A REVIEW OF THE *CANADA PETROLEUM RESOURCES ACT* AND THE *CANADA OIL AND GAS OPERATIONS ACT* AS THE LEGAL FRAMEWORK FOR FUTURE DEVELOPMENT IN THE NORTHWEST TERRITORIES

RAYMOND E. QUESNEL*

This article examines the current core legislation that governs oil and gas activity in Canada's North. While there has been increased industry interest in the Northwest Territories, there has thus far been a lack of actual oil and gas projects against which to measure the efficacy of the current regime in the context of northern development. An historical analysis of the legislative developments indicates that the northern regime formed the basis for the legislative framework now governing east coast megaprojects. The author evaluates the current basis on which rights are granted and recorded, the tenure system, the royalty regime, and the project approval process. He concludes that, while the northern regime is suitable for large scale developments, it may require certain changes to accommodate smaller, more conventional projects likely to be undertaken.

Cet article examine la législation de base qui régit actuellement les activités pétrolières et gazières dans le Nord canadien. Bien que l'intérêt pour l'industrie dans les Territoires du Nord-Ouest a augmenté, il y a eu jusqu'#a présent, un manque de véritables projets pétroliers et gaziers permettant de mesurer l'efficacité du régime actuel dans le contexte de l'exploitation du Nord canadien. Une analyse historique de l'élaboration des lois indique que le régime du Nord représente la base d'un cadre juridique qui régit maintenant les mégaprojets de la côte est. L'auteur évalue la base actuelle sur laquelle les droits sont accordés et enregistrés, le mode de faire-valoir, le régime de redevances et le processus d'approbation du projet. Il en est arrivé à la conclusion que, bien que le régime du Nord convienne à l'exploitation de projets à grande échelle, certains changements pourraient être nécessaires pour convenir aux projets plus petits et plus traditionnels qui pourraient alors être entrepris.

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I. INTRODUCTION

A period of sustained high prices for oil and gas, an expanding market, increased pipeline infrastructure, settlement of Aboriginal land claims, and relatively recent discoveries have again made the Northwest Territories an area of particular interest for those wishing to explore and develop hydrocarbon resources in the North. A wide range of legislation, much of it of relatively new vintage, governs the many facets of oil and gas activities in the North. Nevertheless, the core oil and gas legislation governing most of

* Partner, McCarthy Tétrault, Calgary, Resources and Environment Division.

the Northwest Territories and the adjacent offshore area remains the *Canada Petroleum Resources Act*[1] and the *Canada Oil and Gas Operations Act*.[2] The *COGOA* (formerly called the *Oil and Gas Production and Conservation Act*) has been in force since the late 1960s. With the coming into force of the *CPRA* in February 1987, the combined *CPRA/COGOA* regime has now been in place for over fourteen years. Accordingly, a review of the legislation and its appropriateness to current circumstances is timely.[3] This article discusses certain aspects of the *CPRA* and the *COGOA* in that light.

II. HISTORICAL PERSPECTIVE

A review of the appropriateness of the current *CPRA/COGOA* regime necessarily entails a consideration of the history of legislative developments applicable to the North. Between March 1982 and February 1987, oil and gas activities in the North were governed by three different legal regimes. Prior to March 1982 and the announcement of the National Energy Program, much of what is now governed by the *CPRA* was governed by the *Canada Oil and Gas Land Regulations*[4] made pursuant to the *Public Lands Grants Act*[5] and the *Territorial Lands Act*.[6] These regulations were superseded by the *Canada Oil and Gas Act*.[7] The last statute represented a significant portion of the legislation implementing the National Energy Program. The *Canada Oil and Gas Act* was, in turn, replaced by the *CPRA* in 1987. Thus, in the space of several years, the core of the northern oil and gas regime changed three times. In the interim, the Inuvialuit settled their western arctic land claim with the Government of Canada.[8] Since then, settlement of several other Aboriginal land claims has been achieved; namely, the Gwich'in Comprehensive Land Claim Agreement, the Sahtu Dene and Metis Comprehensive Land Claim Agreement,[9] and the Nunavut Settlement Agreement.[10] Other land claims (*i.e.*, Deh Cho, North Slave, and South Slave areas) remain pending and may ultimately result in further land claims legislation. In addition, the *MacKenzie Valley Resource Management Act*[11] has been enacted.

