

10-1-2007

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Recommended Citation

Robert G. Grant, "Regulatory Issues Concerning EnCana's Deep Panuke Project" (2007) 30:2 Dal LJ 426.

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Robert G. Grant, Q.C.* Regulatory Issues Concerning EnCana's
Deep Panuke Project

EnCana is proposing to develop the second gas producing project in the Scotian Shelf, the Deep Panuke Project. The author examines modifications to the Project from that initially proposed in 2002, the use of the previously approved Comprehensive Study Report, and the procedure for public review and approval. The author will also discuss major issues identified during the public hearing, held before a member of the NEB and the Commissioner appointed by the C-NSOPB, including EnCana's alternative options for carrying out the project, consultation with the Aboriginal communities, Canada-Nova Scotia benefits matters, consultation and engagement with the fishing industry, and EnCana's proposal for abandonment and decommissioning.

EnCana se propose de mettre en place et de réaliser le deuxième projet d'exploitation d'hydrocarbures sur le plateau Scotian, le Projet Deep Panuke. L'auteur se penche sur les modifications apportées au projet depuis la première fois où il en a été question, en 2002, sur l'utilisation du rapport d'étude approfondie déjà approuvé et sur la procédure d'examen public et d'approbation. L'auteur traite en outre des principaux enjeux relevés pendant les audiences publiques tenues devant un membre de l'ONÉ et le commissaire nommé par l'OCNEHE; il examine notamment les autres possibilités qui s'offrent à EnCana pour réaliser le projet, la consultation avec les collectivités autochtones, les questions qui touchent le plan de retombées économiques Canada – Nouvelle-Écosse, la consultation tenue avec l'industrie de la pêche et l'engagement envers cette dernière et, enfin, la proposition avancée par EnCana pour le démantèlement des installations.

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Introduction

EnCana Corporation's Deep Panuke Project (the Project) represents the second natural gas project presented for regulatory approval in the Nova Scotian offshore. Throughout 2007 it has been undergoing regulatory review. On 6 September 2007, the federal Minister of the Environment accepted the conclusions of a Comprehensive Study Report (CSR), submitted 4 June 2007, that the Project is not likely to cause any significant adverse effects with the implementation of appropriate mitigation measures. The Minister referred the Project back to the responsible authorities: the Canada-Nova Scotia Offshore Petroleum Board (C-NSOPB); the National Energy Board (NEB); Fisheries and Oceans Canada; Industry Canada; and Transport Canada, for appropriate action.

A public hearing took place in March 2007 before a member of the NEB and a Commissioner appointed by the C-NSOPB. The NEB member and the Commissioner recommended approval of the Project to the NEB

and the C-NSOPB respectively, subject to certain conditions. On 13 September 2007, the Project received the final NEB decision, subject to cabinet approval, granting its application for a certificate of public convenience and necessity under Section 52 of the *National Energy Board Act*.¹ On 3 October 2007, the C-NSOPB, after receiving the approval of the federal Minister of Natural Resources and provincial Minister of Energy, released its fundamental decision pursuant to section 143(4) of the *Nova Scotia Accord Acts*² approving the Development Plan, and its decision approving EnCana's Benefits Plan pursuant to section 45(2) of the *Accord Acts*.³

The regulatory treatment of the Project to date is of interest to practitioners in a number of respects: the coordinated process through which the regulators considered the applications for project approvals; the manner in which the regulators made use of a prior environmental assessment in considering the current application; the consideration of the project alternatives; the consideration of conditions to be attached to any approval; and the approach to the Benefits Plan requirement of the *Accord Acts*.

I. *The Deep Panuke Project: background*

The Deep Panuke Project is a modification and refinement of a project for which regulatory approval was sought in 2002. The Project involves production and processing of gas offshore from six subsea wells tied by way of subsea flowlines and control umbilicals to a central offshore processing facility. The gas reservoir is sour containing 0.18 per cent hydrogen sulphide. Gas sweetening and processing will be undertaken on the production platform. The acid gas removed from the raw gas stream will be disposed of in a subsea acid gas injection well.

EnCana identified two options for bringing the processed natural gas to market. The first option was by way of a subsea offshore pipeline running 173 kilometres from the production facility to Goldboro, Guysborough County, Nova Scotia where it will be connected to the Maritimes & Northeast Pipeline system connecting to the North American grid (the M&NP option). An alternative transportation option was the construction

1. R.S.C. 1985, c. N-7 [*NEB Act*].

2. *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, R.S.C. 1988, c. 28; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3. I refer to these acts together as the *Nova Scotia Accord Acts*. All citations refer to the federal version of the legislation.

3. *Deep Panuke Offshore Gas Development: Canada-Nova Scotia Benefits Plan Decision Report: Development Plan Decision Report* (September 2007), C-NSOPB decision, online: C-NSOPB <http://www.cnsopb.ns.ca/whatsnew/pdf/deep_panuke_decision_report.pdf>.

of fifteen kilometres of subsea pipeline to connect to the Sable Offshore Energy Project's existing multi-phase subsea pipeline to the Sable gas plant in Goldboro (the SOEP option).

The Deep Panuke export pipeline is designed for a sales gas capacity of eight and a half times 10^6 m³/d (300 MMscfd). The mean estimate of recoverable sales gas in place for the project is 632 billion cubic feet (Bcf) with a probabilistic range of P₉₀ of 390 Bcf and a P₁₀ estimate of 892 Bcf. The expected life of the Project is estimated to range from eight to seventeen and a half years. The development phase costs are estimated to be \$700 million exclusive of the costs of the field centre which is proposed to be leased from a third party and accounted for as operating costs during the production life of the Project.

1. *Modifications to the Project in 2006*

The principal differences between the configuration of the Deep Panuke Project as proposed in the 2006 application and as proposed in the 2002-approved CSR are as follows:

- Instead of platform wells drilled from a central platform, the reservoir will be exploited through up to nine subsea wells connected by buried flowlines and umbilicals to a central platform.
- The central platform is relocated 3.6 kilometres north northeast from the previous location.
- Instead of three fixed platforms there will be one integrated facility known as the production field centre.
- The peak production rate of natural gas will be decreased from 400 million standard cubic feet per day (MMscfd) to 300 MMscfd with consequent reduction in infrastructure sizing.
- Consideration is to be given to the SOEP option for gas export.
- The expected mean project life of the project is increased from 11.5 years to 13.3 years.

2. *The regulatory process for the 2002 application*

In March 2002, EnCana filed applications with the C-NSOPB and the NEB for approval of a natural gas project to develop the Deep Panuke reservoir. In 2001, the C-NSOPB and the NEB, together with other federal and provincial authorities, had entered into a Memorandum of Understanding (MOU)⁴ to coordinate the environmental assessment required under

4. *Draft Memorandum of Understanding on Effective, Coordinated and Concurrent Environmental Assessment and Regulatory Processes for Offshore Petroleum Development Projects in Nova Scotia Accord Area*, online: Canadian Environmental Assessment Agency <http://www.ceaa-acee.gc.ca/010/0001/0003/0001/0010/mou-ns_e.pdf>.

the *Canadian Environmental Assessment Act (CEAA)*.⁵ Pursuant to that MOU, EnCana was delegated the responsibility pursuant to s. 17 of *CEAA* to prepare the CSR for the project. This final CSR was prepared and forwarded to the Minister of Environment on 1 November 2002. In December 2002, the federal Minister of the Environment approved the CSR for Deep Panuke under the *CEAA*. The Minister referred the Project back to the responsible authorities for regulatory decision making.

