Dalhousie Law Journal

Volume 26 | Issue 2 Article 5

10-1-2003

Provincial Entitlement to Gas Trunk Line Ownership - Enforceability and Constitutionality

Dufferin Harper
Merrick Holm

Dufferin R. Harper*

Provincial Entitlement to Gas Trunk Line Ownership — Enforceability and Constitutionality

The author discusses the interpretation of section 40 of the Nova Scotia Accord Act *(Canada) and the* Nova Scotia Accord Act (Nova Scotia). *The section provides that the Government of Nova Scotia be given "a reasonable opportunity" to acquire on a "commercial basis" up to a fifty percent ownership in the Nova Scotia trunkline in certain circumstances. He points out that even though the dispute between the Federal and Provincial governments regarding the ownership of the offshore appears to be on hold, the issue is relevant to the application of section 40.*

L'auteur discute de l'interprétation de l'article 40 de la Loi de mise en œuvre de l'Accord Canada – Nouvelle-Écosse *sur les hydrocarbures extracôtiers. L'article prévoit que dans certaines circonstances, le gouvernement de la Nouvelle-Écosse doit avoir « la juste possibilité d'acquérir, sur une base commerciale... au moins cinquante pour cent de la propriété de la canalisation néo-écossaise ». L'auteur souligne que même si le différend qui oppose les gouvernements fédéral et provincial quant à la propriété de la zone extracôtière semble être suspendu, la question est pertinente pour ce qui est de l'application de l'article 40.*

* Partner, Merrick Holm, Halifax. The research assistance of summer student Jared Schwartz is gratefully acknowledged.

Introduction

The rules surrounding the development of the Nova Scotia offshore are set out in both the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*[1] and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act.*[2] Collectively these two Acts will be referred to as the *Accord Acts*. The *Accord Acts* are essentially mirror pieces of legislation, contemporaneously enacted by the Federal Government and the Province of Nova Scotia. One of the more novel sections of the *Accord Acts* is section 40. It refers to a Nova Scotia "trunkline" and confirms that the Province is to be provided with a reasonable opportunity to acquire, on a commercial basis, up to a fifty per cent ownership interest in the trunkline.

This paper will address the interpretation of section 40 including the meaning of the terms "reasonable opportunity," "trunkline," and "commercial basis." The paper will also address the jurisdictional basis for the section and discuss the possibility that part of the section is unconstitutional and therefore unenforceable. This is significant if the province wishes to acquire an ownership interest in a trunkline over the opposition of the trunkline proponent.

---

1. S.C. 1988, c. 28 [*Nova Scotia Accord Act (Canada)*].
2. S.N.S. 1987, c. 3 [*Nova Scotia Accord Act (Nova Scotia)*] .

I. *Background*

More than 130 years after Confederation, jurisdiction over the offshore of Nova Scotia remains unresolved. Both the Province of Nova Scotia and the Government of Canada continue to assert jurisdiction. Although there have been decisions rendered by the Supreme Court of Canada and the Newfoundland Court of Appeal on the offshore areas of Newfoundland and British Columbia,[3] there has not yet been any decision relating to the Nova Scotia offshore. During the 1980s, as an alternative to a lengthy and protracted court battle, and to facilitate the development of offshore oil and gas resources, both levels of government entered into negotiations concerning governance of the offshore.

In 1982, the Federal Government and the Province of Nova Scotia executed the *Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing*[4] (*1982 Accord*). The *1982 Accord* was subsequently implemented by Nova Scotia in 1984 through the *Canada-Nova Scotia Oil and Gas Agreement (Nova Scotia) Act*[5] and by Canada in 1984 through the *Canada-Nova Scotia Oil and Gas Agreement Act.*[6] These were followed in 1986 by the *Canada-Nova Scotia Offshore Petroleum Resources Accord*[7] (*1986 Accord*). The *1986 Accord* was subsequently implemented by the *Nova Scotia Accord Act* (*Nova Scotia*) and the *Nova Scotia Accord Act* (*Canada*).[8] The *Accord Acts* now serve as a comprehensive regulatory regime governing oil and gas exploration in the Nova Scotia offshore.

