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**PRIMARY BENEFICIARIES:
NEWFOUNDLAND AND NOVA SCOTIA'S
STRUGGLE TO ACHIEVE THE PROMISE OF
PETROLEUM WEALTH**

MATTHEW CLARKE[†]

ABSTRACT

This paper provides an overview of some key issues which have arisen since the implementation of political resolutions to the contentious issue of offshore governance. Through an examination of: i) the role of the Petroleum Boards which manage offshore development; ii) the royalty and benefits regimes in place offshore Newfoundland and Nova Scotia; iii) the impact of the federal equalization scheme on provincial offshore revenues; and iv) some critical perspectives of the current offshore governance arrangements, this paper provides a background for the larger question of whether, in fact, the provinces have achieved the status of "primary beneficiaries" as originally envisioned by the provincial and federal governments. While this question is not conclusively answered herein, the suggestion made is that, from the perspective of maximising benefits for the provinces, the management regimes currently in place invite room for significant improvements.

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I. INTRODUCTION

This paper will review benefits and royalty regimes which govern the offshore oil and gas industries in the provinces of Nova Scotia and Newfoundland and Labrador.¹ Rather than providing a detailed analysis of any single aspect of the regimes, it surveys the major issues in this area, and attempts to address a number of questions. The questions posed are as follows: Who regulates the offshore, and where does this authority to do so come from? What are the goals of the regulatory regime; are these goals being met, and if not, what are the impediments standing in the way?

Part I provides a necessary background. This consists of a review of the political arrangement reached between the federal and provincial governments to govern the management of offshore petroleum. In Part II, the structure of the royalty and benefits regimes governing the provinces' offshore industries are examined, along with the related issue of federal equalization payments. Part III provides a brief look at the policies that Norway and the United Kingdom adopted during the development of the North Sea oil and gas industry in order to encourage the growth and viability of their own domestic supply and service industries. This material provides a point of comparison and contrast to the strategy adopted in Nova Scotia and Newfoundland. Finally, Part IV addresses a number of critical perspectives on the Atlantic Canadian benefits and royalties regimes. While not drawing any firm conclusions, it is hoped that these perspectives will assist in an analysis of whether the provinces have gotten what they originally expected from the jurisdictional arrangements governing their offshore industries.

II. LEGAL AND POLITICAL FOUNDATIONS OF THE REGULATORY REGIMES

It would be ineffective to undertake an examination of the existing regulatory regimes governing the Newfoundland and Nova Scotia offshore oil industries without having an understanding of the legal and political

¹ For convenience, the author refers to the Province of Newfoundland and Labrador as "Newfoundland" in the remainder of this essay.

background underlying these regimes. The current regimes emerged as a solution to years of competing claims by the governments of the provinces and the federal government over control of offshore oil and gas resources, both in the political and legal sphere. This tumultuous period eventually culminated in a political agreement in the form of the Atlantic Accord² and in legislation that was intended to give the agreement legal effect. This section lays out the legal foundation upon which this compromise was built.

1. The Atlantic Accord: A Political Solution

It is not surprising that the agreement finally reached by Newfoundland and the federal government was grounded in politics rather than in strict legal entitlements. Commentators have noted that, “[t]he politics of Newfoundland and its impact on oil and gas development has and, no doubt, will continue to be as crucial a determinant in the development of the offshore as will any legislative enactment.”³ The *Hibernia Reference*⁴ (in which the Supreme Court of Canada ruled that the continental shelf rights rested with the federal government) was a bitter disappointment to the Newfoundland Government, which continued to maintain a “moral entitlement” to control the offshore. This position was buoyed by a frustration over its lack of control of its fisheries, as well as a determination to overcome high levels of unemployment.⁵ The province had no choice but to seek a negotiated agreement with the federal government.

Following the decision in the *Hibernia Reference*, the Newfoundland government, noting that the federal Progressive Conservative party (then in opposition) was enjoying an upswing in popularity, began negotiating with party representatives. The federal Tories had publicly tak-

² The Atlantic Accord: Memorandum of Agreement Between the Government Of Canada And The Government Of Newfoundland And Labrador On Offshore Oil And Gas Resource Management and Revenue Sharing (11 February 1985) [Atlantic Accord].

³ C.P. MacDonald & R.S.G. Thompson, “The Atlantic Accord: The Politics of Compromise” (1985) 24 No. 1 Alta. L. Rev. 61 at 61-62 [Macdonald and Thompson].

⁴ *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86, 5 D.L.R. (4th) 384 [*Hibernia Reference* cited to S.C.R.].

⁵ Hunt, Constance D., *The Offshore Petroleum Regimes of Canada and Australia* (Calgary: Canadian Institute of Resources Law, 1989) at 5-6 [Hunt].

en the position that the provinces should have significant control over offshore management, a policy position maintained during Joe Clark's short tenure as Prime Minister in 1979. Clark had discussed a transfer of jurisdiction in 1979, but the PCs were defeated before this could happen. In the wake of the *Hibernia Reference* decision "Ownership" of the resource could no longer be claimed by the province, so the terms of the discussion were adapted. In 1984, newly elected Prime Minister Brian Mulroney expressed his willingness to facilitate Newfoundland participation in the offshore. Earlier discussions between Mulroney and Newfoundland Premier Brian Peckford became the basis of the Atlantic Accord in the aftermath of the Tory election victory.⁶ The Atlantic Accord was a political agreement that provided a blueprint for a legislative framework for shared jurisdiction over the development of offshore resources.

The Atlantic Accord agreement was signed by Premier Peckford and Prime Minister Mulroney on February 11, 1985. Following this, the federal and provincial governments began the process of drafting the reciprocal sets of legislation that would form the legal framework to govern the Newfoundland offshore area. Because the province had no jurisdiction to extend legislation to the offshore area (one of the findings in the *Hibernia Reference*), "mirror legislation" was required to create a sphere of shared jurisdiction for the federal and provincial governments. Federal legislation was required which would referentially extend provincial legislation to the offshore. On April 4, 1987, the Atlantic Accord agreement was finally implemented by *Canada - Newfoundland Accord-Implementation Act*⁷ and the *Canada - Newfoundland Atlantic Accord Implementation Newfoundland Act*⁸ both coming into force.

In 1982, Nova Scotia reached an agreement with the federal government to jointly share the management of offshore petroleum resources.⁹ The agreement contained a "most - favoured province" clause. This

⁶ *Ibid.* at 13.

⁷ S.C. 1987, c. 3 [*Newfoundland Accord Act*].

⁸ Later renamed the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, R.S.N.L. 1990, c. C-2 [*Newfoundland Accord Act (Newfoundland)*], and collectively with the *Newfoundland Accord Act*, the *Newfoundland Accord Acts*].

