the activities associated with producing the oil and gas for market. Often the production stage involves the construction of pipelines and production facilities. During this stage both the regulator and the proponent monitor production to ensure it is carried out in a manner that is sustainable and optimises production and revenues. For example, the legislation for the Operations functions promotes sustainable development by setting production volumes through the use of spacing and drainage provisions. It is during this stage that royalties are calculated and paid. The final stage is referred to as the reclamation stage. Any number of circumstances may bring on this stage such as the commercial volume is produced or it is not economical viable to produce. The objective of this stage is to return the land to its original position as if oil and gas had not been undertaken. This stage promotes sustainable development by ensuring physical environment is rebuilt for future.

While the focus of this thesis is on the federal oil and gas regulatory regimes, it is important to note that there is vast and sophisticated corporate and commercial framework in which oil and gas is developed, produced and sold. Oil and gas is a global industry. Therefore, projects must be competitive not only within the Canadian market but also within the international market. Industry uses a variety of agreements to structure and finance projects

²⁰³ See especially Ballem, *supra* note 195 and the CAPP website, *supra* note 3 for publications on each of these four stages.

including exploration, production and title agreements.²⁰⁴ Typically these deals include more than one company with defined interests in the development process. Joint ventures and alliances are used most often as they generate needed funds to carry out the project and minimize exposure to risks and costs. It is important to note that Industry decides on the business structure for petroleum development not the Crown. The Crown merely provides a regulatory regime within which Industry must operate on Crown lands. The federal government monitors Industry business practices in order to keep track of the title interests. In other words, the Crown needs to know which companies have interests in federal lands and subsurface resources so that it may regulate the activities, collect the revenues and know who is liable for any debts or damages. Industry can be split into the upstream producing sector and the downstream refining and marketing sector.²⁰⁵ The upstream component includes 700 exploration and production companies along with hundreds of associated businesses. For example, environmental, seismic and drilling contracts as well as rig operators, engineering firms and supply and service companies. The downstream component consists of refineries, distribution utilities, pipeline systems and wholesaler/retailers.

In deciding to proceed with development, Industry considers two types of factors, business and technical.²⁰⁶ Business factors include consideration of the following: price, market forces such as supply and demand, strength of the economy, transportation costs, national reserves, pipeline capacity, and cost of other energy sources. Another important business factor is the

²⁰⁴ For general information see the Canadian Association of Petroleum Landman Administration (CAPLA) website at <<http://www.caplacanada.org>>, (last accessed: 19 February 2001). For examples of the range of agreements and explanations on their application see the CAPLA educational series such as the CAPLA, *Conventional Exploration Agreements* (Calgary: CAPLA, 1999) or CAPLA, *Advanced Surface Rights* (Calgary: CAPLA, 1998).

²⁰⁵ *CAPP Backgrounder*, *supra* note 197 at *Role in Canada's Economy, Our Industry*.

consideration of the rate of taxes, royalties and fees as well as the complexity of the regulatory regime.²⁰⁷ Business challenges are complex. The decision to proceed with commercial production is based on whether the price paid for the product will exceed the cost of development and production by enough to make the project worthwhile. Technical factors include the consideration of the following: the challenges of building the infrastructure to produce the oil or gas, location, proximity to markets, geology, accessibility to transportation infrastructure and environmental mitigation measures. For example it is more challenging to extract petroleum from the high arctic or the continental shelf and send it to market than it is to extract oil from central Alberta where there is an established oil and gas infrastructure.

B. Legislative Functions

The purpose of Federal oil and gas legislation is two-fold: to regulate the relationship between the Crown and Industry and to promote sustainable development. The two functions are referred to as the Rights Issuance and the Operations functions.²⁰⁸ Each function is dealt with comprehensively by legislation and regulations. There is some overlap between these two functions and with other regulatory functions such as the environmental assessment regimes.

²⁰⁶ Canadian Association of Petroleum Producers, *Contributing to Responsible Development: An overview of Environment, Health and Safety Stewardship in Canada's Petroleum Industry* (Calgary: CAPP, 2000).

²⁰⁷ *Ibid.*, this is important point as it relates to the encouragement of economic development under each regime.

1. Rights Issuance

The Rights Issuance function regulates the beginning of the regulatory process and the allocation of oil and gas interests by way of statutory instruments: leases, licenses and permits. It involves Industry securing the surface and subsurface rights to explore for and produce oil and gas on federal Crown lands. The *Canada Petroleum Resources Act* (CPRA) is an example of the basic approach taken by the federal government to regulating this aspect of oil and gas management.²⁰⁹ The statutory instruments create interests that entitle Industry to conduct exploration programs on the land, engage in development activities and eventually produce petroleum resources.²¹⁰ Decisions about the terms and conditions of exploration, development and production are made at the outset including decisions about economic benefits such as annual rents, bonuses, and royalties. However, it does not govern how Industry structures its business deals as the arrangements among companies are entirely their prerogative. Since Industry frequently transfers and creates additional interests in the original lease, the regime provides a system to registers these interests, transfers or assignments. The fiscal arrangements have a significant impact on the desirability of oil and gas development in a region and the generation of resource revenues. Accordingly, the Rights Issuance legislation sets out the royalty structure, application fees, surface and subsurface rents, bonuses and other charges. Open, transparent and competitive processes

²⁰⁸ See A.R. Lucas & C.D. Hunt, *Oil and Gas Law in Canada* (Calgary: Carswell, 1990). The text provides a summary of federal and provincial oil and gas regulatory schemes.

²⁰⁹ *Canada Petroleum Resources Act*, R.S.C. 1985, c.36 (2nd Supp.), [hereinafter CPRA]. Regulations have been enacted to assist in the administration of the CPRA dealing with such matters as environmental studies research fund, petroleum royalties, registration and specific locations such as the Polar Bear Pass (under the *Territorial Lands Act*): SOR/87-641, SOR/92-26 SOR/88-230, SOR/98-349, SOR/98-188, SOR/97-540..

²¹⁰ For example, CPRA s.22 exploration, s.29 significant discoveries, and s.37 production.

yield the best returns for the Crown and are conducive to development.²¹¹

2. Operations

The Operations legislation provides for safe and sustainable development. This aspect of the federal oil and gas regulatory regimes requires substantial infrastructure and financial resources to implement. The *Canada Oil and Gas Operations Act* (COGOA) is an example of the federal approach to the Operations function of oil and gas management.²¹² The Operations function monitors the technical aspects of exploration, development and production utilizing a scheme of comprehensive regulations. These regulations are critical to achieving sustainable development. Accordingly, the emphasis is on conservation, environmental protection, pollution and safety. Operations focus on decisions regarding compliance with legislation and regulations as well as decisions about sustainable production. The operations function involves multiple regulatory agencies that measure production volumes and make determinations about production. The technical expertise required for most industry jobs makes it the highest paying industry in Canada.²¹³ It involves highly educated and skilled workforce. It is particularly active in monitoring production and auditing the calculation and payment of royalties. Depending on the legislation, the

²¹¹ CAPP, *supra* note 3.

²¹² *Canada Oil and Gas Operations Act*, R.S.C. 1985, c.O-7, [hereinafter COGOA]. Comprehensive regulations have been enacted to assist in the administration of the COGOA: SOR/90-791, SOR/87-331, SOR/96-144, SOR/88-600, SOR/79-82, SOR/ 96-117, SOR/96-118, and SOR/83-149. Regulations: Oil and Gas Certificate of Fitness Regulations; Canada Oil and Gas Diving Regulations; Canada Oil and Gas Drilling Regulations; Canada Oil and Gas Geophysical Operations Regulations; Canada Oil and Gas Installations Regulations; Canada Oil and Gas Operations Regulations; Canada Oil and Gas Production and Conservation Regulations; and the Oil and Gas Spills and Debris Liability Regulations.

²¹³ CAPP *Background*, *supra* note 197 at Role in Canada's Economy.

calculation of royalties can be rather complex and time consuming.²¹⁴

C. Federal Regulatory Regimes

Oil and gas jurisdictions and authorities are rooted in the *Constitution Act, 1867*.²¹⁵ There is no one head of power that gives any government jurisdiction over natural resource management. Instead, authority is derived from several different sources.²¹⁶ First, as owner of federal Crown lands, the federal government has a wide breadth of powers to manage the use of these lands.²¹⁷ The federal government has full executive powers over its public properties. Ownership of federal Crown lands includes surface and subsurface resources giving the federal government jurisdiction over oil and gas on these lands.²¹⁸ Proprietary powers permit the federal government to enact legislation to deal with land use planning, natural resource extraction, conservation and the environment. Secondly, the federal government has legislative jurisdiction over natural resource management from various heads of powers.²¹⁹ For example, the federal government has jurisdiction to manage oil and gas pipelines by virtue of section 91(20) and section 92(10)(a), (b), and (c) of the *Constitution*

²¹⁴ CAPLA, *supra* note 204 notes that there countless combination of royalty schemes that can be created by government and among the parties to a project such as GORR, ORR, Net ORR, NPI and Working Interests. Each may be calculated differently depending on the legislation or the Industry agreement. It notes that it is rare that Industry submits the monthly payment to government on time and is usually several months behind at any given time. Government does not monitor the payment of royalties among Industry as per their project agreements.

²¹⁵ Hunt, *supra* note 208.

²¹⁶ Hogg, *supra* note 95 at 705-716 and 717-738.

²¹⁷ The *Constitution Act, 1867*, s.91(1A) gives the federal government authority over “public debts and property” and by virtue of Crown immunity.

²¹⁸ Federal Crown lands located outside of the NWT is beyond the scope of this paper and will not be discussed. Note: oil and gas development on federal Crown lands located in the provinces such as national parks, harbours and military lands are generally regulated under the *Federal Real Property Act* and *Federal Real Property Regulations*.

²¹⁹ Hogg, *supra* note 95 at 717-738.

Act, 1867.²²⁰ There is a plethora of federal legislation not all of which will be analyzed in this thesis. The Crown retains underlying title to First Nation Indian Reserves and Settlement Lands. The First Nations have proprietary title that is limited by the *Indian Act* and the Comprehensive Land Claims Agreements and is not the same as the federal governments proprietary powers.

Provincial governments as owners of provincial Crown lands, have a wide breadth of powers to make laws respecting the use of their Crown lands including oil and gas management - sections 92(5), 92(13) and 92A. Provincial jurisdiction includes the authorities over conservation and management over non-renewable and renewable natural resources. Each province acquired lands and natural resource in accordance with their terms of union. For example, in the case of Alberta, Saskatchewan and Manitoba ownership over subsurface resources were transferred to the provinces by the *1930 Natural Resource Transfer Agreements*, whereas Ontario and Quebec were given those powers under section 109 of the *Constitution Act, 1867*.²²¹ While the federal government has jurisdiction and authority to legislate, administer and enforce oil and gas development on federal Crown lands, it has elected to exercise its jurisdiction both exclusively and cooperatively with provincial, territorial and First Nation governments. The federal oil and gas regulatory regimes regulate oil and gas development, not oil and gas business development.

²²⁰ *Constitution Act, 1867* s.91(20) refers to 'local works and undertakings' and s.92(10)(a) refers to 'works situate wholly in a province that are declared to be for the general advantage of Canada or two or more provinces'.

²²¹ *Resource Development*, *supra* note 116 at 50-90.

1. The Northern Regime

The focus of this thesis is on First Nations and federal oil and gas regimes. Since the federal government has devolved jurisdiction over oil and gas to the Yukon Territorial Government and there are no First Nations with claims in the Nunavut Territory, our focus in this Part will be on the Northwest Territories.²²² The North is an excellent example of an integrated approach to oil and gas management that emphasizes sustainable development on frontier lands.²²³ There are several natural resource management agreements and federal statutes that impact upon the regulation of oil and gas in the North. This has meant that careful planning and coordination among agencies is required to avoid duplication and delays. The Northern Regime is a quasi-joint management model. The federal government retains jurisdiction but has legislated for joint management with respect to land management boards. First Nations and Inuit have negotiated a high level of involvement and a significant role in the management of oil and gas in the North pursuant to their Comprehensive Land Claim

²²² In an effort to have resource management decisions made at the local level, the federal government transferred oil and gas jurisdiction over the onshore and specified areas offshore to the Yukon Territorial Government. For information on the devolution of oil and gas to the Yukon see Canada-Yukon Oil and Gas Accord implemented by the *Canada-Yukon Oil and Gas Accord Implementation Act*, S.C. 1998, c.5 and the *Oil and Gas Act*, S.Y. 1998, c.16. The YTG will harmonize their oil and gas regime with that of the Yukon First Nations pursuant to the *Council for Yukon Indians Umbrella Final Agreement* (Ottawa: DIAND, 1993) enacted by the *Yukon First Nation Land Claim Settlement Act*, S.C. 1994, c.34. The Umbrella Final Agreement is among the federal government, territorial government and fourteen Yukon First Nations of which seven have completed individual Final Agreements; the remaining seven are at various stages of negotiation.

²²³ For a comprehensive analysis of all of the federal legislation and regulatory agencies active in the NWT see CAPP, *Oil and Gas Approvals in the Northwest Territories, Southern Mackenzie Valley* (Calgary: CAPP, 2000). CPRA, s.2 and COGO, s.2 define frontier lands to mean "lands that belong to Her Majesty in right of Canada, or in respect of which Her Majesty in right of Canada has the right to dispose of or exploit the natural resources, and that are situated in (a) the Yukon, the Northwest Territories, Nunavut, or Sable Island, or (b) submarine areas, not within a province, in the internal waters of Canada, the territorial sea of Canada or the continental shelf of Canada". Please note there have been subsequent amendments in legislation devolving jurisdictions to the Yukon and to Nunavut.

Agreements.²²⁴ These modern-day treaties provide First Nations with ownership and authorities over natural resources located on their Settlements Lands and ensures their participation in decision-making regarding natural resource development in their Settlement Area and will be discussed in more detail in Parts IV to VI. First Nation lands and resource interests are incorporated into the existing regimes. Essentially, the federal government manages the overall oil and gas regime through the Northern Oil and Gas Directorate (hereinafter “NOGD”).²²⁵ In addition, the National Energy Board (hereinafter “NEB”) plays a significant role in managing the operations aspects.²²⁶ The NOGD and NEB use two primary pieces of federal legislation pertaining to oil and gas management in the North, the CPRA and COGOA which will be discussed further in more detail in the next two Parts.

The Northern Regime covers two of Canada’s main petroleum producing regions, the Arctic and the northern portion of the Western Canada Sedimentary Basin which runs up through the Mackenzie Valley to the Beaufort Sea. Oil and gas development has been consistent in the North with modest development ongoing since the 1950s in the Mackenzie Valley.²²⁷ The North holds a quarter of Canada’s discovered conventional oil reserves and 24% of gas

²²⁴ The federal government has settled comprehensive land claims agreements with several First Nations and Métis groups as well as the Inuit in the Northwest Territories with comprehensive claims negotiations and self-government negotiations still underway with the remaining claimants. See for example the *Gwich'in Comprehensive Land Claim Agreement*, (Ottawa: DIAND, 1992) enacted by the *Gwich'in Land Claim Settlement Act* S.C. 1994, c.53 and the *Sahtu Dene and Métis Comprehensive Agreement* (Ottawa: DIAND, 1993) implemented by *Sahtu Dene and Métis Land Claim Settlement Act* S.C. 1999, c.27. Referred to, hereinafter, as the *Gwich'in Agreement* and *Sahtu Agreement* respectively.

²²⁵ For a comprehensive information on the NOGD, its mandate, statistics, annual report, legislative regime, electronic services, newsletters and other information see their website at <<http://www.inac.gc.ca/oil>>, (last accessed: 30 June 2000).

