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Bruce A. Marchand**

Oceans Act: Uncharted Seas For
Offshore Development In
Atlantic Canada?

Canada's Oceans Act, now five years old, is a ground-breaking piece of legislation in marine law which provides a framework for the development of a national oceans strategy, integrated planning and management, and institutional responsibilities. In this article, the authors review the Act and its issues and argue that the uncertainties found there provide opportunities for participants in the Atlantic Canada offshore oil and gas industry to influence the development of an oceans policy, legal and institutional framework that accommodates all interests.

La Loi sur les océans du Canada a maintenant cinq ans. C'est une loi novatrice dans le domaine du droit maritime qui crée un cadre propice à l'élaboration d'une stratégie nationale des océans, à la planification et à la gestion intégrée des océans et à la définition des responsabilités institutionnelles. Dans cet article, les auteurs se penchent sur le texte et les enjeux de la Loi; ils y décèlent des zones floues qui ouvrent la possibilité aux intervenants de l'industrie pétrolière et gazière du offshore du Canada Atlantique d'influencer l'élaboration de la politique des océans et de créer du même coup un cadre juridique et institutionnel qui favorise les intérêts de tous.

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Introduction

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Introduction

On 18 December 1996 Bill C-26 received royal assent and became *An Act Respecting the Oceans of Canada*, more commonly known as the *Oceans Act*.¹ This *Act* was at the time, and still is today, a ground-breaking piece of legislation in marine law anywhere. The *Oceans Act* is innovative in that it is not exclusively appropriative, in the sense of simply defining the extent and functions of Canada's modern maritime zones to maximize benefits under a new international law of the sea. In particular, the *Act* sets out a framework for the development of a national oceans management strategy, integrated planning and management, and the institutional responsibilities for leading and administering these responsibilities. As a result, much has occurred on the Canadian coastal and ocean management front. Even so, however, and despite five years of age, there

1. S.C. 1996, c. 31 [hereinafter *Oceans Act* or *Act*].

continue to be mounting concerns over the intention and content of the *Oceans Act*, as well as its implementation, including policy, process and institutional issues. No significant new regulation has occurred under this statute, leaving the generality of much of the statute's text to interpretation. The *Oceans Act* is currently under review by the Standing Committee on Fisheries and Oceans pursuant to s. 52 and a report is expected to be tabled in the House of Commons by 1 October 2001.

The offshore oil and gas sector, like other marine sectors, has tested and continues to test the extent to which the *Oceans Act* facilitates or constrains ocean development in Canada. In particular, the offshore oil and gas sector in the Atlantic region is faced with the need to find a *modus vivendi* in a situation of policy, legal and institutional uncertainty. On the one hand, offshore development off Newfoundland and Nova Scotia is governed by legal regimes supported by federal and provincial statutes based on offshore accords.² On the other hand, there are questions as to how that same development operates within the larger framework set out in the *Oceans Act*. There is much at stake. In January 1999 it was estimated that the total development cost for offshore Atlantic Canada oil and gas projects then under production, in development or at an advanced stage of exploration was 14 billion dollars.³

The oil and gas industry is not new to uncertainty and consequent risk. However, it must assess the cost-benefit ratio under a scenario where Canada continues to experiment with approaches to integrated management in the context of conflicting policies, competing sea uses, conservation and development values, perceptions and scientific realities, special interests and regional economic development in a part of the country in need of greater economic activity.

This article reviews salient parts of the *Oceans Act* relevant to offshore development in the Atlantic region, especially off Newfoundland and Nova Scotia where the bulk of offshore licensing and industry activity is under way. It will focus on selected old and new issues affecting or potentially affecting the Canadian quest for oceans development and integrated management. This article argues that, despite uncertainties, there is an opportunity for industry to participate in and influence positively the evolution of an oceans development policy and a legal and

2. *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28.; *Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*, R.S.N. 1990, c. C-2; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3.

3. Strategic Concepts Inc., W. Locke and Community Resource Services, *Harnessing the Potential — Atlantic Canada's Oil and Gas Industry* (January 1999) at 11-12.

institutional framework that is inclusive of all interests. It is suggested that the long-term feasibility of offshore activity in this region will depend on a mutual accommodation of interests.

I. *Issues Of Concern To Industry*

1. *Maritime Zones*

To a great extent, Canada's maritime zone entitlements under the international law of the sea are well defined by the *Oceans Act*. Until the enactment of this statute, Canada had a maritime zone system that did not fully maximize benefits under the law of the sea. Although it had a good, normal and straight baseline system and a full 12-nautical-mile territorial sea, it did not have a 24-nautical-mile contiguous zone and a full 200-nautical-mile exclusive economic zone (EEZ). True enough, Canada has had a 200-nautical-mile fishing zone and has exercised environmental jurisdiction within this area prior to the *Act*, but these jurisdictions constituted something less than the full entitlements of the EEZ.⁴ Likewise, Canada has always had a continental shelf, *ipso iure*, *ipso facto* and *ab initio* since the emergence of the continental shelf as a norm of customary international law in the early 1950s, but with the advent of a redefinition of the full extent of the legal continental shelf as the continental margin in the early 1980s, Canada had not yet maximized its full continental shelf entitlement in domestic law.

With a single legislative stroke, Canada reorganized its maritime zones and maximized its entitlements using much of the language of the *United Nations Convention on the Law of the Sea 1982*.⁵ The territorial sea, as an area of full sovereignty, continues to extend to 12 nautical miles from state-established baselines.⁶ There is now a contiguous zone extending to 24 nautical miles from the territorial sea baselines.⁷ This zone enables Canada to exercise jurisdiction for prevention of the infringement and enforcement of federal laws on customs, fiscal, immigration

4. This was provided for in the *Territorial Sea and Fishing Zones Act*, R.S.C. 1985, c. T-8, as rep. by *Oceans Act*, *supra* note 1, s. 55.

5. *United Nations Convention on the Law of the Sea*, adopted in Montego Bay, Jamaica, opened for signature on 10 December 1982 and came into force with the 60th ratification on 16 November 1994, in *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (New York: United Nations, 1983) at 1-157 [hereinafter *LOS Convention*.] Regulations to date defining maritime zones under the *Oceans Act* are to be found in: *Fishing Zones of Canada (Zones 1, 2 and 3) Order*, C.R.C., c. 1547; *Fishing Zones of Canada (Zones 4 and 5) Order*, C.R.C., c. 1548; *Fishing Zones of Canada (Zone 6) Order*, C.R.C., c. 1549; *Territorial Sea Geographical Coordinates Order*, C.R.C., c. 1550; and *Territorial Sea Geographical Coordinates (Area 7) Order*, S.O.R./85-872.

6. *LOS Convention*, *ibid.*, art. 3; *Oceans Act*, *supra* note 1, s. 4.