The impact of land claims settlement legislation and the *MacKenzie Valley Resource Management Act* on the administration of the *CPRA/COGOA* regime is of enormous significance. The legislation addresses the right of Aboriginal groups to have a major role in the development of the resources in their settlement areas and to benefit economically from such development. As well, the legislation provides Aboriginal groups a major role

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1 R.S.C. 1985, c. 36 (2d Supp.) [hereinafter *CPRA*].

2 R.S.C. 1985, c. O-7 [hereinafter *COGOA*].

3 The *CPRA* was reviewed comprehensively when introduced, but it has received little attention since then. See E.E. Evans, "Bill C-92: The Canada Petroleum Resources Act" (1986) 25 Alta. L. Rev. 59.

4 C.R.C., c. 1518.

5 R.S.C. 1985, c. P-30.

6 R.S.C. 1985, c. T-7.

7 S.C. 1980-81-82-83, c. 81, s. 1.

8 See the *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c. 24, as am., which implements the Inuvialuit Final Agreement.

9 See the *Gwich'in Land Claim Settlement Act*, S.C. 1992, c. 53 and the *Sahtu Dene and Metis Land Claim Settlement Act*, S.C. 1994, c. 27.

10 See *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29.

11 S.C. 1998, c. 25.

in the protection of the environment and in the preservation of their way of life and heritage. For the most part, this legislation focuses on such matters as environmental impact reviews, benefits, surface rights, and land and water use. To the extent that land claims agreements transfer subsurface rights to oil and gas to Aboriginal groups, the *CPRA* does not apply, except in respect of "grandfathered" rights extant at the time of the applicable settlement agreement. In terms of area, the subsurface rights in the control of Aboriginal groups is relatively small. As such, the *CPRA/COGOA* regime remains applicable throughout most of the Northwest Territories and in the adjacent offshore area.

As part of the dismantlement of the National Energy Program, the federal government entered into a series of so-called "accords." These agreements included the Western Accord,[12] the Canada-Newfoundland Atlantic Accord,[13] and the Canada-Nova Scotia Offshore Petroleum Resources Accord.[14] As well, on September 6, 1988, the Government of Canada and the Government of the Northwest Territories entered into an Agreement in Principle regarding a Northern accord. The Agreement in Principle was intended to establish the basis for negotiating a Northern accord. As stated in the Agreement in Principle, the purpose of the Northern accord is:

- to achieve the orderly development of oil and gas resources for the benefit of Canada as a whole and the Northwest Territories in particular;
- to provide a stable and fair oil and gas management regime for the industry;
- to increase the economic self-sufficiency of the Northwest Territories;
- to protect any oil and gas related Aboriginal rights and interests flowing from claim settlements; and
- to advance the political development of the Northwest Territories consistent with the structure of Canadian federalism.

In addition to the above objectives, the Agreement in Principle articulated several principles. One principle was that the Government of Canada agreed to a phased-in transfer to the Government of the Northwest Territories of the administrative and legislative powers to manage oil and gas resources onshore in the Northwest Territories, including:

- the disposition and administration of oil and gas rights;

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[12] Canada, *The Western Accord: An Agreement Between the Governments of Canada, Alberta, Saskatchewan, and British Columbia on Oil and Gas Pricing and Taxation* (Ottawa: Government of Canada, 1985).

[13] See *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3.

[14] See *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28.

- the determination and administration of oil and gas resource revenues, including royalties, bonus payments, rentals, and licence fees;
- the regulation of oil and gas exploration, development, and production activities; and
- the management of territorial benefits programs.

At the same time, the Agreement in Principle recognized that the existing legislative regime onshore was the *CPRA* and the *Oil and Gas Production and Conservation Act* (now the *COGOA*). It also recognized that the eventual territorial onshore oil and gas legislative regime would be modelled after existing regimes in Canada and would be compatible with the offshore regime. The Agreement in Principle is interesting because there is a tension between devolution of authority to the territorial government and a desire to maintain the *CPRA/COGOA* regime (or, at least, one compatible with the offshore regime). To date, no Northern accord has been entered into in relation to the Northwest Territories.