²²⁶ For a comprehensive information on the NEB, its purpose, publications, legislation, policy directives, electronic regulatory filing, statistics, safety & environment and other information see their website at <<http://www.neb.gc.ca>>, (last accessed: 26 May 2000).

²²⁷ See *Northern Oil and Gas Annual Report 1998* (Ottawa: NODG, 1998) at 3.

reserves, plus an estimated 40% of undiscovered oil and gas reserves.²²⁸

2. The Offshore Regime

The *Constitution Act, 1867* is silent on who has jurisdiction over oil and gas offshore. Given the potential for enormous resource revenues, the federal and provincial governments both claim the jurisdiction. The matter has been partially settled by a series of Supreme Court of Canada decisions that have held that the federal government has jurisdiction over oil and gas on the continental shelf and in the territorial seas.²²⁹ Despite the disagreements over who and how the offshore should be regulated, the federal government has entered into two separate accords with the governments the Province of Newfoundland and Labrador (hereinafter “Newfoundland”) and the Province of Nova Scotia (hereinafter “Nova Scotia”) respectively to manage offshore oil and gas jointly.²³⁰ The federal government reached agreement with Newfoundland on February 11, 1985 with the Canada-Newfoundland Offshore Petroleum Accord (hereinafter “Atlantic Accord”).²³¹ It concluded an accord with Nova Scotia on August 26, 1986 entitled the Canada-Nova Scotia Offshore Petroleum Resources Accord

²²⁸ Ibid. at i.

²²⁹ See offshore cases in *supra* note 144. There is one notable exception British Columbia has jurisdiction over the territorial sea located between the mainland and Vancouver Island. However, the issue remains unresolved with respect to the remaining provinces with coastal boundaries such as British Columbia.

²³⁰ See R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (Sydney: The Federation Press Pty Ltd., 1990) for a comparative analysis of how each federal government dealt with competing interests of the provinces or states regarding offshore oil and gas. Cullen provides a thorough review of federal-provincial relations that focus on both the legal and political factors that influenced the resolution of these disputes.

²³¹ The implementation legislation for the Atlantic Accord is the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c.3 and the *Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*, S.N., 1986, c.37 [hereinafter CN Act].

(hereinafter “Nova Scotia Accord”).²³² The Accords are essentially the same except for some additional provisions in the Nova Scotia Accord that reflect commitments made in a previous agreement between Canada and Nova Scotia in 1982. Nevertheless, the federal government retains exclusive jurisdiction over the offshore for the rest of Canada including the offshore of the Nunavut Territory, the Northwest Territories as well as portions of the Yukon Territory.

The Offshore Regime is example of a joint management model. The Nova Scotia Accord establishes the Canada-Nova Scotia Offshore Petroleum Board (“CNSOPB”) and the Atlantic Accord establishes the Canada-Newfoundland Offshore Petroleum Board (“CNOBP”). The CNOBP and CNSOPB are the primary regulatory agencies under the Offshore Regime and manage the majority of the matters with the assistance of the NEB. An arbitration process is available to set the boundary between the offshore regions of Newfoundland and Nova Scotia where negotiations are unsuccessful.²³³ The Offshore Regime is similar to the Northern Regime in that the legislation implementing the Atlantic Accord and the Nova Scotia Accord is simply the amalgamation of the same legislation used by the Northern Regime, namely COGOA and CPRA.²³⁴ Yet, the Offshore Regime and Northern Regimes have a number of key differences that will be identified and discussed in more detail in the next Parts. For example, the Northern and Offshore Regimes are both examples of joint management models but created and achieve this status by two different constitutional methods. The Offshore is a

²³² The implementation legislation for the Nova Scotia Accord is the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c.28 and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c.3 [hereinafter CNS Act].

²³³ See CN Act and CNS Act.

²³⁴ The caveat to this statement is the offshore legislation contains comprehensive fiscal arrangements between the federal government and provincial governments pertaining resource revenue sharing and fiscal transfer payments.

joint federal and provincial regime created by federal and provincial legislation and subject to federal and provincial laws. Whereas, the Northern Regime is created by federal legislation and subject to First Nation Comprehensive Land Claim Agreements.

The Offshore in Atlantic Canada is comprised of the Scotian Shelf, Grand Banks, Offshore Labrador, and the Cabot Strait. Offshore projects pose significant business and technical challenges. For example, the costs associated with offshore exploration are enormous making it imperative for projects to be on a large enough scale to make profits. Exploration has been ongoing since the 1940s with over 300 exploration wells that did not result in production until the 1990s.²³⁵

Based on the geology of the region Atlantic Canada large quantities of natural gas (46 trillion cubic feet) are thought to exist.²³⁶ This figure is similar to the estimated natural gas reserves for the Western Canada Sedimentary Basin (thought to be approximately 58 trillion cubic feet). In addition to natural gas, the Offshore has large deposits of oil. Again, the scale of deposits is similar to what remains in the Western Canada Sedimentary Basin. Generally oil is produced off Newfoundland and natural gas is production off Nova Scotia. The Hibernia Project, off the Grand Banks of Newfoundland has been producing oil since November 1997 at a rate of 150,000 barrels per day.²³⁷ Hibernia does not produce natural gas. The Cohasset-Panuke, now closed, produced oil off the coast of Nova Scotia until December 1999 and at the nearby Deep Panuke field, Pan-Canadian Petroleum Ltd is assessing whether the 1.5

²³⁵ CAPP, *Outlook for the Natural Gas Industry in Atlantic Canada* (Calgary: CAPP, 2001) and John deMont, "Dreams of Riches" *Maclean's Canada's Weekly Newsmagazine* 114:7 (12 February 12, 2001) 24.

²³⁶ *Ibid.* at 2 based on surveys conducted by the Geological Survey of Canada.

²³⁷ "Dreams of Riches", *supra* note 235 at 25.

trillion cubic feet of natural gas is commercial viable to produce. The Terra Nova project is expected to produce the same volume per day once production commences in Spring 2001. Husky Oil Operations Ltd and its partners have filed for regulatory approval to start production from its While Rose field estimated to contain 230 million barrels.²³⁸ And, Chevron Canada Resources, the operating company in a consortium is deliberating on whether to develop its 350 million barrel Hebron field. The Sable Offshore Energy Project commenced natural gas production in 1999 with an estimated 25 year production life and produces between 400 and 500 million cubic feet per day, an amount equivalent to the energy demands of the City of Montreal.²³⁹ As demonstrated by the statistics on these projects, these accords have provided much needed economic benefits to Newfoundland and Nova Scotia.²⁴⁰

3. The Indian Reserve Regime

The federal government has jurisdiction over oil and gas development on reserve lands by virtue of section 91(24) "Indians, and Lands reserved for the Indians" of the *Constitution Act, 1867*. Accordingly, Indian Oil and Gas Canada (IOGC), a federal regulatory agency, regulates the oil and gas development on reserve through the *Indian Oil and Gas Act* (IOG Act) and *Indian Oil and Gas Regulations* (IOG Regulations).²⁴¹ IOGC's mandate, as

²³⁸ *Ibid.* at 24-25.

²³⁹ CAPP, *supra* note 3.

²⁴⁰ For an overview of Offshore Regimes see D. Black & F.V.W. Penick, "Survey of Legal Issues: Canadian Offshore Oil and Gas Developments" (1992) 30 Alta. L. Review (No.1) 178, and M. Harrington, C. Seviour, & M. MacDonald, "Emerging Issues in East Coast Oil and Gas Development" (1997) 35 Alberta Law Review (No.2) 389.

²⁴¹ Indian Oil and Gas Canada is a federal agency [hereinafter IOGC]. See *Indian Oil and Gas Act*, R.S.C. 1985, c.I-7 [hereinafter IOG Act] and the *Indian Oil and Gas Regulations*, 1995 SOR/94-753 [hereinafter IOG

articulated by IOGC, is to fulfill the Crown's fiduciary and statutory obligations related to the management of oil and gas resources as well as to further First Nation initiatives to manage and control their oil and gas.²⁴² Unlike the Northern and Offshore Regimes, the Indian Reserve Regime does not model itself after the COGOA or CPRA. In other words, the federal government did not simply take the COGOA and CPRA and incorporate it into legislation to apply to the Indian Reserve Regime. Instead, it has created a separate federal oil and gas regime that is based on entirely different Rights Issuance and Operations principles. It applies to Indian Reserves located south of the 60th parallel.

The Indian Reserve Regime is not a joint management model. However, it may be characterized as a consultation model with oil and gas development occurring at the request of the First Nations. The federal government retains jurisdiction over oil and gas but consults with First Nations before making its decisions.²⁴³

There is one other key difference between IOGC and other federal regulatory regimes. Unlike NOGD and the Offshore boards, IOGC is mandated not only to regulate oil and gas development but also to advise First Nations on oil and gas economic development. This is a major departure from federal regulatory responsibilities and functions. IOGC has 'Negotiators' that are mandated to review the business structures of oil and gas projects produced by First Nations and Industry and the CEO has absolute discretion to approve or

Regulations]. See *Annual Report 1997-1998* (Calgary: DIAND, 1998) [hereinafter *IOGC Annual Report*] for mandate, objectives and activities.

²⁴² *Ibid.* at 6.

²⁴³ The IOG Act recognizes the federal jurisdiction over oil and gas development on reserve and the IOG Regulations set out the specific decision-making powers.

reject these deals.²⁴⁴ Traditionally, federal oil and gas regulatory regimes are aimed at regulating oil and gas development not Industry's business arrangements. This unique function of IOGC has serious consequences in that it has taken on responsibility for deciding when an oil and gas project is good or bad. Should First Nations take the position that IOGC approved a bad deal it could lead to enormous contingent liabilities.²⁴⁵ NOGD and the Offshore Boards simply do not take on this responsibility.

The majority of oil and gas development under the Indian Reserve Regime occurs in Alberta but extends into the northeast corner of British Columbia and portions of Saskatchewan and Manitoba. The scale of production under this regime is 2.7 billion barrels of oil and 89.1 billion cubic feet of gas, collected \$121 million in royalties.²⁴⁶ For example, the Hobbema bands, Ermineskin, Samson and Montana First Nations have experienced significant development with high revenues and economic development.²⁴⁷ While development has tapered off, it continues to provide benefits to the communities through the provision of energy services and modest revenue generation. The most common type of production is conventional production with some potential for non-conventional production.²⁴⁸

D. New Zealand Regulatory Regimes

Tapsell's article indicates that Maori are seeking ownership and control over oil and gas,

²⁴⁴ *IOGC Annual Report*, *supra* note 241 at 16.

²⁴⁵ See cases itemized under Part V, C and Part VI. C.

²⁴⁶ *IRC 2000 Oil and Gas Conference and Annual General Meeting* (Ottawa: DIAND, 2000) [hereinafter *IRC 2000*].

²⁴⁷ Notze, *supra* note 32.

²⁴⁸ *IOGC Annual Report*, *supra* note 241.

however it is beyond the scope of this thesis to assess in any detail what role, if any Maori have under the New Zealand oil and gas model. The comparative elements relevant to this thesis are with respect to the role Maori have under natural resource management models generally. Nevertheless, it is interesting to make some general observations. First, there is only one oil and gas model in New Zealand. The federal Crown, through Crown Minerals (CM), a division of the Ministry of Economic Development (MED), is responsible for administering New Zealand's minerals including petroleum.²⁴⁹ Specifically, CM is responsible for the overall management of oil and gas development in New Zealand both onshore and offshore. New Zealand has a moderate but thriving industry with substantial offshore development, especially in the Taranaki region. It has combined the two basic functions into the *Crown Minerals Act, 1991 (CMA)*, *Crown Minerals (Petroleum) Regulations 1999*, *Crown Mineral (Petroleum Fees) Regulations, 1993*. Its mandate includes that it achieves an efficient allocation of permits, obtains fair financial return, and there is due regard to the principles of the Treaty of Waitangi. Section 4 of the CMA states that "all persons exercising functions and powers under this Act shall have regard to the principles of the *Treaty of Waitangi*". CM has adopted a similar approach to oil and gas management as Canada as it is based on a competitive and open regime, with the allocation of rights through permits and licenses. Secondly, the oil and gas regime is subject to the *Resource Management Act, 1991* and promotes sustainable development.²⁵⁰ The role of Maori under the environmental management regime is relevant to our analysis and will be examined in the next Part.

²⁴⁹ See <<http://www.crownminerals.govt.nz>>, (last accessed: 16 September 2000) for annual reports, legislation, policies and guidelines on oil and gas development

PART IV: ENVIRONMENTAL ASSESSMENT

Sustainable oil and gas development involves the application of more than just the oil and gas legislation. Prior to any work commencing on projects, environmental assessments are conducted under federal or provincial legislation. Environmental assessments are a mandatory pre-requisite of all federal oil and gas regimes. Economic and social impacts, as well as land use planning strategies, are considered during the reviews.²⁵¹ This part focuses on what role First Nations are afforded in the environmental assessment process under oil and gas regimes. For comparative purposes, this part will also examine what role, if any, Maori have in environmental assessments for oil and gas regimes in New Zealand.

A. Environmental Assessment & Oil and Gas Regimes in Canada

Canada has taken an active role in the environmental management of its natural resources.²⁵² As such it has enacted numerous environmental protection and environmental assessment legislation.²⁵³ Environmental assessments pertaining to federal oil and gas regimes are conducted pursuant to the *Canadian Environmental Assessment Act* (CEAA).²⁵⁴ The

²⁵⁰ See P.H. Mitchell and R.J. Matthews, "The Resource Management Act in the New Millennium" (2000 New Zealand Petroleum Conference Proceedings, 19-22 March 2000) Wellington: Ministry of Economic Development, 2000.

²⁵¹ See generally E.L. Hughes, A.R. Lucas, & W. Tilleman, *Environmental Law and Policy* 2nd ed. (Toronto: Emond Montgomery Publications Limited, 1998).

²⁵² The federal government's environmental assessment and protection powers are based on its residual powers under the *Constitution Act, 1867* s.91 "peace, order and good government" as well as on s.91(27) "criminal law". Its environmental jurisdictions have been firmly established by *Friends of Oldman River Society v. Canada*, [1992] 1 S.C.R. 3 (S.C.C.) and *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 399 (S.C.C.).

²⁵³ For example *Canadian Environmental Protection Act*, R.S.C. 1985, c.16 (4th Supp.), *Navigable Waters Protection Act*, R.S.C. 1985, c.N-22, *Fisheries Act*, R.S.C. 1985, c.F-14, ss.2, 20 to 22, 26, 34 to 43, 66 to 69 and 78 to 88. See especially, *Canadian Environmental Legislation 2000 Edition* (Aurora: Canada Law Book Inc., 2000).

²⁵⁴ *Canadian Environmental Assessment Act*, S.C 1992, c.37 [hereinafter CEAA].

'environmental assessment' is considered to be an indispensable planning-tool to assist in sustainable development.²⁵⁵ Sustainable development means "development that meets the needs of the present, without compromising the ability of future generations to meet their own needs."²⁵⁶ The objective of an environmental assessment is to identify and mitigate possible adverse effects of an oil and gas project on the environment, before they occur.

The purpose of CEAA is:

- 4.(a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them;
- (b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy; ...²⁵⁷

CEAA has adopted a broad approach to environmental assessments addressing issues associated with discharge and emissions approvals, land-use planning and consideration of alternative methods, locations and plans. CEAA uses an expansive definition of the environment with a broad range of considerations including the natural environment and the human social, economic, and cultural environment.

In the context of oil and gas management, CEAA requires 'responsible authorities' such as NOGD, NEB, CNOBP, CNSOPB and IOGC to undertake an environmental assessment if they intend to issue licenses, permits or other authorization that will allow oil and gas development to go forward.²⁵⁸ Environmental assessment fall under two categories, self-

²⁵⁵ Paul Bernier, "The Evolving Process of Environmental Assessment: The Federal Perspective" *Environmental Assessment of Natural Resource Projects* (Insight Press, Calgary, September 23-24, 1999).