⁹ Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing (2 March 1982) [1982 Nova Scotia Agreement].

clause provided that if the federal government entered into an offshore oil and gas management agreement with any other province prior to January 1, 1985 (i.e. Newfoundland), the Nova Scotia government could substitute the latter agreement in its entirety for the entirety of its existing agreement.

Nova Scotia invoked the clause, and on August 26, 1986 the Prime Minister and Premier of Nova Scotia signed the Canada-Nova Scotia Offshore Petroleum Resources Accord.¹⁰ The Nova Scotia Accord ultimately led to the passing of the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*¹¹ and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*¹², which served to extend joint jurisdiction to the Nova Scotia offshore area, just as the Newfoundland Accord Acts had done for the Newfoundland offshore.

The following section discusses the purposes of the Accord agreements as they were set out at the time of their creation, and the structure of the joint-management regimes that these deals created. It also examines the benefits and royalty regimes that the agreements provided for, and describes the impacts of the federal equalization formula on the provinces' abilities to benefit from the revenues thereby generated.

¹⁰ Canada-Nova Scotia Offshore Petroleum Resources Accord (26 August 1986) [Nova Scotia Accord].

¹¹ S.C. 1988, c. 28 [*Nova Scotia Accord Act*].

¹² S.N.S. 1987, c. 3 [together with the *Nova Scotia Accord Act*, hereinafter *Nova Scotia Accord Acts*]. The *Newfoundland Accord Act*, *supra* note 8 and the *Nova Scotia Accord Acts* are referred to as the Accord Acts.

III. STRUCTURE OF THE REGULATORY REGIMES UNDER THE ACCORD ACTS

1. The Stated Purposes of the Atlantic Accord and Nova Scotia Accord

As noted in the section above, the political settlements reached through the Atlantic Accord and Nova Scotia Accord were implemented into law through “mutual and parallel legislation.”¹³ One requirement of this legislation was the assurance that certain powers that would otherwise be exercised by the federal and provincial ministers in respect of the marine and shelf areas beyond the low water mark off the provinces, would be exercisable by the joint petroleum boards (discussed below). Another was to complete the framework of rules for shared decision-making as envisioned by the two Accord agreements.¹⁴ In short, the extension of provincial laws and decision-making powers into the offshore areas was accomplished through a combination of administrative inter-delegation and legislative referential incorporation.¹⁵

Section 2 of the Atlantic Accord¹⁶ and section 1.02 of the Nova Scotia Accord¹⁷ set out the similar objectives that those agreements sought to facilitate. For the most part, the provisions of these sections are identically worded. There are several themes in the agreements that are central to the current discussion. These include:

- 1) The idea that the development of offshore oil and gas reserves should occur for the benefit of Canada in general and of the provinces in particular (see section 2(a) of the Atlantic Accord and section 1.02(a) of the Nova Scotia Accord);
- 2) The recognition that the provinces have the right to be the principal beneficiaries of the oil and gas resources off their shores (section 2(c) of the Atlantic Accord and section 1.02(c) of the Nova Scotia Accord);

¹³ *Supra* note 2 at s. 1.

¹⁴ *Supra* note 3 at 63.

¹⁵ See Alan Pettie, “Are Royalty Agreements Required for Canada East Coast Offshore Oil and Gas?” (2001) 24 Dal. L.J.151 at 180-181 [Pettie].

¹⁶ *Supra* note 2.

¹⁷ *Supra* note 10.

- 3) The recognition of the equality of the Federal and Provincial Governments in the management of the resources, as well as the need to ensure that development is optimized to provide economic and social benefits to the country generally and the provinces specifically (section 2(d) of the Atlantic Accord and section 1.02(d) of the Nova Scotia Accord), and;
- 4) The provision that the provinces can establish and collect resource revenues as if the resources were on land within the provinces (section 2(e) of the Atlantic Accord and section 1.02(e) of the Nova Scotia Accord).

In reviewing these themes, it is important to not only recognize the acceptance by the Federal Government of shared jurisdiction over offshore resources, but also the strength of the commitments that the revenues and benefits arising from the development of these resources would primarily benefit the provinces. A critical examination of the benefit and royalty regimes governing the Newfoundland and Nova Scotia offshore industries requires a focus on these key principles. The question asked herein is, “are the current regimes meeting the general objectives set out in the Accord agreements?”

2. Shared Jurisdiction - The Boards and Industrial Benefits

The implementation of the Accord Acts¹⁸ established the Canada-Newfoundland Offshore Petroleum Board (C-NOPB) and the Canada-Nova Scotia Offshore Petroleum Board (C-NSOPB). These boards have the delegated authority to administer most aspects of the management and regulatory regimes within their respective offshore areas. A. Taylor and J. Dickey have commented that the establishment of the boards under the Accord Acts is central to the administration of the offshore regimes in two respects. First, much of the decision-making process was shifted from the bureaucracies at the two levels of government in each region to an entity separate from government. Second, the level of discretionary power held by the administrator (previously the Minister under the

¹⁸*Supra* note 12.

*Canada Oil and Gas Act*¹⁹) was diminished and instead provided better-defined criteria and processes by which decisions are to be made.²⁰

The mandates of the boards are derived from the Accord Acts, and include the issuance of and administration over petroleum exploration and development rights in their respective offshore areas; the administration of statutory requirements regulating offshore exploration, development and production; and the approval of Canada-Newfoundland and Canada-Nova Scotia benefits and development plans.²¹ For the purposes of the present discussion, we are most concerned with these “benefits plans.”

The Nova Scotia Accord Acts²² and the Newfoundland Accord Acts²³ all contain provisions (section 45 in each case) describing the contents of the benefits plan that is required of every proponent who applies to the boards for approval of a development project. The wording of these provisions is nearly identical. For illustrative purposes, section 45(1) from the *Newfoundland Accord Act (Newfoundland)*²⁴ is reproduced below:

45. (1) In this section “Canada-Newfoundland and Labrador benefits plan” means a plan for the employment of Canadians and, in particular, members of the labour force of the province and... for providing manufacturers, consultants, contractors and service companies in the province and other parts of Canada with a fair opportunity to participate on a competitive basis in the supply of goods and services used in a proposed work or activity referred to in the benefits plan.

Taylor and Dickey have noted the difficulties that the relatively intangible elements of “full and fair opportunity to participate” and “first consideration” have caused the boards in their attempts to construe these requirements.²⁵ The first offshore oil project in Canada was the Cohas-

¹⁹ R.S.C. 1985, c. O-6 as rep. by the *Canada Petroleum Resources Act*, R.S.C. 1985, c.36 (2nd Supp.), s.130.

²⁰ A. Taylor *et al.*, “Regulatory Regime: Canada-Newfoundland/Nova Scotia Offshore Petroleum Board Issues” (2001) 24 Dal. L.J. 51 at 56-57.