Under the MOU, the NEB and the C-NSOPB agreed to coordinate their proceedings into one public process and hear the applications to the NEB for pipeline approval and to the C-NSOPB for approval of the Development Plan at the same time. The proposed process would have a Commissioner appointed by the C-NSOPB and a member of the NEB sit together to hear evidence, comments and submissions and to function jointly where possible and appropriate. Each would maintain, however, their assigned separate and independent regulatory roles.

In February 2003, in the course of the pre-hearing procedures, EnCana requested an adjournment to obtain more time to assess preferable ways to complete the project. EnCana had determined at that time that it could not proceed with the Project as described in the applications and that it needed additional time to develop an understanding of its options, including design and commercial improvements, additional drilling, and evolving transportation and market opportunities. The Boards granted the adjournment and decommissioned the Secretariat Office established to coordinate the joint proceedings.

After obtaining the "regulatory time-out," EnCana drilled three additional wells to improve its understanding of the Deep Panuke reservoir. It refined its development concept for Deep Panuke to bring it into alignment with its improved understanding of the reservoir. EnCana also reached an agreement with the province of Nova Scotia respecting the development of the Project, the employment of Nova Scotians and investment by EnCana in research and development, education and training, and providing opportunities for disadvantaged groups.

3. *The regulatory process for the 2006 application*

As was the case with the earlier application, EnCana's 2006 application for approval of the Project engaged three separate regulatory processes including the comprehensive study process under *CEAA*, the development plan application process of the C-NSOPB, and the pipeline approval process of the NEB.

5. S.C. 1992, c. 37.

A number of the decisions sought by EnCana triggered the need for an environmental assessment (EA) under *CEAA*, principally among them the approval of the development plan by the C-NSOPB pursuant to s. 143(4) (a) of the *Nova Scotia Accord Acts* and the granting of the NEB certificate under s. 52 of the *NEB Act*.

In February 2005, the NEB, C-NSOPB, the Government of Canada represented by the Ministers of Environment, Fisheries and Oceans, Transport and Natural Resources, and the Government of Nova Scotia represented by the Ministers of Energy and Environment and Labour, entered into a Memorandum of Understanding (the concurrency MOU) regarding effective, coordinated and concurrent environmental assessment and regulatory processes for offshore development. The purpose of the concurrency MOU was to foster cooperation, encourage effective public participation, promote certainty and predictability of process and to avoid regulatory duplication in the review of development projects. The concurrency MOU is not specific to the Deep Panuke Project. Under the concurrency MOU, the parties agreed to establish project coordination teams within two weeks of receiving a project description and to engage promptly in determining whether they had environmental assessment or regulatory responsibilities in connection with a project. To the extent possible, the parties agreed that their regulatory review and environmental assessment processes would proceed concurrently either in parallel or distinct processes. Provision is made in the concurrency MOU for establishing joint review panels and the appointment of joint review panel members.

In October 2005, the C-NSOPB and federal regulatory authorities prepared a draft work plan for the comprehensive study of the Deep Panuke Project. This work plan set out the responsibility and timing for procedures such as preparing the draft scope for the comprehensive study, making recommendations to the federal Minister of the Environment regarding the type of assessment, arranging for public consultation, government review of the environmental assessment report, preparation of the CSR and follow-up. Under the work plan it was identified that the responsible authorities would delegate the conduct of the environmental assessment to the proponent pursuant to s. 17 of the *CEAA*. The CSR, however, would be prepared by the responsible authorities, with the C-NSOPB undertaking the first draft. The parties identified timelines for completion of various components of the regulatory process. Unlike the process for the previous application for approval of the Deep Panuke Project, then, the process for the second application left preparation of the CSR with the responsible authorities rather than the proponent.

In November 2006, after review of the Responsible Authorities' Track Decision Report, the Minister of the Environment made a decision to continue the environmental assessment project as a comprehensive study. The parties to the concurrency MOU agreed to conduct a coordinated review incorporating the 2002 comprehensive study. The C-NSOPB appointed a Commissioner to conduct a public review of the development application and to make a report and recommendation to the C-NSOPB. The NEB appointed a member to take evidence for the purpose of making a report and recommendation to the NEB. It was determined that the Commissioner and the NEB member would sit together to hear evidence and submissions, to function jointly where possible, and to facilitate and coordinate the public process. The Commissioner and the NEB member were directed to prepare a joint Environmental Report to be used in the preparation of the CSR. They were not to constitute a joint review panel under *CEAA* but would maintain their assigned separate and independent regulatory roles.

The principal distinguishing feature of the process for the review of the second Deep Panuke application and that of the first application is that the evidence and information gathered in the public hearing process was to be used to feed into the CSR. In this respect, the process was comparable to that used in connection with the Sable Offshore Energy Project. It is a preferable process as it allows intervenors in the public hearing process to comment upon the environmental assessment and for the proponent to respond to those comments without engaging in debates as to whether an environmental issue has already been dealt with in the approved CSR.

II. *Use of the approved 2002 Comprehensive Study Report*

From the outset the proponent and the regulators recognized the importance of the prior approved CSR and its implications for the environmental assessment to be performed in connection with the second application. In its application, EnCana submitted that elements of the previously approved CSR that were still valid for the revised Project did not need to be assessed during the revised Project's EA, in accordance with s. 24 of *CEAA*.⁶

24. (1) Where a proponent proposes to carry out, in whole or in part, a project for which an environmental assessment was previously conducted and

- (a) the project did not proceed after the assessment was completed,
- (b) in the case of a project that is in relation to a physical work, the

6. *Supra* note 5.

proponent proposes an undertaking in relation to that work different from that proposed when the assessment was conducted,

(c) the manner in which the project is to be carried out has subsequently changed, or

(d) the renewal of a licence, permit, approval or other action under a prescribed provision is sought,

the responsible authority shall use that assessment and the report thereon to whatever extent is appropriate for the purpose of complying with section 18 or 21.

(2) Where a responsible authority uses an environmental assessment and the report thereon pursuant to subsection (1), the responsible authority shall ensure that any adjustments are made to the report that are necessary to take into account any significant changes in the environment and in the circumstances of the project and any significant new information relating to the environmental effects of the project.

The C-NSOPB, on behalf of the responsible authorities at the direction of the Minister of the Environment, issued a document defining the scope for the environmental assessment of the Deep Panuke Project.⁷ In this scoping document, the responsible authorities acknowledged that as a result of s. 24 of *CEAA*, they were obliged to use the previous assessment to the extent appropriate to take into account any significant changes in the environment or in the circumstances of the project and any significant new information (including change in legislation and policy) relating to the environmental effects of the project. The scoping document directed that commitments from the approved 2002 CSR be verified and updates provided based on new scientific information and methods.

Section 24 of *CEAA* has not received a great deal of judicial consideration. In *Alberta Wilderness Association v. Cardinal River Coals Ltd.*⁸ the applicants sought judicial review of an EA report regarding the construction of an open pit mine. The Court quashed the authorization stating that the EA was not conducted in compliance with *CEAA* and ordered the Minister to direct the panel to do what was necessary to bring it into compliance with the Act. Justice Campbell discussed s. 24 as follows:

7. C-NSOPB, *Scope of the Environmental Assessment for the Proposed EnCana Corporation Deep Panuke Offshore Gas Development Project* (November 8, 2006), online: C-NSOPB <http://www.cnsopb.ns.ca/environment/pdf/30,008.23_11-8-06_Final_Scope.pdf>.