²⁵⁶ CEAA, s.2. See also Thom Alcoze, "Our Common Future: Native Land Use and Sustainable Development," in *The Guelph Seminars on Sustainable Development* (Guelph, ON: University of Guelph, 1990).

²⁵⁷ CEAA, s.4.

²⁵⁸ CEAA, s.2 defines 'responsible authorities', 'federal authorities' and s.11 sets out duties and obligations. Proposed amendments to the Federal Authorities Regulations includes the designation of the CNSOPB as a

directed (screenings and comprehensive studies) and independent (mediations and panels).²⁵⁹

Approximately 95% of environmental assessments are conducted by a screening or comprehensive study with the remaining 5% conducted by either mediation or public panel.

In most cases, oil and gas projects are dealt with by self-directed assessments. However, a larger scale oil and gas projects like an offshore projects and pipelines are often referred to an independent assessment since there are transboundary issues and the potential for significant impacts.²⁶⁰

CEAA makes little reference to First Nations beyond its inclusion in its definitions; in fact, the definition references aboriginal peoples, which includes First Nations, Inuit and Métis:

“environmental effect” means, in respect of a project,
(a) any change that the project may cause in the environment, including any effect of such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, and ...²⁶¹

In the context of oil and gas, the responsible authority (NOGD, CNOSPB, CNOPB, and IOGC) is directed to consider the impact of the project on First Nations when approving oil and gas projects. Normally, this requires the proponent to consult with First Nations in preparing its screening or comprehensive study reports. Under CEAA, the First Nation does not have a right to participate in a screening rather it must request permission from the

federal authority, see CEAA, Press Release, “Federal Authorities Regulations Amended to Include CNSOPB” 2 September, 2000.

²⁵⁹ CEAA, ss. 18-20 ‘screenings’; ss.21-24 ‘comprehensive study’; and ss.29-36 ‘mediation and review panels’. A screening is the most basic self-assessment tool typically used for projects with a low potential for adverse affects. A comprehensive study is a more thorough self-assessment and is typically used when there is a potential for significant adverse impacts. The independent assessments are independent in that the Minister of Environment appoints independent mediators and panels to assess a project usually when public concern warrants it or when there are significant impacts.

²⁶⁰ See Comprehensive Study List Regulations SOR/99-439 Part IV Oil and Gas Projects wherein it requires offshore platforms and oil sands projects to undergo the more thorough environmental assessment process.

responsible authority to do so. A First Nation may, however, participate in a comprehensive study, mediation or public panel.²⁶²

B. First Nations & Environmental Assessments

First Nations have harvested resources in a manner that has ensured future generations have access to these resources.²⁶³ First Nations have successfully employed the concept of sustainable development as an approach to natural resource management for centuries.²⁶⁴ The Berger Inquiry was instrumental in raising First Nation environmental issues and influenced subsequent federal policy.²⁶⁵ It was also the most important environmental assessment in Canadian history; it was tasked with assessing the implications of two proposed pipeline routes from the Arctic Ocean to southern markets.²⁶⁶ While traditional resource management practices have been negatively impacted by colonisation, First Nations have been able to retain many aspects of their traditional environmental knowledge.²⁶⁷ It is these

²⁶¹ CEAA, s.2.

²⁶² Modest participation funding is provided for public panels, Hughes, *supra* note 251.

²⁶³ See John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" [1997] 47 U of T L J 417 [hereinafter "Water and Rocks"]. Borrows argues that First Nations have much to offer current environmental regimes and that a more inclusive approach with broader ideas and values may assist in making better environmental decisions. Also see R. Kapashesit & M. Klippenstein, "Aboriginal Group Rights and Environmental Protection" [1991] 36 McGill L J 925 for an analysis of traditional First Nation environmental management principles. These authors argue that recent jurisprudence could support aboriginal rights that include traditional environment practices. See Chris Tollefson, "Strategic Lawsuits and Environmental Politics: Diashowa Inc. v. Friends of the Lubicon" (1996) Vol. 31, No. 1 *Journal of Canadian Studies* 119.

²⁶⁴ "Water and Rocks", *ibid.* wherein Borrows, in his discussion on the environment and the concept of sustainable development comments that the *Brundtland Commission* recognizes that Aboriginal communities have been able to meet their present needs without compromising the ability of future generations to meet their needs, a sort of integration of human economic and natural ecological activities.

²⁶⁵ See Thomas R. Berger, *Northern Frontier, Northern Homeland - The Report of the Mackenzie Valley Pipeline Inquiry*. Two Volumes. (Toronto: James Lorimer and Co., 1977) [hereinafter *Berger Inquiry*].

²⁶⁶ Hughes, *supra* note 251 at 194.

²⁶⁷ Traditional environmental knowledge, sometimes referred to as TEK is a concept that has growing importance in First Nations communities many of whom are commissioning studies of their traditional territories, looking at cultural, social and traditional.

principles of natural resource management that are reflected in modern day treaties wherein First Nations “wish to recognize and protect a way of life that is based on an economic and spiritual relationship between [the First Nation] and the land”.²⁶⁸ The concept of natural resource management uses an integrated approach to ensure social, cultural, economic and environmental policies are applied to the management, protection and use of land, water and resources. Recognition of the stewardship role First Nations have towards the environment in the federal environmental legislation is one option to increase their role in natural resource management. Nevertheless, it is artificial to restrict their role to reserve lands since environmental issues go beyond reserve boundaries and impacts the whole of their traditional territories. First Nations can contribute substantively to environmental processes and legislation through their TEK as First Nations possess very specific knowledge regarding plant and animal habitat, burial and sacred sites and sustainable practices.²⁶⁹ While sustainable development is a cornerstone of natural resource management, their interests extend beyond environmental issues. It would be naïve to think that First Nation interests can be dealt with through environmental legislation alone. It is time to starting viewing First Nations as nations and governments with same range of interests as other levels of government.

1. Decision-Making

Generally, First Nations do not have any decision-making power over environmental assessments for oil and gas development. First Nations have a low level of involvement in

²⁶⁸ For example, see *Gwich'in Agreement*, *supra* note 224 at 2.

²⁶⁹ “Water and Rocks”, *supra* note 263 at 425.

the environmental assessment processes associated with each of the federal oil and gas regimes. This is the case even when a First Nation allows oil and gas development on reserve under the Indian Reserve Regime. The federal agency regulating oil and gas on reserve, IOGC, is the responsible authority under CEAA with final decision-making power not the Chief and Council. The responsible authority under CEAA for the Northern Regime is NOGD and for the Offshore Regime it is CNSOPB and CNOPB.

Nevertheless, there are several notable exceptions to this basic rule. In the case where a First Nation has negotiated ownership and authorities over lands and resources, such as the Sahtu Dene and Métis and the Gwich'in in the Northwest Territories, First Nations exercise decision-making powers with respect to environmental assessments on their Settlement Lands.²⁷⁰ First Nations have a high level of involvement in the environmental assessment process associated with the Northern Regime. Under their Comprehensive Land Claim Agreements, the First Nations have representation on various lands, water and environmental boards that have decision-making powers. In the future, if and when the federal government devolves oil and gas jurisdictions to the territorial government the agreements have provided for the inclusion of First Nations.²⁷¹ For example, the Government of the Northwest Territories and First Nations jointly manage environmental issues under the *Mackenzie Valley Resource Management Act* (MVRMA).²⁷²

²⁷⁰ *Sahtu Agreement*, *supra* note 224 at c.19 and c.22.

²⁷¹ Devolution talks underway include tripartite negotiations. DIAND, Press Release, "Devolution Talks Commence" 6 March 2000.

2. Problems with EA Process

There are a number of flaws with CEAA with respect to the participation of First Nations in the environmental assessment process. First, CEAA does not provide sufficient substantive provisions to compel responsible authorities to consider the effects of oil and gas projects on First Nations. The indirect reference to First Nations in the definition section is not adequate to deal with the full range of issues associated with First Nations. Secondly, CEAA does not include substantive provisions to safeguard First Nation interests by ensuring their participation in the environmental assessment process. First Nations are not afforded separate standing under CEAA they are grouped in with all other interest groups. This does not recognize the unique position First Nations have with respect to their lands and resources. Thirdly, the scope and application of CEAA with respect to First Nation concerns regarding social, economic and cultures are too narrow.²⁷³ An environmental assessment process is not the optimal process to deal with the complexity and diversity of First Nation issues. Fourthly, the implementation of the existing CEAA provisions dealing with First Nations suffers from procedural deficiencies. Litigation suggests that First Nations are not afforded sufficient opportunities to participate fully in environmental assessments and frequently responsible authorities simply do not consider their issues in a meaningful way. In fact, this low level of involvement falls shy of even the most basic level of consultation.

²⁷² *Mackenzie Valley Resource Management Act* S.C. 1998, c.25 [hereinafter MVRMA]. It is contemplated that it will be extended to apply to more First Nations once they have completed their claims settlements.

²⁷³ In *Vuntut Gwitchin First Nation v. Canada*, [1999] 1 C.N.L.R. 299 (F.T.D.) the court held the Crown was not permitted to depart from, vary or add to the criteria it was considering under the CEAA. The decision-maker was correct in considering only the environment issue raised by the Vuntut Gwitchin, namely the impacts on the calving grounds of the Porcupine Caribou Herd, as it was beyond his jurisdiction to consider the other political and legal issues raised. The joint panel review of the Terra Nova project illustrates that First Nations issues were not adequately addressed under the environmental assessment process. See generally, NRCan,

The litigation regarding the Sable Offshore Energy Project ("SOEP") and Maritimes & Northern Pipelines ("M&NP") in Atlantic Canada involves deliberation on the aforementioned issues. SOEP and M&NP have structured alliances to develop the massive offshore gas reserves located off the coast of Nova Scotia near Sable Island.²⁷⁴ The SOEP is a natural gas development project located on the Scotia Shelf. The M&NP is the natural gas line located offshore connecting to onshore pipelines that will transport natural gas from SOEP to Canada and the United States. Under CEAA, a Joint Review Panel comprised of representatives from CNSOPB, NEB and the Nova Scotia Department of Energy and Resources conducted a public review of the SOEP and M&NP offshore gas development, offshore pipelines, and onshore pipelines.²⁷⁵ The panel concluded that SOEP and M&NP were not likely to cause significant adverse environmental effects provided the appropriate mitigation measures and panel recommendations were followed. Additionally, the Joint Review Panel was satisfied that the benefit plan would result in socio-economic benefits for all Canadians and recommended that the SOEP and M&NP go ahead.²⁷⁶ The integrated, multi-jurisdictional review process was heralded a tremendous success by government and Industry however, there was a disturbing lack of inclusion of First Nations in the process.

The First Nations allege that the environmental assessment process did not address the full

News Release, "Federal Response to the Panel Recommendations on the Terra Noval Development: An Offshore Petroleum Project" 5 December 1997.

²⁷⁴ L.M. Zeidler, "Case Study: Inter-Jurisdictional Assessment Issues in the Sable Offshore Energy Project", Insight Conference Environmental Assessment of Natural Resource Projects, September 23-24, 1999 (Toronto: Insight Press, 1999) 315 and T. Vadjia "Case Study: Maritimes & Northeast Pipeline Development", Insight Conference Environmental Assessment of Natural Resource Projects, September 23-24, 1999 (Toronto: Insight Press, 1999) 277.

²⁷⁵ CEAA, ss.40-42.

²⁷⁶ Recommendation 26 of the Joint Public Review Panel Report Sable Gas Projects (October 1997).

range of issues associated with the oil and gas projects on their aboriginal and treaty rights.²⁷⁷ There were a number of problems with the process. First, the fact that it was a public hearing meant that the NEB was functioning as a quasi-judicial body, hence it did not have a fiduciary obligation to consult with the First Nations.²⁷⁸ Secondly, the First Nations allege the NEB did not consider First Nations concerns with respect to all of the issues. In other words, the environmental assessment did not consider the full environmental effects or did not weight them appropriately in making their approvals. Thirdly, neither the federal nor provincial Crown consulted in any meaningful way with the First Nations on these projects thereby allegedly breaching their fiduciary obligations under section 35 of the *Constitution Act, 1982*.²⁷⁹ Fourthly, there was no statutory requirement to consult. As a result, CEAA and its application in this situation did not meet the high standards required of the Crown to honour and respect constitutionally protected aboriginal and treaty rights.

C. Environmental Assessments & Oil and Gas in New Zealand

In 1991, New Zealand redefined natural resource management with the enactment of the *Resource Management Act, 1991* (RMA).²⁸⁰ The RMA consolidates land use planning with

²⁷⁷ There are two recent decisions that tell a very different story about consultation and participation by First Nations in Atlantic Canada. First there is the *Union of Nova Scotia Indians v. Maritimes Northeast Pipeline Management Ltd.* [1999] F.C.J. No.1546 (F.C.A.), online: QL (CJ), an example of a case where First Nations are alleging they are not being treated fairly under CEAA. The NEB breached the principles of procedural fairness with respect to the UNSI when it did not allow the First Nations an opportunity to respond to M&NP's claim that it had satisfied a requirement for a protocol agreement. In this case, the NEB was making a determination of whether or not M&NP had satisfied a condition set by the Joint Review Panel to consult with First Nations. Secondly, there is the litigation wherein the UNSI is challenging the oil and gas development in Atlantic and alleging that the Crown has breached its fiduciary obligations see *Union of Nova Scotia Indians v. Nova Scotia*, [1999] N.S.J. No. 270 (N.S.S.C.); [1999] N.S.J. No.440 (N.S.C.A.), online: QL (NSJ) [hereinafter *UNSI v. NSJ*].

²⁷⁸ *Quebec v. Canada*, [1994] 3 C.N.L.R. 49 (S.C.C.) [hereinafter *Quebec v. Canada*].

²⁷⁹ *UNSI v. NS*, *supra* note 277.

²⁸⁰ *Resource Management Act, 1991* [hereinafter "RMA"].

environmental legislation and significantly changes the legislative framework for natural resource management in New Zealand.²⁸¹ A key difference between this piece of legislation and CEAA is the RMA provides both environmental protection and environmental assessment laws. Further, the RMA deals with a broad range of environmental issues at both the national and local level. For instance, the RMA applies to land-use planning matters at the municipal level, which are normally dealt with by provincial legislation in Canada. Nonetheless, the RMA applies to environmental assessments relating to oil and gas projects.

The RMA balances sustainable management with the economic objective of other natural resource legislation and establishes new underlying principles for natural resource management. The purpose of the RMA is:

- 5.(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, 'sustainable management' means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
 - (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
 - (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems ...²⁸²

Maori interests are reflected more comprehensively than First Nations interests are under CEAA. Most notably, the RMA states "in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the

²⁸¹ The RMA repeals the *Town and Country Planning Act 1977*(TCPA), the *Water and Soil Conservation Act 1967*, *Clean Air Act 1974*, the *Noise Control Act, 1974* large parts of the *Soil Conservation and Rivers Control Act 1941*, (Coal Mines Act 1979 and Petroleum Act 1932) and *Crown Minerals Act, 1991*. It does not replace the *Conservation 1987*, the *Reserves Act 1977* and fisheries and wildlife legislation.

²⁸² RMA, s.5.

Treaty of Waitangi.”²⁸³ In addition, the RMA requires all persons exercising functions and powers to recognize and provide for “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.”²⁸⁴ It also directs all persons to have particular regard for “kaitiakitanga” which is defined as “the exercise of guardianship, and in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself”.²⁸⁵ It provides for a moderate level of involvement for Maori in that the legislation provides sufficient provisions to require consultation. It is the implementation of this legislation by authorities, however, that does not achieve this proposed level of involvement.