²¹ *Ibid.* at 59.

²² *Supra* note 12.

²³ *Supra* note 8.

²⁴ *Supra* note 8.

²⁵ *Supra* note 20 at 77-80.

set project in offshore Nova Scotia. The project operator (LASMO Nova Scotia, later PanCanadian) filed its benefits plan in December 1989, about a month before the C-NSOPB was established. One of the board's first tasks was to decide how to assess how a "full and fair opportunity" was to be afforded. The view taken by the C-NSOPB at that time, which it continues to hold, is that a "full and fair opportunity" is demonstrated through the requirement that an operator abide by a procurement policy that is "open, fair and predictable."²⁶

Taylor and Dickey argue that many of the complaints made by observers who claim that local interests are not receiving a fair share of the work generated by offshore projects arise because of a lack of understanding of the inherent "competitiveness" element of the "full and fair opportunity" requirement. They write that:

[U]nlike the C-NSOPB, these commentators have no knowledge of how bids on any particular contract stack up in terms of commercial, technical, or quality competitiveness. Indications are, however, that local companies are becoming increasingly competitive as they gain more experience and local infrastructure grows.²⁷

The second important element in defining the benefits plan is "first consideration." Subsection 45 (3) of the *Accord Acts* requires that a benefits plan commits to providing "first consideration" to "individuals resident in the province" for training and employment, and also states that "first consideration is to 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."²⁸

Again we see that a competitiveness criterion is involved in the definition of "first consideration." As Taylor and Dickey explain by continued reference to the Nova Scotia context, the C-NSOPB's interpretation of this principle envisions it being applied at two stages during an operator's procurement process. The first is during the establishment of the bidder's list and the second is at the contract award stage. If there are a sufficient number of qualified local bidders, then the list should

²⁶ *Supra* note 20 at 77.

²⁷ *Supra* note 20 at 78.

²⁸ *Accord Acts*, *supra* note 12, s. 45(3)(b).

be confined to these local bidders. It is argued that the objective of the Accord agreements, that the respective provinces should be the principle beneficiaries of offshore development, is operationalized in this manner.²⁹ The second stage of application of the “first consideration” criterion occurs when an operator is presented with a situation in which there are competing bids submitted which contain varying degrees of local content, but are otherwise essentially equal in terms of price and quality. In such a situation, the operator is expected by the board to award the contract to the bidder with the greater degree of local content. However, the authors note the limits on the boards’ abilities to reward bids that maximize local content. They observe, “it also must be acknowledged that usually bids are not equal. If pressed, an operator can usually identify some ‘material’ difference, be it technical, commercial or otherwise.”³⁰

Like any administrative decision maker, the boards can only operate within their statutorily authorized domains. Their jurisdiction to oversee and enforce specific measures with regard to industrial benefits plans is limited to what is explicitly provided for in the enabling legislation. As becomes apparent in a review of the legislation (as above), the indeterminate language used does not easily provide for firm and comprehensive levels of local participation in offshore development. The limitations inherent in these provisions regarding their ability to actively boost local participation are discussed in greater detail later in this paper.

3. Royalties

The issues surrounding the generation of royalties and taxes by government from offshore petroleum development are extremely numerous and complex. Due to the limited scope of this paper, the discussion is limited to an examination of the legal source of the provincial governments’ abilities to levy royalties and taxes against operators in the offshore industry and a brief description of the mechanisms employed to do this. Also, the issue of provincial equalization payments must be

²⁹ *Supra* note 20 at 79.

³⁰ *Supra* note 20 at 79.

discussed in this context, as it is a key limiting factor in any improvements that are to be hoped for in the provinces' financial affairs.

Despite the provinces' legislative competence to levy royalties and certain forms of taxation against the oil companies exploring for and producing petroleum in their offshore areas, there are a number of factors that are at play in the structures of and limits upon these sources of revenue. One important factor is that the petroleum production industry is global. For this reason, the governments must monitor the various fiscal regimes in petroleum producing regions around the world to ensure that local exploration and production remains viable and attractive to petroleum companies.³¹ Royalty regimes will either encourage or discourage development depending on the degree to which they impact profitability. The Nova Scotia and Newfoundland governments must also consider the fiscal instruments they employ based on their larger strategies to extract social and economic benefits from these developments. It is in this context that the desired industrial benefits discussed above have to be factored into overall development strategies.³²

The source of the provincial authority to levy royalties against offshore producers arises pursuant to the provincial acts that the Accord Acts referentially incorporate, and the regulations that are established thereunder. In Nova Scotia, these are the *Offshore Petroleum Royalty Act*³³ and the *Offshore Petroleum Royalty Regulations*.³⁴ In Newfoundland, these are the *Petroleum and Natural Gas Act*³⁵ and the *Royalty Regulations*.³⁶

Both provinces originally negotiated individual royalty agreements with offshore producers, such as the operators of the Cohasset and Sable developments off Nova Scotia and the operators of the Hibernia and Terra Nova projects off Newfoundland. Such agreements were extremely complex and time consuming to reach. For example, the Hibernia royalty agreement took more than a year to negotiate, while the

³¹ Watkins, G.C., "Atlantic Petroleum Royalties: Fair Deal or Raw Deal" (2001) Atlantic Institute for Market Studies (Paper #2 in AIMS Oil and Gas Series).

³² M. Harrington *et al.*, "Emerging Issues In East Coast Oil and Gas Development" (1997) 35 No. 2 Alta. L. Rev. 269 at 293.

³³ S.N.S. 1987, c. 9.

³⁴ N.S. Reg. 71/99.

³⁵ R.S.N.L. 1990, c. P-10.

³⁶ Nfld. Reg. 84/01.

Sable agreement took a year and a half.³⁷ The indeterminacy, complexity and cost associated with the need to negotiate royalty agreements on a project-to-project basis is a disincentive to offshore development, and has led both provincial governments to develop generic royalty regimes for their offshore areas in order to establish a predictable mechanism for determining royalty levies.

4. Equalization

The federal equalization program operates pursuant to the *Federal-Provincial Fiscal Arrangements Act*.³⁸ This program makes payments to the provinces whose ability to raise revenues (their “fiscal capacity”) is below that of a baseline level. The formula that determines this level measures the fiscal capacity of the ten Canadian provinces on the basis of thirty-three individual revenue sources. It then determines the difference between these individual fiscal capacities and an average capacity based on the average of the five provinces remaining after excluding Alberta and the four Atlantic provinces. The federal government compares the individual provincial capacities against this average measure, and the provinces below the average receive a per-capita payment based on the differential.³⁹

As noted above, petroleum royalties and related provincial taxes bring increased revenue to the treasuries of Newfoundland and Nova Scotia. As revenues rise, both provinces receive lower equalization transfer payments because the provinces’ fiscal capacity is closer to the baseline determined by the formula described above. Because a concomitant decrease in equalization payments accompanying increased provincial revenues was anticipated by the parties during the negotiation of the Atlantic Accord and Nova Scotia Accord, the agreements established “equalization offset provisions” so that the provinces would not experience dollar for dollar decreases in transfer payments as provincial revenues rose.