7. *LOS Convention*, *ibid.*, art. 33.

and sanitary matters. The EEZ, which extends to 200 nautical miles from the baselines, provides Canada with:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration [of the EEZ] such as the production of energy from the water, currents and winds;
- (b) jurisdiction [in the EEZ] with regard to
 - (i) the establishment and use of artificial islands, installations and structures,
 - (ii) marine scientific research, and
 - (iii) the protection and preservation of the marine environment; and
- (c) other rights and duties [in the EEZ] ... provided for under international law.⁸

As in the case of the EEZ, the continental shelf includes sovereign rights for the exploration and exploitation of “mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species”⁹

Although Canada has maximized its maritime zones using almost verbatim the text of the *LOS Convention*, it is not yet a party to this treaty. It has relied on entitlements under customary international law, but clearly any other benefits, or for that matter, responsibilities, that it might be entitled to and has to fulfil in international law have to be read against its future membership under this treaty and any other legal instrument that might add to the jurisdictional power of the coastal state in maritime zones defined by the *LOS Convention*.

There are many implications of not being a party, but one stands out in significance: the full extent of the extended continental shelf of Canada, *i.e.*, the seabed and subsoil outside the 200-nautical-mile EEZ. The *Oceans Act* has defined the outer limits of all maritime zones, with the exception of the continental shelf. In several areas of the Atlantic and Arctic regions, Canada is in a position to claim extended continental shelf rights going outside the 200-nautical-mile EEZ limit. According to one preliminary study, Canada’s claim to extended continental shelf jurisdiction beyond 200 nautical miles “would likely encompass about 1 million square kilometres in the Atlantic Ocean, and about three-quarters of a

8. *LOS Convention, ibid.*, art. 56; *Oceans Act, supra* note 1, s. 14.

9. *LOS Convention, ibid.*, art. 77; *Oceans Act, ibid.*, s. 18.

million square kilometres in the Arctic Ocean . . . Taken together, these regions are roughly equal to the area covered by Canada's three Prairie Provinces combined."¹⁰ While the extended continental shelf in the Atlantic has significant potential for hydrocarbons and gas hydrates, the Arctic has a potential for gas hydrates. The Atlantic extended continental shelf may also have a potential for sedentary living species. It has been stated that in the Atlantic region "known and potential hydrocarbon resources offer the primary economic justification for seeking international recognition of Canadian jurisdiction beyond 200 nautical miles."¹¹

The area encompassed between the baselines and the outer limit of the EEZ is not an issue, as both the EEZ and continental shelf within 200 nautical miles have overlapping, but clear international legal regimes and outer limits based on distance from baselines. Somewhat more complex is the area of seabed and subsoil that still forms part of the continental margin of so-called broad margin states, which include Canada. Clearly, Canadian continental shelf rights will still apply even though the outer limit of the extended continental shelf has not been determined.¹² But there remain two issues here: the first is the outer limit itself and the second is a new international legal regime applicable to mineral activities on the extended continental shelf.

In the *LOS Convention*, and probably also at customary international law, a broad margin state is entitled to an adjacent continental shelf, now defined in terms of the entire continental margin (*i.e.*, including the shelf proper, slope and rise), so long as criteria of appurtenance are satisfied. These criteria are set out as rules for the determination of the outer limit of the extended continental shelf in art. 76 of the *LOS Convention*. If Canada were a party, it would have a ten-year period from the entry into force of the *LOS Convention* in its regard to submit particulars of the limits, including supporting scientific and technical data, of its extended continental shelf to the United Nations Commission on the Limits of the Continental Shelf (UN Commission).¹³ As a body established by the *LOS Convention* to assist and guide the determination of the outer limit of the extended continental shelf, the UN Commission is composed of scientists

10. Personal opinions expressed by R. Haworth and R. Macnab, "Earth Science and the Law of the Sea: Keys to Canada's Offshore Energy and Mineral Resources beyond 200 Nautical Miles," (GeoCanada 2000, Third Summit Session, Earth Science and Society, Calgary, 25 May 2000) [unpublished]. See also personal opinions expressed in R. Macnab, ed., *Canada and Article 76 of the Law of the Sea: Defining the Limits of Canadian Resource Jurisdiction beyond 200 Nautical Miles in the Atlantic and Arctic Oceans* (Dartmouth, Nova Scotia: Geological Survey of Canada, Open File 3209, 15 May 1994) at 22.

11. *Ibid.*, Macnab, at 15.

12. *Oceans Act*, *supra* note 1, s. 17(2).

13. *LOS Convention*, *supra* note 5, Annex II, art. 4.

and technical persons. It is not a body with determinative functions, but is in a position to consider a state submission and provide appropriate recommendations.¹⁴ The task of establishing outer limits is reserved to the coastal state. There does not seem to be state practice to indicate what the rules for the precise determination of the outer limit might be at customary law, although Canada would still have to be guided by the outer limit of the continental margin as the seaward-most extent of its legal continental shelf and eventually define the outer limit through regulation under the *Oceans Act*.

This issue is hardly a theoretical one. Several exploration licences and one discovery licence issued off Newfoundland in the Flemish Cap area are well outside the 200-nautical-mile limit. The Call for Bids No. NF-00-1 (South Whale and Carson Bonniton), issued on 15 March 2000 with a closing date of 15 November 2000, included four blocks in the Carson Bonniton area which are beyond 200 nautical miles.¹⁵ More recently, the Call for Bids No. NF-01-1 issued on 1 May 2001 with a closing date of 20 November 2001 includes parcels in the Jeanne D'Arc Basin and Flemish Pass Area that are also located well beyond 200 nautical miles.¹⁶ The legal question here is how far beyond 200 nautical miles do the Canadian extended continental shelf rights and responsibilities actually extend in the absence of a delineated limit under the *Oceans Act*, and presumably an official nod from the UN Commission. Should there be doubt as to whether an offshore area is within Canadian jurisdiction, the situation at the moment is that a certificate issued by or under the authority of the Ministry of Foreign Affairs containing a statement that such offshore area is in the continental shelf of Canada would be needed as conclusive proof.¹⁷

14. At an Open Meeting of the UN Commission on the Limits of the Continental Shelf, held at the UN Headquarters in New York on 1 May 2000, participants were informed that the UN Commission is currently prepared to accept formal submissions from coastal states and to provide scientific and technical advice in the preparation of submissions. CLCS/Inf./2 (20 April 2000). To guide submissions, the following documents have been produced: *Rules of Procedure on the Commission on the Limits of the Continental Shelf*, CLCS/Rev. 3 (6 February 2001); *Modus Operandi of the Commission*, CLCS/L.3 (12 September 1997); and *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, CLCS/11 (13 May 1999) and CLCS/11/Add. (3 September 1999).

15. Canada-Newfoundland Offshore Petroleum Board, News Release (15 March 2000), online: Canada-Newfoundland Offshore Petroleum Board Homepage <<http://www.cnopb.nfnet.com/newsr/2000nr/mar14en.htm>> (date accessed: 11 July 2000).

16. Canada-Newfoundland Offshore Petroleum Board, News Release (1 May 2001), online: Canada-Newfoundland Offshore Petroleum Board Homepage <<http://www.cnopb.nfnet.com/newsr/2001nr/may01en.htm>> (date accessed: 19 June 2001).

17. *Oceans Act*, *supra* note 1, s. 23(1).