For our purposes, the consent approval process for major projects is most relevant as it is required before any oil and gas activity can take place. Proponents must seek approvals under the RMA. Local or regional authorities prepare policies and plans that guide the categories of activities and corresponding consents required. The local and regional bodies are referred to as the ‘consent authorities’ similar to ‘responsible authorities’ under CEAA. Different processes apply to different consent applications. With respect to oil and gas development, public notice is required. Appeals may be made to the Planning Tribunal, recently renamed the Environment Court. In matters of national concern, the Ministry of the Environment may step in to participate in a consent process.

²⁸³ RMA, s.8.

²⁸⁴ RMA, s.6.

D. Maori & Environmental Assessments

The Maori are the tangata whenua, meaning 'people of the land'. The concept of tangata whenua refers to their connection to land through ancestral ties and establishes them as the kaitiaki, meaning guardians, of their sacred lands, mountains, rivers and seas.²⁸⁶ They believe that the land, Papatuanuku, is the earth mother from which life sprang and continues to provide nourishment and sustenance to all life. Land is a communal resource that is to be handed down to succeeding generations and defended by the collective efforts of the tribe. Each tribe has mana whenua over a particular area and each tribe's land base is well defined by oral history. The Maori aphorism "man perishes but the land remains" expresses the traditional Maori attitude towards the land as a permanent resource to be handed down to succeeding generations.²⁸⁷ While the RMA represents a new approach to environmental management, it does not appear to be particularly innovative with respect to recognizing Maori interests as similar provisions were used in previous legislation and suffered from much the same implementation and interpretation problems as the RMA.²⁸⁸ As with First Nations, sustainable development is an integral element of Maori natural resource management. Recognition that their interests extend beyond environmental management has been somewhat achieved in New Zealand with the growing trend to reference to treaty principles in legislation.

²⁸⁵ RMA, s.7.

²⁸⁶ *Proposed Guidelines for Local Authority Consultation with Tangata Whenua* (Wellington: Parliamentary Commissioner for the Environment, 1992).

²⁸⁷ *Years of Anger*, *supra* note 74 at 43.

²⁸⁸ Boast and Edmunds, *supra* note 107, comment that the TCPA referenced the treaty and the PT has developed precedent regarding treaty principles.

1. Decision-Making

Maori do not exercise decision-making powers under the RMA. Rather, Maori have a moderate-to-high level of involvement in that the legislation requires consultation with Maori in certain circumstances. However, the consent authorities, the local and regional councils, make the decisions. That being said, RMA goes a considerable distance to ensure that their concerns are considered with references to Maori throughout the Act with some mandatory requirements to consult with them. Again, there is a notable exception to this general rule. In cases where Maori have negotiated jurisdiction over their lands and resources under settlement agreements, they exercise decision-making powers.

2. Problems with the RMA Process & Consultation

The RMA has been plagued with difficulties from the start.²⁸⁹ There are several flaws with this system from the perspective of the Maori as they are seeking a high level of involvement. Maori not only seek ownership of their lands and resources but also decision-making powers over their lands and resources. First, the RMA does not go far enough to protect treaty rights. Secondly, the RMA does not afford adequate decision-making powers for Maori. Thirdly, the RMA does not provide for mandatory consultation on all issues with Maori.²⁹⁰ It is the implementation and interpretation of these provisions that is at the centre of most disputes. The bulk of disputes and appeals relate to Maori grievances with local and

²⁸⁹ John Milligan, "The Resource Management Act – 9 months on." (1992) 4 N.Z. Law J. 351.

²⁹⁰ The caveat being there is a mandatory obligation to consult with tangata whenua on proposed changes to official plans, see *Ngati Kahu and Pacific International Investments Ltd v. Tauranga District Council* (Planning Tribunal, A 72/94, 20 September 1994).

regional consent authorities with respect to a wide range of land use and environmental issues. These cases provide an assessment of how well the RMA deals with Maori issues.

From the outset, the Waitangi Tribunal has criticized “the lack of priority accorded the principles of the *Treaty of Waitangi* in the *Resource Management Act 1991*”.²⁹¹ In the *Ngawha Geothermal Resource Report* the Waitangi Tribunal found the Crown had breached its treaty obligations by delegating management of geothermal resources to local and regional bodies through the *Geothermal Act 1953* and RMA.²⁹² In turn, the RMA fails because it does not hold local and regional authorities accountable to the same level as the Crown and does not provide adequate protection of treaty rights in geothermal resources. Mikaere suggests that the recent Planning Tribunal decisions demonstrate that the Waitangi Tribunal’s criticism of the RMA is well founded.²⁹³ In *Seatow* the Planning Tribunal dismisses the recommendations of the Waitangi Tribunal on the grounds that it is not an appropriate body to determine law.²⁹⁴ The Planning Tribunal goes on in *Seatow* at 25 to remark that there were ample opportunities for Maori to participate in the RMA process with:

... ample opportunities for the tangata whenua to participate in the decision-making process. They have opportunities to participate by being consulted, by making submissions to the Regional Council, by taking part in pre-hearing meetings, by making submissions and giving evidence at the regional Council’s hearing, and by

²⁹¹ A. L. Mikaere “Maori Issues” (1994) N.Z. Recent L Rev 265 at 267 [hereinafter “Maori Issues 1994”].

²⁹² *Ngawha Geothermal Resource Report* (Wai 304) (Wellington: Brooker & Friend, 1993) is a claim by ten Ngapuhi hapu to ownership and rangatiratanga of the Ngawha geothermal field. They sought findings that ownership and rangatiratanga of the resource was not dependent upon ownership of the surface land and, that the acquisition of the title by the Crown in breach of the principles of the Treaty did not involve the transfer of the resource. In addition, they sought a finding that nga hapu o Ngawha retained the ownership and rangatiratanga of the resource which included the grant of resource consents to the joint venture applications without their consent would be in breach of their Treaty rights. They argued that the *Geothermal Act 1953* and the *Resource Management Act 1991* are inconsistent with the Treaty. See also *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wai-53) (Wellington: Brooker & Friend, 1993). For a discussion of these see A.L. Mikaere, “Maori Issues” (1993) NZ Recent L Rev 318 [hereinafter “Maori Issues 1993”].

²⁹³ “Maori Issues 1994”, *supra* note 291 at 267-268.

²⁹⁴ *Seatow Ltd. v. Auckland Regional Council* (Planning Tribunal, A 129/93, 14 Dec 1993) [hereinafter *Seatow*].

making submissions and giving evidence at inquiries sought by them and others. Happily, the tangata whenua of Pakiri have taken those opportunities in respect of the present applications ... So they have been involved in the decision-making process to that extent, and as the law does not give them a greater part, there is no basis for an adverse report ... on the Auckland Regional Council recommendations in that respect.

The Planning Tribunal did not decide on whether the RMA was inconsistent with treaty principles because it was beyond its scope of jurisdiction. This case illustrates that the focus is on the process of decision-making rather than on the actual decision-making. The Ngatiwai were seeking effective and meaningful involvement in the management of their resources and were denied that opportunity.

The notion of mandatory consultation was rejected in *Greenshill* wherein the Planning Tribunal held that section 8 did not impose upon the consent authorities the Crown obligation to consult with iwi and hapu:

The [RMA] is clearly directed at the desirability of a consultative process but wide discretion are still vested in the consent authority ... although desirable, there is no compulsion on the applicant for a resource consent or on the officers of the consent authority to embark unilaterally upon consultation.²⁹⁵

This case illustrates that if Maori rangatiratanga were truly recognized by the RMA they would not be a party to the action but would indeed be a part of the decision-making body.²⁹⁶ The court rejected the argument that the hapu should perform a decision-making function. The RMA does not deal with issues of ownership or control nor is the Planning Tribunal prepared to delay resource consent decisions until the appropriate body, the Waitangi Tribunal, is able to deal with the issues.²⁹⁷

²⁹⁵ *Greenshill v. Waikato Regional Council* (Planning Tribunal, W 17/95, 6 March 1995) [hereinafter *Greenshill*] at 8.

²⁹⁶ A.L. Mikaere, "Maori Issues" (1997) N.Z. Law Rev 247 at 249 [hereinafter "Maori Issues 1997"].

²⁹⁷ "Maori Issues 1995", *supra* note 93 at 139.

In *Hanton* the court confirmed there is no mandatory duty to consult.²⁹⁸ The Ngati Whatua challenged the Council's consent for the building of a service station on land that BP had purchased from the Auckland Area Health Board. They argued that the surplus land should be returned to Maori ownership and not used for activities that the iwi thought were unsuitable. At issue was the interpretation of section 8 of the RMA. They argued there was a duty to consult with iwi and local hapu seriously. The Planning Tribunal rejected the argument that a consent authority is obliged to consult with the tangata whenua on a resource consent application as the language is merely permissive rather it is merely directed to "take into consideration principles of the Treaty". Moreover, the Planning Tribunal held that the consent authority was acting in judicial function therefore it was not appropriate for it to consult with Maori.

One option to address this deficiency is for Treaty settlements to secure representation for Maori on boards that have authority over matters relating to the environment. A joint management model is being advocated by Maori. Another option is to amend the RMA to include Maori on decision-making authorities or to give them decision-making powers. The RMA should be amended to reflect the principles of partnership. Mikare argues partnership does not mean that one partner can be compelled the other to participate in a consultative process defined and controlled by them.²⁹⁹

²⁹⁸ *Hanton v. Auckland City Council & BP Oil NZ Ltd.* (Planning Tribunal, A 10/94, 1 March 1994) [hereinafter *Hanton*].

²⁹⁹ "Maori Issues 1994", *supra* note 291 at 270.

PART IV: RIGHTS ISSUANCE

The decisions about when, where and how oil and gas development is going to take place, occur at the beginning of the process under the Rights Issuance function. For example, it is at this stage that the Crown makes decisions about whether or not Crown land is going to be made available for exploration. The federal legislation requires decisions regarding the terms and conditions as well as the fiscal arrangement for the entire project, to be made at the beginning of the process. Hence, decisions regarding economic and sustainable development are made prior to issuing approvals. It is this decision-making process that will be assessed to determine to what extent First Nations participate. The legislation provides the regulatory agencies with incidental administration, monitoring and adjudication powers. There is overlap between the Rights Issuance functions and the Operations functions as approvals and decisions are required as a company advances from one stage of oil and gas development to the next.

A. The Northern Regime

1. Terms and Conditions

The Northern Regime provides First Nations with a moderate-high level of involvement with respect to the implementation of the Rights Issuance functions. While they do not exercise decision-making powers they do participate in the regulatory process. The level of their involvement is greater when the proposed activity is on their Settlement Lands than it is

when it is in their Settlement Area. CPRA provides for the issuance of exploration, development and production interests.³⁰⁰ The Northern Regime is an open and competitive system and applies to all lands in the NWT.³⁰¹ In other words, the right to explore for oil and gas is subject to a competitive process where anyone can bid on the parcel of land.³⁰² The highest bid that fulfills the predetermined conditions is usually accepted.³⁰³ It provides equal and fair access to all parties to bid on the development opportunities. The NOGD uses modern technology and provides a large portion of its information on-line and encourages companies to submit bids on-line.³⁰⁴ The Northern Regime is responsive to Industry as well as Northerners and First Nations. The terms and conditions are clearly established at the outset, with input from all stakeholders. Industry indicates where they are interested in conducting exploration activities and NOGD consults with First Nations and Northerners to address any concerns they may have with proposed development. For example, the Sahtu agreement contains the following provision:

22.1.2 Prior to opening any lands in the settlement area for oil and gas exploration, government shall notify the Sahtu Tribal Council, provide it with an opportunity to present its views to government on the matter, including benefits plans and other terms and conditions to be attached to rights issuances, and consider such views.³⁰⁵

In fact, as a matter of practice the NOGD consults with First Nations whether or not they have concluded a Comprehensive Land Claims Agreement if the proposed development is

³⁰⁰ There is overlap between Rights Issuance and Operations. For example, if Industry is issued a development or production license it cannot conduct its operations until NEB has issued its operations permits under CPRA and COGOA.

³⁰¹ All rights issuance information is electronically posted and full details on its competitive system are made available to the public.

³⁰² Part II General Rules Relating to the Issuance of Interests sets out the rules for nominations, bids and issuance of interests by way of leases and licenses.

³⁰³ It is important to note that the federal government has some discretion in electing to accept the bids submitted as per CPRA.

³⁰⁴ NOGD makes use of the internet to post nominations, bids and other statistics and data for oil and gas development in the North. In contrast, the Alberta system makes substantial use of on-line technology, the Alberta Utilities and Energy Board regulates the energy sector by on-line mechanisms such as registration. See AEUB website at <<http://www.eub.gov.ab.ca>>, (last accessed: 4 January 2001).

within their traditional territories.³⁰⁶

Likewise the fiscal arrangements are open and transparent with a one-royalty regime.³⁰⁷ As previously noted, Industry considers the regulatory fiscal demands as one of the business factors to determine if it will go forward on oil and gas development. The fact that the Northern Regime has established a consistent and simplistic fiscal regime creates a degree of certainty that is conducive for oil and gas development. Fees such as application fees for statutory instruments and annual rents accrue to NOGD as do the bonuses and royalties. However, those First Nations with Comprehensive Land Claim Agreements receive a percentage of the overall royalties as per their agreements. For example, in the Gwich'in Agreement the federal government has agreed to annual resource revenue sharing of 25% of the first \$2 million and 1.5% of any additional resource revenues for any development within their Settlement Area. In addition the Gwich'in receive 100% of revenues for development of its subsurface resources on its Settlement Lands.³⁰⁸ Part VIII of CPRA provides the registration framework for interests issued under the Northern Regime.

2. Benefit Plans

The mandate of NOGD expressly states that it is committed to managing the northern oil and gas resources wisely and in a manner that “balances the northern and national interests in the context of aboriginal land claims, promotes investment in the sustainable development of

³⁰⁵ See for example the *Sahtu Agreement*, *supra* note 224 at 22.12.

³⁰⁶ There are ongoing comprehensive land claims negotiations with several First Nation groups in southern NWT such as the Dogrib and Deh Cho First Nations.

³⁰⁷ Part IV CPRA and royalty regulations.

northern resources, and provides related information and service".³⁰⁹ The benefit provision in its legislation reads:

21. No work or activity on any frontier lands that are subject to an interest shall be commenced until the Minister has approved, or waived the requirement of approval of, a benefit plan in respect of work or activity pursuant to subsection 5.2(2) of the Canada Oil and Gas Operations Act. R.S.C. 1985, c.36 (2nd Supp.), s.21; S.C. 1992, c.35, s.35.³¹⁰

To this end, NOGD requires benefit plans to include First Nations irrespective of whether it is under a mandatory requirement or discretionary requirement to do so.³¹¹ Under the Sahtu and the Gwich'in agreements, the NOGD cannot issue any approvals until it is satisfied that the proponent has consulted with the First Nations and negotiated a benefit agreement. For example,

22.1.3 Before any oil and gas exploration takes place, the person proposing to explore and the Sahtu Tribal Council shall consult on the exercise of the person's exploration rights with respect to the matters listed in (a) to (h) below. Similar consultations shall be held before the exercise of a developer's right to develop or produce...³¹²

NOGD is, however, only required to ensure First Nations are addressed if the Crown land is covered by a Comprehensive Land Claim Agreement. Over the last decade, NOGD has improved its ability to secure meaningful benefit agreements. It has taken time for Industry to accept the new oil and gas regimes in the North; particularly the statutory requirements to negotiate benefit agreements with First Nations. Initially, negotiations were difficult with little employment or economic opportunities accruing to First Nations.³¹³ Typically, these agreements today include provisions for jobs, training, apprenticeships, education,

³⁰⁸ *Gwich'in Agreement*, *supra* note 224 at c.22.