³⁷ Pettie, *supra* note 15 at 195.

³⁸ R.S.C. 1985, c. F-8.

³⁹ Boessenkool, K.J., “Taking Off the Shackles: Equalization and the Development of Non-renewable Resources in Atlantic Canada” (2001) Atlantic Institute for Market Studies (Paper #1 in AIMS Oil and Gas Series) [Boessenkool].

As the initial formulas provided a low level of protection, the federal government responded to calls from several provinces for changes to the preferential treatment the Atlantic offshore revenues were receiving. In 1993, the federal government introduced a generic offset provision.⁴⁰ Under this provision, if an equalization-receiving province has seventy percent or more of a tax base, then the taxback rate (the amount that the revenue source will diminish potential equalization payments) on that revenue source is capped at seventy percent. Under this formula, the equalization payment flowing to Nova Scotia and Newfoundland can be reduced by no more than seventy percent of the amount of their offshore oil and gas revenues.

Thus far, this paper has traced the legal and political basis for the regulatory regimes governing the Newfoundland and Nova Scotia offshore oil and gas industries. It has also provided an overview of the benefits and royalty schemes in place, and the impact of equalization on provincial revenue. For comparative purposes, the following section sets out a brief description of strategies in Norway and the U.K. for the regulation of the offshore petroleum industries, with a particular focus on the efforts of each jurisdiction to maximize the local benefits of offshore development.

IV: COMPARISONS WITH OTHER JURISDICTIONS: NORWAY AND THE UNITED KINGDOM

Norway and the United Kingdom often provide a basis of comparison in critical discussions about the choices and directions taken by those politicians and regulators who are plotting the course for the Atlantic Canadian offshore industries. In a number of ways, Norway and the U.K. are relevant comparators. Like Norway and the U.K., (and unlike many of the world's developing nations in which oil production is currently taking place) Atlantic Canada has a stable political and labour environment, which makes it attractive to oil companies seeking new

⁴⁰ *Ibid.* at 29.

exploration and production opportunities.⁴¹ In other areas, there are significant differences.

One important distinction between the Newfoundland and Nova Scotia industries and those offshore of Norway and the U.K. is that developers in the North Sea have only one level of government to deal with; Norway and the U.K. are both unitary states, meaning that their national governments have full authority over the offshore industry. Canada has developed a legal and regulatory framework to share jurisdiction over the offshore between the federal and provincial governments, which adds complexity to operating within Atlantic Canada (despite the intent that the Petroleum Boards would provide a single regulatory authority for most purposes).⁴² Also, the fact that the size of the proven reserves of the North Sea are well beyond those which have so far been proven offshore Newfoundland and Nova Scotia also skews efforts to draw direct comparisons between these regions.

Nevertheless, for the purposes of a general examination of the different strategies that can be utilized to maximize benefits from offshore development, Norway and the U.K. are useful points of comparison. Economist Wade Locke has argued that the Atlantic Canadian industry can benefit from the examples of Norway and the U.K. in its efforts to develop a regulatory environment which balances a “commercial requirement for operators to remain cost competitive with the regional economic development requirement that “full and fair opportunity” be given to Atlantic Canadian individuals and companies.”⁴³

1. Norway

The most distinctive aspect of Norway’s offshore policies is the level of direct state involvement in the industry. Since the early 1970s, the

⁴¹ McMullan, Sandy: Presentation to Oceans Law and Policy class, Dalhousie Law School, March 12, 2003. Mr. McMullan also noted that Norway and the U.K. are among the regions that the Nova Scotia government considers as its main competitors when evaluating strategies to attract oil companies to the region.

⁴² Pettie (*supra* note 15) has expressed concern that despite the legislative detail and complexity of the mirror legislation that has implemented the Accord agreements, there are serious constitutional problems with the scheme, and that certain of its provisions may actually be invalid.

⁴³ Locke, Wade, “Harnessing the Potential: Atlantic Canada’s Oil and Gas Industry: An Analysis of the Variables Affecting Present and Future Involvement of Local Business” (1986) Background report for the Royal Commission of Employment and Unemployment, at 28 [Locke].

Norwegian state has undertaken a central role in ensuring Norwegian involvement in its offshore, and generally directed development of the industry by establishing a state oil company, called “Statoil.” This strategy was developed on the premise that Norwegian society would receive the most benefit from its offshore oil industry if the industry could be subjected to political control.⁴⁴ Through the use of this “insider approach,” Statoil has provided a vehicle through which the state has exercised an option for up to fifty percent participation in oilfield developments.⁴⁵ While licences have been awarded in part on the basis of competitive bidding, preferential treatment has been provided to Statoil and other domestic companies during licensing rounds. In some cases, certain parcels of land were held for these companies only, and in other cases Statoil was specified as the operator on the licences from the outset.⁴⁶

The Norwegian state’s direct involvement in individual oil developments has given it a great deal of influence over the decisions of multinationals regarding their procurement of goods and services. A second part of the Norwegian strategy has been to require that foreign developers use Norwegian supply companies, subject to quality, pricing and delivery considerations. These licensees are monitored pursuant to legislated powers which link the granting of future licences to their past records of using Norwegian suppliers. In this way Statoil has broken down the traditional purchasing practices of the large multinational oil companies and provided access to domestic firms in the areas of design, engineering, and project management. Known as “Norwegian Technology Agreements,” these are usually entered into at the licensing stage and are used as a basis for transferring technology from the multinationals to the country’s domestic offshore players.⁴⁷ Norway has also used licensing to encourage foreign companies to assist in the development of its general domestic industries.⁴⁸

⁴⁴ Nelsen, B.F., *The State Offshore: Petroleum, Politics, and State Intervention on the British and Norwegian Continental Shelves* (New York: Praeger, 1991) at 35-37 [Nelsen].

⁴⁵ Ryan, Carey P., “Offshore Petroleum: Industrial Benefits and Fiscal Policies (Literature Review)” prepared for the Atlantic Canada Petroleum Institute, 2001 at 3 [Ryan].

⁴⁶ Locke, *supra* note 43 at 28.

⁴⁷ Ryan, *supra* note 45 at 3-4.

⁴⁸ Locke, *supra* note 43 at 28.