The second issue here is a new international legal regime that will apply to extended continental shelf activities beyond 200 nautical miles, once Canada becomes party to the *LOS Convention*, and on which the *Oceans Act* and the *Canada Petroleum Resources Act*¹⁸ are silent. This is provided in art. 82 of the *LOS Convention*, which is entitled "Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles." The text is as follows:

1. The coastal States shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.
2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter. Production does not include resources used in connection with exploitation.
3. A developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource.
4. The payments or contributions shall be made through the [International Seabed] Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.¹⁹

During the negotiations of this provision at the Third United Nations Conference on the Law of the Sea 1973-1982 (UNCLOS III) several delegations wanted to see a compromise provision that would benefit those states, especially developing states, that were clearly not going to reap benefits as broad margin states. The provision was consistent with the principle of the common heritage of mankind that permeated the entire conference, and resulted in, among other things, the establishment of an area beyond national jurisdiction known as the International Seabed Area under the administration of a new organization entitled the International Seabed Authority. At the same time, coastal states with good geography (*i.e.*, with open adjacent maritime spaces) had to compromise in providing benefits to land-locked, geographically disadvantaged and developing states generally. Such was the rule of consensus at UNCLOS III, ensuring that nothing was agreed upon until everything was agreed

18. R.S.C. 1985, c. 36 (2d Supp.).

19. *LOS Convention*, *supra* note 5, art. 82.

upon by all, thus resulting in a package deal. After all, there was a perception that broad margin states were going to reap extra benefits at the expense of the International Seabed Area, which was beyond national jurisdiction and not subject to national appropriation. The royalty will thus accompany extended continental shelf rights.

The compromise has resulted in what appears as an incremental royalty on the gross production starting from the sixth year of production and reaching a ceiling of 7 percent by the twelfth year. Since it stems from an international convention, the “treaty responsibility” is that of the coastal state party to the *LOS Convention*, including Canada, if it becomes a party. However, it is difficult to imagine a situation where the actual operator would not pay such a royalty, with Canada acting as a conduit for the payment to the International Seabed Authority. The payments may be made in cash or in kind, and this seems to be an option for the coastal state. If in kind, they would have to be valued at prevailing market rates.

Clearly, the language of this provision requires various clarifications on how the provision would apply to producing states acceding to the *LOS Convention* (e.g., is the date of production retroactive to a period when the coastal state was not a party?), the precise role of the coastal state, the understanding behind the references to “value or volume,” which developing states are actually exempted from payments and at what time, and the so-called equitable criteria for sharing of collected royalties. There have been no reports on this provision to better explain its application, including by relevant UN organizations such as the International Seabed Authority itself and the Division of Ocean Affairs and the Law of the Sea in the Secretary-General’s office.²⁰ Nor does it appear that there are other areas where offshore development is taking place within national jurisdiction outside the 200-nautical-mile limit from which to draw guidance.

But what is clear for offshore development off Newfoundland and Nova Scotia is that art. 82 would apply when Canada becomes a party to the *LOS Convention*.²¹ Canada would not be in a position to make a reservation to this provision²² and presumably would eventually legislate the new requirement. This is an issue that the National Energy Board, offshore petroleum boards and concerned operators would need to

20. Personal communication from L. Cunningham, Division for Ocean Affairs and the Law of the Sea, UN, New York (13 July 2000).

21. Personal communication from D. Angus Taylor (11 July 2000). The issue has in fact been referred to the Department of Foreign Affairs and International Trade by the Canada-Newfoundland Offshore Petroleum Board.

22. *LOS Convention*, *supra* note 5. Article 309 does not allow reservations or exceptions to the application of the treaty by states on ratification or accession.

address as there might well be the need for an amendment to royalty regimes established in Canadian law. This issue should be anticipated to avoid difficulties during the life of a producing field.

2. *Federal-Provincial Jurisdiction*

Federal law will apply to offshore islands, installations, structures and safety zones.²³ There is also the possibility of application of provincial law. The potential overlap between federal and provincial jurisdiction has been handled in a rather interesting manner by the *Oceans Act*.

Federal-provincial jurisdiction over maritime areas has from time to time surfaced as a contentious issue. Section 7 of the *Oceans Act* states, for greater certainty, that "the internal waters of Canada and the territorial sea of Canada form part of Canada." In recognition of unique individual provincial maritime entitlements that might be in existence, s. 8 goes further in stating, again for greater certainty, that "in any area of the sea not within a province, the seabed and subsoil below the internal waters of Canada and the territorial sea of Canada are vested in Her Majesty in right of Canada." These provisions have to be read against a background of constitutional issues and what individual provinces may have brought into confederation by way of property rights. In 1967 the Supreme Court of Canada ruled that the territorial sea, its seabed and subsoil, including any mineral and other natural resources from the ordinary low-water mark on the coast of the mainland and islands of British Columbia, and outside harbours, bays, estuaries and similar inland waters, is property of Canada. Canada therefore has the right to explore and exploit and exercise jurisdiction over these areas.²⁴ What remained unanswered was ownership of internal waters, including mineral and other natural resources of the seabed and subsoil, between the British Columbia mainland and the islands, specifically the waters of the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait and the Queen Charlotte Strait. This second question was resolved in 1984 in favour of the province on the ground that these waters were brought into confederation as part of British Columbia.²⁵ Newfoundland, the most recent member of the confederation, raised similar questions in relation to the territorial sea and continental shelf. The Newfoundland Court of Appeal answered the question concerning ownership of a three-mile territorial sea in favour of the province, but found that the province did not have continental shelf

23. *Oceans Act*, *supra* note 1, s. 20.

24. *Reference Re Ownership of Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792.

25. *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 S.C.R. 388.

rights.²⁶ In the reference to the Supreme Court of Canada, it was decided that continental shelf rights accruing under international law are a federal matter.²⁷ Newfoundland failed to show that the continental shelf doctrine had become part of customary international law, thus entitling coastal states to continental shelf rights, prior to its joining confederation in 1949. However, provincial rights over the territorial sea were not questioned further.

Other Atlantic coastal provinces also have potential maritime entitlements. For instance New Brunswick and Nova Scotia have shared the Bay of Fundy, possibly as far back as the deed to Sir William Alexander in 1621. On joining confederation in 1867 the two provinces had already shared a maritime boundary cutting across the Bay, with a closing line at the mouth of the Bay. The *Constitution Act, 1867* recognized that the provinces of New Brunswick and Nova Scotia have the same limits as they had on its passing.²⁸ All lands belonging to the provinces, except public harbours, were reserved for the provinces.²⁹ The executives and courts of both provinces have historically exercised spatial jurisdiction over activities in provincial bays, and both provinces may have brought territorial sea rights into confederation. The precise full extent of provincial maritime entitlements needs to be researched further, but several commentators have opined in favour of provincial property rights in certain inshore water areas.³⁰ The legal implication of this is that federal jurisdictional prerogatives over fishing, navigation and shipping may be parallel to provincial property rights over certain inshore areas.

26. *Reference Re Mineral and Other Natural Resources of the Continental Shelf* (1983), 145 D.L.R. (3d) 9 (Nfld. C.A.).

27. *Reference Re Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86.

28. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s.7.

29. Confirmed in *Canada (Attorney-General) v. Ontario (Attorney General)*, [1898] A.C. 700 (P.C.) and accepted in *Reference Re Ownership of Offshore Mineral Rights* (1967), 65 D.L.R. (2d) 353 (S.C.C.).