II. *Section 40 of the* Accord Acts

Section 40 is a unique provision. There is no comparable provision in the *Canada-Newfoundland Atlantic Accord Implementation Act*[9] or the *Canada-Newfoundland and Labrador Atlantic Accord Implementation*

---

3. *Reference re: Mineral and Other Natural Resources of the Continental Shelf* (1983), 145 D.L.R. (3d) 9, 41 Nfld. & P.E.I.R. 271 (Nfld.C.A.); *Reference re: Seabed and Sub-soil of the Continental Shelf offshore Newfoundland*, [1984] 1 S.C.R. 86 (QL); *Reference re: Ownership of Offshore Mineral Rights (British Columbia)*, [1967] S.C.R. 792.
4. The Agreement was executed on March 2, 1982, between Pierre Trudeau, Prime Minister of Canada and John Buchanan, Premier of Nova Scotia.
5. S.N.S. 1984, c. 2 [*1984 Nova Scotia Act*].
6. S.C. 1984, c. 29 [*1984 Federal Act*].
7. This Agreement was executed on August 26, 1986 between Brian Mulroney, Prime Minister of Canada, Marcel Masse, Federal Minister of Energy Mines and Resources, John Buchanan, Premier of Nova Scotia, and Joel Matheson, Provincial Minister of Mines and Energy.
8. *Supra* notes 1 and 2.
9. S.C. 1987, c. 3.

Newfoundland and Labrador Act.[10] The author is also unaware of any similar provisions in any other legislation affecting the other provinces of Canada including British Columbia.

The precursor to the present section 40 was section 20 of the *1982 Accord*, which stated:

> Transportation
>
> 20. Without prejudice to decisions on the most appropriate mode for transporting oil and gas from the offshore region:
>
> (a) The parties agree that an application for a certificate for any new natural gas or oil trunkline bringing gas or oil from the offshore region into Nova Scotia, and including any extensions of the trunkline within the province shall provide *an option* for the Nova Scotia government to participate, on a commercial basis, in an interest of up to 50%.[11]

This clause was briefly considered in a memorandum of understanding signed in 1982 between Nova Scotia Resources Limited (the Provincial Government's representative at the time) and TransCanada Pipelines Limited. The memorandum stated:

> Pursuant to the Canada/Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing, the province has the option to participate in any new natural gas or oil trunkline from the offshore region into Nova Scotia including any extensions of the trunkline within the Province, up to a 50% interest therein;...[12]

Other than the brief reference above, there are no reported cases dealing with the interpretation of section 20 of the *1982 Accord*. It is interesting to contrast the wording of the *1984 Nova Scotia Act* with the wording of section 20 of the *1982 Accord* which it implements. Section 19(2) of the *1984 Nova Scotia Act* states:

> Right to Acquire Interest in Pipeline

---

10. R.S.N.L. 1990, c. C-2.
11. Supra note 4, s. 20.
12. *TransCanada Pipelines Ltd.* v. *Nova Scotia (Attorney General)* (1999), 180 N.S.R. (2d) 355, 557 A.P.R. 355, 39 C.P.C. (4th) 390 at p.11.

> (2) Notwithstanding any other Act, an issuing authority shall not issue a certificate or authorization in respect of a Nova Scotia offshore pipeline, unless the issuing authority is satisfied that the Government of Nova Scotia has been given a *reasonable opportunity* to acquire at least a fifty per cent ownership interest in the pipeline.[13]

It is noteworthy that the heading to the section 19(2) refers to a "right." Secondly, the term "option" used in the *1982 Accord* has been replaced with "reasonable opportunity."

The corresponding section of the *1984 Federal Act* is section 22(2), which falls under the heading of "Supply." It reads as follows:

> (2) Notwithstanding any other Act of Parliament, an issuing authority shall not issue a certificate or authorization in respect of a Nova Scotia offshore pipeline, unless the issuing authority is satisfied that the Government of Nova Scotia has been given a *reasonable opportunity* to acquire at least a fifty per cent ownership interest in the pipeline.[14]

In the *1984 Federal Act*, however, there is no reference to a "right" in the heading.

Section 22 of the *1984 Federal Act* was incorporated by reference into the *1986 Accord* and subsequently reproduced as section 40 in the *Nova Scotia Accord Act (Nova Scotia)* and the *Nova Scotia Accord Act (Canada)*. Section 40 of the *Nova Scotia Accord Act (Nova Scotia)* states:

> Interpretation
>
> 40 (1) In this Section,
> (a) "certificate" means a certificate of public convenience and necessity issued pursuant to Part III of the *National Energy Board Act*;
>
> (b) "Nova Scotia trunkline" means a trunkline for the transmission of petroleum in the offshore area or from the offshore area, and includes all tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property connected therewith that are located within the offshore area or any other part of Nova Scotia, but does not include laterals, gathering lines, flow lines, structures, and facilities for the production and processing of petroleum.