³⁰⁹ *Primer on Oil and Gas Resource Management in Canada's North – 1999 Update* (Ottawa: DIAND, 1999).

³¹⁰ CPRA, s.21.

³¹¹ *1997 Northern Oil and Gas Annual Report* (Ottawa: DIAND, 1997) at 6.

³¹² *Sahtu Agreement* at 22.1.3.

³¹³ As legal counsel for two First Nation groups in NWT, Davis & Company 1995-1997, I assisted in protracted consultations and negotiations with several prominent oil and gas companies. First Nations were frustrated at their inability to secure real benefits for their communities.

scholarships as well as business opportunities.

3. Environmental Assessment

This is a time of transition in the North with the implementation of the Comprehensive Land Claim Agreement and *Mackenzie Valley Resource Management Act* (MVRMA). Under the current regime, NOGD ensures that First Nations are provided a moderate-high level of participation under the CEAA process. First Nations are involved in the environmental assessment though it is NOGD that makes the final decisions. Under the new regime, First Nations will have a high level of participation exercising joint decision-making powers. The federal government is committed to bolstering the capacity of the new boards (water and land) to ensure efficiency. To this end, it has cooperated with CAPP to publish guidelines to assist Industry operate in this new environment the *Oil and Gas Approvals in the Northwest Territories: Southern Mackenzie Valley*.³¹⁴ It is anticipated that regulatory approvals will require more time than under the old system until the new system is fully operational.

B. The Offshore Regime

1. Terms and Conditions

The Offshore Regime is based on the same regulatory principles as the Northern Regime. It is simple, straightforward, competitive, and profit sensitive. Both CNOPB and CNSOPB use

open and competitive systems and consult with stakeholders prior to going to opening the offshore to development. Notwithstanding, the CNOPB and CNSOPB have yet to adopt the practice to meet with First Nations as a specific stakeholder group. Although given the growing activism of the First Nations in Atlantic Canada and the work of the Atlantic Policy Congress, there may be some pressure to meet with First Nations regarding offshore development.³¹⁵ An interesting feature of the Offshore Regime is that royalties, bonuses, corporate taxes and provincial sales taxes flow to the provinces whereas the federal tax and custom laws apply offshore and all revenues flow to the federal government.³¹⁶ The Accords use the principle of 'own source revenues' as part of the resource revenue sharing arrangements. After an initial period, the calculation of transfer payments and equalization calculations will include the provincial revenues from the offshore development.³¹⁷

2. Benefit Plans

Both the CNSOPB and the CNOPB rigorously enforce the provisions of their oil and gas regimes pertaining to benefit agreements. To assist in their assessment of benefit plans, the boards may hold public hearings and consult with other agencies. The Offshore Regimes

³¹⁴ Grenall, *supra* note 42. Canadian Association of Petroleum Producers, *Oil and Gas Approvals in the Northwest Territories: Southern Mackenzie Valley* (Calgary: CAPP, 2000) Canadian Association of Petroleum Producers, *Outlook for the Natural Gas Industry* (Calgary: CAPP, 2001)

³¹⁵ See the websites for CNOPB and CNSOPB for publications, press release at <<http://cnopb.nf.ca>>, (last accessed: 16 July 2000) and <<http://www.cnsopb.nc>>, (last accessed: 16 July 2000). Also see Atlantic Policy Congress of First Nations Chief Secretariat, *Fishery Supplement 2000, Vol. 1, No. 1*, April 2000 which sets out their approach to the treaty fishery and other natural resource development issues. Industry remains divided on how to respond to this issue with some companies agreeing to negotiate benefit agreements with First Nations while other refuse to consult with First Nations. See CBC website at <<http://cbc.ca>>, (last accessed: 2 September 2000) at "Deal Struck with NS Mi'kmaq" 20 December 1999 wherein the company negotiated at deal and CBC "Sable Island gets Go Ahead" 2 December 1999 wherein the company refused to consult with First Nations.

³¹⁶ See the fiscal arrangement sections in Black *supra* note 240 and Harrington *supra* note 240.

utilize the same benefit provision as the Northern Regime to ensure that industrial and employment benefits accrue to locals and Canadians generally. Benefit plans are mandatory and must be approved prior to any work on the projects taking place. The boards have full discretionary powers to review and approve the benefit plans imposing any conditions they consider relevant.³¹⁸ Despite the fact the boards have a discretionary ability to require benefit plans to expressly provide for First Nations, they have chosen not to exercise this power. There are a number of plausible explanations for this. First, it may be that in modeling their legislation after the CPRA and COGOA the boards simply have not considered the interpretation and application of this section to First Nations. Secondly, there may be the perception that offshore development does not impact First Nations therefore First Nations have no interests and there is no need to include them in economic benefits. Thirdly, it may be a choice by the boards not to fully enforce all parts of section 45 of the respective implementation legislation reads:

45.(1) In this section, "[benefits plan]" means a plan for the employment of Canadians and, in particular, members of the labour force of the Province and, subject to paragraph (3)(d), for providing manufacturers, consultants, contractors and service companies in the Province and other parts of Canada with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in any proposed work or activity referred to in the benefits plan. ...

(3) [benefits plan] shall contain provisions intended to ensure that:

(a) before carrying out any work or activity in the offshore area, the corporation or other body submitting the plan shall establish in the Province an office where appropriate levels of decision-making are to take place;

(b) consistent with the Canadian Charter of Rights and Freedoms, individuals resident in the Province shall be given first consideration for training and employment in the work program for which the plan was submitted and any collective agreement entered into by the corporation or other body submitting the plan and an organization of employees respecting terms and conditions of employment in the offshore area shall contain provisions consistent with this paragraph;

³¹⁷ CN Act ss.218-227 and CNS Act ss.223-232. See Hogg *supra* note 95 at c.6 and c.30 for a discussion on federal /provincial / territorial transfer and equalization payments.

³¹⁸ The boards' decision-making powers are subject to ministerial approval regarding 'fundament decisions' as defined in the accords and implementation legislation. See for example, CNS Act ss. 2, 32-37.

(c) a program shall be carried out and expenditures shall be made for the promotion of education and training and of research and development in the Province in relation to petroleum resource activities in the offshore area; and

(d) first consideration shall be given to services provided from within the Province and to goods manufactured in the Province, where those services and goods are competitive in terms of fair market price, quality and delivery.

(4) The Board may require that any [benefits plan] include provisions to ensure that disadvantaged individuals or groups have access to training and employment opportunities and to enable such individuals or groups or corporations owned or cooperatives operated by them to participate in the supply of goods and services used in any proposed work or activity referred to in the benefits plan ... 45(4) ... the [b]oard may require that any [benefit plan] include provisions to ensure that disadvantaged individuals or groups have access to training and employment opportunities and to enable such individuals or groups or corporations owned or cooperative operated by them to participate in the supply of goods and services used in any proposed work or activity referred to in the [benefit plan] ...

The success of benefit plans depends on the willingness of the board to interpret and apply section 45 in a proactive manner as well as their willingness to monitor and enforce compliance. There is no requirement for the board to enforce benefit plans.³¹⁹ It appears that the decision to implement benefits plans is more of a political or policy decision than a regulatory one. This has not been problematic for the offshore development where the boards have proven to be extremely committed to enforcing benefit plans.³²⁰ For example, the CNOPB reviews all major contracts or purchase orders for the Hibernia Project.³²¹

Given the fact that this provision is exactly the same as the benefit plan provision in the COGA, it raises a question why the Crown would not implement this provision in a similar fashion to its actions in the North. NOGD was originally influenced to alter its approach due to its constitutional obligations under Comprehensive Land Claim Agreements. In Atlantic

³¹⁹ In *St. John's (City) v. Canada-Newfoundland Offshore Petroleum Board* [1998] N.J. No.233 (N.S.C.) the court held that all aspects of the benefit were in the discretion of the board. There was no statutory provision to compel the board to enforce the terms and conditions.

³²⁰ Harrington, *supra* note 240.

³²¹ *Ibid.*

Canada, aboriginal and treaty issues remain unresolved with no post-confederation treaties or comprehensive claims process in place.³²² Bartlett argues that the changing constitutional setting in Canada constitutionally protecting aboriginal and treaty rights necessitates the accommodation of aboriginal title into natural resource development.³²³ In fact Newfoundland has reversed its position that aboriginal title has been extinguished and is negotiating lands claims with the Inuit and the Innu Nation.³²⁴ Accordingly, the scope of the benefit plans should be expanded to include First Nations and Inuit. There is no question that First Nations qualify as “disadvantaged groups”. If the boards continue to refuse to address First Nation issues in approving benefit plans then First Nations may challenge a benefit plan by way of judicial review if it can establish standing on administrative law grounds such as bad faith or an error of law. The argument would be that the board did not apply section 45 properly. Another option would be for First Nations to challenge the entire scheme on constitutional grounds and the following provision:

Nothing in this Part [the Rights Issuance Function] shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal people of Canada under section 35 of the *Constitution Act, 1982*.³²⁵

First Nations in Atlantic Canada want to negotiate agreements with Industry to benefit from the economic activities and are aggressively pursuing opportunities.³²⁶ Support from the boards and the full enforcement of section 45 would go a long way in addressing economic development issues for the First Nations. Alternatively, First Nations may push to amend the

³²² Colonization history in Atlantic Canada is very different than that of the north with the issue extinguishment unresolved, see *Indian Reserves in the Atlantic Provinces of Canada*, *supra* note 19. But note there are ongoing comprehensive land claims negotiations in Newfoundland and Labrador.

³²³ *Resource Development*, *supra* note 116 at 35.

³²⁴ But see *Homeland*, *supra* note 1 at 32-39 for commentary on the position of Atlantic Provinces regarding aboriginal title and the issue of extinguishment.

³²⁵ CN Act, s.48 and CNS Act, s.50.

³²⁶ Bernd Christmas, “Agreements: The Mi’kmaq Approach” in *Aboriginal Economic Development Conference Reports* (Toronto: Insight Press, 1999).

Acts to make their role explicit. The Supreme Court of Canada's adage 'negotiate not litigate' seems particularly apt in this situation if First Nations and the Crown want to avoid another *Marshall* crisis.³²⁷

3. Environmental Assessment

Under this regulatory regime, First Nations have a low level of involvement and neither CNSOPB nor CNOPB have taken any steps to ensure that First Nations are afforded participation or decision-making under CEAA process. There is no indication that there is any likelihood that their positions are going to change in the near future. The boards retain decision-making powers with respect to the approval of environmental assessments under CEAA. First Nation grievances over the Sable Offshore Energy Project and the Maritime & Northern Pipelines illustrates that the current process is not satisfactory from the First Nations perspective and is vulnerable given the public policy and legal landscape of aboriginal and treaty rights. One option to address First Nations concerns would be for the Boards to provide First Nations with representation on the Environmental Coordinating Committee and Fisheries Advisory Committees.³²⁸ These bodies have been established to solicit advice from local interest groups on the offshore projects. Another option would be for the Boards to simply consult with First Nations.

³²⁷ Following the *Marshall* decision there were violent clashes in Atlantic regarding treaty fishing rights, see CBC, "Ottawa's Move in Atlantic Fishery Debate Uncertain" CBC website <<http://www.cbc.ca>> (28 September 1999) and "Top Court Issues Rebuke in Fish Furor" *Globe & Mail* (18 November 1999) at A1.

³²⁸ First Nations in Atlantic Canada may already be pursuing this option.

C. The Indian Reserve Regime

1. Terms and Conditions

The Indian Reserve Regime departs from the basic principles of the other federal oil and gas regulatory regimes in a number of ways. First, the decision to open Indian Reserve lands to oil and gas development rests with the First Nation.³²⁹ Secondly, it has not established an open and competitive regime easily accessible to the public via online regulation.³³⁰ Instead, IOGC may use three options to open Indian Reserve to development: a call for public tenders, a call for proposals, or direct negotiations.³³¹ The theory behind adopting this approach is to provide First Nations with more flexibility in deciding how oil and gas development is going to take place on their land. The rents, bonuses and royalties are open for negotiation for every deal and accrue to the First Nation. However, the regulatory fees such as permit fees accrue to IOGC. Using this method means there is no clear fiscal regime, instead each deal has its own arrangements.³³² It has resulted in unpredictable development parameters.

While IOG Act and IOG Regulations provide First Nations with some control over oil and gas development it is in reality minor. First Nations have a moderate level of involvement under this regime. Actual decision-making rests with IOGC. Despite the fact that some

³²⁹ Prior to opening their land for oil and gas development the First Nation must first comply with the surrender provisions under the *Indian Act*, ss.37-41.

³³⁰ Both the Northern Regime and Offshore Regimes use online facilities to manage their regimes. IOGC has not established a public online service.

³³¹ IOG Regulations, s.10.

³³² IOG Act, s.4 and IOG Regulations, s.33.

approvals require First Nation consent, all approvals rest with IOGC.³³³ In other words, once a First Nation has negotiated a deal for oil and gas development on its reserve it must take the agreement to IOGC for approval. This regime is an offshoot of the paternalistic *Indian Act* regime and perpetuates the subjugation of First Nations.³³⁴

Even the Pilot Project, an initiative to transfer management over to five First Nations, does not provide First Nations with final decision-making powers.³³⁵ Under the Pilot Project, started in 1995, First Nations have been transferred authorities to administer the IOG Act and IOG Regulations. It has resulted in some capacity building with jobs and training.

Nevertheless, it is important to recognize that the First Nations have not been granted jurisdiction or authority to manage oil and gas, as they have only been granted administrative control. A number of other issues have plagued the Pilot Project as well. First, it does not fall under the *Inherent Right Policy* and as such it is beyond their mandate to negotiate self-government powers until the Memorandum of Agreement is amended. Secondly, the associated costs have been extraordinarily high. Thirdly, First Nations have been reluctant to take on full jurisdiction and authority until the implications regarding the Crown's fiduciary obligations are clearly addressed.³³⁶ Finally, significant implementation and capacity issues coupled with mandate disputes has resulted in a delay in the overall project.³³⁷

³³³ The IOG Regulations reference "with the approval of, and consent to" and provide decision-making powers over the terms of surrender of resource rights with the First Nation. Notzke, *supra* note 32 at 197-225 wherein she compares First Nation control over non-renewable natural resources.

³³⁴ *Homeland*, *supra* note 1.

³³⁵ In response to the Indian Oil and Gas Task Force recommendations, IOGC instituted the Pilot Project to increase the role First Nations play in oil and gas management under the IOG Act and IOG Regulations. See DIAND, Press Release, 1-9514 "Blood Tribe Joins First Nation Management Initiative" (1997). For an update see *IOGC Annual Report*, *supra* note 241 at 16-17.

³³⁶ *IRC 2000*, *supra* note 246 at 12.

2. Benefit Plans

The mandate of IOGC expressly states that it is committed to fulfilling its fiduciary obligations as well as to promoting economic development.³³⁸ However, IOGC has chosen not to enforce the benefit plan section of the *Indian Oil and Gas Regulations* which requires proponents to do the following:

54. To the extent that it is practicable and reasonably efficient, safe and economical to do so, every person who conducts exploratory work, drilling or production operations under these Regulations shall employ persons who are resident on the Indian lands on which the work is being conducted.³³⁹

IOGC does not have a policy or procedure in place to implement this provision instead it has interpreted the provision to mean the onus is on the First Nation to negotiate a benefit plan with Industry.³⁴⁰ Moreover, IOGC does not require any benefit plan prior to approving any activity related to oil and gas development on Indian Reserves. It is ironic that the federal Crown is less inclined to ensure economic opportunities for First Nations under the Indian Reserve Regime than it has under other federal oil and gas Regimes.