30. For detailed commentaries on the legal and political history, see: G.V. La Forest, "Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident" (1963) 1 Can. Y.B. Int'l L. 149; J. Morin, "Les eaux territoriales de Canada au regard du Droit international" (1963) 1 A.C.D.P. 82; G.V. La Forest, "The Delimitation of National Territory: re Dominion Coal Company and County of Cape Breton" (1964) 2 Can. Y.B. Int'l L. 233; K. Beauchamp, M. Crommelin & A. R. Thompson, "Jurisdictional Problems in Canada's Offshore" (1973) 11 Alta. L. Rev. 431; N. L. Nicholson, *The Boundaries of the Canadian Confederation* (Toronto: Macmillan/Carleton Library No. 115, 1979); E. C. Foley, "Nova Scotia's Case for Coastal and Offshore Resources" (1982) 13 Ottawa L. Rev. 281.

The *Oceans Act* does address potential uncertainties that may arise as to the full application of provincial law to maritime areas. Section 9 provides for the application of provincial laws of a province to the internal waters and the territorial sea of Canada that is not within a province and that is so prescribed by regulation.³¹ Similarly in s. 21, the application of provincial laws may be extended to the EEZ and continental shelf. For greater clarity, both sections provide that provincial laws would be applied to the same extent as federal laws to maritime areas as if those areas were within provincial territory.³² To date, the only regulation under the *Oceans Act* extending the application of provincial law to a maritime area is in relation to the Confederation Bridge area to Prince Edward Island.³³

A similar approach has been adopted in regard to court jurisdiction. Maritime or admiralty jurisdiction has always been concurrent between federal and provincial courts, except in those subject-areas specifically reserved for Federal Court jurisdiction.³⁴ What the *Oceans Act* does is to confer jurisdiction on provincial courts that are most geographically proximate to offshore activities in relation to laws applicable under the *Act*.³⁵

3. *Oceans Management Strategy*

The *Oceans Act* provides for the development and implementation of a national oceans management strategy. This strategy contemplates the development and implementation of integrated management plans for Canada's estuarine, coastal and marine ecosystems and the establishment of a national system of marine protected areas (MPAs). The *Oceans Act*

31. See also *Oceans Act*, *supra* note 1, s. 26(1)(b), which provides for the Governor in Council to make regulation to extend the application of provincial law to any area of internal waters, territorial sea, exclusive economic zone or continental shelf.

32. *Oceans Act*, *ibid.*, s. 26(c)(e)(j). Both sections also provide that they shall not be interpreted "as providing a basis for any claim, by or on behalf of a province, in respect of any interest in or legislative jurisdiction over any area of the sea in which a law of a province applies under this section or the living or non-living resources of that area, or as limiting the application of any federal laws." Also, the Governor in Council may exclude application of provincial law.

33. *Confederation Bridge Area Provincial (P.E.I.) Law Application Regulations*, S.O.R./97-375. The laws of Prince Edward Island, with the exception of the *Highway Traffic Act*, were made to apply to the "Confederation Bridge Area"

34. *Federal Court Act*, R.S.C. 1985, c. F-7, s. 22(2); *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

35. *Supra* note 1, s. 22.

does not embody or reflect an oceans strategy for Canada, but rather provides the process and principles for the development of one. That process began with the preparation and distribution to the public of a discussion paper entitled *Toward Canada's Oceans Strategy*.³⁶

The *Oceans Discussion Paper* states that “the Oceans Strategy will replace the current fragmented approach to oceans management with a collaborative, integrated approach.”³⁷ The *Act* provides that the “National Oceans Strategy” shall be based on the principles of sustainable development, the integrated management of oceans activities and the precautionary approach. The discussion paper defines these as follows:

Sustainable Development: development that meets the needs of the present without compromising the ability of future generations to meet their needs. The utilization of resources, investment, technological development and institutional change must all consider future as well as current needs.

Integrated Management: a continuous, transparent decision-making process developed by stakeholders to integrate planning and implementation of activities and policies affecting Canada's oceans.

Precautionary Approach: erring on the side of caution.³⁸

The *Oceans Discussion Paper* notes that the renewed interest in the exploration and development of east coast oil and gas has the potential to generate significant economic benefits into the future. It states, however, that

acoustics from geophysical seismic surveys and drilling, sea-bed disturbances from development infra-structure (such as pipelines), drilling fluids disposal and accidental petroleum discharges are among the potential environmental threats associated with such development.³⁹

When the discussion paper was circulated it was contemplated that the oceans strategy would be developed following broad consultation, perhaps through the use of a panel process. It appears that the approach has shifted to moulding the strategy through the development and implementation of integrated management plans, the first being the Eastern Scotian Shelf Integrated Management Project.⁴⁰ While some might argue that this is putting the cart before the horse, this “learning by doing” approach is based upon the principles set forth in the *Act*, if not guided by a national

36. Fisheries and Oceans Canada, Discussion Paper, *Toward Canada's Oceans Strategy* (Ottawa: Communications Directorate, 1997), online: Oceans Canada Homepage <<http://www.oceanscanada.com/english/index.htm>> (last modified: 20 January 1998) [hereinafter *Oceans Discussion Paper*].

37. *Ibid.*

38. *Ibid.*

39. *Ibid.*

40. Interview with Faith Scattolon, Regional Oceans Co-Ordinator, Department of Fisheries and Oceans, Maritimes Region (8 August 2000) [hereinafter Scattolon].

strategy. There appears to be no target date for the development of the oceans strategy. Given the wide array of different issues facing Canada's three oceans, it would appear that Canada's oceans strategy will be an evolving one which, in many respects, is likely to be ocean-specific and possibly site-specific.

The Canadian Association of Petroleum Producers (CAPP) has expressed several concerns about the *Oceans Act* and the uncertainties it presents to the oil and gas industry including concerns about: compromising existing offshore oil and gas regulatory and management regimes in the different offshore regions; introducing uncertainty about access, and conditions of access, to offshore lands; a risk of existing exploration or development rights being deferred or abrogated; higher operating costs caused by restrictive operating conditions or imposition of temporary or permanent operating constraints to protect living resources at risk for unknown reasons; unreasonable application of the precautionary principle to delay projects or activities.⁴¹

4. Sustainable Development

The definition of sustainable development found in the *Oceans Discussion Paper* leaves it unclear how this principle will be interpreted in the context of the oil and gas industry. What does it mean in the context of the extraction of non-renewable resources? How does this relate to Canada's energy strategy? Does this principle imply that multiple use conflicts must always be resolved in favour of renewable resources? The answers to these and many more questions will need to be addressed in the consultative process. It is critical that the oil and gas industry be involved in this process.

A Department of Fisheries and Oceans (DFO) report entitled *Sustainable Development — A Framework for Action*⁴² states that the federal government's sustainable development strategy will be guided by seven principles articulated by the Government of Canada in its *Guide to Green Government*.⁴³ The seven principles are integrated approach, continuous improvement, accountability, shared stewardship, ecosystem approach, precautionary approach and pollution prevention. In developing this strategy DFO has identified its own guiding principles. Under these

41. Internal discussion paper of the Canadian Association of Petroleum Producers, *CAPP's Position on the Oceans Act* (6 July 2000) [hereinafter CAPP Internal Paper].

42. Fisheries and Oceans Canada, *Sustainable Development: A Framework for Action* (Ottawa: Communications Directorate, 1997), online: Fisheries and Oceans Canada Homepage <http://www.dfo-mpo.gc.ca/sustdev/sust_e.htm> (last modified: 31 July 2000).