13. *Supra* note 5 [emphasis added].
14. *Supra* note 6 [emphasis added].

Option to acquire up to fifty per cent

(2) No certificate shall be issued in respect of a Nova Scotia trunkline, unless the National Energy Board is satisfied that the Government of Nova Scotia has been given a *reasonable opportunity* to acquire on a commercial basis at least a fifty per cent, or such lesser percentage as the Government proposes to acquire as a result of the opportunity, ownership interest in the trunkline.

No authorization unless opportunity to acquire

(3) Where a certificate is not required in respect of a Nova Scotia trunkline, no authorization shall be issued pursuant to clause (b) of subsection (1) of Section 135 in respect of that trunkline, unless the Board is satisfied that the Government of Nova Scotia has been given a *reasonable opportunity* to acquire on a commercial basis at least a fifty per cent, or such lesser percentage as the Government proposes to acquire as a result of the opportunity, ownership interest in the trunkline.

Minister may enter into agreements

(4) The Minister may, with the approval of the Governor in Council, enter into such agreements, make such arrangements and expend such money as is necessary for him to participate in the construction, operation and acquisition of trunklines including the acquisition of the ownership interest referred to in this Section.[15]

Similarly, section 40 of the *Nova Scotia Accord Act (Canada)* states:

Nova Scotia trunkline

40. (1) In this section, "Nova Scotia trunkline" means a trunkline for the transmission of petroleum in the offshore area or from the offshore area to and within the Province, and includes all tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property connected therewith that are located within the Province or the offshore area, but does not include laterals, gathering lines, flow lines, structures, or facilities for the production and processing of petroleum.

15. *Supra* note 2 [emphasis added].

Certificate

(2) No certificate of public convenience and necessity shall be issued pursuant to Part III of the *National Energy Board Act* in respect of a Nova Scotia trunkline, unless the National Energy Board is satisfied that the Government of Nova Scotia has been given a *reasonable opportunity* to acquire on a commercial basis at least fifty per cent, or such lesser percentage as the Government proposes to acquire as a result of the opportunity, ownership interest in the trunkline.

Authorization

(3) Where a certificate referred to in subsection (2) is not required in respect of a Nova Scotia trunkline, no authorization shall be issued under paragraph 142(1)(b) in respect of that trunkline, unless the Board is satisfied that the Government of Nova Scotia has been given a *reasonable opportunity* to acquire on a commercial basis at least fifty per cent, or such lesser percentage as the Government proposes to acquire as a result of the opportunity, ownership interest in the trunkline.[16]

While no definition of the term "reasonable opportunity" has been provided in either of the *Accord Acts*, the meaning has not yet been an issue. Perhaps this is because Nova Scotia has always declined to acquire an ownership interest in trunklines.[17]

The position of the Province may be changing. In the *Hansard* debates for Wednesday, November 14, 2001, during questions involving the potential Deep Panuke project (which was then being proposed by PanCanadian, now EnCana, and which included the potential for a trunkline), the following exchange occurred:

MR. MANNING MACDONALD: Mr. Speaker, my question is to the Premier. (Interruptions) As per Section 40 of the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, Nova Scotia has the right to acquire a commercial interest of 50 per cent or less in any offshore transmission line. My question to the Premier is, is the Premier aware of any letter by his Minister responsible for the Petroleum Directorate or the CEO of the Petroleum Directorate that signifies an intent to exercise this option with regard to PanCanadian's transmission line, and if so, will he table that letter?

16. *Supra* note 1 [emphasis added].

17. The most recent project where the province declined was the Sable Offshore Project. During that project the government of Nova Scotia issued a letter stating that it would not be acquiring an interest under section 40 (personal communication with Michael McPhee, Legal Counsel to CNSOPB).

> The Premier: Mr. Speaker, I am not aware whether or not there was a letter. What I do know is it is the intention of the government to pursue and receive value for the back-in provision for the offshore pipe.[18]

The above exchange highlights a difficult question in interpreting section 40, namely, what does the section confer on the province absent the term "right," or conversely, what exactly must a trunkline proponent do to ensure that the province is given a "reasonable opportunity."

III. *Interpretation of Section 40*

Sections 40(2) and (3) of the *Accord Acts* refer to "trunkline," "reasonable opportunity," and "commercial basis," none of which is fully defined. A closer review of the specific terms reveals the following.