To pressure IOGC to enforce this provision, a First Nation has the option to commence litigation against IOGC claiming it has failed to fulfill its mandate to promote economic development opportunities and/or to fulfill section 54 of the IOG Act.³⁴¹ The fact that IOGC, the Crown, is managing surrendered lands on behalf of the First Nation means it has a

³³⁷ *Ibid.* .

³³⁸ *Ibid.* .

³³⁹ IOG Regulations, s.54.

³⁴⁰ The author was a senior manager at IOGC from November 1998 to May 1999. As a senior manager I inquired as to how we enforced this provision and ascertained there was no written policy or procedures with respect to implementing the section. One would have to contact the First Nation to determine if there is a benefit plan between the First Nation and Company as it is not required to be filed or reviewed by IOGC.

fiduciary duty imposed upon it to use a high standard of care in all of its dealings with the land.³⁴² First Nation bands in Alberta like the Hobbema bands have been particularly vocal about their allegations of fiduciary breaches and have filed many claims that if successful will amount to millions of dollars in damages.³⁴³

3. Environmental Assessment

Under the Indian Reserve Regime, IOGC must comply with CEAA. Accordingly, proponents of projects must conduct an environmental assessment under CEAA. In most cases, proponents conduct one screening for all stages of petroleum development (exploration, development, production and reclamation). IOGC encourages First Nations to participate in environmental assessments under CEAA. However, there is no formal policy or procedure in place that reflects this sentiment. IOGC accepts, rejects or imposes conditions it deems necessary for a project to go ahead on reserve; IOGC possesses full decision-making powers. In practice, First Nations have a high level of involvement with

³⁴¹ For example, it could allege breach of fiduciary duty, breach of statutory duty or request a judicial review based on administrative law.

³⁴² *Guerin and Apsassin*, *supra* note 139.

³⁴³ See the following Samson litigation Federal Court of Canada Action No. T-2022: *Samson Indian Band v. Canada*, [1992] F.C.J. No. 932 (F.T.D.), online: QL (FJ) and *Samson Indian Band v. Canada*, [1996] F.C.J. No. 1158 (F.T.D.), online: QL (FJ) wherein the Crown tried to claim privilege over documents pertaining to its administration of oil and gas on the Samson reserve. The court ordered production of documents because they concerned the First Nation as beneficiaries. See the Samson, Enoch and Ermineskin litigation at the Federal Court of Canada in Action Nos. T-2022-89, T-1386-90, T1254-92 and A-756-96, A-757-96, A-758-96: *Samson Indian Band v. Canada*, [1995] F.C.J. No.1047 (F.T.D.), online: QL (FJ); *Samson Indian Band v. Canada*, [1998] 2 F.C. 60 (F.C.A.); *Samson Indian Nation and Band v. Canada*, [1998] 3 F.C. 3 (F.T.D.); and *Ermineskin Indian Band v. Canada*, [1995] 3 F.C. 544 (F.T.D.). The First Nations are alleging that the Crown through its officers and servants has breached its responsibilities as a trustee or their fiduciary arising under equity, common law, statute, treaty and constitutional law with respect to various aspects of its management of oil and gas resources located on reserve lands, the management of royalties derived from those resources, and the provision of programs and services. But see, *Alexander Band No.134 v. Canada*, [1991] 2 C.N.L.R. 22 (F.T.D.) wherein the First Nation brought an action to compel the government to ratify and enact new regulations claiming the delay was costing them millions. Unsuccessful because fiduciary duty did not include a duty to enact regulations.

respect to environmental assessments as it is unlikely that IOGC would sanction an environmental plan that did not meet the needs of the First Nation.

D. Observations

The Northern Regime and the Offshore Regime are virtually identical yet First Nations are treated very differently under the respective regimes. The Northern Regime demonstrates oil and gas development can flourish even with a high level of First Nation involvement. In fact, it illustrates that joint management can work effectively and efficiently. Likewise, the Offshore Regime illustrates that joint management and inter-jurisdictional models can work. Including First Nations in benefit plans does not negatively impact oil and gas development.³⁴⁴ Moreover, the benefits provide First Nations with much needed economic, social and cultural benefits and enables them to partners in resource development versus being reactive opponents seeking delays and injunctions.

There are compelling policy and legal reasons why the Offshore Regime should expand the role First Nations play in oil and gas management. First, the Crown has a fiduciary relationship with First Nations and must uphold its honour and act in good faith with First Nations. Arguably, the Crown's fiduciary duty extends to the CNOSPB and CNSOPB because they do not operate as quasi-judicial bodies during the rights issuance phase and the Crown includes both federal and provincial Crowns. Secondly, aboriginal title has not been resolved in Atlantic Canada. As a result, the Offshore Regime may impact upon both

³⁴⁴ See *Probabilistic Estimate of Hydrocarbon Volumes in the Mackenzie Delta and Beaufort Sea Discoveries* (Ottawa: NEB, 1998); *Natural Gas Assessment of the Southeast Yukon and Northwest Territories, Canada*

aboriginal rights and treaty rights. As discussed in Part II, this means CNOSPB and CNSOPB arguably have a fiduciary obligation to address how the Offshore Regime impacts any existing aboriginal and treaty rights.

One would think the Indian Reserve Regime would provide the most benefit to First Nations and that First Nations would exercise a higher degree of decision-making powers with respect to oil and gas development on reserve. Unfortunately, this is not the case. First Nations are merely consulted with respect to oil and gas development on their reserve. First Nation may make the decision to surrender portions of their reserve for petroleum development but it is the DIAND that approves the surrender. Likewise the First Nation may decide to agree to an oil and gas project on reserve but it is IOGC that approves the project. First Nations do not have the jurisdiction or authority to grant approvals under the IOG Act and IOG Regulations nor do they have any other jurisdiction or authorities recognized by the Crown to do so. It is even more surprising that the Indian Reserve Regime is less inclined to require benefit plans than the other two regimes. One option to address some of the issues associated with the Indian Reserve Regime is to increase First Nation's land management powers through such initiatives as the FMLMA. The FNLMA provides a greater degree of decision-making to First Nations including more jurisdictions such as the authority to enact a land code to address such issues as environmental assessments.³⁴⁵

There are some serious deficiencies with the Indian Reserve Regime that have plagued it for the last two decades. In the mid-1980s, Indian Minerals West, the predecessor to IOGC

(Ottawa: NEB, 1996).

³⁴⁵ Imai, *supra* note 90 at 249-270.

became subject to close examination.³⁴⁶ A joint task force was struck to assess the department and make recommendations for change.³⁴⁷ It was found that it was lacking in even the most fundamental prerequisites necessary to fulfill its mandate for First Nations. Recommendations included amending the IOG Regulations to provide for joint management with the ultimate goal of transferring control to First Nations, establishing the Indian Resource Council (IRC) to facilitate First Nation participation in oil and gas development, and restructuring of Indian Minerals West. At least three of the recommendations were followed with the establishment of IRC, IOGC and the Pilot Project. I hesitate to criticize the IRC and Pilot Project because both initiatives have resulted in at least some positive advances for First Nations especially with respect to capacity building, education, training and policy development. The IRC is a national organization created to represent First Nations on oil and gas matters. However, there have been no substantive amendments to the Indian Reserve Regime. As a result, IOGC again finds itself under close scrutiny with a second operational review that has been ongoing since 1998.³⁴⁸ With the inaction, litigation continues to mount with unprecedented contingent liability on the part of the Crown.³⁴⁹ I wait with anticipation for the recommendations coming from the now 2-year old operational review process.

One option to address the problems with the Indian Reserve Regime is to consult with First Nations and make substantive amendments to the IOG Act and IOG Regulations that enable

³⁴⁶ Notzke, *supra* note 32 at 207-208.

³⁴⁷ Notzke, *supra* note 32. *Resource Development*, *supra* note 116 at 144.

³⁴⁸ 2000 IRC, *supra* note 246.

³⁴⁹ See *Bearspaw, Chiniki and Wesley Bands v. PanCanadian Petroleum Ltd.*, [1999] 1 C.N.L.R. 219 (Q.B.) wherein the court held that the First Nations were entitled to a recalculation of royalties. The Crown had wrongly allowed certain deductions resulting in the loss of over \$6,000,000 in royalty payments. Likewise, in

First Nations to play a meaningful role in oil and gas development on their lands. Another option includes IOGC relying on the federal oil and gas infrastructure rather than provincial oil and gas regimes, thereby creating some rational consistency.

PART V: OPERATIONS

The objective of COGOA is to promote safety, encourage prudent development plans, ensure conservation and environmental protection as well as enforce production arrangements.³⁵⁰

The legislation for the Operations function enables the regulatory agencies to administer, monitor and enforce oil and gas operations such as exploration, drilling, development, and production as well as environmental, conservation, and safety issues. It assists the regulatory authority in determining how petroleum production should proceed and who is responsible for the project operations. Moreover, it ensures compliance with the regulatory system and environmental, development plans and benefit plans. It involves complex functions requiring a high level of capacity in terms of technology and expertise.³⁵¹ The Operations function is important because it ensures that oil and gas is developed in a sustainable manner by ensuring drilling, spacing, pooling and unitization requirements are being fulfilled by Industry. Examples of activities under Operations functions include the determination of whether or not there is commercial quantity of petroleum for production, the determination of production volumes, and decisions about worker safety and response to spills or debris. The costs associated with the Operations function are significant.³⁵² Usually more than one agency is involved and it uses an integrated cooperative approach. Under COGOA, the National Energy Board (NEB) has a significant role under the Northern Regime and the Offshore Regime and is available to the Indian Reserve Regime.

³⁵⁰ COGOA section 3.

³⁵¹ The guidelines and regulations provide examples on how complex and technical it is to develop drilling programs, geophysical programs and in the offshore, diving programs.

³⁵² See budget annual reports for NEB, NOGD and IOGC at their respective websites and compare with AEUB.

A. The Northern Regime

First Nations have a low level of involvement under the Northern Regime's Operations function. The Operations function is regulated under several pieces of federal legislation, regulations, guidelines and memoranda of agreement.³⁵³ There are no provisions to include First Nations under the Operations function. Both NOGD and NEB administer the Operations function. NOGD retains the overall management functions with respect to granting leases and permits and royalties whereas the NEB, an independent federal regulatory agency, handles all aspects of oil and gas production and exercises decision-making powers over more technical aspects. The mandate of the NEB is to promote safety, environmental protection and economic efficiency with respect to exploration and development of oil and gas resources in non-Accord frontier areas. It also handles the construction and operation of inter-provincial and international pipelines, tolls and tariffs of inter-provincial and international pipelines, exports and imports of natural gas. One of its functions is to issue operating licenses under COGOA and includes the ability to issue orders, render decisions, direct action, take control, prosecute, cancel and revoke interests. The NEB functions as a quasi-judicial body, the implication being it has no fiduciary duty to consult with First Nations.

B. The Offshore Regime

The Operations function under the Offshore Regime is based on the Northern Regime. Both

³⁵³ *National Energy Board Act*, R.S.C. 1985, c.N-7, CEAA, CEPA, Northern Pipeline Act, Frontier Lands Petroleum Royalty Regulations (CPRA) as well as a myriad of NEB Act regulations relating to pipelines.

Boards have enacted numerous regulations to assist in administering offshore development.³⁵⁴ There are no provisions to include First Nations under its Operations function. The CNOPB and CNSOPB operate the overall regime with the NEB managing the technical aspects of the Operations function. The NEB also administers the Operation function under the *Canada-Newfoundland Atlantic Accord Implementation Act* and the *Canada-Nova Scotia Offshore Petroleum Resource Accord Implementation Act*. Prior to commencing any activities offshore, the board must approve a development plan outlining the parameters of the proposed project.³⁵⁵ The development is even more important in the Offshore than in the North as there are technical challenges to responding to operations in the offshore. It is also interesting to note that COGOA has created an Oil and Gas Administration Advisory Board to promote consistency and improvements to the Northern and Offshore Regimes but there is no link to the Indian Reserve Regime.³⁵⁶

C. The Indian Reserve Regime

First Nations have a low level of involvement in the Operations functions under the Indian Reserve Regime. In contrast to the Northern and Offshore Regimes, the Indian Reserve Regime does not utilize the NEB to administer its Operations function. In fact, the Indian Reserve Regime is remarkably devoid of guidelines or policies for its Operations. Whereas

³⁵⁴ The CNSOPB has enacted regulations pertaining to spills and debris, diving, geophysical operations, production and conservation, certificate of fitness, drilling, installation, revenue accounts, revenues and fiscal equalization: SOR/95-123; SOR/95-189; SOR/95-144; SOR/95-190; SOR/95-187; SOR/92-676; SOR/95-191; SOR/93-441; SOR/96-249; SOR/94-168; and SOR/84-592 respectively. CNOPB has enacted regulations to address such issues as debris, operations, diving, geophysical operations, protection and conservation, registration, certificate of fitness, drilling, installations, revenue funds: SOR/88-262; SOR/88-347; SOR/88-601; SOR/95-334; SOR/95-103; SOR/88-263; SOR/95-100; SOR/93-23; SOR/95-104; and SOR/95-257 respectively.

³⁵⁵ See e.g. CNS Act s.143.

the Northern and Offshore Regimes rely on several pieces of federal legislation and comprehensive regulations, the Indian Reserve Regime only has the seven clause IOG Act and one set of IOG Regulations with a mere fifty-nine clauses.³⁵⁷ Instead of using federal oil and gas legislative regimes, agencies and expertise, the Indian Reserve Regime uses provincial oil and gas regimes. The majority of operations are guided by provincial oil and gas operation regimes. The IOG Regulations reads:

4. (c) It is a condition of every contract that the operator will comply with the applicable provisions of the Indian Act and any applicable orders and regulations made under the Act; these Regulations and any directions made pursuant thereto; and unless otherwise agreed to by the Minister and specified in the contract, all provincial laws applicable to non-Indian lands that relate to the environment or to the exploration for, or development, treatment, conservation or equitable production of, oil and gas and that are not in conflict with the Act or these Regulations.

In effect, this is a referential incorporation of provincial laws by way of a contract. The term contract is defined in section 2 to mean a "permit, lease, surface rights contract, option or other disposition issued, made or granted under these Regulations or former regulations". One explanation for this approach is the desire to have one oil and gas regime within any given province. The objective is to provide Industry with one set of rules and regulations. The nature of oil and gas development and the relatively small amount of Indian Reserve lands means often a company that wants to explore, develop or produce from a particular subsurface resource deposit will need both federal and provincial permits as the lands are often situated in close proximity to one another. Having the Indian Reserve Regime incorporate the provincial regulatory regime simplifies things for Industry. Many of the IOG

³⁵⁶ COGOA section 5.4.

³⁵⁷ There is at least one set of guidelines available the Indian Minerals (West), Directorate *Guidelines for the Calculation and Reporting of Gas Cost Allowance for Natural Gas and Associated By-Products on Indian Lands* (Ottawa: DIAND, 1982). In addition, there is a brief circular stating that an environmental assessment has to be completed compared numerous guidelines available for the Northern Regime and Offshore Regimes covering such issues as applications, benefit plans, environment, drilling, safety, and royalties.