43. Environment Canada, *A Guide to Green Government* (1995), online: Environment Canada Homepage <<http://www.ec.gc.ca/grngvt/guide.htm>> (last modified: 26 April 2000).

principles DFO has stated that it will be transparent, results-oriented, timely, comprehensive, consultative and flexible.⁴⁴

The oil and gas industry is looking for input and greater clarity in the definition of “sustainable development” and how this principle will be applied in the context of regulations and MPAs under the *Act*.

5. *Precautionary Approach*

Of these principles the precautionary approach appears to be of greatest concern to the oil and gas industry. The concern is that an unreasonable or extreme application of this principle could lead to unreasonable delays of offshore projects or activities or the imposition of restrictive operating conditions based upon speculative rather than probable risks.

It is of interest to note that neither the *Act* nor the *Oceans Discussion Paper* defines “precautionary approach” in the same manner as the *Canada Environmental Protection Act, 1999*⁴⁵ or the 1992 *Rio Declaration on Environment and Development*.⁴⁶ Principle 15 of the *Rio Declaration*, which is affirmed in the preamble to the *CEPA*, provides:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.⁴⁷

Principle 15 of the *Rio Declaration* suggests an allowance for environmental trade-offs for economic development and socioeconomic benefits. The reference to “cost-effective measures” implies this utilitarian approach.⁴⁸ Principle 15 suggests a higher threshold for application of the precautionary approach than a “likely to cause harm” threshold as it requires an indication of serious or irreversible damage. In the absence of clear direction on what circumstances trigger the application of the precautionary approach in the context of the *Oceans Act*, the oil and gas industry is left with little guidance as to how this principle will affect the implementation of precautionary control measures.

44. *Supra* note 42.

45. S.C. 1999, c. 33 [hereinafter *CEPA*].

46. *Agenda 21 and the Rio Declaration on Environment and Development*, online: Environment Canada Homepage <http://www.ec.gc.ca/sd-dd_consult/pdf/factsheetagenda211_e.pdf> (last modified: 27 April 2000) [hereinafter *Rio Declaration*].

47. *Ibid.*

48. *Ibid.* For a detailed discussion of the “precautionary principle” or “precautionary approach” see *CEPA and the Precautionary Principle Approach*, online: Environment Canada Homepage, <http://www.ec.gc.ca/cepa/ip18/e18_00.html> (last modified: 9 June 2000).

The industry should have the opportunity for input on the measures of unacceptable activity such as the threshold limits for contaminants and assessment of cumulative effects. The industry is not only a significant stakeholder but also has expertise and scientific knowledge to offer. It would contribute to a more efficient management practice to draw upon the scientific knowledge of industry in this regard.

The oil and gas industry argues that the application of the precautionary approach to marine management of oil and gas activities demands a high level of knowledge about that industry. Otherwise, it is argued, restrictive or exclusionary decisions may be based more on ignorance than knowledge. The challenge for DFO, which has historically focused on the fisheries and more recently Coast Guard activities, will be how to bridge the perceived knowledge gap. Of course, the onus is on industry to take full advantage of the consultative and collaborative processes currently underway to ensure that this concern is addressed.

6. *Integrated Management Planning*

CAPP has recommended that DFO focus on the integrated management planning component of the *Act* and defer decisions about MPAs until management plans for each selected region have been accepted.⁴⁹ It is hoped that the process of developing integrated management plans will identify ecologically sensitive areas and, where needed, deal with such issues through the integrated management plan itself. This is expected to narrow the focus for potential areas of interest (AOIs) which may require the protection of MPA designation to those which cannot be adequately dealt with under the integrated management plan.⁵⁰

Any integrated management planning should take account of the fact that the oil and gas industry is subject to constant technological advancements and change. It is not a static situation. Accordingly, the regulatory regime and management planning should allow for changes in accommodation due to improvements in technology, knowledge and practices.

The integrated management planning should also take account of the complementary resources and services available as a result of an oil and gas operational presence in the offshore. This includes contributions to science, monitoring programs and search and rescue capability enhancement, to name a few.

49. CAPP Internal Paper, *supra* note 41.

50. Interview with Deborah Walsh, Manager, East Coast, Canadian Association of Petroleum Producers (14 August 2000).

7. *Eastern Scotian Shelf Integrated Management Project*

In December of 1998 the Minister of Fisheries and Oceans announced the Eastern Scotian Shelf Integrated Management (ESSIM) project. This project focuses on the Eastern Scotian Shelf which includes approximately 320 thousand square kilometres from Lahave Basin to the Laurentian Channel and extending beyond the EEZ to include continental shelf claims to be defined under the *LOS Convention*. The project objectives are to

integrate the management of all activities in the Eastern Scotian Shelf area; encourage the conservation, effective management and responsible use of marine resources; maintain or restore biological diversity and productivity of the marine environment; and foster opportunities for economic diversification and sustainable wealth generation for coastal communities and stakeholders.⁵¹

Since this announcement, DFO Maritimes Region has been holding information or coordination sessions with other departments (federal and provincial) and specific stakeholder groups in fisheries, oil and gas, environmental non-governmental organizations and academia.

The first formal meeting on the ESSIM took place on 25 July 2000. That meeting included two representatives from the oil and gas industry.⁵² A federal/provincial steering committee was proposed to coordinate the approach of each level of government to the ESSIM project.⁵³ A discussion document has been developed, continues to evolve, and will be discussed at a future ESSIM forum.⁵⁴ The governance body for the Eastern Scotian Shelf Oceans Management Area (known as the Eastern Scotian Shelf Integrated Management Body or ESSIM Body) includes a Regional Committee on Government Affairs (RCGA), an Oceans Management and Planning Group (OMPG), an Implementation Plan Working Group (IPWG) and the ESSIM Forum Secretariat.⁵⁵ The composition and mandates as floated for discussion are summarized and discussed below.⁵⁶

51. Fisheries and Oceans Canada, *Eastern Scotian Shelf Integrated Management (ESSIM) Project* (1998), online: Oceans Act Coordination Office, Maritimes Region, Homepage <<http://oceansconservation.com/mpa/mpahome.htm>> (date accessed: 9 August 2000).

52. Representatives from Marathon Oil Canada Ltd. and Shell Canada Ltd. (List of Participants Annex to minutes of 25 July 2000 ESSIM meeting).

53. Scattolon, *supra* note 40.

54. This was originally scheduled for November 2001, but was postponed as a result of the call for federal elections. *Ibid.*

55. Oceans Act Coordination Office (OACO) presentation entitled *Proposed Governance Framework for the Eastern Scotian Shelf Oceans Management Area* presented at 25 July 2000 ESSIM meeting.

56. *Draft Terms of Reference for ESSIM Regional Committee on Government Affairs and Program Implementation Working Group*, an undated discussion document prepared by the OACO. The governance structure proposed in this document reflects the internal thinking of OACO and may not reflect the final structure of ESSIM.