8. [1999] 3 F.C. 425 (T.D.) (QL) [*Alberta Wilderness*].

Also during the course of argument, I expressed the opinion that, if the Environmental Assessment conducted by the Joint Review Panel is found not to be in compliance with the requirements of *CEAA*, the least intrusive approach to reaching compliance would be adopted.

In my opinion, the most appropriate approach to reaching compliance is that suggested by counsel for the Minister which involves reliance on the provisions of section 24 of *CEAA* ...

...In view of my findings, within the terms of paragraph 24(1)(a), it is clear that the project cannot proceed until the Joint Review Panel's environmental assessment is conducted in compliance with *CEAA*. Therefore, as argued by counsel for the Minister, in my opinion, under subsection 24(2) the Minister has authority and responsibility to direct the Joint Review Panel to reconvene and, having regard to my findings, direct that it do what is necessary to make adjustments to the Joint Review Panel's report so that the environmental assessment conducted can be found in compliance with *CEAA*.⁹

This interpretation of s. 24 is also evident in the case of *Pembina Institute for Appropriate Development v. Canada (Minister of Fisheries and Oceans)*,¹⁰ a case that was part of the litigation related to *Alberta Wilderness*. At this stage of the litigation, changes had been made to the project and the applicants challenged the decision of the responsible authority not to conduct an assessment under *CEAA* that would address the changes to the project. Justice Snider discussed s. 24 as follows:

In the Applicants' view, section 24 does not remove the fundamental duty imposed under the Act to prepare an assessment of modifications, rather it is concerned with how to accommodate pre-existing information into another environmental assessment. In particular, the Applicants submit that section 24 of the Act does not grant the responsible authority the discretion to refuse an assessment if it considers the modifications to the physical work to be insignificant.

The Applicants are correct that section 24 of *CEAA* does not impose a duty to conduct a further assessment; *it exists to avoid duplication and promote efficiency in environmental assessment*.¹¹

The environmental assessment of the revised Deep Panuke Project was conducted consistently with this interpretation of s. 24 of *CEAA* being designed to promote efficiency and avoid duplication. The decisions and reports regarding the revised Deep Panuke Project are noteworthy for the rigour with which the authors have refrained from revisiting conclusions

9. *Ibid.* at paras. 89-91.

10. 2005 FC 1123, [2005] 16 C.E.L.R. (3d) 170.

11. *Ibid.* at paras. 35-36 [emphasis added].

contained in the approved 2002 CSR in the absence of evidence of significant change in the environment or significant new information.

In the Joint Environmental Report, the Commissioner and the NEB member commented:

The Commissioner and NEB member note that, subject to minor modifications, the M&NP option is essentially the same as that reviewed in the approved 2002 CSR. While the application for the SOEP pipeline is new, its identification as an alternative was reviewed in the 2002 CSR and no parties presented evidence or clarified how the application for it now alters the 2002 CEA Act determination of significance.¹²

This recommendation in the Joint Environmental Report was accepted and elaborated upon in the 2007 CSR.

The following passage of the 2007 CSR introduces consideration of the environmental effects of the Project:

This assessment comprises only the undertakings differing from those originally proposed by the proponent, or components potentially affected by information that has become available since the approved 2002 CSR was completed.¹³

In assessing effects of the revised proposal, the 2007 CSR continues to rely upon the 2002 assessment of the earlier proposal. The following passages are good examples:

The potential for interference of the M&NP Option with other ocean users such as fisheries is essentially unchanged from the 2002 proposal. Therefore, the RAs 2002 conclusion remains the same: the Project is not likely to cause significant adverse effects on the ability of other ocean users to access resources. Effects of pipeline construction activity will be short-term, of limited magnitude and reversible. Effects of the pipeline presence will obviously continue for its lifespan but are expected to be of low magnitude, as the area affected is extremely small in comparison to the total area available for fishing activity and there are no resources that are unique to the affected area.¹⁴

12. Deep Panuke Coordinated Public Review Secretariat, *Joint Environmental Report: Pursuant to the 10 November 2006 Memorandum of Understanding between the Canada-Nova Scotia Offshore Petroleum Board and the National Energy Board Concerning the Public Process for the Deep Panuke Project* (11 April 2007) at 21, NEB File No. OF-Fac-Gas-E112-2006-02 01, C-NSOPB File No. EDP40,002, CEA Registry No. 06-03-21748, online: DPCPRS <https://www.neb-one.gc.ca/11-eng/livlink.exe/fetch/2000/90464/90550/189912/441384/441377/458737/A0Y4V4_-_Deep_Panuke_Joint_Environmental_Report_11_April_2007.pdf?nodeid=458664&vernum=0>.

13. Canada-Nova Scotia Offshore Petroleum Board, National Energy Board, Fisheries and Oceans Canada, Transport Canada and Industry Canada, *Comprehensive Study Report: Deep Panuke Offshore Gas Development Project Encana Corporation* (June 2007) at 140, online: C-NSOPB <http://www.cnsopb.ns.ca/environment/pdf/csr_eng_2007.pdf>.

14. *Ibid.* at 189-90.

The consideration of modifications to the 2002 proposal are evaluated by reference to the conclusions in the 2002 CSR:

New subsea flowlines, umbilicals, subsea protection structures and the export pipeline and associated subsea templates for the SOEP Subsea Option will result in minor loss of access to fisheries resources, mainly the new quahog fishery. Subsea equipment is also not likely to pose a risk for gear damage, given that the 2002 CSR committed that Notices to Mariners will be issued, and Project infrastructure and safety zones will be charted. Also in 2002 EnCana committed to advising all fishers known to operate in the area, of the project schedule and areas of activity during construction and communicating directly with managers of fishing organizations.

The RAs have predicted that impacts will be of low magnitude and geographic extent and have therefore concluded that the presence of new subsea infrastructure is not likely to result in significant adverse environmental effects.

Mitigation and Follow-up

No additional mitigation or follow-up is required of the proponent beyond the commitments made by EnCana in the approved 2002 CSR.¹⁵

A similar rationale is provided in connection with effects on Aboriginal communities or resources:

No new effects on Aboriginal communities or resources have been identified since the 2002 CSR ...

The potential for pipeline construction activities to interfere with heritage resources and Aboriginal uses in the Project area is unchanged from the 2002 proposal. Therefore, the RAs 2002 conclusion remains the same; the Project is not likely to cause significant adverse effects.¹⁶

Consideration of mitigation measures also relied heavily upon the earlier CSR:

EnCana must also honour all relevant commitments made in the approved 2002 CSR ... It should be noted that some of the environmental commitments made by EnCana in 2002 have been slightly modified to reflect the revised project. Also some commitments and requirements are no longer valid, due to project design modifications or other changed circumstances.¹⁷

15. *Ibid.* at 155-56.

16. *Ibid.* at 190.

17. *Ibid.* at 192.

III. *Consideration of alternative ways for carrying out the Project*

EnCana presented to the regulators an application which considered two transportation options for bringing the processed natural gas to shore. The M&NP option would entail 173 kilometres of subsea pipeline running parallel to the existing SOEP pipeline for most of its extent. Under this option, condensate produced offshore would be used for power generation on the platform. The SOEP option involved a fifteen kilometre dual phase (natural gas and condensate) subsea pipeline connecting to the existing SOEP pipeline.