In contrast to the Northwest Territories, devolution has already occurred with respect to the Yukon. In 1993 the Government of Canada and the Yukon signed the Canada-Yukon Oil and Gas Accord.[15] Pursuant to the transfer of responsibility for oil and gas matters contemplated by this accord, the Yukon has enacted the *Yukon Oil and Gas Act*.[16] The *Yukon Oil and Gas Act* presents an interesting attempt to accommodate several first nations land claims settlements[17] with a blend of the *CPRA/COGOA* regime and concepts derived from provincial oil and gas regimes. Such blending raises the issue of what the ultimate oil and gas legal regime in the Northwest Territories will look like when devolution finally occurs with respect to the territorial government.

With regard to the Northwest Territories' oil and gas regime being compatible with offshore regimes, it is interesting to note that the legal regime applicable to the offshore area adjacent to the Northwest Territories remains the *CPRA/COGOA* regime. The *CPRA/COGOA* regime also applies to the Newfoundland offshore area and the Nova Scotia offshore area. The *CPRA* and the *COGOA* form, respectively, the basis for Parts II and III of the *Canada-Newfoundland Atlantic Accord Implementation Act*.[18] As well, the *CPRA* and the *COGOA* form, respectively, the basis for Parts II and III of the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*.[19] If the Agreement in Principle is taken at face value, the core oil and gas legislation in the Northwest Territories will continue to be the *CPRA* and *COGOA*. The Yukon experience suggests, however, that some changes to the core oil and gas legislation may occur,

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15 See the *Canada-Yukon Oil and Gas Accord Implementation Act*, S.C. 1998, c. 5.

16 S.Y. 1997, c. 16.

17 See *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, and *An Act Approving Yukon Land Claims Final Agreements*, S.Y. 1993, c. 19.

18 *Supra* note 13.

19 *Supra* note 14.

regardless of principles set forth in the Agreement in Principle regarding a Northern accord.

III. SHOULD THE *CPRA* AND *COGOA* BE CHANGED?

In the process of devolution, or even in the absence of devolution, should the *CPRA/COGOA* regime be changed, insofar as that regime relates to the Northwest Territories? An argument can be made that it is too early to know. At this juncture, there is very little experience to guide an exercise in legislative amendments. Few exploration projects have progressed to actual development in the Northwest Territories. The Norman Wells project, one of the first major projects in the North, is exempt from the *CPRA*. The *CPRA* provides that

> [n]otwithstanding any other provision of this Act, the Norman Wells Agreement of 1944 and the Norman Wells Expansion Agreement of 1983 shall continue in force in accordance with the terms and conditions of those Agreements, as amended by the Norman Wells Amending Agreement of 1994, and sections 1 to 117 [of the Act] do not apply to any of those Agreements.[20]

Operations at Pointed Mountain and Kotaneelee are governed by oil and gas leases issued under the *Canada Oil and Gas Land Regulations*[21] and, pursuant to s. 114(4) of the *CPRA*, such leases shall continue in force in accordance with the terms and conditions of those leases. Bent Horn, a demonstration project producing relatively small amounts of crude oil on Cameron Island in the high arctic, while governed by the *CPRA/COGOA* regime, is now abandoned. The recent discoveries at Fort Liard have been on production for less than two years. In other words, there is no substantial track record by which to judge the efficacy of the *CPRA/COGOA* regime as it applies to the Northwest Territories.

As noted earlier, however, the *CPRA* and the *COGOA* form the basis of the core oil and gas regime applicable to the Newfoundland and Nova Scotia offshore areas. To date, several projects have been successfully developed under regimes substantially the same as the *CPRA/COGOA* regime, namely the Hibernia project, the Sable project, and the Terra Nova project. Two of these projects are offshore crude oil development projects, and one is an offshore natural gas development project. Each of these projects may be described as megaprojects for they entailed capital expenditures in the billions of dollars to reach first production.

The *CPRA/COGOA* regime was implemented to address the needs of megaprojects. It was also implemented to address grievances voiced by the oil industry in respect of the National Energy Program. With regard to the latter, the *CPRA* addressed a number of issues, including:

- the elimination of the "Crown Share" under the *Canada Oil and Gas Act*;
- the reduction and ultimate elimination of Canadian ownership requirements;

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20 *Supra* note 1, s. 114(5).