Regional Committee on Government Affairs (RCGA)

Once established, the RCGA will be the senior executive forum of ESSIM and will meet semi-annually to provide

- (i) efficient decision-making at the intergovernmental/interdepartmental level on planning, management and regulatory matters in the Eastern Scotian Shelf Ocean Management Area; (ii) internal oversight services, monitoring and performance assessment of the integrated management and planning process at the intergovernmental/interdepartmental level; and (iii) formal government involvement in the development and implementation of the Eastern Scotian Shelf Ocean Management Plan.⁵⁷

The document suggests that this will be the executive arm of integrated management. In fact, its composition would consist of senior federal (Regional Director-General) and provincial (Deputy-Minister) government officials and First Nations representation. The mandate includes key powers in an ocean management context, such as: decision-making powers at the zonal/regional level with decisions implemented via relevant federal/provincial departments, agencies and boards; acting in an advisory capacity to federal and provincial ministers; providing direction to the IPWG, and reviewing and commenting on the work of the OMPG and secretariat; serving as a forum to build consensus; coordinating and harmonizing policies, programs and regulatory approaches; developing and implementing information sharing among departments; and monitoring and reviewing government planning, policy coordination and program implementation.⁵⁸

It is likely that this body, or a variation of it, once finalized, will play a critical role in enabling integrated planning and management decision-making. One would expect this body to provide a forum for consensus building and trade-offs which is essential in the multiple use Atlantic marine environment. It appears that much work will need to be done to develop inter-departmental consensus especially on departmental and intergovernmental jurisdictional concerns. In particular, the question of the relationship between any integrated planning for ESSIM under the *Oceans Act* and existing sectoral mandates under other statutes remains to be addressed.

Oceans Management and Planning Group (OMPG)

This body is significantly different in composition from the first, consisting primarily of stakeholder representation. It will provide an opportunity for stakeholders of the Eastern Scotian Shelf to participate in the development of integrated management plans mandated by the *Oceans Act*.

57. *Ibid.*

58. *Ibid.*

Accordingly, its purposes are to provide advisory and implementation roles for development and implementation of the Eastern Scotian Shelf Oceans Management Plan (ESSOMP), to provide overall oceans vision and strategic management objectives for ESSOMP, to provide advice and recommendations to the ESSIM Steering Committee on development and implementation, and to promote coordinated and harmonized industry-led environmental planning and management approaches.

As can be surmised from its functions, the OMPG is not conceived as an executive body, but rather as an exercise in inclusive process where government meets users in a structured multilateral format on a continual basis, as distinct from *ad hoc* bilateral sectoral consultative formats. This body is likely to become a melting pot of ideas and creativity for the practice of integration. To what extent such a diverse group will be able to function and its ability to participate effectively and meaningfully in the planning and management process remains to be seen. However, it will be an important step in building an inclusive process for direct input by stakeholders in the ESSIM structure. An additional challenge will be the process of transition from current bilateral consultations to more complex consultations in a multilateral context, suggesting that a phasing-in process might be wise to enable efficiency and effectiveness of the OMPG, while minimizing confrontation.

Implementation Plan Working Group (IPWG)

This body is floated as a group of representatives of provincial and federal departments/agencies with policies, programs, interests and regulatory affairs affecting the Eastern Scotian Shelf Oceans Management Area, and whose members would participate in the OMPG. It is primarily viewed as a key implementation tool for policy, regulatory harmonization and coordination purposes. In many ways, its functions are reflective of its more senior counterpart, the RCGA, and include: representation of federal and provincial government interests in the ESSIM planning process; members acting as resource persons on working groups; building consensus on coordination and harmonization while representing departmental mandates; assisting with implementation of decisions; reviewing and commenting on plans, papers, issues and initiatives by the OMPG, including participation in OMPG working groups; and liaising with OMPG and secretariat members.⁵⁹

59. *Ibid.*

Although not formally established to date, the functions of the IPWG are already being undertaken by the *ad hoc* Federal-Provincial ESSIM Working Group, which was struck in January 2001 and expects to have its next meeting in September 2001. It is expected that this working group will transit into the role of the IPWG.

ESSIM Forum Secretariat

Essentially an administrative unit, the secretariat will comprise DFO staff from the Oceans and Coastal Management Division (formerly the Oceans Act Coordination Office) and may include external facilitators, with the following functions: facilitation of oceans and coastal management planning, compilation and development of background documentation, facilitation of capacity-building for effective participation in planning and management, encouragement of sector organization for effective sector representation, and coordination and logistical support of ESSIM forum.⁶⁰

The extent to which one or more of these bodies may have a regulatory role raises concerns that this will create yet another regulatory body for industry to deal with. DFO has stressed that the ESSIM Body is not intended to supplant existing sectoral management structures but will be used to link plans and actions across sectors.⁶¹ The oil and gas industry will likely want the committee or board charged with management of the ESSIM project to have, as part of its mandate, the timely identification of areas on the Eastern Scotian Shelf which are of concern or likely to be identified as AOIs for possible MPA designation.

If the management plan is to include offshore zoning, the oil and gas industry will likely want a clear process for an offshore zoning system to be undertaken in conjunction with existing petroleum boards. Any management board will need to make timely decisions which are scientifically based and not merely subject to political influences. It is also critical to the process that any intergovernmental steering committee or other body take an integrationist approach to their work and not merely protect their respective departmental turf.

8. *Marine Protected Areas*

Section 35(2) of the *Act* provides, that for the purposes of integrated management plans, the minister “will lead and coordinate the development and implementation of a national system of marine protected areas”⁶² Section 35(1) defines an MPA as an area of the sea which has

60. *Ibid.*

61. DFO prepared minutes of 25 July 2000 ESSIM meeting.

62. *Oceans Act*, *supra* note 1, s. 35(2).

been designated under this section for special protection for one or more of the following reasons:

- (a) the conservation and protection of commercial and non-commercial fishery resources, including marine mammals and their habitats;
- (b) the conservation and protection of endangered or threatened marine species, and their habitats;
- (c) the conservation and protection of unique habitats;
- (d) the conservation and protection of marine areas of high biodiversity or biological productivity; and
- (e) the conservation and protection of any other marine resource or habitat as is necessary to fulfil the mandate of the Minister.⁶³

Section 35(3) provides that the Governor-in-Council, on the recommendation of the minister, may make regulations:

- (a) designating marine protected areas; and
- (b) prescribing measures that may include but not be limited to
 - (i) the zoning of marine protected areas,
 - (ii) the prohibition of classes of activities within marine protected areas, and
 - (iii) any other matter consistent with the purpose of the designation.⁶⁴

In February of 1997 DFO released a discussion paper entitled *An Approach to the Establishment and Management of Marine Protected Areas under the Oceans Act*.⁶⁵ DFO hosted information sessions to discuss and obtain feedback on the discussion paper.

In the *Oceans Discussion Paper* DFO sets out the framework for the establishment of individual MPAs which involves the following steps:

- Step 1: Identification of AOIs
- Step 2: Initial screening of AOIs
- Step 3: AOI evaluation and recommendation
- Step 4: Development of a Management Plan for Candidate MPA Site
- Step 5: Designation of MPA
- Step 6: Management of MPA.⁶⁶

63. *Oceans Act, ibid.*, s. 35(1)

64. *Oceans Act, ibid.*, s. 35(3).

65. Fisheries and Oceans Canada, *An Approach to the Establishment and Management of Marine Protected Areas under the Oceans Act* (January 1997), online: Fisheries and Oceans Canada Ocean Conservation Homepage <<http://www.oceansconservation.com/mpa/discussion/discussion.htm>> (last modified: 19 August 1998).

