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Jim Dickey**

Regulatory Regime: Canada-
Newfoundland/Nova Scotia
Offshore Petroleum Board Issues

This article identifies and comments on some of the issues which may be of interest respecting petroleum operations in the Newfoundland and Nova Scotia offshore areas. An emphasis has been placed on identifying some of the issues from an operational context and from a regulator's perspective, with some legal analysis provided where appropriate.

Cet article propose quelques éléments de réflexion sur certaines questions concernant les opérations pétrolières extracôtières en Nouvelle-Écosse et à Terre-Neuve. L'auteur s'intéresse en particulier aux aspects opérationnels et réglementaires et se livre à une analyse juridique de certaines considérations.

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I. *Evolution of the Offshore Boards*

1. *Rights of the Coastal State*

As a background focus to an overview of the administration of petroleum resources within the Newfoundland and Nova Scotia offshore areas, it would be appropriate to briefly mention two aspects of offshore jurisdiction respecting a coastal state; namely, the concepts of the territorial sea and the exclusive economic zone. As the distinction between the territorial waters and high seas evolved, there arose two matters which needed to be addressed; first, the nature of the coastal state's rights with respect to its territorial waters, and second, the extent of these waters. The issue of the nature of the coastal state's rights was considered by the English Court for Crown Cases Reserved in *R. v. Keyn*.¹ The issue on the appeal was whether the court (having convicted the accused of manslaughter) had the jurisdiction to try him given that he was a foreigner, even though he was, at the time of the event, within Britain's territorial seas. The majority had decided that although Britain had claimed jurisdiction

1. (1876) 2 Ex. D. 63 [hereinafter *Franconia*].

within the three-mile territorial sea, it had not expressly done so by statute and for that reason could not extend its jurisdiction to foreigners and foreign ships beyond its shores.

In the *Franconia* case Cockburn C.J. set out two requirements for domestic law to be applicable in the territorial sea. First, there must be a customary international law or a treaty permitting the practice, and second, there must be an act of Parliament which confers domestic jurisdiction. Cockburn C.J. states in his decision,

[t]he assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.²

Today the basic rule of public law governing the application of Canadian law to the offshore is that no law, whether statute or common law, extends beyond the low-water mark unless specifically extended by Parliament.

Insofar as the extent of the territorial sea is concerned, international law has since recognized that a coastal state has the right to establish a territorial sea up to 12 nautical miles from land. In Canada's case, the struggles over territorial sovereignty and the application of laws within this territorial sea have not occurred so much in the context of international disputes, but instead have evolved through the context of domestic disputes. More significantly, these disputes, particularly with regard to seabed resources, have created more interest for those areas which extend beyond the territorial sea into the internationally established contiguous zone. (The most relevant Canadian cases include the *B.C. Offshore Reference*,³ the *Newfoundland Reference*,⁴ the *Georgia Strait Reference*⁵ and the *Hibernia Reference*.⁶)

2. *Ibid.* at 203.

3. *In the matter of a reference by the governor general in council concerning the ownership of the jurisdiction over offshore mineral rights as set out in order in council P.C. 1965-750 dated April 26, 1965, [1967] S.C.R. at 792 [hereinafter B.C. Offshore Reference].*

4. *Reference Re: Mineral and other natural resources of the continental shelf appurtenant to the province of Newfoundland, [1983] 145 D.L.R. (3d) 9 [hereinafter Newfoundland Reference].*

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

6. *Reference Re the Seabed and subsoil of the continental shelf offshore Newfoundland, [1984] 1 S.C.R. 86 [hereinafter Hibernia Reference].*

The evolution of this contiguous zone has given rise to an apparently acceptable concept of coastal state jurisdiction within an area referred to as the exclusive economic zone (EEZ). The EEZ extends seaward from the coastal state's baseline up to a distance of 200 nautical miles within which certain rights such as the exploitation of natural resources may be enjoyed by the coastal state and through and over which other states may enjoy freedom of passage. Although its origins are not recent, the actual concept of such a zone began in 1971 and reached fruition through the third *United Nations Convention on the Law of the Sea*.⁷ It is neither territorial nor high seas but a separate area of *sui generis* character which gives rise, *inter alia*, to rights and duties under the *UNCLOS III* to the coastal state. It is in this context that the basis of some of the Canadian legislation may be studied as it applies to the exploitation of petroleum resources within its offshore areas.

2. *The Creation of the Canada-Newfoundland/Nova Scotia Accords and Accord Legislation*

a. *The Canada-Newfoundland Accord and Accord Legislation*⁸

Canada, like other coastal states, has been exercising its rights over the continental shelf in the search for hydrocarbons, but, as previously mentioned, not without domestic conflagration. Beginning with the Newfoundland offshore area, political negotiations between Newfoundland and Ottawa respecting offshore management in the Newfoundland offshore area were not entirely accommodating. Consequently, both parties resorted to the courts to determine jurisdictional issues relating to the exploitation of hydrocarbons within the continental shelf. In the *Hibernia Reference*,⁹ the Supreme Court of Canada ruled that Newfoundland did not exercise jurisdiction within the continental shelf, the result of which may have provided the impetus, together with a more conciliatory approach by both governments, to resolve the issue through agreement.

On 11 February 1985 the Prime Minister of Canada and the Premier of Newfoundland (together with other signatories) signed the Atlantic Accord¹⁰ which brought about the basis upon which the legislative framework could be built regarding petroleum operations within the Newfoundland offshore area.

7. (New York: United Nations, 1983) [hereinafter *UNCLOS III*].

8. See A.R. Lucas & C.D. Hunt, *Oil and Gas Law in Canada* (Toronto: Carswell, 1990).

9. *Supra* note 6.

10. 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) [hereinafter Atlantic Accord].

The creation of the Atlantic Accord, which brought about the beginning of a cooperative regime for offshore resource management, was based upon objectives which may be summarized as follows: (1) provide for a stable and permanent management regime for industry which recognized the equality of both governments; (2) ensure that resource development enhances social and economic benefits to Canada, particularly to Newfoundland and Labrador; (3) allow Canadians, and particularly residents of Newfoundland and Labrador, to compete on a fair and competitive basis for jobs; (4) increase energy security and economic prosperity; (5) provide for revenue sharing on the same basis as if these resources were on land; (6) protect the environment and fishing industry; and (7) improve the safety of offshore work.

It was not until 4 April 1987 that these objectives were legislatively manifested by the coming into force of the *Canada-Newfoundland Atlantic Accord Implementation Act*¹¹ and the *Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act*.¹²

b. *The Canada-Nova Scotia Accord and Accord Legislation*¹³

In the case of the Nova Scotia offshore area, an agreement was reached in 1982 between the governments of Canada and Nova Scotia which provided for a “most favoured province” right in the event the Government of Canada entered into a similar agreement with another coastal province. As mentioned above, the Atlantic Accord was signed with Newfoundland, and in exercising its rights respecting a “most favoured province,” a subsequent and revised Canada-Nova Scotia Offshore Petroleum Resources Accord¹⁴ was signed on 26 August 1986 between the Prime Minister and the Premier of Nova Scotia. The Nova Scotia Accord ultimately gave rise to the coming into force of the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*¹⁵ and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*.¹⁶ The Nova Scotia Accord was established using objectives similar to those of the Atlantic Accord, resulting in

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

12. R.S.N. 1990, c. C-2 [together with the *Newfoundland Accord Act*, hereinafter *Newfoundland Accord Acts*].

13. *Supra* note 8.

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

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

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

provisions for the *Nova Scotia Accord Acts* which are nearly identical to those of the *Newfoundland Accord Acts*.