Statoil's role in Norwegian oil and gas policy has been changing dramatically over the past ten to fifteen years. At present, the company operates under the same commercial terms as the other participants in the Norwegian offshore, and is no longer a tool of the state's petroleum policy. In 2000, the Norwegian state began the process of privatizing Statoil by listing between ten and twenty-five percent of the company's value on the stock market, while still retaining more than two-thirds of the company.⁴⁹ This move could be viewed as an indication of the fact that Norway now has a mature and stable petroleum industry, with a robust domestic component no longer dependent on the type of firm state intervention described above.

Norway's regulatory regime has largely been attributed with the notable successes enjoyed by its domestic industries. The policies put in place during the 1970s are largely responsible for the fact that the share of goods and services supplied to the offshore industry by domestic firms has risen to over sixty percent.⁵⁰ The result has been that Norway has developed leading expertise in offshore oil and gas production, and is now an exporter of such expertise to many parts of the world, including Atlantic Canada.⁵¹ While Norway may no longer require the strong interventionist policies that it employed during the early stages of its offshore development, the importance of these policies in developing its domestic industry (and the social and economic benefits that it has brought) is undeniable.

2. The United Kingdom

At about the same time Norway was dealing with the offshore problem, the U.K. was also confronted by the question of how to ensure that the benefits of offshore petroleum flowed toward British workers and firms. Unlike Norway's "protectionist" approach, the U.K. developed a strategy that has been referred to as a "free market approach."⁵² U.K. firms

⁴⁹ Ryan, *supra* note 45 at 4.

⁵⁰ Nelsen, *supra* note 44 at 98.

⁵¹ Locke, *supra* note 43 at 29.

⁵² IDP Consultants Ltd., "Newfoundland's Offshore Oil and Gas Industry: An Analysis of the Variables Affecting Present and Future Involvement of Local Business" (1986), Background report for the Royal Commission on Employment and Unemployment at 15.

initially had difficulty penetrating the offshore industry partially due to the high costs associated with entering the industry and the strong existing bonds that the large multinational oil companies (mostly American) had with their traditional suppliers (again, mostly American).⁵³

Following the receipt in 1973 of a report by the International Management and Engineering Group (IMEG), the British Government decided to take an active role in the development of a competitive offshore goods and supply industry. One aspect of this policy involved the creation of an Offshore Supplies Office (OSO), which had as its mandate the tasks of auditing oil company purchasing reports (in the effort to pressure oil companies to “buy British”) and also providing financial assistance to the local supply industry. Auditing was essentially designed to shame companies into providing a “full and fair opportunity” for local suppliers to compete for contracts.⁵⁴

In 1975, the British Department of Energy signed a “Memorandum of Understanding” with the United Kingdom Offshore Operators Association (UKOOA) that further opened the purchasing process to government scrutiny. In particular, it gave the OSO auditors the ability to review the lists of companies invited by an operator to bid on projects, and after the bids were in, to review them. This was designed to ensure that local bidders received the “full and fair opportunity” promised. The auditors were not allowed to strike bidding companies off these lists, but they could add the names of local companies. Technically, the only power the OSO had was moral persuasion, but it was backed by the implicit threat that an uncooperative purchaser would be treated unfavourably in the next round of licensing, as offshore parcels were put up for bids.⁵⁵ Despite some descriptions of the British government’s strategy as “free market,” it certainly contained some indirectly coercive elements.

Like Norway, the U.K.’s perceived need to actively protect and assist its local participants in the offshore industry seems to be waning. Having achieved a successful and mature service industry, the British government seems to have turned its focus to concerns that reflect a

⁵³ Ryan, *supra* note 45 at 4.

⁵⁴ Nelsen, *supra* note 72 at 74-75.

⁵⁵ Nelsen, *supra* note 44 at 75. At 100-1, Nelsen describes an incident in which Sun Oil, an American company, awarded a large contract for the construction of a floating platform to a Swedish company over a British company that had hoped and expected to get the contract. In succeeding rounds of bidding for acreage, Sun Oil’s applications were rejected; the implication being that Sun was being punished for awarding the earlier contract to the foreign shipyard.

mature industry in its later stages of development. The government now appears to be undertaking a facilitative role rather than an interventionist one (as was manifest in the earlier activities of the OSO). In a policy with characteristics similar to Norway's focus on the future, the British government in 1998 established the "Oil and Gas Industry Task Force." This task force has an ambitious agenda focussing on specific areas impacting the industry, and addresses skills and training, innovation and technology.

Despite the fact that the U.K.'s policies toward the regulation of its offshore industries have been largely characterized as "free market" policies, while those of Norway have been seen as "interventionist," this brief overview provided above demonstrates that in both cases the respective governments took significant steps to foster their domestic service and supply industries. This was done in recognition of the desire that the benefits coming from the exploitation of this resource should be maximized for the advantage of the respective nations' service industries and labour force. The jobs and economic spin-offs that arise from the exploitation of offshore petroleum are some of the most valuable elements of this kind of industrial development. The success of the British and Norwegians in offshore, service and supply industries can be traced to the support that these sectors received from their governments during the formative stages of North Sea offshore development. The precedent set by Norway and the U.K. is important to consider when evaluating the policies in place to support local industries in the context of Nova Scotia and Newfoundland. Without the protection and intervention by the respective state governments in Norway and the U.K., it seems evident that those countries would not have developed their strong domestic supply and support industries.

V: CRITICAL PERSPECTIVES

Among the stated goals of the Accord agreements were the objectives that the provinces of Nova Scotia and Newfoundland would be the primary beneficiaries of offshore oil and gas development, and that the provincial governments would be able to control these resources as if they were located on land. The tangible benefits that would flow to the provinces were to take the form of revenue from royalties and taxation,

and industrial benefits such as employment and local economic stimulation. From our examination of the jurisdictional and management regimes governing these resources, it becomes clear that the ability of the provinces (with federal involvement) to achieve such objectives is very much tied to the limitations inherent in the statutory and policy instruments which structure offshore governance. While the determination and creativity of provincial politicians, regulators and stakeholders are important factors to consider, the impediments that these actors face arise for the most part from the legal and statutory underpinnings of the regulatory environment. In the remainder of this section, some critical perspectives on these impediments are explored.