While the SOEP option was subject to the environmental assessment, there was no application before the NEB for approval of the SOEP option. At the time of the public hearing, this option was still subject to a feasibility study and negotiations between ExxonMobil, as operator of the SOEP pipeline, and EnCana. A number of intervenors suggested that the regulators direct that the SOEP option be pursued as it would cause less disturbance to the environment during construction and would leave a smaller footprint upon the environment. EnCana pointed out that a direction to use the SOEP option may render the project unfeasible. EnCana wished to preserve both options as it was still working to determine the one most suitable based on technical and commercial terms. Due diligence to confirm whether the useful life of the SOEP line coincided with the potential life of the EnCana field had not been completed. The environmental assessment did not identify any likely significant adverse environmental effects from either option. The Board and Commissioner dealt with this issue as follows:

While it would appear that the better option from an environmental perspective would be to build the shorter line, in the absence of a full assessment of the condition of the existing SOEP pipeline, it would not be prudent to limit EnCana's options at this stage. The Commissioner and NEB member encourage EnCana to give meaningful consideration to the relative environmental impacts of the two options in its ultimate weighing of its options, and to explain its decision to all stakeholders.¹⁸

The C-NSOPB concluded that either option was acceptable.¹⁹

The regulators, quite properly, concentrated their attention upon whether the proposed alternatives are likely to have a significant adverse environmental effect. The regulators did not rank the options in terms of which option has the least environmental impact, although they did

18. *Supra* note 12 at 21.

19. *Supra* note 3 at 59, 63.

encourage additional consideration of options which they considered would be a better option from an environmental perspective.²⁰

In considering the proposed methods of constructing the pipeline in the nearshore environment, the NEB member considered the effects of trenching the nearshore pipe or installing it through use of horizontal directional drilling (HDD). HDD offers the advantage of less suspension of sediment in the nearshore area than the trenching option which may also require blasting. The technical feasibility of the HDD had not been confirmed, however, and would require additional investigation of the condition of the rock and the substrate. Without requiring EnCana to select this construction method if it were feasible, the NEB encouraged EnCana to consider it:

Prior to completion of an intrusive geotechnical investigation and completion of the HDD feasibility study it is premature to determine if the HDD landfall method and its contingency methods are appropriate and what mitigation measures would be required. Should the proposed Project receive regulatory approval, the NEB Member recommends that the following condition . . . be imposed:

EnCana shall file with the Board for approval at least 45 days prior to construction, an HDD landfall feasibility assessment, which provides EnCana's landfall pipeline proposed installation method and rationale for the decision. Assuming that HDD is feasible, the NEB Member notes that this installation method would serve as a mitigation measure in substantially reducing potential impacts to the sensitive nearshore environment. As such, EnCana is encouraged to use this method if feasible.²¹

IV. *Conditions of approval*

It is NEB practice to file before the close of argument in a hearing conditions which it may contemplate attaching to an approval of an application before it. This practice allows the proponent in closing argument to address potential difficulties for the implementation of the project which may be posed by the imposition of the contemplated conditions.

This practice is a useful one. Quite apart from procedural fairness considerations, this practice avoids the regulator imposing conditions which will have unintended effects. These unintended effects may range

20. In the final analysis, EnCana decided to select the M&NP option after both EnCana and ExxonMobil concluded the SEOP option was not warranted in view of economic and technical considerations.

21. *Supra* note 3 at 39-40.

from purely technical matters²² to fundamental conditions which may go to the root of the economic feasibility of the project.

The C-NSOPB has not followed the practice of airing its contemplated conditions of approval before the closing of the public hearings, to permit the proponent and intervenors to comment upon their appropriateness. It would be beneficial to both industry and interested stakeholders if the C-NSOPB were to follow this practice of the NEB.

A common request on the part of intervenors in the public hearing was to require the regulators to condition approval of the Project upon the proponent's reaching an agreement with a third party as to the means of effectively addressing a concern raised by the third party. EnCana strongly opposed the imposition of conditions which would require third-party approval:

A recommendation or condition which requires third-party agreement or approval imposes a level of uncertainty that would put this project in jeopardy because the matter is not within EnCana's control. Such a recommendation or condition also injects uncertainty into the development of the Scotian Shelf because it sends a message to industry that, even where it meets all the regulatory requirements, it is still dependent upon the vagary of third-party decisions.²³

The Commissioner, the C-NSOPB and the NEB consistently refused to create conditions of this nature which could effectively provide a third-party intervenor with power to veto whether a project may proceed or not.

1. *Compensation for damage to offshore fishing industry*

The Seafood Producers Association of Nova Scotia (SPANS) wished the C-NSOPB to condition its approval upon EnCana's reaching an agreement with it for compensation for any damage caused to the offshore fishing industry. While in connection with its 2002 application EnCana was prepared to enter a bilateral agreement with SPANS on these issues, in its 2006 application EnCana committed to compensate fishermen in accordance with the C-NSOPB *Compensation Guidelines Respecting*

22. For instance, in the Deep Panuke hearing, the NEB's contemplated conditions respecting construction of the onshore component of the pipeline through acid bearing rock would not conform with the best environmental practices developed by the Nova Scotia Department of Environment and Labour for such circumstances.

23. C-NSOPB, *Report of the Commissioner to the Canada - Nova Scotia Offshore Petroleum Board on the Deep Panuke Offshore Gas Development Project Public Review* (May 2007) at 16, online: NEB <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/09550/189912/441384/472807/461457/A0y8I3_-_report_of_the_Commissioner_Deep_Panuke_Project_public_review_8_may_2007.pdf?nodeid=461458&vernum=0&redirect=3>.

*Damages Relating to Offshore Petroleum Activity.*²⁴ EnCana also proposed that this commitment be made a condition of approval. Part of its objection to the proposed bilateral agreement was that SPANS does not represent the entire offshore fishing industry. Furthermore, SPANS insisted that fisheries observers be employed upon a full-time basis throughout development and production of Deep Panuke and that these fisheries observers be employed by and report to the Oil and Gas Observer Program managed and directed by SPANS. The Commissioner expressed the opinion that EnCana was entitled to change from its 2002 commitment to enter a bilateral agreement with SPANS and instead agree to compensation for the fishing industry as a condition of its approval. The Commissioner also was not convinced that it was necessary for EnCana to commit to the fisheries observers program proposed by SPANS as a condition of approval. The C-NSOPB agreed with these recommendations of the Commissioner.²⁵

2. *Aboriginal consultation*

Organizations representing First Nations in Nova Scotia also requested that approval of the Project be subject to certain conditions. Among the proposed conditions were completion of a Mi'kmaq ecological knowledge study, engagement of an Aboriginal liaison, and "meaningful consultations" resulting in an agreement between the Mi'kmaq and the proponent prior to project operations.²⁶ The evidence before the Board indicated that EnCana had contacted various Aboriginal organizations requesting consultation respecting its project. EnCana had met and communicated with these organizations reaffirming the commitments it had made with respect to Aboriginal people in its 2002 CSR. Following further meetings with representatives of the Aboriginal groups, EnCana proposed to conduct a current and traditional use review of the onshore pipeline corridor in nearshore areas, although no project effects upon the Aboriginal community had been identified in earlier studies. EnCana also agreed to retain an Aboriginal liaison person throughout the Deep Panuke project in order to facilitate job and contract placement with the Aboriginal community.