66. *Oceans Discussion Paper, supra* note 36.

In relation to Step 1, DFO will accept nominations of areas for consideration as MPAs from the public or interested groups. Proposed areas of interest that may qualify for MPA status are then placed on an AOI list which will be made available to the public. Where certain activities may threaten the ecological integrity of an AOI, interim protection measures may be implemented by DFO. This could include recourse to s. 36(1) of the *Act* which allows the minister to exercise any power under s. 35 on an emergency basis where the minister is of the opinion that a marine resource or habitat is, or is likely to be, at risk.

To date no MPAs have been designated offshore Nova Scotia or Newfoundland under the *Oceans Act*. However, one area offshore Nova Scotia, the Sable Gully, has been designated as an AOI under the DFO MPA program. While no other AOIs have been designated, other possible areas could include the area abutting the Canada/United States "Hague Line," currently proposed as a "no take" zone for scallops to protect the spawning seed stock; the area subject to the current fishery closure offshore Nova Scotia at Western and Sable Banks (Emerald and Western Bank Juvenile Haddock Closed Area); Georges Bank (currently subject to a ten-year moratorium); East Port; Leading Tickle; and Gilbert's Bay, Labrador.

9. *Marine Protected Areas — Other Legislation*

Despite the objective of the *Act* to provide for a coherent integrated approach to oceans management, not all of the fragmentation has been resolved. For example, in addition to DFO under the *Act*, Parks Canada (PC) has mandated authority to create protected areas in the marine environment pursuant to the *National Parks Act*.⁶⁷ Environment Canada (Canadian Wildlife Service) has a mandated responsibility under the *Canada Wildlife Act*⁶⁸ to create protected areas in the marine environment. Since the *Oceans Act* names the minister as the lead federal authority responsible for oceans, DFO is to "lead in the development of a national system of marine protected areas incorporating the programs of all three departments."⁶⁹

To facilitate coordination of the three federal programs a senior management level Steering Committee with representation from DFO, the Department of Environment (DOE) and PC as well as from Natural

67. R.S.C. 1985, c. N-14. Also, Bill C-8, *Marine Conservation Areas Act*, 2d Sess., 36th Parl., 1999, has passed first and second readings in the House of Commons, and is currently in the report stage.

68. R.S.C. 1985, c. W-9.

69. Fisheries and Oceans Canada, *Marine Protected Areas Policy* (Ottawa: Oceans Directorate, 1999), online: Fisheries and Oceans Canada Ocean Conservation Homepage <<http://www.oceansconservation.com/mpa/policy.system.htm>> (last modified: 28 July 1999).

Resources Canada has been established.⁷⁰ It would appear that, of the three federal departments, DFO has been and likely will continue to take the lead on the east coast and that any designation of MPAs on the Scotian Shelf will be dealt with exclusively under the *Oceans Act*.⁷¹

10. MPA Designation Resulting in Lost or Deferred Rights

Where existing and proposed activities may conflict with the conservation objectives of an MPA management plan, the plan may provide for a phasing out of these activities where existing users operate under government licences. DFO has stated that “agreements will be sought with the operator and responsible authority for protection of the area’s resources.”⁷²

AOIs are evaluated by means of three types of assessment: ecological, technical and socioeconomic. Citing the precautionary approach, DFO states that “AOIs’ ecological values may be more important than technical and socioeconomic considerations. In such areas, the overriding concern may be to provide special protection for these values.”⁷³ While there is no inherent industry bias, it is clear that the preservation of the ecosystem will be paramount where proposed uses or conflicting uses would add an unacceptable risk to the ecosystem. The department acknowledges that a major constraint in planning for MPAs is the “limited understanding of the dynamics of our marine ecosystems.”⁷⁴ That limitation, together with a limited knowledge of the oil and gas industry and the commitment to a “precautionary approach” is a cause for significant industry concerns.

An MPA management plan may provide for one or more of a combination of use restrictions, including zoning, buffer zones, prohibited classes of activities and protection standards. Another possibility is the designation of “no use” zones at sites representing a portion (e.g. 10 percent to 15 percent) of the habitat of a particular species.⁷⁵

70. Fisheries and Oceans Canada, *Working Together for Marine Protected Areas: A National Approach* (April 1999), Fisheries and Oceans Canada Conservation Homepage <<http://www.oceansconservation.com/mpa/wtogether/wtogeth.htm>> (last modified: 12 August 1998).

71. Scattolon, *supra* note 40.

72. Fisheries and Oceans Canada, *National Framework for Establishing and Managing Marine Protected Areas*, online: Fisheries and Oceans Canada Oceans Conservation Homepage <<http://www.oceansconservation.com/mpa/process.htm>> (last modified 18 May 1999) [hereinafter *National Framework*].

73. *Ibid.*

74. *Ibid.*

75. Scattolon, *supra* note 40.

Clearly, the potential for an MPA designation which prohibits or restricts oil and gas exploration or development activity in an area for which exploration or development licences have been issued is of great concern to the oil and gas industry. The current licensing regimes on the east coast provide no express assurances, compensation or recourse in the event such activities are prohibited or curtailed or regulated in a manner which increases costs or reduces economic viability. CAPP is looking for answers from DFO and the regulators about the implications of this on the existing offshore regulatory and management regimes. CAPP is of the view that interdepartmental memoranda of understanding (MOUs) should be entered into. CAPP advocates acceptance by governments of a range of incentives and tools to protect operators where existing rights cannot be exercised.⁷⁶ CAPP has concerns with the lack of clarity in the identification and designation process for MPAs and is encouraging government to develop a more systematic approach to nominating, evaluating and ranking candidate areas.

Both DFO and the Canada-Nova Scotia Offshore Petroleum Board (CNSOPB) appear to have recognized the need for a greater degree of information exchange and increased co-operation between the two organizations. DFO, Maritimes Region is nearing completion of an MOU with the CNSOPB to address these objectives. The MOU is expected to deal with the issue of identification of sensitive and important offshore areas.⁷⁷

While the offshore oil and gas industry is fraught with risks that are physical, natural, financial and regulatory, the industry is understandably calling for greater certainty, timeliness and input in connection with the process for MPA identification and designation.

11. *Sable Gully*

The Sable Gully is the first AOI identified on the Atlantic coast pursuant to the *Oceans Act*. It is located approximately 200 kilometres from mainland Nova Scotia to the east of Sable Island. It is a large and deep undersea canyon over 70 kilometres long and 20 kilometres wide. It has corals and a diversity of shallow- and deep-water fish species and a variety of whales and dolphins. It is home to a large year-round population of northern bottlenose whales. A report prepared by GTA Consultants Inc. for DFO entitled *Socio-Economic Profile of the Sable Gully*⁷⁸

76. CAPP Internal Paper, *supra* note 41.

77. *Supra* note 61.