Regulations make approvals subject to provincial approvals. For example, prior to commencing exploratory work on reserve the proponent must be “granted permission by a provincial authority to conduct exploratory work in the province”.³⁵⁸ Similarly, before commencing any drilling on reserve, the proponent must “submit to the band council and the Executive Director a copy of a well license or other equivalent document issued by a provincial authority”.³⁵⁹

Another plausible explanation for IOGC relying on provincial oil and gas systems is that the Indian Reserve Regime is based on assimilation policies which advocate for the application of provincial laws on reserve which eventually envisioned First Nations operating as mini-municipalities.³⁶⁰ For example, Bartlett notes that it is a common practice for the Crown to incorporate provincial standards on land and cites the *Indian Act Forestry Regulations* as an example.³⁶¹ There is a notable difference between the forestry management regime and the Indian Reserve Regime in that DIAND negotiates agreements with the provinces to extend their systems onto reserve and it does not do this with oil and gas.³⁶²

Whatever the rationale, the application of provincial laws under the Indian Reserve Regime is objectionable for a number of reasons. First, the relationship between First Nations and the provincial Crown has been historically adversarial. Accordingly, the application of provincial law on reserve is a very contentious point with First Nations.³⁶³ Secondly, this

³⁵⁸ IOG Regulations, s.6.

³⁵⁹ IOG Regulations, s.11.

³⁶⁰ *Resource Development*, *supra* note 116.

³⁶¹ *Homeland*, *supra* note 1 at 140-143.

³⁶² *Resource Development*, *supra* note 116 at 140-143.

³⁶³ Imai, *supra* note 125 summary of *Indian Act*, s.88 litigation - provision dealing with the application of provincial laws on reserve. See especially Kent McNeil, “Aboriginal Title and the Division of Powers:

approach flies in the face of recognizing and respecting the ability of First Nations to manage their lands and resources. Thirdly, there are costs implications associated with IOGC adopting provincial regimes for monitoring, enforcing and administration, it would be prudent for the IOGC to negotiate some type of arrangement. If it does not, IOGC is potentially subjecting First Nations to devastating consequences should the provincial Crown refuse to assist IOGC in carrying out environment, conservation and safety measures under the Operations function as other federal oil and gas legislation do not apply on reserve land.³⁶⁴ Finally, the federal Crown has exclusive jurisdiction over “Indians, and Lands reserved for the Indians” not the provincial Crown. The IOG Act and Regulations employ a questionable method to indirectly incorporate provincial laws on to reserve. Canadian constitutional law does not permit inter-jurisdictional delegation.³⁶⁵ In other words, the federal government may not delegate federal jurisdiction to the provincial government or vice versa.³⁶⁶ To establish a comprehensive regulatory regime the federal government would need to employ a combination of administrative inter-delegation, referential incorporations and conditions as it does under the Offshore Regime. For example, the federal government delegates jurisdiction to the Offshore boards, as this type of delegation is wholly permissible.³⁶⁷ Next, the federal government adopts provincial laws as federal laws by

Rethinking Federal and Provincial Jurisdiction” (1998) 61 Sask. L. Rev. 431. But see Canadian Institute of Resource Law, *Application of Provincial Oil and Gas Legislation on Indian Reserves* (Calgary: CIRL, 1989). For referential incorporation see Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) McGill L J 308 and Nigel Bankes, “Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights” (1998) 32 UBC L Rev 317.

³⁶⁴ *IOGC Annual Report*, supra note 241 at 15 notes that IOGC is now pursuing communications and information sharing with the Alberta EUB to open communications on common issues and build on a MOU relating to pooling.

³⁶⁵ Hogg, supra note 95 at 347-376, c.14.

³⁶⁶ *Attorney-General Nova Scotia v. Attorney-General*, [1951] S.C.R. 31 (S.C.C.).

³⁶⁷ *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392 (S.C.C.).

referential incorporation.³⁶⁸ The *Implementation Acts* incorporate provincial royalty laws as federal laws to apply offshore as if the petroleum were produced on provincial lands.³⁶⁹

There is one caveat to this method of joint management, any delegation or referential incorporation must not expand the scope of provincial jurisdiction or it is invalid.³⁷⁰

In the case of the Indian Reserve Regime, it is arguable that section 4 (c) extends provincial jurisdiction to reserve lands to activities associated with the exploration, development and production of a subsurface resource, oil and gas. The pith and substance of the provincial law is exploration and development of oil and gas on reserve as well as environmental issues. An analysis of section 88 of the *Indian Act* is beyond the scope of this thesis, however, jurisprudence supports the application of provincial laws with respect to people on reserve through the common law as well as through section 88 in limited circumstances.³⁷¹ The fact that there are gaps in IOG Act and IOG Regulations does not mean that provincial laws should be incorporated to fill in the gaps. The essence of the point is that First Nations are opposed to the application of provincial laws on reserve particularly with respect to the management of their lands and natural resources.³⁷² By incorporating provincial oil and gas legislation onto First Nation lands diminishes an already low level of involvement by First Nations. First Nations, through litigation, are challenging the application of provincial laws and litigation continues to mount over IOGC's handling of its overall Operations

³⁶⁸ *Attorney-General Ontario v. Scott*, [1956] S.C.R. 137 (S.C.C.) wherein the court held referential incorporation is permissible. In *Coughlin v. Ontario Highway Transportation Board*, [1968] S.C.R. 569 (S.C.C.) the court held that referential incorporation may be of an anticipatory nature.

³⁶⁹ CNS Act, s.99 and CN Act, s.97 with modifications substituting references to provincial Crown with federal Crown and references to provincial lands to the offshore.

³⁷⁰ Hogg, *supra* note 95 at page 369.

³⁷¹ Maclean, *supra* note 192 at 10.

functions.³⁷³

D. Observations

At present, First Nations do not participate in any aspect of the Operations functions under the Northern, Offshore and Indian Reserve Regimes. One option to remedy this situation is to include First Nations in discrete aspects of the Operations function such as monitoring and enforcing environmental and conservation measures by legislative amendment or policy directive. This could be achieved through the environmental assessment process either by legislative amendment, policy directive or within the terms and conditions of approval. The responsible authorities, NOGD, CNSOPB, CNOPB, and IOGC have the authority to include terms and conditions they consider appropriate to ensure environmental objectives are met. Another option is to include First Nation participation through the benefit plans, development plans and terms of approvals. As part of the job, education and training strategies, First Nations could be provided opportunities to learn the more technical aspects of Operations functions. In the North, there are examples of benefit agreements that include First Nations in ongoing environmental managing roles.³⁷⁴

³⁷² McNeil, *supra* note 363. See also Brian Slattery, "The Organic Constitution Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osg Hall LJ 101 and Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Cnd Bar Rev 261.

³⁷³ See *Shell Canada v. Canada*, [1998] 148 F.T.R. 24 (F.T.D.); *Imperial Oil Resources Ltd. v. Canada*, [1997] F.C.J. No. 1767 (F.T.C.), online: QL (FJ); *Stoney Tribal Council v. PanCanadian Resources*, [1999] 1 CN.L.R. 219 and *Stoney Tribal Council v. PanCanadian Resources*, [2000] A.J. No.870 (A.C.A.), online: QL (CJ); *Chevron Canada Resources v. Canada*, [1997] 210 A.R. 64 (A.Q.B.), *Imperial Oil Resources Ltd. v. Canada*, [1998] F.C.J. No. 1708 (F.C.A.), online: QL (FJ); and *Shell Canada Ltd. v. Attorney General*, [1998] 3 F.C. 223 (F.C.A.). Most litigation deals with production, royalty calculations and IOGC's right to audit. Currently, the IOG Regulations do not provide an express right to audit.

In other words, the Operations functions could provide capacity building opportunities to First Nations that would support internal capacities to pursue a more diverse array of economic development initiatives associated with all aspects of oil and gas development. Finally, another option includes using alliances and joint ventures where First Nations have equity interests in oil and gas projects. Without exposure to the technical aspects of the Operations functions, First Nation will remain limited in how they participate in oil and gas development. In other words, they may be relegated to providing basic essential services such as road building and catering. Any of these option could provide First Nations with exposure to sophisticated oil and gas corporations with a depth of experience in the compliance with Operations functions. In limited circumstances where First Nations have band owned companies (BOC) they participate as part of Industry not as Regulators under the Operations function. A BOC must comply with the regulatory regime in carrying out its oil and gas operations.

A final observation includes the fact that liabilities associated with the Operations function are significant. For instance, improper monitoring and enforcement can result in costly environmental accidents or over development resulting in diminished revenues. Therefore, First Nations must be cautious in taking on regulatory responsibilities under this function.

³⁷⁴ Norther News Service, Press Release, "Diavik Project Looks for Go-Ahead in 1999" (15 August 2000). See Northern News Service website at <<http://www.nnsi.com>>, (last accessed: 16 September 2000) for press releases covering at "Mining" and "Oil and Gas" economic opportunities including impact benefit agreements.

PART VII: CONCLUSIONS

To ascertain what role First Nations have and should have under federal oil and gas regimes a great many issues have been canvassed. First, a brief history and background on First Nations followed by an analysis of the impact of aboriginal and treaty rights and the doctrine of fiduciary duty on oil and gas was conducted. Next, there was an overview of federal oil and gas regimes and the oil and gas industry to provide some context. As environmental assessments are directly linked to oil and gas development, it was necessary to determine what role First Nations had under CEAA. Finally, an analysis of what role, if any, First Nations had under the Northern, Offshore and Indian Reserve Regimes was conducted. To supplement the overall analysis, a comparative analysis regarding the role Maori have in natural resource development in New Zealand was undertaken. Along the way problems were identified, observations made and options suggested to improve First Nation participation under the federal oil and gas regime.

In this final part, three oil and gas models will be outlined to provide First Nations with a more meaningful role in oil and gas management. The first option is to establish a First Nation Model. Presently, there is only one federally recognized First Nation Model. It is under the Nisga'a Final Agreement which provides the Nisga'a with both ownership and jurisdiction over oil and gas, although there are several similar agreements nearly complete. The second option is to establish a Joint Management Model. This model could be structured in a way to address the full range of First Nation interests and guarantee their participation in oil and gas management. The third option is to create a Consultation Model. This model can

serve as an interim step to developing the other two models on a regional basis that meet the specific needs of First Nations.

These recommendations are general and would require adjustments to reflect regional differences among First Nations. The fact that First Nation access to lands and resource vary so dramatically across this country means any overall strategy has to be capable of addressing these differences. The level of involvement First Nations have under each of the models will varies from a moderate to high level. Moreover, a different model could be applied to the Rights Issuance functions and the Operations functions and even each of the four stages of oil and gas development. These models could be applied to other natural resource management regimes and/or used in a federal and provincial context.

A. Option #1 – First Nation Model

At this time, the viability of this option is limited, though it would provide a high level of involvement to First Nations. I do not recommend the establishment of a First Nation Model. I do not believe it is in the best interests of First Nations to assume jurisdiction and authority over oil and gas management without the corollary issues of capacity and funding being fully addressed. A salient fact that influences my recommendations is that First Nations are struggling with developing governance models that reflect their cultural values and are accountable to their people.³⁷⁵ It will take time to develop the capacity to operate a new governance system.³⁷⁶ Designing and implementing laws for all the areas of governance will

³⁷⁵ "Water and Rocks", *supra* note 263 at 446-448.

³⁷⁶ John Graham, *Governance* (Ottawa: Institute On Governance, 1998).

require time. This does not mean the task is insurmountable. First Nations have been tremendously successful in dealing with governance areas on a sectoral basis. First Nations have also been successful in designing and implementing laws and policies to carry out their Comprehensive Land Claims Agreements.³⁷⁷ Yet there are still challenges in identifying expertise within the First Nations especially with respect to oil and gas.

I recommend we watch and see how the Nisga'a Final Agreement is implemented. The Nisga'a will be faced with choices on how and when it takes up jurisdictions and authorities set out in its agreement. These choices will in turn be based on the implementation funding and establishing a viable economy to support their governance functions. I imagine that their number one priority is not designing and implementing an oil and gas regime. In the future, the First Nation Model may be a workable option. But, this will be at a time when other First Nation priorities such as the health and welfare of the communities have been adequately addressed and First Nation governments are in a position to develop a First Nation Model that meets their needs and is financially viable.

I do not support the recommendations made to transfer the Indian Reserve Regime over to First Nations. The transfer of the Indian Reserve Regime will only perpetuate a paternalistic governance model. I base my assertion on the fact that the Pilot Project which is characterized as an initiative that gives First Nation power and control over their resources is simply the offloading of administrative programs and services to the First Nation without sufficient resources and no real powers or authorities. Instead, I recommend the Indian Reserve Regime be restructured with the repeal of the IOG Act and Regulations and

³⁷⁷ The Sahtu and Gwich'in Agreements, *supra* note 224 only provide for quasi-self-government powers.

enactment of new legislation that provides First Nations with real decision-making powers and accountability mechanisms. The IRC and the Board of Directors for IOGC are investigating the viability of this option and I look forward to examining the recommendations they develop. An incremental approach to any transfer would be prudent. More specifically, I would recommend that an option be developed that transfers the Rights Issuance function to First Nations. I do not recommend that First Nations take on the Operations function. The liabilities, costs and capacities associated with the Operations function are simply too high to assume at this point in time. This is particularly true when one considers economies of scale associated with operating a First Nation oil and gas regime that will likely be on a smaller scale than that other federal regimes. Any economic benefits derived from the Rights Issuance functions or participation in benefit plans would be negated by the costs of designing and implementing the Operations function. Nevertheless, I would recommend addressing some of the elements of the Operations functions through an Environmental function. I believe that First Nations should have their own Environmental functions. Moreover, I believe that First Nations should be an integral part of the federal and provincial environmental regimes.

B. Option #2 - Joint Management Model

The joint management models in Canada and in New Zealand have influenced my recommendation for establishing a Joint Management Model. It would provide First Nations with a moderate to high level of involvement. This model is based on the principles underlying the purpose of section 35 of the *Constitution Act, 1982* and the *Treaty of*

Waitangi. I believe the principle of partnership, the objective of reconciling First Nations' prior occupation with the Crown's sovereignty and the doctrine of fiduciary duty demand nothing less than a Joint Management Model. I believe this option can meet the needs of First Nations and is flexible enough that it does not require the express recognition of First Nation jurisdiction and authority. If First Nations approach oil and gas management without the rhetoric of 'exclusive jurisdiction', 'inherent right' or 'self-government', a major stumbling block with government, I believe we can still achieve the benefits of these concepts at a much lower cost, both financial and human. Under this model First Nations should be afforded decision-making powers, access to revenues and a role in law and policy development. I recommend that this model employ joint boards, either governmental or independent, to carry out oil and gas regulatory management. I will refrain from recommending on how First Nations should be represented under this model as it is an issue that must be addressed by First Nations. I will note, however, that larger aggregates provide better economies of scales than 600 individual First Nations with 600 regulatory boards.

The Offshore Regime illustrates that it is possible to design and implement an oil and gas management regime that shares jurisdictions and revenues. It is a federal-provincial joint management model that could be expanded to include First Nations. The joint land, water and environment boards under the Northern Regime are examples of the Crown and First Nations working together to foster sustainable development of the North's vast natural resources. In order for the Joint Management Model to succeed it would have to approach oil and gas management in a holistic fashion addressing the full range of issues associated with oil and gas management. First Nations have expressed a desire to have their social,

cultural, political and economic interests addressed in more than just an environmental context. Accordingly, the statutory basis for a Joint Management Model should not be based on environmental legislation alone as it must also be based on oil and gas legislation. Another critical component to this model is the inclusion of First Nations in revenue sharing. First Nations have expressed a desire to access the benefit derived from natural resource development including oil and gas. At a minimum, this model would ensure that First Nations are included in benefit plans. This approach is flexible enough that boards could be structured to reflect regional representation. The degree of decision-making powers could vary depending on the issues and proximity of the project to each First Nation. I base this recommendation on the fact that the federal government already shares revenues with First Nation under the Northern Regime and gives almost all of the revenues to the respective provinces under the Offshore Regimes. New Zealand's approach can be characterized as joint management in that it is attempting to include the Maori within the existing legislative regimes. The Waitangi Tribunal frequently recommends joint boards as an option to facilitate the participation of Maori in natural resource management.