The Commissioner found EnCana's Aboriginal consultation was appropriate and recommended that the C-NSOPB not delay its approval of the proposed project. The Commissioner did recommend that as a condition of approval EnCana report on its continued communication

24. Online, C-NSOPB <www.cnsopb.ns.ca/regulatory/pdf/CompGuidelines.pdf>.

25. *Supra* note 3 at 71-72.

26. *Supra* note 23 at 13-14.

with the various Aboriginal organizations. The C-NSOPB agreed with this recommendation.²⁷

The NEB member reached a similar conclusion:

... [t]he NEB member is satisfied that EnCana's commitment to work with Aboriginal groups would achieve the intent of the conditions proposed by [the Aboriginal groups] therefore, the NEB member does not recommend imposing any conditions in this regard.

Given the above conditions and EnCana's commitment to ongoing consultation, the NEB Member is of the view that the Aboriginal and public consultation programs undertaken by EnCana are consistent with the intent of the NEB filing manual.²⁸

This approach to addressing conditions pertaining to Aboriginal groups is an improvement over that employed by the NEB in a December 1997 decision pertaining to the Sable Offshore Energy Project and the Maritimes & Northeast Pipeline. In that decision, the Board subjected its approval to the following condition:

The Company shall submit to the Board a written protocol or agreement spelling out Proponent-Aboriginal roles and responsibilities for cooperation in studies and monitoring.²⁹

The question of whether this condition had been met unilaterally resulted in litigation.³⁰

3. *Decommissioning and abandonment*

EnCana proposed to remove the production field centre at the end of the Project but to abandon in place the export pipeline, the infield flow lines and umbilicals after properly flushing and plugging them. The environmental assessment demonstrated no likely significant adverse environmental effects of this decommissioning and abandonment plan, and minor positive reef/refuge effects on marine benthos and fish. EnCana

27. *Supra* note 3 at 70.

28. NEB, *Report and Recommendations Pursuant to Section 15 of the National Energy Board Act in the Matter of EnCana Corporation Deep Panuke Offshore Gas Development Project Section 52 Application Dated November 2006* (July 2007) at 23-24, online: NEB <https://www.neb-one.gc.ca/11-eng/livelink.exe/fetch/2000/130635/471161/A0Z711_-_Deep_Panuke_NEB_Report_and_Recommendations_18_July_2007.pdf?nodeid=471162&vernum=0&redirect=3>.

29. *Reasons for Decision: Sable Offshore Energy Project and Maritime & Northeast Pipeline Project* (December 1997), NEB decision GH-6-96 at 28, online: NEB <<http://dsp-psd.pwgsc.gc.ca/Collection/NE22-1-1997-15E.pdf>>.

30. *Union of Nova Scotia Indians v. Maritimes and Northeast Pipeline Management Ltd.* (1999), 249 N.R. 76, [1999] F.C.J. No. 242 (F.C.A.).

agreed that it would comply with all applicable regulations in place at the time the Deep Panuke Project is decommissioned.

Abandoning this infrastructure in place is consistent with industry practice in other jurisdictions including the United Kingdom, the Netherlands, Denmark, Norway and the United States and is justified upon the basis that removal entails increased human safety risk and harm to the environment. Furthermore, there is great uncertainty associated with the costs of reverse engineering and executing removal of large diameter pipe from deep water.

The C-NSOPB approved abandonment in place of offshore pipelines associated with the Sable Offshore Energy Project.³¹ In 2005, in respect of the Cohasset/Panuke Project, the C-NSOPB approved the abandonment in place of subsea infrastructure including interfield pipelines. The Board concluded that the risks to human health and safety did not warrant the removal of the infrastructure. Subsequent surveys have confirmed that the subsea infrastructure has continued a natural burial process and does not present snagging hazards to fishing and navigation.³²

For Deep Panuke, the NEB and the Commissioner did not favour prior approval of in-place abandonment of subsea infrastructure. The Commissioner and the NEB member acknowledged that current industry practices favour abandonment in place. The NEB member noted that s. 74(1)(d) of the *NEB Act* requires that EnCana apply to the NEB for approval of abandonment of the pipeline at the time. While the NEB member and the Commissioner recommended that no decision be made on abandonment at this time, the NEB member proposed as a condition of approval a pipeline monitoring program which would help inform any eventual decision on abandonment.³³ The NEB decision suggested that when the application for abandonment is made, the Board will require evidence to indicate that adverse effects are not likely to occur.³⁴

The 2007 CSR suggests strongly that if the application for abandonment of subsea structures in place were presented today it would receive regulatory approval:

31. *Sable Offshore Energy Project: Benefits Plan Decision Report, Development Plan Decision Report* (December 1997) at 88, online: C-NSOPB <<http://www.cnsopb.ns.ca/regulatory/pdf/CNS-SOE.pdf>>.

32. C-NSOPB, *Annual Report 2006-2007* (Halifax: Canada - Nova Scotia Offshore Petroleum Board, 2007) at 10, 15 [C-NSOPB Annual Report], online: C-NSOPB <http://www.cnsopb.ns.ca/generalinfo/pdf/ar_2007.pdf> [C-NSOPB *Annual Report*].

33. *Supra* note 12 at 22.

34. *Reasons For Decision: Encana Corporation* (September 2007) NEB decision GH-2-2006, online: NEB <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90550/189912/441384/47726/7/477089/A1Ae19_-_Reasons_for_decision%2C_GH-2-2006.pdf?nodeid=477090&vernum=0>.

The 2002 CSR and the assessment of the presence of new structures in the 2007 CSR conclude that there would be no significant environmental effects of abandoning the pipeline, flowlines and umbilicals in place. Applications for authorization to decommission and abandon facilities are required prior to performing such work which will include addressing environmental impacts at that time. Further environmental assessment will be required if plans are changed and such facilities are to be removed.³⁵

The C-NSOPB, while stating that abandonment in place would not have a significant effect upon fisheries, deferred its decision on abandonment until the proponent makes an application near the conclusion of the project.³⁶

Whether or not and the extent to which regulators will approve the abandonment of subsea infrastructure in accordance with industry practices throughout the world adds uncertainty to the design of the facilities and their costs. These become commercial considerations for the proponent in determining whether or not to proceed with the Project.

V. *Benefits Plan.*

In the Atlantic Canadian offshore, before a Development Plan may be approved or work may proceed, the respective Offshore Board must approve a Canada-Nova Scotia Benefits Plan or a Canada-Newfoundland Benefits Plan.³⁷ In what follows, I examine the decision reports of the Boards concerning Benefits Plans for projects to date and compare approaches taken in prior projects to that used in the Deep Panuke Project.

Benefits Plans have frequently been a focal point in the public review of proposed offshore projects. Not surprisingly, in provinces where there have been high rates of unemployment and where economic activity and fiscal health have trailed the advances of other provinces, provincial governments have frequently pressed hard for stronger assurances about a project's contributions to the economy and sustainable employment. Unlike the approval of the Development Plan, which is a fundamental decision subject to review by the federal and provincial ministers,³⁸ the approval of a Benefits Plan is not a fundamental decision. However, the Boards are required to consult with the federal and provincial ministers in

35. *Supra* note 13 at 241.

36. *Supra* note 3 at 73.

37. *Nova Scotia Accord Acts*, *supra* note 2, s. 45(2); *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3, s. 45(2); *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, S.N.L. 1990, c. 2, s. 45(2) [*Newfoundland Accord Acts*]. All citations to the *Newfoundland Accord Acts* refer to the federal version of the legislation.