21 *Supra* note 4.

- the elimination of direct issuance of lands without a competitive bidding process and preferences in favour of crown corporations with regard to land issuance; and

- the implementation of a compulsory transparent and competitive land issuance system based on a single criterion by which bids would be judged.

With regard to the needs of megaprojects, the *CPRA* introduced a number of changes, including:

- a new land tenure system designed to accommodate the long lead time necessary to develop projects in the North and offshore (*i.e.*, exploration licences for terms of up to nine years, significant discovery licences having indefinite terms, and production licences having terms of twenty-five years with certain prescribed extensions); and

- a generous royalty regime that recognizes the enormous capital expenditures required to bring a megaproject to production by prescribing a relatively low gross royalty in the early years of production, followed by a profit sensitive royalty after payout of expenditures, and recovery of a reasonable rate of return on capital.

Should the *CPRA/COGOA* regime be revised? In the writer's view, caution should be exercised in this regard. The regime is already complicated, and the layering of Aboriginal land claim settlement legislation adds to the complication. The investment of capital not only requires fairness, but it also requires certainty as to the rules. While the legislative initiatives of the last twenty-five years have added greater fairness for all stakeholders, they have also added, from an oil industry perspective, greater uncertainty if only by the sheer magnitude of the changes. Nevertheless, the *CPRA/COGOA* regime was designed to address the megaproject. This focus may not always be the appropriate one. The Northwest Territories, particularly in the southern regions, may not require a legal regime designed for megaprojects as exploration and development progresses to a more mature state. There are several issues that merit consideration, and in that regard, certain features of the *CPRA/COGOA* regime which favour megaprojects may need revision as oil and gas development in the north matures.

IV. RIGHTS ISSUANCE

As noted above, the *CPRA* provides for a transparent and competitive rights issuance process. Subject to certain very limited exceptions, the *CPRA* requires that the granting of oil and gas rights be made pursuant to the "call for bids" process set forth in the legislation.[22] Prior to the issuance of oil and gas rights, the minister must make a call for bids.[23] The call must state the terms and conditions which all bids must satisfy to be considered, and it must state the "sole" criterion the minister will apply in assessing bids

[22] *Supra* note 1, s. 14.
[23] *Ibid.*

submitted in response to the call. The requirement for a single criterion as the basis for awarding oil and gas rights is intended to make the rights issuance process fair and objective. This statutory requirement is unique to the *CPRA/COGOA* regime and to the east coast offshore regimes based on the *CPRA/COGOA* model. In the writer's view, this is an excellent feature of the legislation and should not be changed as was done in the *Yukon Oil and Gas Act*, which reintroduced ministerial discretion in the rights issuance process.[24] However, to date, the sole criterion used in the rights issuance process under the *CPRA* has been the "work" bid. Rather than bidding money, oil companies have been required to bid specific work programs defined by the type and quantity of oil and gas exploration activity the bidder is prepared to undertake. The policy underlying this approach is that money will be expended on exploration activity rather than simply going into the government treasury. This is intended to spur exploration and create economic benefits by way of job creation, training, and so forth. For the time being this appears to be an appropriate policy objective. In the future, as the northern industry matures and evolves, use of cash bids should be considered. The cash bid is the most objective criterion for assessing bids. Moreover, as is the experience in Alberta, money derived from land sales can be a very significant source of government revenue. Fortunately, moving from a work-based to a cash-based bidding system, should such a move be considered appropriate at some point in the future, might be achieved without any change in the legislation.

V. THE TENURE SYSTEM

The *CPRA* allows for the issuance of exploration licences for a term of up to nine years. There is nothing problematic with this format. However, the significant discovery licence has an indefinite term. The indefinite term was introduced in the *CPRA* to allow oil companies sufficient time (considering capital requirements and operating conditions) to establish the commerciality of their discoveries. Such an allowance makes sense, at least for the time being, in respect of offshore areas and high north onshore areas. But this may change over time and may not be particularly apt for the southern part of the territories where the geology and, in due course, the infrastructure will be similar to northern Alberta.