1. Royalties and Equalization

In hindsight, it appears somewhat implausible that Newfoundland was ever worried that the development of offshore oil would “overheat the economy,”⁵⁶ causing economic and social turmoil in the process. Yet, expectations were high in the early years of the oil frenzy and such problems had been witnessed during earlier development in Norway. One explanation for why the provinces did not press harder to protect royalty revenue from the “clawback” mechanism of the federal equalization program may be tied to the expectation that once production began, oil revenue would be so great that equalization would quickly cease to be a concern. However, there are also indications that the provinces’ weak bargaining positions in the wake of the *Hibernia Reference* decision also played a part; the perception seems to have existed that by trading off direct cash revenues, significant industrial benefits might be gained. Jim Thistle, a St. John’s lawyer, was advising the Newfoundland government in the period of litigation with the federal government leading up to the signing of the Atlantic Accord. He has described the province’s strategy as follows:

We had a scheme that emphasized jobs, technology transfer, location of operations. All the stuff that offshore development brings, rather than royalties. This approach is sometimes questioned - why the emphasis? Well, money is great if you keep it. But two reasons really drove our approach: 1) Royalty monetary gains were offset greatly

⁵⁶ See, for example, IDP report *supra* note 52 at 13.

by equalization losses; and 2) If we lost the court case (which was what we anticipated) the companies couldn't just pick up all their investment in people and infrastructure and move.⁵⁷

Nevertheless, the issue of royalties from offshore oil and gas has remained prominent. After all, it is asked, if Newfoundland and Nova Scotia really are supposed to be the primary beneficiaries of the offshore (as the Accord agreements promised), why is the bulk of the revenue (seventy percent under the “generic equalization formula” described above) from royalties flowing toward Ottawa? The simple answer is laid out in the discussion above, and is tied to the constitutional structure of Canada and the structure of the federal equalization program. But, such legal formalism does not provide a satisfactory answer for many, and numerous critiques have been made of the impacts of the equalization program on offshore royalties.

One such critique has been advanced by economist Kenneth Boessenkool. Writing for the Atlantic Institute for Market Studies, Boessenkool presents a two-pronged economics argument against including resource revenues in the equalization formula.⁵⁸ The first part of his argument is that royalties from non-renewable resources are a capital asset, in that they are a transfer of a stock of wealth from one form to another, without any actual increase in total wealth in the process. The same is not true of renewable resources. From an accounting point of view, he argues, the sale of an existing asset is not the creation of revenue, but merely a change in the form of existing capital. Therefore, royalties should not be considered a revenue stream for the purposes of calculating equalization transfers.⁵⁹ The second part of Boessenkool's argument is that royalties, or “rents from the extraction of natural resources”⁶⁰ are in effect capitalized throughout the wider economy as a province's economy grows as a result of offshore development. Revenue sources such as sales tax, income tax and so forth are already included in the equalization formula, and as a result, direct natural resource revenues do not need to be; rather, he states, it “amounts to double counting.”⁶¹

⁵⁷ James L. Thistle, “The Hibernia Project: Lessons Learned - A Personal Perspective” (OTANS conference Halifax, NS, October 2000) [unpublished].

⁵⁸ Boessenkool, *supra* note 39 at 8-10.

⁵⁹ Boessenkool, *supra* note 39 at 8.

⁶⁰ Boessenkool, *supra* note 39 at 9.

Boessenkool's arguments are not based on any notion of what is "right or wrong." Rather, they are grounded in the morally detached "efficiency" paradigm that we have learned to expect from economists; he believes that the provinces will be induced to tax resource rents in an "inefficient" manner under the current equalization structure.⁶² However, other criticisms of the way in which equalization operates with regard to royalty revenues have focussed very clearly on the moral propriety of the federal "clawback" of these revenues.

One clear example of this is Nova Scotia's lobbying effort known as the "Campaign for Fairness." Led by Premier John Hamm, this campaign is an effort to focus public attention on two related realities. First, the federal government committed, through the Nova Scotia Accord, that the province was to be the principal beneficiary of offshore development. Second, the federal government is receiving about eighty-one cents of each dollar generated by offshore revenues for that province through the equalization mechanism.⁶³ The crux of the argument made by Premier Hamm's government is that the federal government has reneged on a solemn promise made to the province, and therefore the equalization mechanism should not be applied to offshore resource revenues.

This position has been supported by the well-known Newfoundlander and former politician John Crosbie. Crosbie is quite familiar with the subject, as he was Minister of Justice and Attorney General in Prime Minister Brian Mulroney's cabinet when the Atlantic Accord was signed with Newfoundland, and remained in that position until just a few weeks before the Nova Scotia Accord was signed in 1986. Crosbie, through a spate of newspaper editorials,⁶⁴ has impugned the integrity

⁶¹ Boessenkool, *supra* note 39 at 10.

⁶² Watkins, for his part, has also demonstrated a politically detached view of the royalty issue in his paper for AIMS (*supra* note 31). While making a reasonably convincing case that Nova Scotia and Newfoundland's royalty regimes are fair to both the provinces and the oil companies, he also argued that royalties should not be viewed as a tool to achieve socio-economic objectives. Rather, royalty levels should be set at levels that maximize efficiency (that is, where they would maximize benefits to the province without discouraging development). However, it seems an argument that posits that revenue policies should be made in isolation from social and economic objectives does not recognize the policy imperatives confronting governments in this context.

⁶³ The province's figures are available at <http://www.gov.ns.ca/fairness/Fairness99.pdf>.

⁶⁴ See John Crosbie, Editorial, *The Globe and Mail* (12 September 2001). See also *National Post* June 13, 2001 and St. John's *Telegram*, October 21, 2001.

of the federal government for its failure to live up to the clear commitment made to the provinces regarding the right to receive the economic revenue from offshore development. As he wrote in the *Globe and Mail* on September 12, 2001:

The intent of these agreements was and is that Nova Scotia, and Newfoundland and Labrador, should and would receive the revenues from their respective offshore resources until their economies were at least at the national average level. In fact, in most documents they will remain principal beneficiaries until they reached 110-140% of national standards, depending on certain circumstances.

In his editorials, Crosbie goes on to reference written and oral commitments made by past (Tory and Liberal) federal governments to the provinces that reinforce this position.

Through Crosbie's support of these moral arguments, Nova Scotia's campaign has certainly received a boost, for who better than a person who was centrally involved to attest to the meaning of the commitments made to the provinces through the Accord agreements? At the same time, the question remains for Crosbie that if, as he claims, the intent was that royalty revenue would not be clawed back by Ottawa, why were stronger protections not put in place to protect this revenue from the equalization mechanism during his tenure? The quote from Thistle (see text accompanying note 57), while speaking from a period of time prior to the establishment of the equalization offset provisions in the Accord agreements, seems to indicate that the province (in this case Newfoundland) was anticipating from the outset that royalty income would be largely diminished by the equalization program.

It will be interesting to see if efforts by the provinces to renegotiate the way royalty revenues are treated by the equalization program are successful. It appears that in the meanwhile, the solution to the economic problems of Nova Scotia and Newfoundland will have to be sought elsewhere. What remains is the economic activity and employment spurred by petroleum development. The benefits plans that were designed to support local involvement in these areas are addressed next.