1. *Trunkline*

The term "trunkline" is partially defined in the *Nova Scotia Accord Act (Nova Scotia)* within the definition of "Nova Scotia trunkline."[19] It means a trunkline for the transmission of petroleum in the offshore or from the offshore. It does not include laterals, gathering lines, flow lines and production and processing facilities. However, the definition does not provide adequate guidance as to what a trunkline really is. For example, what distinguishes a trunkline from a lateral? Is it based on pipeline size or some other characteristic?

The Commission of the European Communities recently reviewed a proposed merger of Saipem S.p.A and Bouygues Offshore S.A. In so doing, it made the following statements regarding trunklines:

> The industry normally distinguishes between two different types of pipelines: (i) large pipelines with a diameter of 16 inches and above (so-called "trunklines") and (ii) short pipelines, with diameter of less than 16 inches ("flowlines"). A trunkline represents a major transportation system as a trunkline is a long pipeline linking main offshore oil and gas fields to the shore and it serves as an interconnection within and between offshore fields under the sea. A flowline represents a minor transportation system between wells and offshore platforms. Third parties have generally sup-

18. Nova Scotia, Legislative Assembly, Debates (14 November 2001) at 7057.
19. *Supra* note 1, s. 40(1).

> ported the view of the parties that subsea pipelaying should be divided into trunklines and flowlines respectively.[20]

An interpretation of the term "trunkline" in the *Accord Acts* as referring solely to a major transmission line (rather than a pipeline of any size) is supported by the change in wording from the *1982 Accord*, to the *1984 Federal Act* and *1984 Nova Scotia Act*, to the present day *Accord Acts*. In the *1982 Accord*, the term "trunkline" was used. In both of the 1984 Acts, the Legislature and Parliament used the term "pipeline." However, in the *Accord Acts*, the Legislature and Parliament reverted to the term "trunkline." In *Driedger on the Construction of Statutes*, the author refers to the statutory presumption that different words mean different things. He states:

> The Presumption of Consistent Expression
>
> Governing principle. It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.[21]

Using the interpretation espoused in the Saipem decision, a Nova Scotia trunkline would be the main petroleum transmission line running from the offshore, provided it was greater than sixteen inches in diameter. Such an interpretation certainly leaves open the possibility that smaller lines would not be considered trunklines and therefore not trigger any of the provisions of section 40.

2. *Commercial Basis*

The term "commercial basis" is used in many pieces of Canadian legisla-

---

20. EC, *Commission Decision of 02/11 of 02/07/2002 declaring a concentration to be compatible with the common market (Case No IV/M.2842 - SAIPEM / BOUYGUES OFFSHORE) according to Council Regulation (EEC) No 4064/89*, [2002] O.J.L. 168/20.

21. R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 163.

tion.[22] It has generally been used to describe activities undertaken for a profit. The term is also often associated with the phrase "based on sound business practices." Thus, to fulfill the requirements of section 40, a trunkline proponent arguably would have to place an opportunity before the government that was both pursuant to sound business practice and reasonable.

3. *Reasonable Opportunity*

The term "reasonable opportunity" is clearly the most problematic term of section 40. It must be remembered that the government was originally provided with an "option" in the *1982 Accord.* The term "option" was replaced with the term "reasonable opportunity." In *Mitsui & Co. (Canada) v. Royal Bank*,[23] the Supreme Court of Canada dealt with contractual options in the context of a lease agreement with an option to purchase. Major J. writing for a unanimous court stated:

> The meaning of an option to purchase was considered in *Canadian Long Island Petroleums Ltd. v. Irving Wire Products*, [1975] 2 S.C.R. 715, per Martland J. at pp. 731-732:
>
> > An option gives to the optionee, at the time it is granted, a right, which he may exercise in the future, to compel the optionor to convey to him the optioned property ... .
> >
> > In other words, the essence of an option to purchase is that, forthwith upon the granting of the option, the optionee upon the occurrence of certain events solely within his control can compel a conveyance of the property to him.
>
> In that case, it was held that the agreement in question created a right of pre-emption and not an option to purchase. The difference between an option and a right of pre-emption is that *an option gives the optionee the unilateral right to exercise the option and thereby require the optionor to sell the subject-matter of the option upon pre-arranged terms.* A right of pre-emption, or right of first refusal, does not give the grantee the unilateral power to compel the grantor to sell the property in question. Instead,

22. *Bretton Woods and Related Agreements Act*, R.S.C. 1985, c.B-7, Sched. V, Article 13(a)(iii); *Canada Elections Act*, S.C. 2000, c.9, s.2 and 319; *Excise Tax Act*, R.S.C. 1985, c.E-15, s.68.26; *Telesat Canada Reorganization and Divestiture Act*, S.C. 1991, c.52, s. 9(1); *Conflicts of Interest Act*, R.S.A. 2000, c.C-23, s.31.