There are many benefits to Joint Management Models. First, it is effective and efficient to have one management regime in place. An open and transparent oil and gas regime promotes economic development and creates certainty for investors. Secondly, ownership and jurisdiction could remain with the Crown. This of course is a desire of the Crown, not the First Nations.³⁷⁸ Thirdly, there would be economies of scale. It would be less costly to set up Joint Management Models than to continue to negotiate separate resource management

agreements with over 600 different First Nations. Finally, and most important, it supports First Nations to build and strengthen their communities. It would enable First Nations to play a role in decisions that impact their people as well as create a revenue source to support the creation of economies to support their governance. This is a controversial recommendation in that it may appear to perpetuate the status quo. However, I argue that if structured properly, it can work.

C. Option #3 - Consultation Model

The Consultation Model is a compromise or interim recommendation and arguably a constitutional obligation of the federal and provincial governments. I premise my assertion on the fact that the Crown has a fiduciary obligation to consult with First Nations on all aspects of oil and gas management. It would provide First Nations with a moderate level of involvement and if implemented rigorously, a high level of involvement. For this option to work, consultation must be on a broad range of First Nation issues and not restricted to the environmental assessment process. In addition, decision-makers such as 'consent authorities' and 'responsible authorities' must be compelled to fully consider First Nation concerns. Meaningful consultation can provide First Nations with significant benefits to address the infringement of their constitutionally protected rights. Consultation may result in compensation, First Nation participation in decision-making and in some instances it may

³⁷⁸ Though, First Nations under the Indian Reserve Regime have indicated their preference for the Crown to retain its fiduciary obligations. If this model were pursued, it would retain a degree of liability by virtue of its jurisdiction.

involve the consent of the First Nation.³⁷⁹ I would recommend that the Consultation Model provide First Nations with a veto if the project will impact aboriginal title (un-extinguished) as well as close proximity to reserve lands or Settlement Lands.

In order to develop a Consultation Model some fundamental questions will need to be addressed such as who, when and how consultation should occur. My recommendations build on the jurisprudence regarding consultation with First Nations.³⁸⁰

1. Who Should Consult?

The Crown has the duty to consult with First Nations.³⁸¹ The courts have held that both the federal and provincial Crown have a fiduciary duty vis-a-vis First Nations as there is only one, indivisible Crown.³⁸² Accordingly, if the NOGD, CNSOPB, CNOPB and IOGC have a fiduciary duty, they must consult with First Nations. Since there are limits on who has a duty to consult on behalf of the Crown the Consultation Model should clearly designate who will consult on behalf of the Crown. For example, quasi-judicial bodies like the National Energy

³⁷⁹ *Delgamuukw*, *supra* note 60 at 80, 93. Both Chief Justice Lamer and Mr. Justice La Forest suggest infringement includes fair compensation for First Nations. Also see President Cooke's comments *supra* note 113 at 151.

³⁸⁰ For comparative purposes, see *Proposed Guidelines for Local Authority Consultation*, *supra* note 237 that outline an excellent proposals for consultation committees and bodies to achieve better consultation.

³⁸¹ In the case of the common law duty to consult the jurisprudence indicates that it accrues to the Minister as represented by the various department, ministries, agencies and officials. See *TransCanada Pipeline Ltd. v. Beardmore (Township)*, [1998] 2 C.N.L.R. 240 (O.D.C) wherein the court held a provincial commission has a duty to consult with First Nations. In New Zealand, the Crown has a duty to consult based on statutory obligations associated with the *Treaty of Waitangi*, *NZMC (1987)*, *supra* note 113.

³⁸² See especially *Halfway River First Nation v. British Columbia*, [1999] 4 C.N.L.R. 1 (B.C.C.A.) [hereinafter *Halfway River*.], the court applied the *Sparrow* justification test to a treaty right infringement by the Provincial Crown and held the Provincial Crown was bound by the fiduciary duty. See also *Gitanyow First Nation v. Canada*, [1999] 3 C.N.L.R. 89 (B.C.S.C.), [hereinafter *Gitanyow*] the court held that the Crown was indivisible and that the fiduciary duty applied to both the federal and provincial governments. *Delgamuukw*, *supra* note 41 confirms that the fiduciary duty applies to both the federal and provincial Crowns.

Board ("NEB") do not have a fiduciary duty to consult with First Nation.³⁸³ Finally, the Crown's duty to consult does not extend to third parties.³⁸⁴ Nevertheless, as a matter of policy or pursuant to legislation the Crown often directs third parties to consult with First Nations.³⁸⁵ I recommend that the Crown develop a clear policy on consultation and consult through qualified persons rather than on an ad hoc basis.³⁸⁶

Consultation is a two-way process. There is a reciprocal duty for a First Nation to express its interests and concerns and consult in good faith.³⁸⁷ However, if the scope of consultation does not address the full range of aboriginal and treaty issues, the First Nation is faced with a difficult decision. A First Nation cannot refuse to negotiate and later claim there was insufficient consultation.³⁸⁸ In *Ryan v. B.C.*, the court held the Crown had fulfilled its duty to consult by providing the First Nation with ample opportunity to engage in consultations and the First Nation's refusal to consult did not invalidate the process.³⁸⁹ Moreover, a First Nation cannot demand conditions be fulfilled before consultations can be commenced.³⁹⁰ If

³⁸³ *Quebec v. Canada*, *supra* note 278. Similarly, in New Zealand the duty to consult does not extend to third parties or quasi-judicial bodies. See e.g. *Whakarewarewa Village Charitable Trust v. Rotorua District Council* (Planning Tribunal, W 61/94, 25 July 1994) wherein the PT distinguishes between council officers who consult with concerned parties in a non-judicial capacity and council acting as a quasi-judicial body as a consent authority.

³⁸⁴ *Treaty 8 Tribal Association v. Alliance Pipeline Ltd.*, [1999] 4 C.N.L.R. 257 (N.E.B.) Hearing Order No.GH-3-97 confirms this well established principle in noting the duty to consult did not accrue to Alliance Pipelines.

³⁸⁵ In circumstances where there has been consultation between third parties and First Nations the courts have taken this under consideration. See *Kelly Lake*, *supra* note 154 at 143, 157.

³⁸⁶ This would address the Crown's concern over the bureaucracy's capacity to consult see *Uruamo v Carter Holt Harvey Ltd* (Planning Tribunal, A43/96, 24 May 1996) and *Kelly Lake*, *supra* note 186.

³⁸⁷ *Halfway River*, *supra* note 381 at 44.

³⁸⁸ *Kelly Lake*, *supra* note 186. See also *Rural Management Ltd v. Banks Peninsula District Council* (Planning Tribunal, W 35/94, 5 May 1994).

³⁸⁹ *Ryan v. British Columbia*, [1994] B.C.J. No.194 (B.C.C.A.), online: QL (BCJ) the First Nation cannot frustrate the process by refusing to meet and by making unreasonable demands. In *Vuntut Gwitchen*, *supra* note 273 wherein the court noted that at virtually every step of the consultation process both the Crown and the proponent elicited the input from the First Nation. Therefore, it concluded there was adequate consultation.

³⁹⁰ *Wilps Gutginuxs v. British Columbia*, [1995] B.C.J. No.1944 (B.C.S.C.), online: QL (BCJ), the First Nations refused to negotiate until certain demands were fulfilled and broke off talks several times. The court held the

First Nations are not satisfied with the level of consultation, the only remedy available is litigation or civil protest. One option is to elect to consult on a without prejudice basis. Clearly, there is a need to remedy this issue. Therefore I recommend that the Consultation Model be developed that First Nation will want to participate in because it is capable of addressing the full range of issues affecting First Nations.

2. With Whom Should the Crown Consult?

The Crown must consult with any First Nation potentially affected by the oil and gas development.³⁹¹ Moreover, I recommend that the Crown provide sufficient resources to the First Nations so they may participate in the consultation process. There are serious issues about the capacity of First Nations to participate in a consultation process on complex regulatory issues without the provision of resources. First Nations argue that there is a duty to provide sufficient resources so that they may participate in consultation in a meaningful manner. The Crown has not accepted this position, however, it does provide consultation monies on an ad hoc basis. For example, the Crown provided First Nations in Atlantic Canada with modest resources to consult on some oil and gas issues.³⁹²

Crown had discharged its fiduciary obligations by attempting to arrange consultations in 1991 and 1994 and by ensuring a detailed consultation process was established to address any First Nation concerns.

³⁹¹ A similar approach is taken in New Zealand where the Crown takes a broad and inclusive approach to consultation. The Crown consults with Maori groups potentially affected by the Crown act or omission, the fact that one group was recognized really late in the process did not invalidate the process *Tautari v Northland Regional Council* (Planning Tribunal, A55/96, 24 June 1996). There is a preference to consult with the larger aggregates such as the iwi over individual *Arrigato Investments Ltd. v. Rodney District Council* (Environment Court, A24/99, 4 March 1999). For example, in *Winter & Clark & Ors v Taranaki Regional Council* (Environment Court, A106/98, 17 August 1998) the PT agreed to hear from several groups regarding a proposed gas well in North Taranaki. The PT held where the applicant derive from the relationship of the hapu

3. When Should The Crown Consult?

The Crown should consult with First Nations during all phases of oil and gas development. Specifically, the Crown should consult with First Nations over all aspects of oil and gas development under the Northern, Offshore and Indian Reserve Regimes. I argue that the Crown's fiduciary duty requires nothing less.

4. How Should The Crown Consult?

The Crown must consult in good faith.³⁹³ The Crown's fiduciary relationship with First Nations means there is a duty to consult in a meaningful manner. In New Zealand the Crown must consult in "the spirit of goodwill and open-mindedness so that all reasonable (as distinct from fanciful) planning options can be carefully considered and explored."³⁹⁴ This means that the Crown must consult on the full range of issues.³⁹⁵ In addition, the Crown must

with the site and its environment as ancestral land and their sense of kaitiakitanga in respect of it, the applicant has a greater interest in the proceedings than the public generally.

³⁹² *UNIS v. NS*, *supra* note 277.

³⁹³ In *Gitanow*, *supra* note 381, the court held there is nothing obliging the Crown (both federal and provincial) to negotiate a treaty but once negotiations begin, there is a duty to negotiate in good faith. This decision is consistent with *Nunavik*, *supra* note 187. In *Nunavik* the court held that there is a general duty to consult when aboriginal and treaty rights may be affected and the duty to consult is even higher when there are land claims negotiations because the process is protected by s. 35 of the *Constitution Act, 1982*.

³⁹⁴ *Nunavik*, *supra* note 187 wherein the court has indicated that the Crown must give serious consideration to the concerns and interests of the First Nation. See also *Greenshill*, *supra* note 295 at 39 relying on *Wellington Airport Ltd v. Air New Zealand* [1993] 1 NZLR 671 at 675 wherein the court notes that consultation "is to be a reality, not a charade". *Te Runanga O Taumarere & Anor v. Northland Regional Council & Far North District Council*, [1996] NZRMA 77 wherein the court has taken a similar approach stating the consent authority must fully consider the impacts on the Maori interests including sewage, ocean, and cultural significance.

³⁹⁵ In *Cheslatta Carrier Nation v. British Columbia (Project Assessment Director)*, [1998] 3 C.N.L.R. 1 (B.C.S.C.) the court held that the Crown had failed to consult properly on a wildlife issue. The Crown had not provided the First Nation with maps and information that would have enabled them to consider the impact of the project and consider what measures or compensation would be required to address their needs. In *R. v. Jack*, [1995] C.N.L.R. 113 (B.C.C.A.), the court held that DFO did not satisfy the standard of consultation required to justify the infringement of aboriginal rights because it did not consult on all of the issues or provide the First Nation with all of the relevant information.

provide adequate notice and time to the First Nation with sufficient information for them to understand what the issue is upon which they are being consulted.³⁹⁶

5. What Constitutes Consultation?

Consultation is fluid. At one end of the spectrum consultation may be satisfied by the exchange of correspondence, although it is difficult to imagine a letter will discharge the Crown's fiduciary obligation to consult and justify the infringement of an aboriginal right. In the middle, there is extensive consultation with First Nations on all aspects of the infringement where both parties are fully apprised as to each other's concerns. At the other end, consultation involves some degree of First Nations' consent to justify the infringement. The standards of the duty to consult vary depending on the source of the duty and the aboriginal and treaty rights being affected. For example, an obligation to consult on an infringed aboriginal or treaty right protected by s.35 of the *Constitution Act, 1982* will be different than a duty to consult based on the general fiduciary relationship between the Crown and First Nations peoples. Chief Justice Lamer discusses this issue:

... aboriginal title encompasses within it the right to choose to what end a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect of their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title

³⁹⁶ *Gitludahl v. British Columbia*, [1994] 4 C.N.L.R. 43 (B.C.S.C), although decided on other grounds in obiter Madame Justice Newbury commented that the way the First Nation was treated left something wanting had a fiduciary duty been applicable. Under the statutory consultation process, the First Nation was not supplied with information on the effects of logging in their traditional territory and was treated like all other interest groups. *Halfway River*, *supra* note 381 at 44. The *Halfway River* decision confirms the duty to consult imposes a positive obligation to reasonably ensure that First Nations are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered

is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relations to aboriginal lands.³⁹⁷

I recommend the Consultation Model provide for a range of consultation processes that vary depending on the nature of the issue.³⁹⁸

D. Conclusions

In this era of 'negotiation and renewal', law and public policy clearly support a role for First Nations under not only oil and gas regimes but also natural resource management regimes. There is no single model that can address the multitude of the issues facing First Nations in their quest for ownership and control over their lands and resources. First Nations have options on how to improve their roles under the Northern, Offshore and Indian Reserve Regimes. The options and models are not mutually exclusive and can be applied in an incremental and phased-approach to implement change to existing federal systems.

In the short term, immediate action must be taken to create a Consultation Model to ensure that the Crown consults with First Nation under each of these models and fulfills its fiduciary

³⁹⁷ *Delgamuukw*, supra note 60 at 79.

obligations to First Nations. Until substantive changes are made to consultation processes under existing legislation or a Consultation Model is developed, most First Nations will be denied the ability to participate in any meaningful way in oil and gas development. First Nations will be forced to challenge development through litigation or other political means.

Over the next ten years, focus should be on the development of Joint Management Models that provide First Nations with decision-making powers and address resource revenue sharing. Regional differences can be accommodated under this model as well as inter-jurisdictional issues.

Over the long term, First Nation Models can be developed. Models can be adjusted by carefully monitoring the successes and failures of First Nation oil and gas management regimes under Comprehensive Land Claim Agreements such as the Nisga'a Final Agreement. Internal capacity issues with respect to infrastructure, expertise and must be addressed before First Nation can establish economically viable oil and gas models. I reiterate my preference to focus on First Nation participation under the Rights Issuance function over the Operations functions for the simple reason economic, social and cultural benefits are better addressed under this function.

Whatever option is pursued the onus will be on First Nations to determine how they want to participate as governments under these models. There are existing models available that deal with jurisdiction and authorities among First Nation communities such as development

³⁹⁸ The range of consultation could be similar to the range of environmental assessment options under CEAA. The exercise would be to establish criteria to determine what type of consultation process is necessary during

corporations, trust boards, tribal councils and the use of governments at both the nation and community levels. The issue of representation must be answered by each First Nation and be based on their culture and histories. This issue has proven to be challenging given the history of discord amongst claimant groups under the *Comprehensive Claims Policy* who have united and disbanded in the pursuit of modern day treaties. First Nations must develop a consensus as individual nations on how to approach oil and gas management powers. Oil and gas revenues can provide valuable economic opportunities to First Nations that assist in the development of strong governments and communities. First Nations have an active role to play under federal oil and gas models can contribute to the better management of Canada's resources for the benefit of all Canadians.

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