The provisions contained under the *Newfoundland Accord Acts* and the *Nova Scotia Accord Acts* are partially the result of the evolution of petroleum legislation dating back to the early 1960s. To assert a Canadian presence, following initial discussions on the Law of the Sea, the federal government promulgated the *Canada Oil and Gas Lands Regulations*¹⁷ under the authority of the *Public Lands Grants Act*,¹⁸ to provide for the issuance and disposition of petroleum rights in the offshore areas. Industry response was favourable, with large tracts of exploration rights issued to various interest owners, a number of whom are still actively involved in offshore exploitation. To meet the challenges associated with petroleum exploitation, and to implement government policy, the above legislation witnessed a number of amendments until replaced with the *Canada Oil and Gas Act*,¹⁹ which was eventually superseded by the current federal statutes, namely the *Canada Petroleum Resources Act*²⁰ and the *Canada Oil and Gas Operations Act*.²¹ It was from these latter two federal statutes that similar provisions as contained under Part II (Petroleum Resources) and Part III (Petroleum Operations) of the *Accord Acts* evolved, thus creating a consistent management regime for petroleum activity in all frontier areas in Canada.

c. *Creation of the Boards*

In their creation, the *Accord Acts* established the Canada-Newfoundland Offshore Petroleum Board (C-NOPB) and the Canada-Nova Scotia Offshore Petroleum Board (C-NSOPB; and, with the C-NOPB, the Boards). As a result, the Boards have been provided with the authority and power to administer the management regime within their respective offshore areas.

The *Accord Acts*, insofar as the management and administration of the offshore regime is concerned, brought about two significant changes. First, the decision-making process shifted from the bureaucracy of both governments within each respective area, to an entity separate from government. That is not to say that government's role was eliminated, as will be pointed out below. The second change resulted in the lessening of discretionary power by the administrator (previously the "Minister"

17. C.R.C. 1978, c. 1518.

18. R.S.C. 1985, c. P-30 (rep. by S.C. 1991, c. 50, s. 50).

19. R.S.C. 1985, c. O-6 (rep. by the *Canada Petroleum Resources Act*, *infra* note 20, s. 130).

20. R.S.C. 1985, c. 36 (2nd Supp.).

21. R.S.C. 1985, c. O-7.

under the *Canada Oil and Gas Act*²²), and created instead more defined criteria and processes whereby decisions may be made.

Under the *Accord Acts*, the Boards consist of members separately appointed by each of the federal and the respective provincial governments for each area, with the Chairman appointed jointly by both governments.

The C-NOPB is to consist of seven members, including the Chairman, of which three are appointed by the federal government, and three by the provincial government. One or two of these members may be designated as vice-chairman who, together with the Chairman, work full-time as the Executive Committee at the C-NOPB's office in St. John's, Newfoundland. None of the C-NOPB's members or employees may be employed in the public service of Canada or Newfoundland during their tenure.

The C-NSOPB is to consist of five members, including the Chairman, of which two are appointed by each respective government. Unlike the C-NOPB, two members of the C-NSOPB may, during their tenure, be employed in the public service of Canada or Nova Scotia, providing that not more than one member be appointed by each government. The Chairman, however, shall not be a member of the public service, nor shall the staff be considered to be employed in the public service of Canada or the province. The office of the C-NSOPB is located in Halifax. Board members are appointed on a staggered term basis and may continue to hold office during good behaviour. Employees of the Boards on the other hand, are employed on the basis of merit pursuant to the administrative powers vested to each respective Board.

3. *Provincial/Federal Relationships over Offshore Resources*

Even though Canadian constitutional law settled the question of ownership over offshore resources in Canada's favour, the Atlantic and Nova Scotia Accords themselves are significant because they set aside the question of ownership and provide for Canada, Newfoundland and Nova Scotia to manage those resources jointly within the respective areas. As mentioned above, the *Hibernia Reference*²³ settled the question of ownership over offshore resources in Canada's favour, leading to the successful negotiation of the Accords. The Accords, and the subsequent

22. *Supra* note 19.

23. *Supra* note 6.

proclamation of the *Accord Acts*, solidify the agreement respecting ownership of offshore resources by providing the following:

For greater certainty, the provisions of this Act shall not be interpreted as providing a basis for any claim by or on behalf of any province in respect of any interest in or legislative jurisdiction over any offshore area or any living or non-living resources of any offshore area.²⁴

With respect to the regulation-making power of governments, the *Accord Acts* in dealing with all aspects of law-making, including resource management and revenue sharing, ensure that neither government will introduce amendments to the *Accord Acts*, or any regulation made thereunder, without the consent of both governments. Furthermore, each Board may only be dissolved by the joint operation of an act of parliament and an act of the legislature of the province.

4. *The Boards' Areas of Jurisdiction*

The area within the C-NOPB's administrative jurisdiction (offshore area) consists of approximately 166 million hectares and is defined under s. 2 of the *Newfoundland Accord Acts*:

In this Act,

"offshore area" means those submarine areas lying seaward of the low water mark of the Province and extending, at any location, as far as:

any prescribed line; or,

where no line is prescribed at that location, the outer edge of the continental margin or a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea of Canada is measured, whichever is greater.

For rights management purposes, the offshore area has been divided by the C-NOPB into two zones. Zone A comprises thirty full grids (some 1.1 million hectares) located in the northeast Grand Banks area, while Zone B covers the remaining offshore area. The size of parcels to be nominated and rentals applicable to exploration licences vary according to the zones.

The area within the C-NSOPB's administrative jurisdiction (offshore area) is also defined under s. 2 of the *Nova Scotia Accord Acts*, and consists of approximately 40 million hectares. This definition is, unlike that of Newfoundland, more specifically defined as "the lands and submarine areas within the limits described in Schedule I." Schedule I is a detailed description which demarcates the offshore area through a series of latitudinal/longitudinal coordinates with the other Atlantic provinces,

24. The *Newfoundland Accord Acts*, *supra* note 12 and the *Nova Scotia Accord Acts*, *supra* note 16, s. 3.

as well as, the Single Maritime Boundary between Canada and the United States in the Georges Bank. The maritime boundary described under Schedule I between Newfoundland and Nova Scotia is currently under dispute pending resolution by governments.

Unlike the Newfoundland offshore area, the Nova Scotia offshore area is not divided by the C-NSOPB into zones for rights administration purposes. However, in the C-NSOPB *Guidelines on the Issuance of Exploration Licences*, s. 12 indicates that a call for bids will ordinarily be for parcels no larger than 200 sections in the area of significant discoveries around Sable Island, or 800 sections elsewhere. Nominated parcels should therefore be sized accordingly.

The mandate of the Boards, as derived through the *Accord Acts*, includes the issuance and administration of petroleum exploration and development rights in the respective offshore area; the administration of statutory requirements regulating offshore exploration, development and production; and the approval of Canada-Newfoundland/Nova Scotia benefits and development plans.

5. The Administrative and Decision-Making Powers of the Boards

The Boards have a duty to perform their duties and functions pursuant to the Accords and the *Accord Acts*. It should also be noted that even though the *Accord Acts* arose by virtue of the Accords, they do not eliminate the Accords themselves. From a legal point of view this may have some significance, in that the Accords carry with them a covenant that neither government will introduce amendments to the *Accord Acts* without the other's consent. In addition, there are some Board duties and functions under the Accords which are not explicitly dealt with under the *Accord Acts*, namely the requirement to keep both governments informed of Board decisions, and the reporting of significant events or information to government.

Although the performance of the Boards' functions and duties is an ongoing daily affair, Board members are required to meet once every month under the *Newfoundland Accord Acts* and once every two months under the *Nova Scotia Accord Acts*, unless by unanimous agreement the members of the respective Board defer such a meeting. Meetings could also occur through the medium of teleconference. That is not to say that decisions can only be made on a monthly or bi-monthly basis. On the contrary, through the establishment of Board bylaws and the delegation of powers most decisions may be made by each Board through the Chairman, the Chief Executive Officer, or the Executive Committee.

Although the exercise of the decision-making power of the Boards is intended to be final, many of the Boards' decisions are subject to other considerations. For the purpose of distinguishing the Boards' roles as

decision-makers, the matters and decisions dealt with throughout the *Accord Acts* may be categorized as follows:

- (1) fundamental decisions by the Boards;
- (2) decisions by the Boards subject to joint ministerial directives;
- (3) matters requiring interaction by the Boards with the federal minister or provincial minister (other than fundamental decisions);
- (4) proposed decisions by the Boards which may be subject to review by the Oil and Gas Committee;
- (5) decisions by the Boards which are neither subject to other considerations such as ministerial approvals, directives nor otherwise fettered;
- (6) decisions other than by the Boards or ministers; and,
- (7) decisions with respect to which explicit provisions may allow for a review or appeal by the courts.