2. Benefits Plans and their Implementation

The approaches taken by Norway and U.K. in assisting their domestic offshore supply and support industries were reviewed above. The two approaches were quite different, but shared the fact that both included active protection and promotion of their local industries. In both Norway and the U.K., the respective policies have been largely responsible for the development of strong support industries that now export expertise globally. In Part II of this paper, the respective sections of the Accord Acts that provide that offshore operators provide “benefits plans” was discussed, as were the approaches that the petroleum boards have taken in interpreting this provision. When one looks closely at this provision one finds that its objectives are relatively clearly stated; local workers and companies will be given “full and fair opportunity” to compete for contracts and employment, and when other factors are equal, they will be given “first consideration” for those jobs and contracts. However, what is lacking is a meaningful mechanism to implement these objectives.

In their description of the C-NSOPB’s approach to local benefits during the Cohasset project and that of the C-NOPB’s during the Hibernia project, Harrington *et al.* note that while the boards monitor the content of employment and supply contracts, their approach appears “to be mostly based upon a commitment by the proponent to principles rather than specific requirements.”⁶⁵ More precisely, the boards monitor the oil companies to assess the levels of local content involved in their various projects, but do not specifically require that any level of local content is maintained.

The “full and fair opportunity” phrase used in the openings of the Accord Acts is identical to that which was used under the “moral suasion” approach utilized by the OSO in the U.K. This might indicate that the Nova Scotia and Newfoundland approach was intended to work the same way as the one employed by the OSO. However, as the Sun Oil anecdote noted above seems to indicate, there were real and substantial consequences for companies operating in the U.K. that did not abide by their “gentlemen’s agreements” to “buy British.”⁶⁶ There has been

⁶⁵ *Supra* note 32 at 299.

⁶⁶ Nelsen, *supra* note 44 at 99-100.

little indication from the Atlantic Canadian boards that unsatisfactory performances by oil companies in maintaining adequate levels of local content in their projects will elicit penalties or sanctions. In fact, recent developments in Newfoundland indicate that the C-NOPB is unwilling to even define its level of expectation regarding local content.

On November 26, 2001, the C-NOPB released its final report on the White Rose Development Plan application and the corresponding Benefits Plan application.⁶⁷ The report granted approval to Husky Oil (with some conditions) for both plans. What is more noteworthy in the context of the current discussion is the opportunity the board took in its report to respond to recommendations that had been previously made by White Rose Public Review Commissioner Herbert Clarke in his own report. Clarke is not an individual who is new to industrial development in Newfoundland; he was deputy minister of development in Brian Peckford's administration in the early 1980s as the province challenged the federal government for control of offshore oil.⁶⁸ Clarke's report recommended that the board establish "targets", "quantifiable objectives", "specific goals" or "specific benefits targets", but noted "targets are not quotas... but rather management tools."⁶⁹

The C-NOPB unconditionally rejected this suggestion. In supporting this rejection, it progressed through several steps to demonstrate the rationale for its conclusion. First, it refused to accept the distinction between "targets" or "quantifiable objectives" and quotas, and argued that there is no authority granted in the legislation for the board to impose targets or quotas.⁷⁰ As a principle of administrative law, it also observed that its authority to act is strictly circumscribed by the powers granted in s. 17(1) of the *Accord Acts*.⁷¹ Further, it drew particular attention to the presence of the phrase "on a competitive basis" in the wording of subsection 45(1) of the *Accord Acts*:

⁶⁷ C-NOPB, White Rose Project Development Plan Decision Report, Canada-Newfoundland Benefits Plan Decision Report (26 November, 2001).

⁶⁸ See J.D. House's *The Challenge of Oil: Newfoundland's Quest for Controlled Development* (ISER: St. John's, 1985), particularly Chapter 5, "The Politics" for insight into the contributions of Peckford's administration in the struggle with the federal government for increased offshore autonomy.

⁶⁹ *Supra* note 67 at 21.

⁷⁰ *Supra* note 67 at 22.

⁷¹ *Supra* note 67 at 15.

Canada-Newfoundland Benefits Plan means a plan... for providing manufacturers, consultants, contractors and service companies in the Province... with a full and fair opportunity to participate on a competitive basis in the supply of goods and services [emphasis added].⁷²

The board reasoned that because the words “on a competitive basis” were added to the description of a benefits plan between the Atlantic Accord stage and the implementing *Accord Acts*, the phrase should be given significant interpretive weight. The board also noted what it described as a “misconception” that either the Accord agreement or the resulting legislation intended some measure of preference for goods and services from the province:

This misconception is often expressed as a duty on the Board’s part to maximize Newfoundland & Labrador/Canada content in projects. There was a clear consensus on this in many of the presentations during the public hearings. But, as has been noted, the Legislation is prescriptive in this area; and is prescriptive in a manner which precludes consideration of preference and any requirement for content targets. Not only is there no legislative obligation to introduce such a local preference policy, the wording of the Legislation prevents the use of requirements which would have that effect. The Legislation prescribes a competitive process [emphasis in original].⁷³

This pronouncement is stunning. It is an interpretation of section 45 of the *Accord Acts* that all but castrates the benefits plan provisions. Further, the interpretation that the legislation “precludes consideration of preference” is difficult to understand in light of the fact that section 45(3)(d) requires that “first consideration” be given to goods and services supplied from within the province when they are otherwise equivalent to imported goods and services. Certainly “first consideration” must describe a form of preferential treatment. It is clearly arguable that a “competitive process” does not exclude this kind of preference: local goods and services compete with imports, and if they successfully compete (i.e. they are as good or better than the imports) then they are to be given preference. It appears that the board may have misinterpreted section 45 by focussing too intently on the phrase “competitive process” and failing to read all the subsections together as a cohesive provision.

⁷² The legislation is cited in C-NOPB, *supra* note 67 at 16.

⁷³ *Supra* note 67 at 22.

The argument by the board that it is not statutorily authorized to set quotas or mandate requirements for specific levels of local participation is also problematic. Viewed narrowly, this proposition appears, *prima facie*, to be correct: there is no wording in the statute that gives the board a mandate to set quotas for local content. However, one of the principal tasks of the petroleum boards, both the C-NOPB and the C-NSOPB, is to evaluate the benefits plans and either accept them or reject them. Section 45(2) of the Newfoundland Accord Acts reads as follows:

Before the board may approve a development plan under subsection 135(4) or authorize any work or activity under paragraph 134(1)(b), a Canada-Newfoundland and Labrador benefits plan shall be submitted to and approved by the board, unless the board directs that that requirement need not be complied with.⁷⁴

Clearly, the applicants cannot be approved for any development plan unless they have submitted and had approved a Canada-Newfoundland and Labrador benefits plan. It is also clear that the board is not obliged or compelled to accept any plan it receives. Subsection 45(3) sets out criteria by which a plan is to be evaluated, and includes, *inter alia*, the “first consideration” provision of section 45(3)(d): where a Newfoundland business is equally able to provide the service or goods in question, that Newfoundland business should receive preference. So, while the board may not have a mandate to establish fixed levels of local content in offshore projects, it does have a mandate to approve benefits plans that meet the requirements of section 45 and to reject those that do not. To do any less is to act in dereliction of its statutory duties.