Under the *CPRA* a significant discovery is defined as "a discovery indicated by the first well on a geological feature that demonstrates by flow testing the existence of hydrocarbons in that feature and, having regard to geological and engineering factors, suggests the existence of an accumulation of hydrocarbons that has potential for sustained production."[25] The criterion is rather a low test to meet to obtain indefinite tenure. One need only establish the "suggestion" of an accumulation of hydrocarbons having the "potential" for sustained production; there are no economic or commercial parameters. This test for an award of a significant discovery is rather vague and has been the subject of judicial review.[26] To obtain a significant discovery licence, the holder of an

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[24] *Supra* note 16, s. 15.

[25] *Supra* note 1, s. 2.

[26] See *Mobil Oil Canada Ltd.* v. *Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202.

exploration licence must establish the existence of a significant discovery. Having done so, the holder of an exploration licence is entitled to obtain a significant discovery licence for the area of the significant discovery to the extent the significant discovery area lies within the boundaries of the applicable exploration licence. Once a significant discovery licence with its indefinite tenure is issued, there are only a limited number of ways in which the size or duration of the significant discovery licence may be reduced.

Under s. 28(4) of the *CPRA*, the areal extent of a significant discovery area may only be reduced as a result of further drilling that shows there are reasonable grounds to believe that a discovery is not a significant discovery, or that the lands to which the significant discovery extends differ from the significant discovery area previously determined by the National Energy Board. If the areal extent of a significant discovery area is reduced, the area of a significant discovery licence shall be reduced accordingly (see s. 31(1) of the *CPRA*). This reduction in size of a significant discovery area and corresponding reduction in the lands to which indefinite tenure has been granted is only triggered by further drilling. In the absence of voluntary further drilling by the licence holder, there is no basis to reduce the size or duration of a significant discovery licence.

To some extent, the above situation is ameliorated by the power of the minister to order the drilling of a well.[27] Such an order is subject to a hearing and review by the Oil and Gas Committee under s. 106 of the *Act* before being implemented. The drilling order power is rarely, if ever, used. From a resource management perspective (*i.e.*, from the perspective of government as resource owner) it is difficult to retract indefinite tenure once granted pursuant to a significant discovery licence. Thus the government's ability as resource owner to manage its resources is limited by the *CPRA* tenure system. Conversely, from the significant discovery licence holder's perspective, the system provides an advantage in that land can be held for an indefinite period without further expenditure of capital. From a general industry perspective, one might ask if this is necessarily good — if an oil company holds land without working the same, while another company is prepared to work the land the answer should be no.

The production licence issued pursuant to the *CPRA* has a fixed term of twenty-five years, and it may be extended beyond the term under certain circumstances.[28] This lengthy tenure does not depend on actual production. Under the *CPRA*, the holder of an exploration licence or the holder of a significant discovery licence may obtain a production licence for the lands covered by a commercial discovery declaration within the holder's licence area. The definition of a commercial discovery under the *CPRA* is much tighter than that for a significant discovery. A commercial discovery is defined as "a discovery of petroleum that has been demonstrated to contain petroleum reserves that justify the investment of capital and effort to bring the discovery to production."[29] This definition does introduce an element of commercial discipline. However, once having obtained the production licence, there are few levers from the resource owner's

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27 *Supra* note 1, s. 33.

28 *Ibid.*, s. 41.

29 *Ibid.*, s. 2.

perspective to ensure the lands subject to the production licence are worked. Twenty-five years plus other statutory extensions is a rather extended period of time.

The *CPRA* provides that a commercial discovery area and, correspondingly, the areal extent of a production licence may be reduced in the same manner as a significant discovery area and a significant discovery licence.[30] In addition, the minister may issue a development order.[31] Pursuant to this power, the minister may, by notice to a licence holder, require the licence holder to commence commercial production within a period of not less than six months. Exercise of this power is, of course, premised on there being a declaration of commercial discovery in relation to the lands to which the notice applies. The lands do not necessarily have to be held under a production licence at the time notice is issued. If commercial production as required by the notice is not commenced, the minister may by order reduce the term of the licence to a period of three years, or such longer period as is specified in the order.[32] The only criterion governing use of this ministerial power is that the minister be of the opinion that the issuance of the order is in the public interest. If by the end of the term of the licence, as reduced by the minister's order, commercial production has not commenced, the applicable licence ceases to have effect. If commercial production does commence prior to the end of the licence term, as reduced by the order, the order ceases to have effect and is deemed to have been vacated, thus restoring the original term of the licence. Again, exercise of this ministerial power is subject to review by the Oil and Gas Committee.[33] Use of such power may be viewed as rather draconian, but it at least gives the resource owner leverage to ensure that the otherwise very generous tenure under the significant discovery licence and the production licence is not abused. To date, this blunt and somewhat awkward power has not been used.