Although the appropriate provisions relating to the above are contained in the *Accord Acts*, a word of explanation should be given regarding fundamental decisions, ministerial directives, and the Oil and Gas Committee.

A “fundamental decision”²⁵ is one which is subject to ss. 31 to 40 of the *Newfoundland Accord Acts* and ss. 30 to 39 of the *Nova Scotia Accord Acts*, which effectively means that the respective Board’s decision must be approved by one or both of the ministers. These decisions, together with those subject to ministerial directives or consultation, provide the degree of scrutiny and control desired by government, without necessarily putting government in the position of influence or management in the first instance.

With respect to ministerial directives, the ministers may jointly issue written directives to each Board in relation to (1) fundamental decisions, (2) decisions prohibiting work or activity in circumstances where dangerous or extreme weather conditions affect the health or safety of people or equipment, (3) public reviews, (4) benefits plans, and (5) certain studies to be conducted by each Board.²⁶ Each Board shall comply with a directive jointly issued.

Under the *Accord Acts*, an Oil and Gas Committee (OGC) may be appointed by a Board for the purposes of fulfilling certain functions.²⁷ With respect to certain matters which relate to land tenure, an affected

25. The *Newfoundland Accord Acts* and the *Nova Scotia Accord Acts*, *ibid.*, s. 2.

26. The *Newfoundland Accord Acts*, s. 42; the *Nova Scotia Accord Acts*, *ibid.*, s. 41.

27. *Newfoundland Accord Act*, *supra* note 11, s. 141; *supra* note 15, s. 145.

party may refer a proposed decision by the Board to the OGC for its review and recommendations. Such land tenure matters would include decisions proposed by the Board respecting the declaration, amendment or revocation of a significant or commercial discovery, the issuance of a drilling order or development order, or the cancellation of an interest or share due to non-compliance. It is important to note that the role of the OGC in such instances is advisory. Other powers are vested with the OGC respecting production and operation matters (*e.g.* orders respecting prevention of waste, pooling orders, unitization orders). However, in any case, the Board may vary or rescind any such decision or order made by the OGC.

II. Board Issues

1. Onshore to Offshore Drilling — Dual Jurisdiction

a. Background

Since 1995 four wells have been spudded for the purpose of exploring prospects in the offshore area adjacent to the west coast of Newfoundland. Three of these have been directionally drilled using a land drill rig located onshore, adjacent to an offshore exploration licence extending seaward from the low-water mark. The following is an analysis of some of the issues arising with respect to onshore to offshore drilling using the west coast of Newfoundland as the illustrative context. The analysis also includes some references to other jurisdictions and how they approach similar issues. Similar issues would no doubt prevail should onshore to offshore drilling occur with respect to the Nova Scotia offshore area.

Not surprisingly, when the *Newfoundland Accord Acts* were drafted and came into force their provisions did not contemplate a scenario of onshore to offshore drilling. Consequently the administration of such work or activity assumed a dual jurisdictional character. In order to position and operate a drilling rig onshore and to drill through the intermediate onshore formations into the offshore area, the provincial Department of Mines and Energy must grant an authorization. In granting such authorization, considerations must be given to safety, the environment, and the financial responsibility of the operator. By the same token, because such a well is intended to explore a prospect within an offshore exploration licence, the C-NOPB is legally compelled to address those same considerations under a similar authorization. Although the province and the C-NOPB have cooperated administratively to allow the issuance of work authorizations for such a purpose, the practice has become problematic (*e.g.* the application of offshore certification requirements for onshore drilling rigs) and has the potential for giving rise to greater concerns should a discovery be made and production pursued.

For example, if a commercial discovery was made, potentially there could be a desire, for economic reasons, to establish production/processing facilities onshore. In addition, the granting and administration of discoveries which straddle onshore and offshore licences and the attendant production/conservation issues, not to mention the royalty regime for such straddling discoveries, are matters which will need to be resolved before production occurs.

b. *Relevant Legislation to the Newfoundland Offshore Area*

In the context of dual jurisdictional issues between the Government of Newfoundland and Labrador, and the offshore area as administered by the C-NOPB, the following is an overview of the legislative provisions which serve some relevancy.²⁸

Section 5 of the *Newfoundland and Labrador Petroleum Regulations*²⁹ appears to be the only provision in provincial petroleum legislation or regulations which could enable an agreement between the Newfoundland government and another government body:

Where an interest holder has made a discovery of petroleum that extends beyond the area under the sole petroleum administration of the Province, the Minister, after consulting with the interest holder, shall undertake all reasonable efforts to conclude such agreements as are necessary to ensure that such discovery is developed and produced with the administrative cooperation of the Province.

The provision is worded in an interesting fashion in that it suggests, by use of the word “shall,” an obligation on the minister. However, the use of the phrase “undertake all reasonable efforts to conclude those agreements that are necessary” diminishes that obligation and results in the phrase being susceptible to a number of different interpretations, depending on the circumstances, the interpreter and a number of other factors.

In reviewing the *Newfoundland Accord Acts*, there are provisions which, to a limited extent, are relevant to the administration of arrangements between the C-NOPB and the Government of Newfoundland and Labrador for the drilling, discovery and production of petroleum in the offshore. The *Newfoundland Accord Acts*, by virtue of their *raison d'être*, evidence the feasibility of a bilateral agreement between the Government of Newfoundland and Labrador and the Government of Canada regarding petroleum resource management. While the legislation addresses offshore petroleum, it remains silent with respect to the management of onshore to offshore directional drilling. In light of the

28. The authors wish to acknowledge and thank Kathleen O'Neill of Cox Hanson O'Reilly Matheson for her research assistance in relation to this portion of the article.

29. Nfld. Reg. 1150/96 [hereinafter *Petroleum Regulations*].

agreement between federal and provincial governments on resource management, there are two possible approaches to this issue. First, legislation separate and apart from the *Newfoundland Accord Acts* could be enacted to address the matter in question. A second approach would be to consider necessary amendments to the *Newfoundland Accord Acts* and regulations addressing the issue of interjurisdictional directional drilling. Any amendments would require extensive consultation between the governments and would require approval by both governments.

More specifically, under the *Newfoundland Accord Acts*, s. 3 may be a “for greater certainty” clause, aimed at ensuring that no provision of the *Newfoundland Accord Acts* would, under any circumstance, be interpreted to provide the province with jurisdiction over the offshore or offshore resources.³⁰ This provision would not, however, prohibit the C-NOPB from entering into and administering, together with the governments, a memorandum of understanding aimed at the effective management of a situation of onshore to offshore directional drilling.³¹ However, any such memorandum of understanding cannot create new law and must be bounded by the jurisdiction and authority vested by the *Newfoundland Accord Acts*. Such an arrangement would operate in contravention to s. 3 if it attempted to transfer jurisdiction over the offshore to the province, or exceeded jurisdiction otherwise.

It is noteworthy that the administration of such an agreement would be in accord with s. 5 of the provincial *Petroleum Regulations*. In particular, it is noteworthy that s. 46(1)(f) of the *Newfoundland Accord Acts* allows for the establishment of such arrangements in relation to matters other than those listed. Arguably, there could be no more appropriate situation than that of directional drilling from the onshore to the offshore.

The *Newfoundland Accord Acts* also allow for the delegation of powers and duties:

51 The Board may designate any person to exercise the powers and perform the duties and functions under this Part that are specific in the designation and on such designation that person may exercise those powers and shall perform those duties and functions subject to such terms and conditions, if any, as are specified in the designation.³²

. . .

137.1 The Board may delegate any of the Board’s powers under section 138, 138.2, 138.3, 139.1, 139.2 or 163 to any person, and the person shall exercise those powers in accordance with the terms of the delegation.³³

30. *Newfoundland Accord Acts*, *supra* note 12, s. 3.

31. *Ibid.*, s. 46.

32. *Supra* note 11, s. 51.

33. *Ibid.*, s. 137.1.