23. [1995] 2 S.C.R. 187, 142 N.S.R. (2d) 1, 407 A.P.R. 1, (1995) 32 C.B.R. (3d) 1, 123 D.L.R. (4th) 449, 180 N.R. 161.

> the grantor has the sole power to decide whether to make an offer. *It is only at that point that the grantee (or lessee) is given the opportunity of purchasing the property.* A right of first refusal is a commitment by the grantor to give the grantee the first chance to purchase should the grantor decide to sell.[24]

The italicized portions of the quotation show that Justice Major's judgment supports the position that an opportunity is less than an option. Major J. added the following statements regarding options:

> Paul M. Perell, in "Options, Rights of Prepurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991) 70 Can. Bar Rev. 1, at p. 37 lists the three principal features of an option, all of which are present in clause 32:
>
> 1. exclusivity and irrevocability of the offer to sell within the time period specified in the option;
>
> 2. specification of how the contract of sale may be created by the option holder; and
>
> 3. obligation of the parties to enter into a contract of sale if the option is exercised.
>
> An option contract is an antecedent contract because it precedes the contract of purchase and sale that will result if the opportunity provided by the option is "seized upon" or exercised. Once an option is exercised, the parties discharge their obligations under the option contract by entering into the contract of purchase and sale. The exercise of an option is the election to buy property on the terms specified in the option agreement, and is the equivalent of accepting the irrevocable offer made in the option. One cannot exercise the same option twice. The exercise of the option must mean the acceptance of the offer. That acceptance must be unconditional, must only be made once, and must be made in accordance with the terms of the option.[25]

Section 40 of the *Accord Acts* does not satisfy the above three factors cited by Justice Major. Other than the reference to a commercial basis, there is no limitation on time, no specifics surrounding how the contract

---

24. *Ibid.* at 10 [emphasis added].
25. *Ibid.* at 11 [emphasis added]. See also *Sail Labrador Ltd.* v. *Navimar Corp.* [1999] 1 S.C.R. 265.

is to be created, and no specifics on how the government is to respond to an offer. By consciously replacing the term "option" with "reasonable opportunity," the Legislature and Parliament obviously intended the benefit accruing to the Nova Scotia government to be something other than, and less than, an option.

The term "reasonable opportunity" arises quite frequently in Canadian legislation.[26] The term has received little judicial attention. In *Northwest Territories (Commissioner) v. Simpson Air (1981) Ltd*,[27] Vertes J. discussed the interpretation of the term "reasonable opportunity" in the context of a trustee inspecting property pursuant to section 79 of the *Bankruptcy and Insolvency Act*. Vertes J. states:

> What is meant by "reasonable opportunity" is not explained. In my opinion this concept is similar to that of "reasonable time" to be given to a debtor to satisfy a demand for payment. The question of what is "reasonable" must be looked at in the light of all of the facts and circumstances in the individual case: per Estey J. in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.* (1982), 135 D.L.R. (3d) 1 (S.C.C.).[28]

In *Driedger on the Construction of Statutes*, the author explains the presumption for interpreting statutes according to their ordinary meaning. In so doing he cites the case of *Camden (Marquis) v. C.I.R.* as follows:

> It is the duty of the court to construe a statute according to the ordinary meaning of the words used, necessarily referring to dictionaries or other literature for the sake of informing itself as to the ordinary meaning of any words, but any evidence on the question is wholly inadmissible... [W]e are not dealing with any private statutes nor with contracts. It is a public Act of Parliament, and the Court must take judicial cognizance of the language used without evidence.[29]

In the context of its ordinary meaning, *The Concise Oxford Dictionary* defines opportunity as "favourable occasion, good chance."[30]

---

26. *Access to Information Act*, R.S.C. 1985, c.A-1, s.35(2); *Aeronautics Act* R.S.C. 1985, c.A-2, s.4.79(2), s.5.5(1) and s.6(1); *Bank Act* S.C. 1991 c.46, s.129, s.277, s.278 and s.400; *Bankruptcy and Insolvency Act* R.S.C. 1985, c.B-3, s.14.02(1), and s.79; *Canada Business Corporations Act* R.S.C.1985, c.C-44, s.78(1); *Canada Deposit Insurance Corporation Act* R.S.C. 1985, c.C-3, s.39.1(1); *Agricultural Marshland Conservation Act* S.N.S. 2000, c.22, s.30; *Sale of Goods Act* R.S.N.S. 1989, c.408, s.18 and s.36.
27. [1995] N.W.T.R. 184 (S.C.), (1994) 27 C.B.R. (3d) 190 at 203.
28. *Ibid.* at para. 26. See also *Dale v. Hatfield Chase Corporation*, [1922] 2 K.B. 282.
29. *Supra* note 21 at 14.
30. *The Concise Oxford Dictionary*, 7th ed. (Oxford: Clarendon Press, 1983).