One might argue that significant discovery licences having indefinite tenure and production licences with terms of twenty-five years, irrespective of actual production, may, in the future, become inappropriate in the Northwest Territories as development progresses and infrastructure becomes well established. A tenure system that more sensitively balances the need for proper resource management, one that is fairer to all industry participants may emerge in the future; that, however, will require amendment of the *CPRA* by Parliament.

VI. THE ROYALTY REGIME

Section 55 of the *CPRA* establishes a royalty regime by way of regulation.[34] Again the royalty regime was designed with megaprojects in mind. The royalty regime, while generous, is rather complicated. It provides for a relatively small gross royalty prior to payout. The royalty rate starts at 1 percent of gross revenues and increases by a further 1 percent at the end of each eighteen months of production to a plateau of 5 percent,

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30 *Ibid.*, ss. 35(3), 40(1).

31 *Ibid.*, s. 36.

32 *Ibid.*, s. 36(3).

33 *Ibid.*, s. 106.

34 See *Frontier Lands Petroleum Royalty Regulations*, S.O.R./92-26.

pending project payout.[35] Payout, in simple terms, is reached when the aggregate of gross revenues and gross royalties equals the aggregate of certain allowed operating and capital costs plus a prescribed rate of return on allowed capital costs. After payout, the royalty is 30 percent of net revenue.[36] The royalty regulations contain detailed rules for establishing what costs are allowed for royalty purposes and for the calculation of the return allowance, revenues, and so forth.

This type of royalty regime appears suitable for megaprojects, and it has been implemented by Newfoundland for the Hibernia project and the Terra Nova project, and by Nova Scotia for the Sable project. In the case of Newfoundland, the approach is to establish the royalty regime by way of agreement with project participants. The royalty regime for the Sable project is hybrid, established in part by regulation and in part by agreement between the government and the project participants. The *CPRA* does not contemplate a royalty agreement. Rather, the royalty regulations are intended to be a comprehensive code and thus do not afford the flexibility that a contractual or hybrid regime can. On the other hand, the royalty regulations do provide a greater degree of certainty and avoid lengthy and expensive industry-government negotiations, the outcome of which may be uncertain.

As development in the southern part of the Northwest Territories matures to a level similar to that in Alberta, a review of the royalty regime may be in order to ensure that it adequately and efficiently captures the economic rent of territorial hydrocarbon resources on behalf of Northerners. Unlike a change to the tenure system, the royalty regime can be changed without an act of Parliament. All that is required is an order in council amending the regulations. From a governmental perspective, this requirement is a far easier exercise than amending a statute. Through the use of regulations, one or more royalty regimes specifically tailored to fit varying circumstances in the Northwest Territories can be implemented.

While the writer is not advocating immediate or wholesale changes to the existing royalty regime, there are features of the existing regime that illustrate the possible need for refinements as the oil and gas industry in the North matures. The royalty regime is structured around a "ring-fencing" concept. In other words, revenues and allowed costs are streamed to a "project." This ring-fencing concept is critical to the determination of payout, return allowances, and net revenue for royalty purposes. For this purpose, a project is defined in the regulations as the project described in a development plan, approved pursuant to s. 5.1 of the *COGOA*. Project lands are, in turn, defined as the frontier lands described in the production licence or licences issued for the purpose of producing petroleum from such lands in accordance with a project. There is an implicit assumption in the legislation that there will always be a one-to-one correspondence between the areal extent of a production licence and the areal extent of a project. This will not always be the case, particularly for smaller scale, more conventional projects. Similarly, the gross royalty payable prior to payout may not be an apt fit in many cases. The gross royalty structure assumes, implicitly, that payout may take up to seven or eight

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[35] *Ibid.*, s. 3(a).