38. *Nova Scotia Accord Acts*, *ibid.*, ss 32-37, 143(4); *Newfoundland Accord Acts*, *ibid.*, ss. 31-40, 139(4).

their review of the Benefits Plans.³⁹ The federal and provincial ministers may also jointly issue directives respecting the Benefits Plans.⁴⁰ The *Accord Acts* require plans for promoting employment, and training and education in the province, whereby residents of the province will be given first consideration and a full and fair opportunity to participate on a competitive basis in the supply of goods and services. The Boards have, however, quite rightly recognized that the elements of a Benefits Plan addressing these points are statements of principles rather than guarantees. From the perspective of proponents this is reasonable. While they would prefer, where possible, to retain employees and suppliers locally, they do not have control over other economic demands upon the workforce and businesses. Industry also cannot control the manner in which the workforce and businesses may respond to employment and contracting opportunities.

Provincial governments, in some respects supporting views of their citizens and local businesses, have sought greater assurance that proponents will direct work to the local economy. They have sought confirmation that Benefits Plans will be successful in transmitting positive social and economic benefits at levels that meet or exceed those predicted in the socio-economic assessment. The resolve and consistency with which provincial governments have pursued this end may be accentuated by their historic grievances regarding the allocation of royalties between the federal government and the provincial government.

EnCana's revised Deep Panuke application reflects a new approach to addressing the Benefits Plan requirements of the *Accord Acts*. To counter concerns expressed by the province of Nova Scotia in connection with the initial Deep Panuke application regarding assured levels of local employment and opportunities and investments in education, training and research and development, EnCana reached an agreement with the province setting out its obligations. This agreement, known as an Offshore Strategic Energy Agreement (OSEA) under Nova Scotia's Energy Strategy,⁴¹ secured the support of the province for the Deep Panuke Project. It was, however, considered, at least by the Commissioner appointed by the C-NSOPB, not to meet fully the legislative requirements of the *Accord Acts*.

39. *Nova Scotia Accord Acts, ibid.*, s. 45(5); *Newfoundland Accord Acts, ibid.*, s. 45(5).

40. *Nova Scotia Accord Acts, ibid.*, s. 41; *Newfoundland Accord Acts, ibid.*, s. 42.

41. Nova Scotia Department of Energy, *Seizing the Opportunity: Nova Scotia's Energy Strategy* (Halifax: Communications Nova Scotia, 2001), online: Department of Energy <<http://www.gov.ns.ca/energy/AbsPage.aspx?ID=1247&siteid=1&lang=1>>.

The requirements for a Benefits Plan are set out in substantially similar terms under the Nova Scotia and Newfoundland *Accord Acts*. The relevant terms of the Newfoundland regime are as follows:

Canada Newfoundland Benefits Plan

45. (1) In this section, "Canada-Newfoundland 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.

Canadian and Newfoundland participation

(2) Before the Board may approve any Development Plan pursuant to subsection 139(4) or authorize any work or activity under paragraph 138(1)(b), a Canada-Newfoundland Benefits Plan shall be submitted to and approved by the Board, unless the Board directs that that requirement need not be complied with.

Particular provisions of plan

(3) A Canada-Newfoundland Benefits Plan shall contain provisions intended to ensure that

(a) before carrying out any work or activity in the offshore area, the corporation or other body submitting the plan shall establish in the Province an office where appropriate levels of decision-making are to take place;

(b) consistent with the Canadian Charter of Rights and Freedoms, individuals resident in the Province shall be given first consideration for training and employment in the work program for which the plan was submitted and any collective agreement entered into by the corporation or other body submitting the plan and an organization of employees respecting terms and conditions of employment in the offshore area shall contain provisions consistent with this paragraph;

(c) expenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province; and

(d) 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.

Affirmative action programs

(4) The Board may require that any Canada-Newfoundland Benefits Plan include provisions to ensure that disadvantaged individuals or groups have access to training and employment opportunities and to enable such individuals or groups or corporations owned or cooperatives operated by them to participate in the supply of goods and services used in any proposed work or activity referred to in the Benefits Plan.

Duties of Board in reviewing plans

(5) In reviewing any Canada-Newfoundland Benefits Plan, the Board shall consult with both Ministers on the extent to which the plan meets the requirements set out in subsections (1), (3) and (4).

Directives

(6) Subject to any directives issued under subsection 42(1), the Board may approve any Canada-Newfoundland Benefits Plan.⁴²

The relevant terms of the Canada-Nova Scotia regime are as follows:

Canada-Nova Scotia Benefits Plan

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.

Canadian and Nova Scotian participation

(2) Before the Board may approve any Development Plan pursuant to subsection 143(4) or authorize any work or activity under paragraph 142(1)(b), a Canada-Nova Scotia Benefits Plan shall be submitted to and approved by the Board, unless the Board waives that requirement in accordance with subsection (6).

Particular provisions of plan

(3) A Canada-Nova Scotia Benefits Plan shall contain provisions intended to ensure that

(a) before carrying out any work or activity in the offshore area, the corporation or other body submitting the plan shall establish in the Province an office where appropriate levels of decision-making are to

42. *Newfoundland Accord Acts*, *supra* note 37.

take place;

(b) consistent with the Canadian Charter of Rights and Freedoms, individuals resident in the Province shall be given first consideration for training and employment in the work program for which the plan was submitted and any collective agreement entered into by the corporation or other body submitting the plan and an organization of employees respecting terms and conditions of employment in the offshore area shall contain provisions consistent with this paragraph;

(c) a program shall be carried out and expenditures shall be made for the promotion of education and training and of research and development in the Province in relation to petroleum resource activities in the offshore area; and

(d) 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.

Affirmative action programs

(4) The Board may require that any Canada-Nova Scotia Benefits Plan include provisions to ensure that disadvantaged individuals or groups have access to training and employment opportunities and to enable such individuals or groups or corporations owned or cooperatives operated by them to participate in the supply of goods and services used in any proposed work or activity referred to in the Benefits Plan.

Duties of Board in reviewing plans

(5) In reviewing any Canada-Nova Scotia Benefits Plan, the Board shall consult with both Ministers on the extent to which the plan meets the requirements set out in subsections (1), (3) and (4).

Directives

(6) The Board may, pursuant to subsection (2),

(a) subject to any directives issued under subsection 41(1), approve any Canada-Nova Scotia Benefits Plan; or

(b) with the consent of both Ministers, waive the requirement for any Canada-Nova Scotia Benefits Plan.

Regulations

(7) Subject to section 6, the Governor in Council may make regulations prescribing the time and manner of submission of any Canada-Nova Scotia Benefits Plan and the form and information to be contained

therein.⁴³

1. *Hibernia Benefits Plan*

The first Benefits Plan to be considered under the Atlantic Accord legislation was in relation to the Hibernia Project. In recognition of significant investment by the federal government in the project, there were a number of mechanisms in place to assure government that the project could be undertaken in a fashion which would provide significant local benefits. The Hibernia Management and Development Company Ltd. (HMDC) entered into a Statement of Principles with the federal and provincial governments prior to commencing construction, to clarify financial commitments and undertakings regarding the development of the Hibernia oilfield. This Statement of Principles established a target for Canada-Newfoundland and Labrador content in the Project of between 45 and 50 per cent, and specified that a certain portion of the engineering design work for the project and construction of certain components of the project facilities would be executed within Newfoundland and Labrador. In its Decision Report approving the Hibernia Benefits Plan, the Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB) stated:

The Board considered a number of regulatory management options for ensuring that the greatest possible economic benefit accrues to both Newfoundland and Labrador and the rest of Canada. It was the decision of the Board that the most effective approach would be to encourage the commitment of the Proponent to a series of basic principles. The implementation of these basic principles would, in the Board's opinion, be more effective than attempting to negotiate specific requirements for the multitude of elements of which the Project will consist. The Board will monitor the Project, as it proceeds, to ensure that the Proponent complies with the commitments.