Depending on the nature of an arrangement between the province and the C-NOPB, an arrangement under s. 46(1)(f) could include a delegation of power. As noted, such a delegation under s. 51 is not permitted with respect to all duties incumbent on the C-NOPB, but is limited to those powers and duties provided for in Part II (Petroleum Resources) of the *Newfoundland Accord Acts*. Furthermore, any delegation of power under s. 137.1 of Part III (Petroleum Operations) is limited to specific provisions. Nonetheless, with respect to the above mentioned powers and duties, s. 46(1)(f) could potentially facilitate the *administration* of an arrangement aimed at the resolution of the complications related to onshore to offshore drilling. However, to the extent issues of proprietary rights and jurisdiction arise as between federal and provincial governments, statutory amendments would need to occur.

As a final comment and as alluded to above, the most appropriate course of action may be to enact amendments to existing legislation which would allow for cooperation between the governments on this matter. Such amendments could be brought to the attention of both governments involved pursuant to s. 17(2) of the *Newfoundland Accord Acts*:

The Board may make recommendations to both governments with respect to proposed amendments to this Act, the Provincial Act and any regulations made under those Acts.

The C-NOPB, in addressing onshore drilling, is therefore in a position to advise both the federal and provincial governments of possible amendments to the *Newfoundland Accord Acts* and provincial legislation and regulations thereunder, particularly where issues respecting production ownership and the application of royalties on straddling discoveries become relevant.

c. Other Jurisdictions

There are no agreements between British Columbia and any other jurisdictions which pertain to drilling near or across the provincial boundary, as no such pools have been successfully produced. There have been instances where a pool extends over two jurisdictions (Ring Border gas pool in British Columbia and Alberta and Beaver River gas pool between British Columbia and the Northwest Territories). These pools were developed within the regulatory framework of their respective jurisdictions. In the case of the Ring Border field, the pool was unitized separately on each side of the border. The British Columbia legislation does not preclude the formation of such an agreement. Moreover, there

are provisions in the province which allow for the administration of intergovernmental arrangements.³⁴

Still with British Columbia, the *Northern Development Act*³⁵ allows the Northern Development Commissioner to invite other governments or any of the agencies of those governments to join in activities under the Act.³⁶ The commission is charged with, among other things, promoting private sector investments in northern British Columbia.³⁷ If an intergovernmental arrangement rendered the administration and regulation over an interjurisdictional pool less duplicative and more effective (or indeed possible where it would have otherwise been impossible), perhaps it could be argued that the creation of the arrangement promoted investment in Northern British Columbia.

There are no instances of cross-border drilling respecting Saskatchewan, although inquiries into its feasibility have been made with respect to the Lloydminster (Alberta/Saskatchewan border) and Gainsborough (Saskatchewan/Manitoba border) areas. There are, of course, instances where an operator drills into a pool held by someone else, however, these have occurred within the province and are dealt with by production sharing or other such agreements.

There are many pools which underlie the Alberta/British Columbia or the Alberta/Saskatchewan borders, but there are no formal agreements between the governments involved regarding jurisdiction over the pools. However, the Alberta legislation has provided enabling legislation for such an agreement. The *Energy Resources Conservation Act*³⁸ contains the following provision:

23(2) Subject to the approval of the Lieutenant Governor in Council, the Board may enter into any agreements it considers desirable with the Government of Canada or an agency of it with respect to a matter relating to the purposes of this Act or with any government of a jurisdiction outside Alberta or an agency of that government in respect of the effects of that matter in that jurisdiction.

34. *Oil and Gas Commission Act*, S.B.C. 1998, c. 39, s. 6(1)(a) defines the capacity of the commission to include the ability to

negotiate and enter into agreements with the government, or with an official or agency of it or with any person, including, subject to the prior approval of the Lieutenant Governor in Council, with the government of Canada, the government of another province, First Nations or local governments, or with an official or agency of any of them.

35. S.B.C. 1998, c. 19.

36. *Ibid.*, s. 10.

37. *Ibid.*, s. 4.

38. R.S.A. 1980, c. E-11.

With respect to the North Sea, the question of jurisdiction resulting from onshore to offshore drilling does not arise in the context of jurisdiction over oil and gas, as both the offshore and onshore lie solely with the central government. However, there are situations of some producing fields which straddle the maritime boundaries with either Norway or the Netherlands, and these have given rise to similar jurisdictional questions. As regards the exercise of jurisdiction, the general rule is that an installation is governed by the laws of the state on whose territory or continental shelf it "sits."

In the case of the Markham Field Reservoirs,³⁹ which straddle the United Kingdom and Netherlands sectors, installations lie on either side of the maritime boundary and these installations are linked by intrafield pipelines, cables *etc.* In practice (and notwithstanding the jurisdictional position), the field operator will, in these circumstances, probably seek to meet the most stringent of the two legislative requirements, thereby automatically satisfying the lesser.

As yet, there is no example of an installation on the United Kingdom continental shelf being used to exploit a resource wholly on a neighbouring continental shelf, or vice versa.

2. *Disclosure of Information*

a. *Introduction*

The following overview relates to the treatment and disclosure of information or documentation received or held by the Boards in the course of conducting their business. The primary focus will deal with the role of each Board in administering the *Accord Acts* or any regulation made thereunder, and its status as a government institution under the federal *Access to Information Act*⁴⁰ and *Privacy Act*.⁴¹

Unless otherwise stated, statutory references will be to the *Newfoundland Accord Act*.⁴² Virtually identical provisions exist for the provincial versions of the *Newfoundland Accord Act* and the *Nova Scotia Accord Act*. For easy reference, the provisions of the *Newfoundland Accord Act* referred to below have been attached in Schedule "A". Although the use of the term "Board" in this discussion refers to the C-NOPB, the effect would be the same for the C-NSOPB.

39. See "Agreement between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands" The Hague (26 May 1992).

40. R.S.C. 1985, c. A-1 [hereinafter *AlA*].

41. R.S.C. 1985, c. P-21 [hereinafter *PA*].

42. *Supra* note 11.

b. *Relevant Legislation*

Before addressing the Board's practice or policy respecting the treatment or disclosure of information, the following legislative provisions must be reviewed:

(1) Section 18 of the *Newfoundland Accord Act*

Section 18(1) allows each minister access to any information or documentation *relating to petroleum resource activities in the offshore area* which is provided *for the purposes of the Acts or regulations*, without requiring the consent of the party who provided such information.

Note that this provision relates to information provided for the purposes of any part of the *Accord Acts*, or their regulations (*i.e.* it is not limited to Parts II (Petroleum Resources) or III (Petroleum Operations) of the *Accord Acts*). The only restrictions are that the information must relate to petroleum resource activities in the offshore area and it must have been provided for the purposes of the *Accord Acts* or regulations. Arguably, some information held by the Board may not relate to offshore petroleum resource activities; nor would it necessarily be provided for the purposes of the *Accord Acts* or regulations (for example, information relating to personnel/personal matters, third party information given in confidence but not for the purposes of the *Accord Acts* or regulations, certain contracts entered into by the Board regarding office operations, *etc.*). Whether or not information is "relating to" or provided "for the purposes of" is in itself open to interpretation and should be dealt with on a case-by-case basis where the matter becomes debatable. What may also be considered as a restriction relates to the fact that disclosure of information under s. 18(1) is limited to the respective energy ministers (or, in the province's case, the minister so designated). Legally, other ministers have no right of access.

Section 18(2) makes s. 119 applicable to any such disclosure or the giving of evidence by the minister with respect to such information provided by the Board. Therefore some confidentiality restrictions will apply to ministers.

(2) Section 119(2) of the *Newfoundland Accord Act*

Subject to the exceptions given below, this provision classifies all information or documentation which is provided *for the purposes of Part II or III of the Acts or any regulation made under these Parts*, as privileged. Such information or documentation shall not knowingly be disclosed without the consent of the person who provided it. Under this provision exceptions would allow limited disclosure:

- (a) to the ministers pursuant to s. 18,
- (b) for the purposes of the administration or enforcement of Part II or III,⁴³
- (c) for the purpose of legal proceedings relating to the administration or enforcement of Part II or III,⁴⁴
- (d) with respect to certain documents registered under Division VIII (s. 119(4)), or
- (e) as permitted by the provisions of s. 119(5).