The concept of an opportunity being related to a "chance" is reflected in *Cinabar Enterprises v. Bertelsen*. In that case Wilkinson J., in discussing an opportunity available to the plaintiff, makes the following statement:

> The 1993 tank opportunity was an inchoate prospect that would not be fully realized until the Schedule "B" tanks could be successfully marketed to third parties. As the subject of a bargain, an "opportunity" is an ephemeral concept that cannot be analysed in terms of transferrable proprietary rights. [31]

Similarly, the "reasonable opportunity" afforded the government under section 40 is not a transferable property right. The government has an opportunity or "chance" to accept a proposal to acquire an ownership interest based on the terms as set out in the Act. Assuming the opportunity is on a commercial basis, the government's only response can be acceptance or rejection. If the government declines to participate, it will lose the opportunity.

IV. *Jurisdiction and Constitutionality*

The jurisdictional dispute over the offshore was not resolved by the enactment of the two *Accord Acts*. Rather the dispute between the Federal and Provincial Governments was effectively placed on hold. The lack of finality associated with the jurisdictional dispute is reinforced by section 3 of each of the *Accord Acts*. Section 3 of the *Nova Scotia Accord Act* (*Nova Scotia*) states:

> The provisions of this Act shall not be construed as providing a basis for any claim by or on behalf of the Government of Canada in respect of any entitlement to or legislative jurisdiction over the offshore area or any living or non-living resources in the offshore area.

Similarly, section 3 of the *Nova Scotia Accord Act* (*Canada*) states:

> 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.

31. (2000), 8 W.W.R. 561, 193 Sask. R. 161, [2000] S.J. No. 337 at 19.

Without ending the jurisdictional argument, the *Accord Acts* have enabled both levels of governments to transfer their authority over the offshore (however extensive that may be) to the Canada-Nova Scotia Offshore Petroleum Board (CNSOPB). The *Accord Acts* no longer focus on the question of ownership but instead provide for joint management of the resources.[32]

Nova Scotia's claim to the offshore is predicated in part upon the *Constitution Act, 1867*. Section 7 of that Act states: "The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act." Additionally section 109 states:

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Since Nova Scotia retained its territorial boundaries and proprietary right over lands, mines, minerals and royalties at the time of Confederation, the exact limits of those boundaries at that time must be examined. The terms of the grant in 1621 by James I to Sir William Alexander support Nova Scotia's contention that its boundaries include all or part of the offshore. It states:

> [A]ll and singular the lands upon the continent and the Islands situate, lying and being in America, within the head or promontory, commonly called Cape Sable in the latitude of forty-three degrees nearly or thereabouts, from that promontory along the shore, stretching to the west to the bay commonly called Saint Mary's bay, thence to the north, by a direct line crossing the entrance or mouth of the great bay, which extends eastward, between the countries of the Suroquois and Etchemins, so commonly called, to the river commonly called by the name of the Holy Cross or the St. Croix, and to the furthest source or spring upon the western branch of the same, which first mingles its waters with those of the said river, thence by an imaginary direct line, to be drawn or run through the country, or over the land to the north, to the first bay, river or spring emptying itself

32. Angus Taylor & Jim Dickey, "Regulatory Regime Canada-Newfoundland/Nova Scotia Offshore Petroleum Board Issues" (2001) 24 Dal. L.J. 51.