[36] *Ibid.*, s. 3(b).

years to achieve. Again, this may not always be the case. While the regulations provide for the triggering of the higher net royalty at payout, which may occur at any time, there remains a flaw in the system. The gross revenue royalty escalates over time and is not linked to production rates, cumulative production volumes, or net revenue. To the extent production can be accelerated in the early years, royalty is paid at very low rates. It is possible that royalties are paid at rates no higher than 1 or 2 percent prior to payout. One may question whether in smaller, more conventional projects this is an effective manner in which to capture the economic rent of hydrocarbon resources. On the one hand, this type of royalty structure can be a powerful incentive to drive oil and gas development. On the other hand, it may be counterproductive. The land claims and environmental legislation referred to above require the input and cooperation of Northerners if development is to proceed. If the economic benefits made possible by development are not perceived to be received through an appropriate royalty regime, such co-operation may not be forthcoming.

VII. DEVELOPMENT PLANS

Under s. 5(1)(b) of the *COGOA*, the National Energy Board must issue an authorization in respect of each oil and gas work or activity proposed to be carried out in the Northwest Territories. The *COGOA* provides that no approval, applicable to an authorization relating to the development of a pool or field, may be granted unless the National Energy Board has approved a development plan relating to that pool or field.[37] The *CPRA* also provides that no work or activity on any frontier lands shall be commenced until the minister has approved, or waived the requirement for, a benefits plan in respect of the work or activity pursuant to s. 5.2(2) of the *COGOA*.[38] That section of the *COGOA* states that no approval of a development plan shall be granted under s. 5.1(1) and no authorization of any work or activity shall be issued under paragraph 5(1)(b) until the minister has approved, or waived the requirement for, a benefits plan in respect of the work or activity. The minister is, in this case, the Minister of Indian Affairs and Northern Development. In other words, oil and gas development cannot proceed in the absence, or waiver, of a benefits plan. To understand the implications of this, one must refer to the land claims settlement legislation referred to above and its impact on the administration of the *CPRA/COGOA* regime. Needless to say, there are many regulatory hurdles that must be met in order to proceed with development in the North. Many of the hurdles fall outside the ambit of the core oil and gas legal regime. While daunting, these barriers are a fact of life insofar as the conduct of business in the North is concerned. In addition to this complexity, the *CPRA/COGOA* regime adds yet another hurdle: a development plan approved by the National Energy Board must receive the consent of the Governor in Council (*i.e.*, the federal Cabinet) insofar as the board's approval relates to Part I of the development plan.[39] Part I of a development plan describes the general approach to the development of a pool or field, and pursuant to s. 5.1(3) of the *COGOA*, it must deal with items such as:

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37 *Supra* note 2, s. 5.1.

38 *Supra* note 1, s. 21.

39 *Supra* note 2, s. 5.1(4).

- the scope, purpose, location, timing, and nature of the proposed development;
- production rates, evaluations of the pool or field, estimated amounts of oil or gas proposed for recovery, reserves, recovery methods, production monitoring procedures, costs, and environmental factors in connection with the proposed development; and
- the production system and any alternative production systems that could be used for the development of the pool or field.

Part II of the development plan deals with the more technical aspects of the development. From the writer's perspective, Part I is a rather technical document in its own right. One might ask why the federal Cabinet should be involved at all in such matters, as there already exists a competent body with the technical expertise and history of experience to deal with such matters in the public interest; namely, the National Energy Board. The requirement for Cabinet approval may be appropriate for megaprojects, but again, this requirement appears to be excessive for smaller, more conventional projects. Obtaining the requisite order in council can add a significant amount of time to an already arduous regulatory regime. For the time being, it may be appropriate to retain this degree of political oversight over the regulatory regime as implementation of land claims settlement agreements progresses. It should be noted that this degree of political oversight is reflected in the legislative regimes applicable to the Newfoundland and Nova Scotia offshore areas as well. Under the legislation applicable to these areas, political oversight is exercised by an elaborate system of ministerial approvals, suspensive vetoes, and overriding vetoes.[40] The legislation defines certain decision-making functions of the Canada-Newfoundland Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board as "fundamental decisions." Fundamental decisions include the approval of development plans. In the course of devolving certain ministerial functions to the National Energy Board under the *CPRA*, political oversight of development plan approval, previously exercised by the minister, was elevated to the federal Cabinet. Political oversight of what is essentially a technical area is not warranted and may result in unnecessary delays in the regulatory process. At some point, it may be appropriate to vest ultimate development plan approval in the National Energy Board. This, of course, will require an amendment to the *COGOA*. The legislation does not provide for the consent function of the Governor in Council to be delegated.