The development and implementation of the Benefits Plan is, because of the nature of the subject matter, an evolutionary process. The Board has found the Proponent willing to amend its positions to comply with regulatory requirements and respond positively to issues of concern. It is the Board's expectation that the Proponent's demonstrated responsiveness in the area of benefits will continue through the duration of the Project.⁴⁴

43. *Nova Scotia Accord Acts*, *supra* note 2.

44. *Application of Approval-Hibernia Development Plan Update* (August 1990), Canada-Newfoundland Offshore Petroleum Board Decision 90.01, online: C-NLOPB <http://cnlopb.nl.ca/previewmysite.com/new/news/d1990_01.en.shtml>.

In 1990, the proponents of the Hibernia project submitted a Development Plan Update and Revised Benefits Plan. In its Update, HMDC reaffirmed its commitment to the principles of the Benefits Plan in light of design changes. The Board in its Decision Report⁴⁵ noted ongoing negotiations between the proponent, the government of Canada and the government of Newfoundland and Labrador, which would result in revised estimates of Canada and Newfoundland and Labrador content and employment for the Project.

2. *Cohasset/Panuke Project*

In 1990, the C-NSOPB considered the Benefits Plan submitted in connection with the proposed development of the Cohasset/Panuke Project. Acknowledging that the Project was not large by offshore standards, the Board found the Benefits Plan to be generally acceptable. As with the Hibernia project, government had a significant investment in the project. The province of Nova Scotia, through its wholly owned corporation, Nova Scotia Resources Limited, had a fifty per cent interest in this Project which was operated by Lasmo Nova Scotia, the other fifty per cent interest holder.⁴⁶ The Board referred to the Benefits Plan's statement of general principles and adherence to the directives of the *Accord Acts*. The Board concluded:

As a result of these commitments, it is not the Board's intention to direct the execution of any portion of the project at any specific location or time.

The development and implementation of a Benefits Plan is by its very nature an evolutionary process. The Board has found the Proponent cooperative, willing to react to the Board's concerns and prepared to comply with the regulatory requirements. Over the life of the Project, the Board will continue to monitor the performance of the Proponent to ensure compliance with all the Benefits Plan commitments.⁴⁷

The Board also indicated that it chose not to establish specific levels or percentages of Nova Scotia or Canadian employment for each major component of the project. The Board expressed the view that the interests of all parties were best served by securing employment commitments from

45. *Ibid.* at para. 102.

46. Nova Scotia Office of the Auditor General, *Nova Scotia Resources Limited – Special Audit* being chapter 13 of the *Annual Report 1996* (Halifax: Auditor General, 1997), online: Gov. of N.S. <<http://www.gov.ns.ca/audg/1996/ch%2013%201996%20NS%20Resources%20Limited%20Special%20Audit.pdf>>.

47. *Cohasset-Panuke Project: Benefits Plan Decision Report, Development Plan Decision Report* (August 1990), at 11, online: C-NSOPB <<http://www.cnsopb.ns.ca/generalinfo/pdf/CNS-SOE.pdf>>.

the proponent by undertaking ongoing project monitoring and continuing close consultations with the proponent.⁴⁸ Similarly, the Board accepted the commitment of the Cohasset/Panuke proponent to encourage and support the enhancement of Nova Scotian and Canadian technology, expertise and facilities without specific indications of how this was to be accomplished or the level of financial commitment that it would take to comply with the requirements of the Act.

3. *Terra Nova Benefits Plan*

The Canada-Newfoundland Offshore Petroleum Board's Decision 97.02 regarding the Terra Nova Canada-Newfoundland Benefits Plan reflects similar themes. The Board observed as follows:

Any Benefits Plan is, in large measure, a commitment to principles. The Accord Acts contain provisions designed to ensure that the resources off Newfoundland's coasts are developed in such a way that maximum benefits accrue to Canada and, in particular, to the Province. Two fundamental principles are embodied in the legislation for this purpose. The first requires that Canadian enterprises and individuals be provided full and fair opportunity to participate in the supply of goods and services to offshore oil and gas activities with first consideration being given to those located within the Province provided they are competitive in terms of fair market price, quality and delivery and the second requires that first consideration for training and employment be given to residents of the Province.

The Proponent has presented a Canada-Newfoundland Benefits Plan which addresses these principles. The Benefits Plan describes the Proponent's commitments to locate engineering and procurement activities in the Province, to employ residents to the Province in the development, to develop procurement policies which are aimed at supplier development in the Province, and to undertake expenditures on education and training and research and development in the Province.⁴⁹

The Board did not stipulate levels of employment of residents of Newfoundland and Labrador or Canada, or levels of expenditures for goods and services in Newfoundland and Labrador and in Canada. Similarly, the Board did not stipulate the necessary levels of investment in research and development for the proponents of the Terra Nova Project.

48. *Ibid.* at 16.

49. *Application for Approval Terra Nova Canada – Newfoundland Benefits Plan* (December 1997), C-NLOPB Decision 97.02 at para. 1.2, online: C-NLOPB <<http://www.cnlopb.nl.ca/>>.

4. *Sable Offshore Benefits Plan*

A good portion of the fifty-six hearing days before the Joint Review Panel inquiring into the SOEP was occupied by consideration of the Canada-Nova Scotia Benefits Plan. The SOEP proponents submitted a plan in which they committed to supporting the statutory directives of the *Accord Acts*. The proponents described policies and procedures designed to optimize economic benefits to Canadians and, in particular, to Nova Scotians with a view to maximizing the natural flow of opportunities to Nova Scotians and other Canadians. Some intervenors attempted to argue that the Benefits Plan should address benefits arising from royalties and taxation and the economic potential associated with access to gas supplies. The Commissioner and the C-NSOPB rejected these suggestions as beyond their mandate.⁵⁰

The Commissioner and the Board also rejected the request by a number of proponents that adherence to quantitative and qualitative estimates of effects of the Benefits Plan be made a condition of project approval. As stated by the Commissioner, the Benefits Plan is intended to reflect a statement of principles and is not designed to be a vehicle for binding the proponent to a rigid set of targets.⁵¹

The Board did, however, indicate that it would use the estimates of benefits contained in the Benefits Plan as benchmarks and would require the proponents to justify any shortfall in the event that these levels were not achieved.⁵² In its Decision Report the Board imposed as conditions of approval detailed requirements for ongoing consultation and monitoring to ensure that the commitment of the owners of the SOEP to benefits principles remained intact. The Board also imposed as additional conditions the requirement that the proponents submit an employment and training plan to the Board for approval and a research and Development Plan outlining the revolving three to five year plan for offshore related research and development initiatives. The Board indicated its expectation that the level of research and development expenditures would be proportionate relative to the expenditures being made in the project and to the proponent's collective worldwide research and development budgets.⁵³

The Commissioner and the Board recommended that the proponent take a leadership role in developing a research program to "identify ways and means to capture a larger share of the development phase benefits in

50. *Report of the Commissioner to the Canada-Nova Scotia Offshore Petroleum Board on the Sable Offshore Energy Project* (24 October 1997), C-NSOPB Decision at 11.