Note that s. 119(2) is restricted to information or documentation provided *for the purposes of Part II or III of the Acts or any regulation made under these Parts*. Therefore, it could be argued that under this provision, information provided for purposes other than under Parts II or III or the regulations made under either part (*i.e.* information provided under Parts I, IV, V, VI, VII, VIII) may not be privileged. This raises the question of whether or not some sensitive information is susceptible to release (*e.g.* information provided in relation to benefits matters under Part I). As mentioned above, the question of whether information was provided “for the purposes of” may be open to debate and interpretation. It is also important to emphasize that because of s. 119(2), any information or documentation provided for the purpose of Parts II or III, or their regulations, other than information falling within the ambit of the above-mentioned exceptions, is privileged *permanently*, unless the person providing such information consents to its disclosure.

(3) Section 119(5) of the *Newfoundland Accord Act*

This provides that the general rule respecting privileged information established under s. 119(2) *does not apply* with respect to specific classes of information or documentation obtained *as a result of carrying on a work or activity that is authorized under Part III*. In many classes, the privileged status is removed following the passage of a particular time period (refer to s. 119(5)(a), (b), (c), (d), (e) and (i)). In other classes, information will not be considered privileged at all, irrespective of the passage of time (refer to s. 119(5)(f), (g), (g.1) and (h)).

There are three points worth noting with respect to s. 119(5). First, the fact that it renders s. 119(2) inapplicable to particular classes of information raises the question of whether the information could nonetheless be privileged by virtue of other law. Secondly, although s. 119(2) does not apply to such classes of information, the argument arises that s. 119(5) does not make it mandatory for the Board to release the information.

43. See *Canadian Forest Oil Ltd. v. Chevron Canada Resources* (16 June 2000), A-58-00 (F.C.A.).

44. *Ibid.*

(These points are more particularly discussed in Item b.(4) and Subsection c. below.) Thirdly, the information intended to be captured under s. 119(5) must arise as a result of carrying on an authorized work or activity in the offshore area. For example, well data or geophysical work authorized by or in another jurisdiction (unless it is deemed to have been authorized by the Board pursuant to transitional provisions of the *Accord Acts*), or provided to the Board without the need for an authorization, would not be captured by s. 119(5) and, therefore, the general rule under s. 119(2) would apply if the information was provided for the purposes so stated thereunder.

(4) Other Federal and Provincial Legislation Respecting Treatment of Information

Under the federal jurisdiction, the *AIA* and the *PA* came into force in 1982 and comprehensively deal with the treatment and disclosure of information held by a “government institution.” By virtue of these acts, the Boards are each considered a “government institution” and therefore are supposed to be governed by the provisions of the *AIA* and *PA*. In essence, the *AIA* and *PA* provide access to records held by the Boards subject to following a particular procedure. In certain cases however, depending upon the nature of the information, the Board either is required or has the option, to refuse disclosure of information. The circumstances relating to such cases are varied.

In the case of the *AIA*, it is important to note that the legislation is complementary in nature:

The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.⁴⁵

Thus, the purpose of the *AIA* is to expand the means by which a person can gain access to information in the possession of the government and not to provide additional means by which access can be declined.

45. *Supra* note 40, s. 2(1), (2).

There are provisions under the *AIA* however, where disclosure is prohibited. A particularly important provision under the *AIA* is s. 24(1):

The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.⁴⁶

The Schedule II referred to in s. 24(1) includes reference to s. 119 of the *Newfoundland Accord Act*. Consequently, this provision requires the Board, as a “government institution,” to refuse disclosure of information if the disclosure of that particular information is restricted by s. 119 of the *Newfoundland Accord Act*, notwithstanding that the information could otherwise be disclosed under the *AIA*. Therefore, the application of s. 119 becomes important since in some cases it restricts the disclosure of certain information (respecting Parts II and III and their regulations, s. 119(2); and work authorizations, s. 119(5)). However, in the case of s. 119(5), once the periods referred to thereunder have expired (or for some cases where no such time period applies), no such restriction exists and therefore the Board could no longer deny disclosure on the basis of s. 24 of the *AIA*. If the Board therefore chooses to deny the disclosure of such information because it believes it has a duty as a government institution under the *AIA*, it would need to be for other reasons pursuant to another provision under the *AIA*, or in limited cases, under the *PA*.

Another important provision under the *AIA*, particularly with respect to the technical information held by the Board, is the following:

Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

- (a) trade secrets of a third party;
- (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
- (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
- (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.⁴⁷

As indicated by para. (c), despite the fact that certain information is no longer considered privileged by virtue of the expiry of specified time periods under s. 119(5), the argument may nonetheless be raised that its disclosure could be inhibited by other law, namely s. 20(1) of the *AIA*.

46. *Ibid.*, s. 24(1).

47. *Ibid.*, s. 20(1)

If it was the intent under the *Accord Acts* to allow the *AIA* to prevail, s. 20(1) of the *AIA* arguably makes it mandatory for the Board *not to disclose* a record which, for example, is confidential technical information provided to the Board and treated as such by the provider. Consequently, the argument which would need to prevail is that such technical information, although no longer privileged under s. 119(5), may still be captured under s. 20(1) (or some other provision of the *AIA* or *PA* for that matter). This will depend largely on how we wish to interpret s. 119(5) as discussed in para. 3 below.

c. Relationship Between the Accord Acts and Other Statutes

In dealing with the *AIA* first, there are two perspectives from which the provisions of s. 119 of the *Newfoundland Accord Acts* may be viewed.

First, s. 119(5) states that “[s]ubsection (2) does not apply” What does this really mean? One interpretation is that the classes of information are not privileged and may therefore be disclosed without consent. In other words, if the rule of non-disclosure “does not apply,” the inference may be that disclosure is intended to apply, notwithstanding anything in the *AIA* to the contrary.

On the other hand, the interpretation could be that in the context and for the purpose of s. 119(2) only (*i.e.* in dealing with the relationship between s. 119 (2) and s. 119(5) only without regard to other law such as the *AIA*) those classes of information are not privileged nor do they require consent for disclosure. The argument would remain, therefore, that this interpretation would preserve the requirement of the Board, as a government institution, to apply the *AIA* (*e.g.* s. 20) and possibly prevent disclosure.

What was Parliament’s intention with respect to the application of s. 119 and the provisions of the *AIA*? If indeed it was Parliament’s intention to restrict the disclosure of such information through the application of the *AIA*, why would provisions such as s. 119 be included as part of the *Newfoundland Accord Act*? Would it not have been more efficacious simply to refer to the *AIA* without setting out specific provisions under s. 119 or to have made s. 119(5) subject to the *AIA*?

Allowing for the precedence of the *Accord Acts* over the *AIA* in the case of inconsistency or conflict between the two acts (s. 4 of the *Newfoundland Accord Act*), the Board should be free to disclose without consent once the privileged status under s. 119(5) no longer applies. To do this we would have to accept the first interpretation referred to above and resolve the conflict in favour of the *Accord Acts*. The conflict would be that on the one hand s. 119(5) at least impliedly says you may release without consent, while s. 20(1) of the *AIA* says you refuse disclosure if certain criteria prevail.

What about the applicability of equivalent provincial law respecting access to information? Given that the C-NOPB assumes its legal entity through the *Newfoundland Accord Acts*, as proclaimed through both the Parliament of Canada and the Legislature of the Province of Newfoundland and Labrador, it is interesting to note that the Board has not been given similar status under the provincial *Freedom of Information Act*⁴⁸ as that accorded federally under the *AIA*. Although the provisions are not identical between the *AIA* and *FIA*, the objectives are essentially the same, including the listing within a schedule of the *FIA* any Board to which the *FIA* will apply. Such a schedule under the *FIA* does not include the C-NOPB, nor has such status been given to the C-NSOPB respecting similar provincial legislation in Nova Scotia.