> into the great river of Canada, and from thence running to the east along the shores of the said river of Canada to the river, bay, or harbour commonly called and known by the name of Gachepe, or Gaspee, and from thence South East to the Islands called Baccalaos or Cape Breton, leaving the same Islands upon the right, and the gulph of the said river or bay of Canada and Newfoundland with the Islands thereunto belonging upon the left, and from thence to the head or promontory of Cape Breton aforesaid, lying near the latitude of forty five degrees or thereabouts, and from the said promontory of Cape Breton to the southward and westward to Cape Sable aforesaid the place of beginning, including and comprehending within the said coasts and shores of the Sea, and the circumferences thereof from Sea to Sea, all the lands upon the continent with the rivers, torrents, bays, shores, Islands or Seas, lying near to, or within six leagues from any part thereof on the western, northern or eastern parts of the said coasts and precincts of the same, and to the southeast where Cape Breton lies, and to the southward thereof where Cape Sable lies, *all the Seas and Islands to the south within forty leagues of the said shores*, including the great island commonly called the Isle of Sable or Sablon, lying south-southeast in the Ocean about thirty leagues from Cape Breton aforesaid, and being in the latitude of fourty four degrees or thereabouts. All which land aforesaid, shall as all times hearafter be called and known by the name of Nova Scotia or New Scotland in America... And if any questions, or doubts shall hereafter arise upon the interpretation or construction of any clause in the present Letters Patent contained, they shall all be taken and interpreted in the most extensive sense, and in favor of the said Sir William Alexander, his heirs and assigns aforesaid. Moreover we of our certain knowledge, our own proper motion, regal authority, and royal power have made, united, annexed, erected, created and incorporated: and we do by these our Letters Patent, make, unite, annex, erect, create, and incorporate, the whole and entire Province, and lands of Nova Scotia aforesaid with all the limits thereof, Seas, etc.. Offices and Jurisdictions, and all other things generally and specially above mentioned, into one entire and free dominion and barony, to be called at all times hereafter by the aforesaid name of Nova Scotia.[33]

Further support of Nova Scotia's claim to the offshore is found within various treaties signed between 1632 and 1818, including the *Treaty of St. Germain-en-Laye* in 1632, *Treaty of Utrecht* in 1713, *Treaty of Paris* in 1763, and the 1818 Convention between United States and His Britiannic Majesty, all of which incorporate references to territorial seas.[34]

---

33. 6 International Adjudications 136-37 (J. Moore ed., modern ser. 1923) cited in Edward C. Foley, "Nova Scotia's Case for Coastal and Offshore Resources" (1981) 13 Ottawa L. Rev. 281 at 284 [Foley] [emphasis added].
34. Foley, *ibid.* at 287.

In the past, governors of Nova Scotia were given commissions upon their appointment which described the boundaries of the territories they were to govern. All of the commissions are essentially identical except that from 1773 onward the island of St. John, now known as Prince Edward Island, was removed since it had been granted separate colonial status. The 1846 commission of Lord Elgin describes the boundaries as follows:

> Our said province of Nova Scotia in America, the said Province being bounded on the westward by a line drawn from Cape Sable across the entrance to the centre of the Bay of Fundy; on the northward by a line drawn along the centre of the said Bay to the mouth of the Musquat River by the said river to its source, and from thence by a due East line across the Isthmus into the Bay of Verte and the Gulf of St. Lawrence to the Cape or Promontory called Cape Breton in the Island of that name, including the said Island, and also including all Islands within six leagues of the Coast, and on the Southward by the Atlantic Ocean from the said Cape to Cape Sable aforesaid, including the Island of that name, *and all other islands within forty leagues of the Coast, with all the rights, members, and appurtenances whatsoever thereunto belonging.*[35]

The final line above—"all the rights, members and appurtenances whatsoever thereunto belonging"—appears in all of the commissions. In *The Ship "North" v. The King*,[36] the Supreme Court of Canada described the territorial sea as an appurtenance, as has the International Court of Justice in *United Kingdom v. Norway (Fisheries Case)*.[37] Lassa Oppenheim described the use of the word appurtenance as follows: "it is a universally recognized rule of the Law of Nations that the subsoil to an unbounded depth belongs to the State which owns the territory on the surface and the territorial waters appurtenant to the territory of the State."[38] Finally, reference is made to LaForest J.'s writings regarding Nova Scotia's ownership of its three-mile territorial sea. In a 1959 article, he concluded that the province owns all the territorial waters for three marine miles as "measured from the shore or a line drawn across the headlands of bays."[39]

---

35. Quoted in Memorandum to F.H. Peters, Surveyer General, Topographical Survey of Canada, Dept. of the Interior, from the Deputy General of N.S., 10 Sept. 1934, cited in Foley, *ibid.* at 289 [emphasis added].
36. (1906), 37 S.C.R. 385 at 401.
37. [1951] I.C.J. Rep. 116 at 128.
38. Lassa Oppenheim, *International Law: A Treatise*, ed., by Sir Hersch Lauterpacht, 8th ed. (London: Longman, 1955) vol. 2 at 462, cited in Foley, *supra* note 25 at 290-91.
39. Gérard LaForest, *Report on the Rights of the Provinces of Nova Scotia, New Brunswick and Prince Edward Island to the Ownership of Adjacent Submarine Resources* (1959) at A, cited in Foley, *supra* note 32 at 300.