VIII. REGISTRATION SYSTEM

The *CPRA* introduced a registration system whereby title to, and encumbrances of licences issued under the *Act* could be registered and priorities established. No such system existed under the *Canada Oil and Gas Land Regulations*[41] or the *Canada Oil and Gas Act*.[42] An effective registration system is essential to the development and financing of oil and gas projects. The *CPRA* system was closely modelled on the registration system

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40 See *supra* note 13, ss. 31-40; *supra* note 14, ss. 32-37.

41 *Supra* note 4.

42 *Supra* note 7.

established under the *Mines and Minerals Act*,[43] which has served Alberta very well over the years. The system is intended to look like a Torrens-type system but operates like a land registry system. The system contemplates the creation of an abstract for each licence issued under the *CPRA* that records the land to which the licence relates, the term of the licence, the holders of the licence, the transfers of shares in the licence, and the registration of security interests against the licence. However, s. 99 of the *CPRA* makes it clear that the Registrar or Deputy Registrar is not liable for any act or omission made in good faith in the exercise of a power or the performance of a duty under the *Act*. Further, the *CPRA* does not establish an assurance fund or other mechanism to compensate users of the system for any errors in the registry.

Neither the *Mines and Minerals Act* nor the *CPRA* create a Torrens-like land titles system. Nevertheless, the Alberta registration system works well in providing users of the system with a useful "snapshot" of the state of title to any lease of oil and gas rights. A search under the Alberta system provides the user with a picture of the current interests held by holders of a lease, the lands currently subject to the lease, and any security notices registered in respect of the lease. The registration system under the *CPRA*, although modelled on the Alberta legislation, is not nearly as helpful. The approach taken in the administration of the system is to treat the abstract as a mere bulletin board. Transfers, security notices, and discharges are noted on the abstract in the order that they are registered. No attempt, however, is made to update the abstract to reflect, in a readily usable form, the identity of the current licence holders or the outstanding encumbrances. One must order and review all of the instruments recorded on the abstract in order to piece together the current situation. Admittedly, one cannot rely exclusively on a search under the *Mines and Minerals Act* or the *CPRA* in investigating title to oil and gas property. Such searches are simply a part of a larger due diligence process. Nevertheless, the abstract search available under the *CPRA* is not particularly helpful. The *CPRA* system could, from a practical perspective, be improved considerably if it was operated along the lines that Alberta Energy operates the registration system under the *Mines and Minerals Act*. This improvement does not entail any statutory or regulatory change. Rather, a simple change in administrative policy can make the entire registration system more efficient for its users.

IX. CONCLUSION

The combined *CPRA/COGOA* regime has been in effect for over fourteen years and constitutes the core of the oil and gas legal regime applicable in the Northwest Territories. While the regime has been in place for a considerable period, it is too early to judge the efficacy of the regime. To date there has been very little oil and gas activity in the Northwest Territories to which the regime applies. Where the regime has been tested (*e.g.*, in the east coast offshore areas of Canada pursuant to joint resource management schemes established by the federal government and the provinces of Newfoundland and Nova Scotia) the regime appears to be working satisfactorily. However, the only projects developed in the east coast offshore areas have been megaprojects. The *CPRA/COGOA*

[43] See Part 8 of the *Mines and Minerals Act*, R.S.A. 1980, c. M-15 and the *Crown Minerals Registration Regulation*, Alta. Reg. 264/97.

regime was designed with megaprojects in mind. It remains to be seen whether the *CPRA/COGOA* is the appropriate regime for oil and gas development throughout the entire Northwest Territories. As oil and gas development in the Northwest Territories matures, certain refinements of the *CPRA/COGOA* regime may be desirable, particularly in the more southern areas where geology and infrastructure permit smaller, more conventional type projects.