Furthermore, the conspicuous non-applicable status of the *FIA* as compared with the status of the *AIA* also suggests an underlying potential jurisdictional issue. Under the *Newfoundland Accord Acts* and the Atlantic Accord itself, both governments have agreed not to introduce amendments to the *Newfoundland Accord Acts* or any regulation without the consent of the other. If in drafting s. 119 of the *Newfoundland Accord Act*, it was the intention of governments to treat the type of information referred to within those provisions in such a way that its release would be otherwise unfettered (*i.e.* without being bound by the *AIA* (or *FIA*)), would not the application of the *AIA* effectively amend the purpose and intent of s. 119 on a unilateral basis by the action of Parliament? If, on the other hand, the *AIA* was intended by both governments to apply with respect to the treatment of the type of information referred to under s. 119, should not the language in the *Newfoundland Accord Acts* have explicitly stated so, thereby effectively rendering the consent of both governments?

d. *Board Practice or Policy*

Presumably a fundamental objective of any Board practice or policy relating to information is to facilitate its correct treatment or disclosure in accordance with the law, regardless of its purpose or source. This would include determining in the first instance whether or not the particular record being sought is clearly a public or non-confidential one, or whether it has some possibility of being confidential or sensitive through the application of other law.

More specifically, in applying a practice or policy, the Board must address how to deal with information held by it which (1) is privileged by virtue of the application of s. 119(2) of the *Newfoundland Accord Act*; (2) may be exempt from disclosure by virtue of the *AIA* or any other act or

48. R.S.N. 1990, c. F-25 [hereinafter *FIA*].

regulation, having regard to the intent of Parliament and the issues surrounding the application of the *AIA* and the *Accord Acts*; or (3) is either not privileged or subject to restricted disclosure under the *Newfoundland Accord Act* because it falls within the following categories of exceptions: it is requested by ministers pursuant to s. 18, its disclosure is necessary for the administration or enforcement of Part II or III of the *Accord Acts*, its disclosure is necessary for legal proceedings relating to the administration or enforcement of Parts II or III, its disclosure is permissible under the registration system, or its disclosure may be permissible under s. 119(5).

In the final analysis, the Board has taken the position that it is free to disclose all such classes of information that are not privileged under s. 119(5).

The one notable circumstance in which the Boards do not disclose information following the expiry of the stated period under s. 119(5) is with respect to non-exclusive seismic data. In that case the privileged period has effectively been extended by the Boards' policies of not releasing it for a further five years. Under s. 119(5)(d), non-exclusive seismic (*i.e.* seismic conducted for the purpose of public sale) is not distinguished from but is lumped together with exclusive seismic and characterized as "geophysical work."

The issue which has emerged from non-exclusive companies is that non-exclusive seismic data should be treated differently and not released by the Board without consent from the original owner. The reason offered is that it places non-exclusive seismic companies at an unfair commercial disadvantage because anyone can obtain, copy and sell (for profit) their data after ten years, thereby eliminating a potential market for such companies.

The issues are complex involving arguments respecting the *AIA*, copyright and trade secrets law, and the matter continues to be an item for further discussion.

3. *The Role of the Certifying Authority*

Another aspect of the Boards' mandate which has received considerable attention of late is safety. One of the key elements in the safety regime established by the *Accord Acts* and administered by the Boards is the role of the Certifying Authority (CA). While most people with an interest in offshore oil and gas are aware that there is some requirement to obtain a certificate of fitness, very few are familiar with how this aspect of the regime actually works.

Petroleum operations are governed by Part III of the *Accord Acts*, which basically mirrors the federal *Canada Oil and Gas Operations Act*⁴⁹ that applies to federal lands. This legislation repealed and replaced the federal *Oil and Gas Production and Conservation Act*⁵⁰ in 1992. The impetus for this new legislation was the loss of eighty-four lives in the sinking of the *Ocean Ranger* on February 15, 1982 and the subsequent *Hickman Royal Commission Report*.⁵¹ Recommendation 91 of that report stated, in part:

[t]hat . . . phase one of the safety audit or approval process, namely an assessment of the physical integrity and stability of the rig be carried out preferably by a classification society.

Based upon this recommendation, experience in Norway and the United Kingdom, and a study by the Harrison Task Force,⁵² legislative amendments were developed which introduced the concept of the CA into the Canadian offshore sector.

It was decided that this should be done as part of the authorization process. At this point it is important to realize that each of the Boards regulates offshore activity both as an inspectorate which checks for regulatory compliance and, if necessary, issues orders; and as a resource manager that approves modes of development and authorizes all activities. Indeed, the *Accord Acts* prohibit any person from carrying on any work or activity related to offshore petroleum unless that person is the holder of an authorization issued by the Board.⁵³ Authorizations are usually issued with conditions and, of course, are subject to the *Accord Acts* and regulations.⁵⁴ The authorization process therefore represents the lever by which the Board can control and influence operators, including the safety of their works and activities. If an authorization is withheld, suspended or revoked,⁵⁵ the impact on the operator is immediate and extremely significant.

49. *Supra* note 21.

50. R.S.C. 1985, c. O-7.

51. Canada/Newfoundland, *Report of the Royal Commission on the Ocean Ranger Marine Disaster, Report Two: Safety Offshore Eastern Canada*, vol. 2 (Ottawa: Minister of Supply and Services Canada, 1985) (Chairman: The Honourable T. Alex Hickman) at 155.

52. Canada, *A Report by the Minister's Task Force on Ocean Ranger Regulatory Recommendations - The Promotion and Enhancement of Safety in Oil & Gas Operations on Frontier Lands* (Ottawa: The Task Force, 1986).

53. *Newfoundland Accord Act*, *supra* note 11, s. 137; *Nova Scotia Accord Act* *supra* note 15, s. 140.

54. *Newfoundland Accord Act*, *ibid.*, s. 138(4); *Nova Scotia Accord Act*, *ibid.*, s. 142(4).

55. *Newfoundland Accord Act*, *ibid.*, s. 138(5); *Nova Scotia Accord Act*, *ibid.*, s. 142(5).

The 1992 amendments to the *Accord Acts* added a section which provides that an authorization cannot be issued with respect to prescribed equipment or installations unless the Board has received from the applicant a certificate of fitness that has been issued by an approved CA.⁵⁶ The certificate must remain in force as long as the equipment is in use and it must state that the equipment or installation is: (1) fit for the purposes for which it is to be used and may be operated safely without posing a threat to persons or to the environment in the location and for the time set out in the certificate, and (2) is in conformity with all of the requirements and conditions that are imposed, whether they are imposed by regulation or by the Board.⁵⁷ It should be noted that a certificate is not valid if the CA fails to comply with any procedure that is prescribed or established by the Board or if the CA participated in the design, construction or installation of the equipment to which the certificate applies.⁵⁸

Although the CA works closely with the Board, certifying authorities are in fact designated by the federal and provincial governments in the respective *Certificate of Fitness Regulations*⁵⁹ which were promulgated in 1995. There are currently four approved CAs, namely: (1) American Bureau of Shipping, (2) Bureau Veritas, (3) Det Norske Veritas Classification A/S, and (4) Lloyd's Register of Shipping. Additionally, these regulations identify four types of installations which require certificates: diving, drilling, production and accommodation installations. For each of these installations the regulations specify that the CA must certify that the relevant equipment is "designed, constructed, transported and installed or established" in accordance with a defined set of regulatory requirements. For example, a drilling installation must be in compliance with certain provisions of the *Petroleum Installation Regulations*,⁶⁰ *Oil and Gas Occupational Safety and Health Regulations*,⁶¹ *Petroleum Drilling Regulations*⁶² and the *Petroleum Diving Regulations*.⁶³ The CA must also endorse on the certificate a description of the site or region in

56. *Newfoundland Accord Act, ibid.*, s. 139.2; *Nova Scotia Accord Act, ibid.*, s. 143.2.

57. *Newfoundland Accord Act, ibid.*, s. 139.2(3); *Nova Scotia Accord Act, ibid.*, s. 143.2(3).

58. *Newfoundland Accord Act, ibid.*, s. 139.2(4); *Nova Scotia Accord Act, ibid.*, s. 143.2(4).

59. *Newfoundland Certificate of Fitness Regulations*, S.O.R./95-100; *Nova Scotia Offshore Certificate of Fitness Regulations*, S.O.R./95-187.