V. *Jurisdictional validity of Section 40(2)*

Section 40(2) prohibits the National Energy Board (NEB) from issuing a certificate of public convenience and necessity unless the NEB is satisfied that the province was provided with a reasonable opportunity to acquire an ownership interest in a trunkline.

Part III of the *National Energy Board Act*[40] outlines the requirements for construction and operation of pipelines. Section 30 of the *NEB Act* confirms that no company shall operate a pipeline unless there is a certificate in force with respect to that pipeline. Pipelines are defined in section 2 as follows:

> "Pipeline" means a line that is used or to be used for the transmission of oil, gas or any other commodity and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith, but does not include a sewer or water pipeline that is used or proposed to be used solely for municipal purposes.

As a result, the NEB has jurisdiction only over pipelines that cross jurisdictional lines. Pipelines that are wholly situate within the Province of Nova Scotia would not trigger the authority of the NEB under the *NEB Act*. Rather, those pipelines would only be subject to the provincial *Pipeline Act*.[41]

Section 2(2) of the *Pipeline Act* confirms that it applies to all pipelines on or under Nova Scotia lands. Nova Scotia lands are defined as:

> "Nova Scotia lands" means the landmass of Nova Scotia including Sable Island, and includes the seabed and subsoil off the shore of the landmass of Nova Scotia, the seabed and subsoil of the Continental shelf and slope and the seabed and subsoil seaward from the Continental shelf and slope to the limit of exploitability.

On the assumption that all or a portion of the offshore would be found within the jurisdiction of Nova Scotia, any trunklines from the offshore to the onshore would not involve inter-jurisdictional transfer of product.

---

40. R.S.C. 1985, c. N-7 [*NEB Act*].
41. R.S.N.S. 1989 c. 345.

Consequently the NEB would have no authority to issue a certificate pursuant to Part III of the *NEB Act*, section 40(2) of the *Accord Acts* would not be triggered, and a hearing before the NEB would not be required. This could actually lead to a more streamlined regulatory process, since fewer regulatory players would be involved in the approval process, something long desired by the oil and gas industry.

For the Province to insist that section 40(2) be triggered, it would have to take the position that the NEB had jurisdiction. In essence that would entail the Province arguing that the offshore is not part of Nova Scotia, a position it would be loathe to take.

If section 40(2) was found not to apply, or where a certificate was waived pursuant to the provisions of the *NEB Act*,[42] section 40(3) would still apply. It deals with the situation where a certificate from the NEB is not required. In those circumstances the CNSOPB has jurisdiction over the granting of a provincial authorization. This sets up another potential jurisdictional dispute between the CNSOPB pursuant to the *Accord Acts* and the Nova Scotia Utility and Review Board pursuant to the *Pipeline Act*. As stated earlier, the *Pipeline Act* encompasses an area that includes the offshore.

This potential dispute seems to have been resolved in favour of the CNSOPB. Section 4 of the *Nova Scotia Accord Act* (*Nova Scotia*) states:

> 4. In case of any inconsistency or conflict between
> (a) this Act or a regulation made pursuant thereto; and
> (b) any other Provincial enactment,
> this Act and the regulations made pursuant thereto prevail.[43]

Although a proponent may be able to extricate itself from the requirements of section 40(2) and any attendant NEB hearing process, it will continue to be subject to the provisions of section 40(3) and the difficulties associated with its interpretation.

Summary

The first part of this paper outlines specific areas of concern in interpreting section 40. It also provides a framework for trunkline proponents to assist them in their interaction with the government. The argument put forth is

---

42. Section 58 of the *NEB Act* provides for exemptions from sections 29-33 of the *NEB Act*, including the necessity of a certificate if a pipeline is less than 40km in length.
43. *Supra* note 2.

that proponents must provide the government with the chance to acquire an ownership interest in a trunkline, which the government must either accept or reject. Notwithstanding that the government might be interested in acquiring an ownership interest, if it refuses to partake in the particular chance that is presented to it, the government does not have the "right" to negotiate a better deal.

The second part of the paper discusses the jurisdictional issue surrounding the Nova Scotia offshore. Although the dispute between the Federal and Provincial governments appears to be on hold, the issue of jurisdiction has some applicability to section 40. More particularly, it may impact on section 40(2) and oust the role of the NEB in the offshore.