78. GTA Consultants Inc., "Socio-Economic Profile of the Sable Gully" (1999), online: Sable Offshore Energy Incorporated Homepage <<http://www.soep.com>> (date accessed: 10 August 2000) [hereinafter *Socio-Economic Profile*].

states that “the Gully offers an excellent opportunity and an appropriate ‘laboratory’ for cross-sectoral pilot projects in marine environmental management.”⁷⁹ This is because key industry stakeholders have interests there, including most sectors of the fishery, the oil and gas sector and transportation industries. The Gully has attracted local, national and international attention of environmental, educational and research groups. The Primrose field, discovered by Shell Canada in 1973, is located adjacent to the western canyon wall of the Gully. The estimated recoverable gas and oil reserves at Primrose are approximately 131 billion cubic feet of gas and two million barrels of oil.⁸⁰ The Gully is located within 50 kilometres of the Venture gas fields. In 1996 the Sable Offshore Energy Project Environmental Impact Statement identified the Gully as a unique ecological site.⁸¹ In 1997 the SOEP Joint Review Panel Report identified the Gully as a unique ecological site deserving special protection against adverse effects of oil and gas development. This followed the 1992 selection by PC of the Gully and Sable Island region as a “National Area of Canadian Significance” in a study to identify possible sites for a national marine park on the Scotian Shelf. In 1994 DFO established a whale sanctuary in the canyon portion of the Gully. In 1994 the Canadian Wildlife Service, Environment Canada, identified the need for a conservation strategy for the Gully to protect its significant biological resources.⁸²

The CNSOPB has refrained from issuing exploration or drilling permits for lands which involve the Gully until the management strategy for this area is established.⁸³ In 1998 DFO released the *Gully Conservation Strategy*. The CNSOPB has not issued any calls for bids or authorized any activities within the Gully AOI (other than scientific and environmental effects monitoring) since that time. In December of 1998 CNSOPB did issue Call for Bids No. NS98-2. An exploration licence was granted for EL2367, a block adjacent to the northern boundary of that area of the Gully known as the Trough because it was considered to be far enough away from the area of concern.

79. *Ibid.*

80. Canada-Nova Scotia Offshore Petroleum Board, *Technical Summaries of Scotia Shelf Significant and Commercial Discoveries* (March 1997), online: Canada-Nova Scotia Offshore Petroleum Board Homepage <<http://cnsopb.ns.ca/tech2.html>> (date accessed: 10 August 2000).

81. Sable Offshore Energy Incorporated, “Environmental Impact Statement” (1996), online: Sable Offshore Energy Incorporated Homepage <<http://www.soep.com/>> (date accessed: 10 August 2000).

82. *Socio-Economic Profile*, *supra* note 78.

83. Personal Communication with Andre D’Entremont, Canada-Nova Scotia Offshore Petroleum Board (10 August 2000).

If the Sable Gully is likely to be the first MPA designated on the Scotian Shelf then the Primrose field may be the first test case for the issues outlined above if it is within the MPA area or a buffer zone. The manner in which Primrose is dealt with may serve as a guide for the resolution of similar issues in the future. While this may offer some guidance to industry for the purposes of risk assessment, the "site specific" approach means that each case could be dealt with in very different ways, in the absence of clear statutory, regulatory and management direction.

II. Assessment

The first five years of the *Oceans Act* may be considered a transitional period, where trial and error have provided an opportunity for useful learning for improving the operational environment of coastal and ocean uses, including offshore activities. The uncertainties related to Canada's status in relation to the *LOS Convention*, the process of developing a national oceans strategy including integrated management plans and MPAs, understanding of key principles of sustainable development including the precautionary approach and their application in a Canadian context, and overlapping inter-institutional regulatory roles have all contributed to a better understanding of current policy, legal and institutional weaknesses. After all, the *Oceans Act* is supposed to be a modern unifying framework in a country that considers itself a world leader in oceans and marine resource management. If the Standing Committee on Fisheries and Oceans is to carry out a successful review, it will have to address these weaknesses consistently with the vision for the oceans of Canada set by the *Act*.

In many ways, the *Oceans Act* may be seen as legislation implementing the *LOS Convention*, frequently using the very same text as the treaty in defining national maritime zones. The lingering issue of Canada becoming a party to the *LOS Convention* carries uncertainty over the full geographical extent of Canadian regulatory jurisdiction on the extended continental shelf and the application or otherwise of the new international royalty regime. Offshore development is far ahead of Canadian ocean policy on this issue. Exploration and development licences on the extended continental shelf have already been issued. The royalty regime may remain in question until Canada clarifies its position as to whether it is within or outside the *LOS Convention*.

Difficulties in directing the implementation of the *Oceans Act* may be attributed in great part to a lack of a clearly articulated and rationalized integrated oceans policy adopted at the highest level of decision-making in Canada. Instead, the *Oceans Act*, which is both framework and tool,

tries to hit two birds with one stone: provide elements for policy development at the departmental level and institutional tools for ocean management to be used in a consultative manner. Both are positive elements, but without an overarching policy the implementation of the *Oceans Act* has been led by a well-meaning department under constant political and diverse constituency pressure, weakening its ability to exercise effective leadership. Hence the difficulties encountered in developing a national oceans management strategy before an oceans policy is in place.

The *Oceans Act*, as a piece of framework legislation, cannot operate successfully without a strong institutional framework with clear and effective regulation and supportive constituencies. Federal agencies with responsibilities promoted by or touched upon by the *Oceans Act* need to dialogue and work together more effectively. This is particularly true with regard to issues concerning MPAs or marine conservation areas or species protection, and those institutions in offshore development with regulatory mandates established under dedicated statutes and line departments. The department entrusted with a lead role for oceans needs to exercise strong leadership at both the national and regional levels. Although consultative processes are important, they are not ends in themselves. Consultative processes should send out a clear message on the rules and purposes of participation in view of decisions to be made.

Without substantive regulation, the *Oceans Act* will remain at a high level of generality, lacking in clarity and effectiveness. It is clear that the concepts of integrated planning and MPAs in modern coastal and ocean management are here to stay, whether the national oceans strategy is developed top-down or bottom-up. Zoning is essential to clarify where single or multiple ocean uses take place, when and under what conditions. In this way, the oil and gas industry, like other users, will have a better idea of what areas are open for which uses at least as early as the nomination stage. This clarity is essential to engender confidence by investors and users and to enable industry to better assess risk and allocate resources. Unless the existing uncertainties are adequately addressed there will remain the risk that the current growth in oil and gas activity and its accompanying momentum may decline as exploration and development budgets are directed to other areas.

As an important constituency of the *Oceans Act*, the oil and gas industry needs to continue to actively contribute to the development of a modern oceans management framework in Canada. Industry, directly or through representative organizations, should be looking not merely at their sectoral concern, but also to partner more closely with regulatory agencies and key ocean users and interests to help develop a management

framework which key users are comfortable with. It should consider taking an interest in regional economic development and develop an image that will enable its acceptance as a regional development partner for the long term. This includes the education of government agencies, other stakeholders and the public on the economic impact of the oil and gas industry on the east coast. Together with advocacy for clear regulation and timely decisions, these are proactive ways of managing uncertainties.

Conclusion

The uncertainties discussed in this article should not be regarded by industry as purely negative situations, but rather as opportunities to contribute effectively to the creation of the oceans policy and management framework in Canada. Clearly, industry, like other ocean users, is in a position to advise regulatory authorities on ways to establish an operational environment conducive to offshore oil and gas development while accommodating other legitimate users and interests. In an Atlantic Canadian context, mutually beneficial working relationships with fishery interests, (themselves very diverse), coastal communities vitally interested in economic development, and concerned environmental groups are essential for a peaceful long-term presence in the region.