60. *Newfoundland Offshore Petroleum Installations Regulations*, S.O.R./95-104; *Nova Scotia Offshore Petroleum Installations Regulations*, S.O.R./95-191.

61. *Occupational Safety and Health Regulations* continue to be in draft form. However, draft regulations are incorporated as conditions of approval for work authorizations.

62. *Newfoundland Offshore Petroleum Drilling Regulations*, S.O.R./93-23; *Nova Scotia Offshore Petroleum Drilling Regulations*, S.O.R./92-676.

63. *Newfoundland Offshore Area Petroleum Diving Regulations*, S.O.R./88-601; *Nova Scotia Offshore Area Petroleum Diving Regulations*, S.O.R./95-189.

which the installation is to be operated and set an expiry date of up to five years.

In addition to the above, before a certificate is issued, the CA must submit a scope of work to the Board's Chief Safety Officer (CSO).⁶⁴ The CSO will only approve the scope of work if he or she determines that it is sufficiently detailed to adequately assess whether the appropriate environmental criteria are being used; that the concept safety analysis meets the regulatory requirements; that the installation has been constructed in accordance with specifications and a quality assurance program, using materials that meet design specifications; and that the operations manual meets regulatory requirements. Typical scope-of-work issues include demonstration of competency of CA personnel in specialized areas, independent analysis to be undertaken, drawings to be reviewed, tests/procedures to be witnessed, third party work to be relied on, and deviations from regulations.

In reviewing the role of the CA, it should be stressed that the CA process is but one component in the Board's safety regime. Obviously this process focuses on equipment. Other Board processes address procedures and personnel. It is also imperative to stress that the operator and the Board are also part of the certification process; the former because it is ultimately responsible for the safety of all its operations, as witnessed by the legislated requirement that the operator submit a declaration stating that (1) the equipment and installations to be used are fit for their purpose, (2) the operating procedures are appropriate, and (3) the personnel are competent and qualified for their employment.⁶⁵

And what about the Board — does it merely collect the declarations and certificates of fitness and, given the statutory immunity which applies when it issues an authorization in reliance on a declaration or certificate of fitness,⁶⁶ issue the authorization? The answer is no. Although the Board has a small staff and limited resources, it does maintain sufficient expertise to carry out a monitoring and audit role with respect to the work of the CA. The Boards continue to be very active in this "due diligence" role. One of the lessons learned in regulating offshore activities is the need to further document procedures and guidelines respecting the certificate of fitness process. The Boards do not have the resources, either in numbers or expertise, to undertake anything but a monitoring and audit role. They must develop systems for more comprehensive and confident

64. *Supra* note 57, s. 6.

65. *Newfoundland Accord Act*, *supra* note 11, s. 139.1; *Nova Scotia Accord Act*, *supra* note 15, s. 143.1.

66. *Newfoundland Accord Act*, *ibid.*, s. 139.1(4),(7); *Nova Scotia Accord Act*, *ibid.*, s. 143.1(4),(7).

reliance on the CA. This initiative is now underway between the C-NSOPB and the C-NOPB, who look forward to working closely with operators, governments and the certifying authorities in an effort to coordinate this very important regulatory responsibility.

4. *Industrial Benefits Under the Nova Scotia Accord Acts*

Perhaps no other aspect of the *Accord Acts* attracts as much attention as the benefits requirements. The foundation on which the current statutory requirements related to Canada-Nova Scotia benefits was built is found in the 1986 Nova Scotia Accord itself—the political agreement between the federal and Nova Scotia governments. In art. 31 the governments agreed that “first consideration” should be given to goods and services provided from within Nova Scotia provided that — and this is an important condition overlooked by many people — “such goods and services are competitive in terms of fair market price, quality and delivery.” This article of the Nova Scotia Accord also states that “a priority of the Parties shall be to encourage the hiring and training of individuals from Nova Scotia who are qualified.”

The statutory embodiment of this article of the Accord is found in s. 45 of the *Nova Scotia Accord Acts* which defines a Canada-Nova Scotia benefits plan under s. 45(1):

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

This definition includes two crucial elements. The first is a full and fair opportunity to participate. Canada’s first offshore oil project was the Cohasset project. The operator of the project, LASMO Nova Scotia (later PanCanadian) filed a benefits plan in December 1989. About a month later, almost three and a half years following the signing of the Nova Scotia Accord, the C-NSOPB was established. One of the first issues the C-NSOPB faced was to address how a “full and fair opportunity” could be afforded.

It was the C-NSOPB’s view at that time, and it still is, that a “full and fair opportunity” is best evidenced by requiring the operator to adhere to a procurement policy that is open, fair and predictable. This is normally implemented through a process that involves notice, prequalification,

tendering and contract award. As a result, the C-NSOPB included the following condition in the December 1997 Sable Offshore Energy Project Benefits Plan Decision Report.⁶⁷

Condition 10: Bidding Process

For all proposed contracts, subcontracts and purchase orders, estimated by the Proponents to be in excess of \$250,000, or such other limit as the Board may determine, and for any other matters identified to be of interest to the Board, the Proponents shall provide to the Board for approval, lists of all contractors that wish to prequalify, the proposed bidders lists and notices of the proposed final contract awards. The Proponents must submit sufficient information with the notifications to enable the Board to assess the subject matter and to be satisfied that the statutory requirements for "full and fair opportunity" and "first consideration" have been addressed by the Proponents.

Of course, there are rare cases where goods or services must be sole-sourced. It has been our experience that this can be restricted to situations where highly specialized goods or services are not available in Canada or where it can be demonstrated that they are only available from a single supplier.

Before leaving this point the element of competitiveness needs to be stressed. This is the part of the definition that local observers sometimes overlook. Frequently loud protest is made that local companies did not receive their "fair share." However, unlike 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.

The second key element of the definition is "first consideration." Subsection 45(3) of the *Nova Scotia Accord Acts* requires that a benefits plan provide for first consideration to be given to "individuals resident in the Province" for training and employment.⁶⁸ It also states that:

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

Once again there is the competitiveness element, but what does "first consideration" mean? The C-NSOPB's interpretation and application of first consideration is applied at two separate stages during an operator's procurement process: the establishment of the bidder's list, and the

67. Canada-Nova Scotia Offshore Petroleum Board, Sable Offshore Energy Project Benefits Plan Decision Report (1997) at 24.

68. *Nova Scotia Accord Act*, *supra* note 15, s. 45(3)(b).

contract award stage. In the establishment of the bidder's lists, operators must provide a full and fair opportunity for Nova Scotians and other Canadians to participate in the supply of goods and services. This is accomplished through the expression of interest/prequalification process. In establishment of the bidder's list if, in the opinion of the operator, a sufficient number of qualified Nova Scotian bidders are available to assure competitive bidding, operators then must exercise the requirement for first consideration and limit the bid list to Nova Scotians. In the authors' opinion, this advances one of the fundamental objectives of the Nova Scotia Accord — that is, the recognition of the right of Nova Scotians to be the principal beneficiaries of the offshore petroleum resources. In such cases, the Board believes that it is quite acceptable to limit the bidder's Lists to Nova Scotian companies. In support of this interpretation, and to reconcile it with a full and fair opportunity for "other Canadians," reference is made again to s. 45(1), which provides that the requirement for a full and fair opportunity to participate is subject to paragraph 3(d) of that section — *i.e.* first consideration for goods and services from within Nova Scotia.

The second element of "first consideration" implies that when an operator is faced with a situation where a bid submitted by a company with low Nova Scotia content and one submitted by a company with high Nova Scotia content are essentially equal in terms of fair market price, quality and delivery, the latter company shall be given the award. In the authors' opinion, this approach by the C-NSOPB has caused operators to give local companies the nod in close bidding situations, rather than to default to a more familiar or experienced foreign competitor. However, 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.