Norway and the U.K. managed to develop strong service and supply industries because they protected and promoted local industry. Yet the C-NOPB appears to be hesitant to even enforce the modest measures provided by s. 45: that local industry be given a “full and fair opportunity” to compete with the giants in the global marketplace. If the White Rose decision is a precedent that is followed by succeeding petroleum boards, Newfoundland’s and Nova Scotia’s industries may not be afforded the opportunity to effectively compete against the giants in this marketplace: giants which got their early start in the shelter of those protective North Sea regimes.

⁷⁴ *Supra* note 8, s. 45(2).

3. Jurisdictional and Constitutional Issues

In one sense Nova Scotia and Newfoundland are fortunate to have as much control and to receive as much benefit as they do from their offshore petroleum industries. Legally speaking (making the safe assumption that Nova Scotia is in the same position as Newfoundland), it is Canada that has the ultimate right to benefit from and legislate in respect of the offshore. On the other hand, as we have seen, the provinces were promised that they would benefit from the resources as if they were on land. The reality of the situation is that the provinces' lack of full jurisdiction over the offshore prevents them from ever fully realizing this promise. Because of their lack of full jurisdiction, the provinces cannot fully control a number of aspects of offshore development.

One such aspect is that the provinces do not have full autonomy to negotiate on their own behalf with large multinational corporations. While a hands-off approach on the part of the federal government may be a vestige of the fallout from the unpopular National Energy Program of the 1980s, some stakeholders feel that the region would benefit from an underlying national policy on offshore development that united the individual provinces on the bases of their common interests. Elizabeth Beale, president of the Atlantic Provinces Economic Council, has written, "[t]he lack of a defined national interest with respect to the exploitation of this important industry stands in stark contrast to other key sectors of the Canadian economy, including aerospace and automobiles, where supportive policies have been instrumental in their development."⁷⁵

One must also wonder if the risk-averse multinational oil companies feel some trepidation in sinking significant investment capital into a region in which jurisdiction for the relevant issues is split between two or more levels of government as well as the petroleum boards. When deciding in which global region to undertake petroleum projects, questions like this must come into play. Further, the reassurance provided in other countries by the fact of being able to deal with a single, unitary state government on all pertinent issues must have strong appeal by comparison. The convoluted nature of Atlantic Canadian regulatory regimes has also caused some legal commentators apprehension about

⁷⁵ "How Do We Create the Best Environment for Maximizing the Benefits of Offshore Oil and Gas Developments?" (2002) *Atlantic Report* Spring/Summer 5 at 7.

their constitutionality.⁷⁶ Further, unless the provisions granting shared jurisdiction to Nova Scotia and Newfoundland are constitutionally entrenched, changed circumstances could impel the federal government to renounce them at any time.⁷⁷

This part of the paper has provided a critical examination of some of the major problems facing Nova Scotia and Newfoundland in their efforts to realize the promise of the Accord agreements: that they become the primary beneficiaries of their offshore oil and gas industries. As noted, the royalties generated by the industry are largely clawed back by Ottawa through the equalization mechanism. In light of this, increased employment and industrial benefits appear to be the most promising source of increased economic integrity arising from the region's petroleum industry. However, based on the example of the C-NOPB in the White Rose decision, it is submitted that the position taken by the petroleum boards has been to largely accommodate the oil companies rather than to challenge their commitment to maximizing local benefits. Improvement will have to be made in this area if the provinces are to realize the full economic potential of this industry.

VI. CONCLUSION

The underlying authority to govern the oil and gas resources offshore Nova Scotia and Newfoundland is complex. As we have seen, continental shelf rights are an incidental extension of a sovereign state, in this case Canada. The Supreme Court of Canada in the *Hibernia Reference* found that it is Canada and not Newfoundland that has the right to exploit the resources under the continental shelf and to legislate with regard thereto. This almost certainly applies to Nova Scotia as well, but has yet to be tested. Canada and the provinces subsequently reached a political settlement which provided that the provinces should be the "principal beneficiaries" of the offshore, to the extent that they should benefit just as they would if the resource were onshore.

This meaning of this commitment has come into question in recent years, as the benefits of provincial offshore oil and gas revenues have

⁷⁶ See for example Pettie, *supra* note 15.

⁷⁷ Hunt, *supra* note 5 at 122.

largely been negated by clawbacks in the federal equalization program. Questions have arisen as to what the promise of becoming principal beneficiaries actually meant. Were the provinces supposed to be the principal beneficiaries of petroleum revenue before or after the equalization mechanism was engaged? Certainly, there is a strong argument to be made that the interaction between royalties and equalization is not operating as was intended nor as it should. Perhaps support from other provinces will lead the federal government to restructure the way these policies are currently operating, but there is no significant indication that this issue will be addressed any time soon.

As a result, most of the provincial hopes for benefits from offshore development have been hung on the potential for results in increased employment and industrial development within the region. As we have seen, the current interpretation of the benefit plan requirements by the petroleum boards do not lead to the enforcement of any firm levels of local content. This is not to say that the tools to provide more support for local industry do not exist within the current regulatory structure. Contrary to the position taken by the C-NOPB in the White Rose decision, it is arguable that the current mandate of the boards could allow for a more assertive application of the “full and fair opportunity” and the “first consideration” principles. Examining the policies that were adopted by the U.K. and Norway during the infancy of their offshore industries, we saw that local support and supply industries prospered with the active and firm assistance of state policies. There is a strong case to be made that local industries will not develop as successfully as those in Norway and the U.K. without similar support from the regulatory structures.

It all comes down to political will and the strength of the provinces’ negotiating positions. Norway and the U.K. faced a different climate in terms of international trade regulation during their industries’ developments, and they also had much larger reserves to use as a bargaining position with the multinational oil companies. Nova Scotia and Newfoundland are hindered by more than just these two factors, however. The inter-jurisdictional nature of the Atlantic Canadian industry requires a high level of inter-governmental cooperation to overcome these obstacles, and achieving such cooperation has rarely proven itself to be easy. Newfoundlanders in particular are liable to be sceptical in this regard, as they have recently seen the domestic cod fishery closed down

once more, while government initiatives to reduce offshore dragging by international vessels are minimal at best.

The provinces face some major hurdles if they are ever to achieve the full benefit of the offshore oil and gas industry. It has been beyond the scope of this paper to offer the solutions. Instead it is hoped that some of the major areas offering room for improvement have been identified.