To conclude on this point, two issues which are sometimes raised by those who favour a more *laissez-faire* approach need to be addressed. Some argue that the employment and benefits provisions infringe upon their rights as Canadians to live and pursue the gaining of a livelihood in any province in that these provisions give a preference to residents of the province. This is, of course, the mobility right guaranteed by s. 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.⁶⁹ In recalling the discussions which took place prior to the adoption of the *Charter*, some

69. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

provinces, most notably Newfoundland, insisted that this mobility right not restrain government's ability to address regional disparity. As a consequence, s. 6(4) of the *Charter* states,

Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

The second issue relates to free trade both external and internal to Canada. Some consider the employment and benefits provision to be contrary to the rules of free trade. Insofar as the *North American Free Trade Agreement*⁷⁰ is concerned, the existing Canada-Nova Scotia benefits provisions are grandfathered. With respect to the *Agreement on Internal Trade*,⁷¹ although the energy chapter has not been finalized, a similar approach is being pursued.

Conclusion

Since the signing of the Nova Scotia and Newfoundland Accords and the implementation of the *Accord Acts*, circumstances have arisen in the course of industry's quest for petroleum, not all of which would have been contemplated when the legislation was first drafted. Consequently, from time to time the Boards find themselves attempting to administer a regime in the face of changing circumstances and continuing demands, thereby giving rise to growing issues.

The issues addressed in this article are but a few. Other issues, such as those relating to occupational safety and health, environmental assessment, approval of development projects, abandonment and decommissioning, regulatory consistency, or the liability of operators and contractors, could just as easily have been given equal ranking.

In dealing with these or any other issue, the interpretation and intent of the legislation becomes the starting point for any legal analysis. The approach to any issue first requires an understanding by the Boards, governments, industry and other stakeholders of the intent and spirit of the legislation. The resolution of any issue must fall within the four corners of the legislation, regardless of how reasonable or logical the objectives or agenda may be for the interested parties involved. Consequently, the Boards, in seeking an administrative resolution of particular issues, are governed always by the limitations or flexibility found within the law. To the extent the legislation cannot facilitate an administrative

70. *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (17 December 1992) (in force 1 January 1994).

71. *Agreement on Internal Trade* 1995, Chapter 12, Energy (not finalized).

solution and provide a desired result, then obviously legislative change becomes the only option. Where the Boards, governments, industry, and other stakeholders share a common and consistent understanding of the governing legislation, issues nonetheless will continue to emerge as different circumstances arise and the way of doing things changes. To the extent that stakeholders do not share a common and consistent understanding of the governing legislation, issues and their resolution become even more compounded and challenging.

SCHEDULE "A"

DISCLOSURE OF INFORMATION:

REFERENCES UNDER THE CANADA-NEWFOUNDLAND *ATLANTIC ACCORD IMPLEMENTATION ACT*

- s. 4 **Precedence over other Acts of Parliament**
In case of any inconsistency or conflict between
- (a) this Act or any regulations made thereunder, and
 - (b) any other Act of Parliament that applies to the offshore area or any regulations made under the Act,
- this Act and the regulations made thereunder take precedence.
- s. 18 **Access to information by governments**
- (1) The Federal Minister and the Provincial Minister are entitled to access to any information or documentation relating to petroleum resource activities in the offshore area that is provided for the purposes of this Act or any regulation made thereunder and such information or documentation shall, on the request of either Minister, be disclosed to that Minister without requiring the consent of the party who provided the information or documentation.

Applicable provision

- (2) Section 119 applies, with such modifications as the circumstances require, in respect of any disclosure of information or documentation or the production or giving of evidence relating thereto by a Minister as if the references in that

section to the administration or enforcement of a Part of this Act included references to the administration or enforcement of the Provincial Act or any Part thereof.

s. 119 (1) In this section,

“delineation well” means a well that is so located in relation to another well penetrating an accumulation of petroleum that there is a reasonable expectation that another portion of that accumulation will be penetrated by the first-mentioned well and that the drilling is necessary in order to determine the commercial value of the accumulation;

“development well” means a well that is so located in relation to another well penetrating an accumulation of petroleum that it is considered to be a well or part of a well drilled for the purpose of production or observation or for the injection or disposal of fluid into or from the accumulation

“engineering research or feasibility study” includes work undertaken to facilitate the design or to analyze the viability of engineering technology, systems or schemes to be used in the exploration for or the development, production or transportation of petroleum in the offshore area;

“environmental study” means work pertaining to the measurement or statistical evaluation of the physical, chemical and biological elements of the lands, oceans or coastal zones including winds, waves, tides, currents, precipitation, ice cover and movement, icebergs, pollution effects, flora and fauna both onshore and offshore, human activity and habitation and any related matters;

“experimental project” means work or activity involving the utilization of methods or equipment that are untried or unproven;

“exploratory well” means a well drilled on a geological feature on which a significant discovery has not been made

“geological work” means work, in the field or laboratory involving the collection, examination, processing or other

analysis of lithological, paleontological or geochemical materials recovered from the seabed or subsoil of any portion of the offshore area and includes the analysis and interpretation of mechanical well logs;

“geophysical work” means work involving the indirect measurement of the physical properties of rocks in order to determine the depth, thickness, structural configuration or history of deposition thereof and includes the processing, analysis and interpretation of material or data obtained from such work;

“geotechnical work” means work, in the field or laboratory, undertaken to determine the physical properties of materials recovered from the seabed or subsoil of any portion of the offshore area;

“well site seabed survey” means a survey pertaining to the nature of the seabed or subsoil of any portion of the offshore area in the area of the proposed drilling site in respect of a well and to the conditions of those portions of the offshore area that may affect the safety or efficiency of drilling operations;

“well termination date” means the date on which a well or test hole has been abandoned, completed or suspended in accordance with any applicable regulations respecting the drilling for petroleum made under Part III.

Privilege

- (2) Subject to section 18 and this section, information or documentation provided for the purposes of this Part or Part III or any regulation made under either Part, whether or not such information or documentation is required to be provided under either Part or any regulation made thereunder, is privileged and shall not knowingly be disclosed without the consent in writing of the person who provided it except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to such administration or enforcement.

Idem

- (3) No person shall be required to produce or give evidence relating to any information or documentation that is privileged under subsection (2) in connection with any legal proceedings, other than proceedings relating to the administration or enforcement of this Part or Part III.

Registration of documents

- (4) For greater certainty, this section does not apply to a document that has been registered under Division VIII.

Information that may be disclosed

- (5) Subsection (2) does not apply to the following classes of information or documentation obtained as a result of carrying on a work or activity that is authorized under Part III, namely, information or documentation in respect of
- (a) an exploratory well, where the information or documentation is obtained as a direct result of drilling the well and if two years have passed since the well termination date of that well;
 - (b) a delineation well, where the information or documentation is obtained as a direct result of drilling the well and if the later of
 - (i) two years since the well termination date of the relevant exploratory well, and
 - (ii) ninety days since the well termination date of the delineation well,have passed;
 - (c) a development well, where the information or documentation is obtained as a direct result of drilling the well and if the later of
 - (i) two years since the well termination date of the relevant exploratory well and

- (ii) sixty days since the well termination date of the development well,

have passed;

- (d) geological work or geophysical work performed on or in relation to any portion of the offshore area,
 - (i) in the case of a well site seabed survey where the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or
 - (ii) in any other case, after the expiration of five years following the date of completion of the work;
- (e) any engineering research or feasibility study or experimental project, including geotechnical work, carried out on or in relation to any portion of the offshore area,
 - (i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or
 - (ii) in any other case, after the expiration of five years following the date of completion of the research, study or project or after the reversion of that portion of the offshore area to Crown reserve areas, whichever occurs first;
- (f) any contingency plan formulated in respect of emergencies arising as a result of any work or activity authorized under Part III;
- (g) diving work, weather observation or the status of operational activities or of the development of or production from a pool or field;

- (g.1) accidents, incidents or petroleum spills, to the extent necessary to permit a person or body to produce and to distribute or publish a report for the administration of this Act in respect of the accident, incident or spill;
 - (h) any study funded from an account established under subsection 76(1) of the *Canada Petroleum Resources Act*, if the study has been completed; and
 - (i) an environmental study, other than a study referred to in paragraph (h),
 - (i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or
 - (ii) in any other case, if five years have passed since the completion of the study.
- (6) Repealed 1988 c. 28 s. 260