51. *Ibid.* at 11.

52. *Supra* note 31.

53. *Ibid.* at 46-47.

future projects”⁵⁴ and to implement training and education plans which would be effective in preparing Nova Scotians and other Canadians to participate fully in the benefit of offshore development.⁵⁵

5. *White Rose Benefits Plan*

In its Benefits Plan Decision Report concerning the White Rose project, the C-NLOPB imposed a number of conditions designed to ensure the proponent's commitment to the principles of its Benefits Plan. These conditions included more detailed plans respecting human resources, plans for research and development and education and training, and forecasts of project requirements for employment and services. The Board required the proponent to establish and submit an appropriate expenditure target for research and development and education and training. The Board further expressed its anticipation that the target would not be less than \$12 million during the preproduction stage. The C-NLOPB also established stringent requirements for monitoring and recording of the achievement of benefits.⁵⁶

The government of Newfoundland and Labrador requested that

[t]he Board treat the plans, estimates and objectives provided therein as benchmarks, recognizing that benchmarks are not ceilings.⁵⁷

The provincial government also asked that the Board acknowledge the proponent's undertaking to strive for even greater levels of benefits for Canada and in particular, Newfoundland and Labrador. In response to this request, the C-NLOPB imposed as part of a condition of approval that any deviation between the benchmarks of estimates, plans and objectives and actual performance should be accompanied by explanatory notes in sufficient detail to allow assessment of the reasons for the deviation.⁵⁸

6. *Initial Deep Panuke application*

In its March 2002 filing, EnCana provided percentage estimates of the total expenditures on operations that would be spent in Nova Scotia during the 11 year life of the project and estimates of the \$1.1 billion capital expenditure that would be spent in Nova Scotia. The then provincial Economic Development Minister immediately expressed displeasure

54. *Ibid.* at 114.

55. *Ibid.* at 114-15.

56. *Application for Approval White Rose Canada-Newfoundland Benefits Plan* (26 November 2001), Canada-Newfoundland Offshore Petroleum Board Decision 2001.01, online: C-NLOPB <http://www.cnlopb.nl.ca.previewmysite.com/new/news/pdfs/d01_01.pdf>.

57. *Ibid.* at 36.

58. *Ibid.*

with the Nova Scotia content in the Project. The province indicated that it wished to have more capital expenditures made in Nova Scotia and wanted to receive firm commitments on training, research and development.⁵⁹ The position of the province was reflected in the extensive information requests it filed seeking opportunities to increase the involvement of Nova Scotians in the Deep Panuke Project.⁶⁰

Prior to responding to these information requests, EnCana sought an adjournment of the scheduled hearing in order to allow it to enhance the economic viability of the Project.

7. *Offshore Strategic Energy Agreements (OSEA)*

Nova Scotia's Energy Strategy identifies it to be in the best interests of both proponents of projects and the provincial government to clearly understand each other's expectations and obligations regarding a project prior to the full regulatory process. The province expressed a preference to enter into voluntary agreements in the form of OSEA to ensure that important issues of provincial concern are well understood and addressed before a project's regulatory process is complete. The provincial government considered the economic value of a project to Nova Scotia to reside in potential ownership in a pipeline, in the potential for supply of petrochemical feed stock, in access to product and support in contribution to training, research and development and use of local suppliers. Through the OSEA, the province intends to place particular emphasis on proposals that create opportunities for Nova Scotian firms to export or expand into other sectors.⁶¹

On 22 June 2006 EnCana entered into an OSEA with the province. It was intended as a collaborative effort to facilitate the Deep Panuke Project for the benefit of the province and EnCana. Under the OSEA, EnCana committed to providing opportunities for Nova Scotian and Canadian companies through employment, procurement and contracting on an internationally competitive basis, with full and fair opportunity for Nova Scotians and first consideration for Nova Scotians where competitive on a best value basis, in compliance with s. 45 of the *Accord Act*. In addition, EnCana undertook to provide not less than 1,350,000 person hours of employment opportunities of which not less than 850,000 person hours would be performed by Nova Scotians. The parties specifically allocated these identified person hours of employment to:

59. Judy Myrden, "Gas Plan Lacking in NS Content, Politicians Upset Over PanCanadian Projects for Deep Panuke Field" *The Chronicle-Herald* (2 March 2002) at A1.

60. Judy Myrden, "Panuke Benefits Probed: Energy Department Submits Questions on Proposed Natural Gas Development" *The Chronicle-Herald* (11 February 2003) at C1.

61. *Supra* note 41 at 21.

engineering procurement and management activities; contracting for the construction of a new offshore supply vessel; design, procurement and fabrication of a subsea trawl overprotection structure; pipe handling; and design, procurement and fabrication of the accommodation unit and the flare boom. If these commitments prove not to be practicable, EnCana has the right to substitute alternative initiatives of equivalent value, subject to the agreement of the province. EnCana also agreed to commit financial and human resources to facilitate the development of the capability of an onshore drilling rig manufacturing operation in Nova Scotia, supporting up to \$1 million per rig for the first five rigs manufactured.

With respect to setting aside funds for research and development, education and training, disadvantaged groups and other benefits expenditures related to these matters as may be required by the C-NSOPB in an approved Benefits Plan, EnCana agreed to contribute 0.5 per cent of the gross revenue from the Deep Panuke Project with provisions for front-ending this commitment during the development phase. The parties recognized explicitly that the agreement was not to be taken to limit or constrain the authority of the C-NSOPB to establish a Benefits Plan for the Deep Panuke Project.

Under the OSEA, the province agreed to support publicly the Deep Panuke Project during the regulatory approval process and not to withhold its consent to C-NSOPB approval of the Development Plan application. EnCana's commitments to stipulated person hours of employment in the OSEA were accepted by the NEB as a positive example of an energy industry proponent ensuring that the local and regional population benefits from a project. The NEB viewed the relevant aspects of the OSEA to support its conclusion that EnCana adequately considered the impact of the Deep Panuke pipeline on employment and the economy.⁶²

a. *Report of the Commissioner and C-NSOPB decision report respecting EnCana's Canada-Nova Scotia Benefits Plan*

In its Canada-Nova Scotia Benefits Plan, EnCana committed to principles and processes consistent with the statutory directives of s. 45 of the *Nova Scotia Accord Acts*. In addition, EnCana relied upon the OSEA to delineate its additional commitments to provide specific industrial and employment opportunities for Nova Scotians with a minimum commitment of person hours of work in Nova Scotia.

The Commissioner noted the lack of any specific provisions in the Benefits Plan respecting education and training, research and development

62. *Supra* note 34 at 35.

and ensuring opportunities for disadvantaged groups to participate in project activities, beyond the agreement of EnCana to provide funds which the province would administer for these purposes. In its evidence, the province, represented by the Nova Scotia Department of Energy (NSDOE), expressed its intention to restrict the use of the OSEA funds to projects and research that assist in the development of the Nova Scotia offshore area and to assisting those Nova Scotians who are generally considered to be at a disadvantage based on their socioeconomic standing. NSDOE intended to create a joint advisory committee with the government of Canada and the C-NSOPB and to consult with this advisory committee and EnCana before allocating the funds. The Department estimated that the funds available could range between \$14 and \$47 million over the course of the project.

The Offshore/Onshore Technologies Association of Nova Scotia (OTANS), one of the intervenors, expressed concern about misuse of previous funds meant for infrastructure costs related to the offshore. While OTANS did not object to NSDOE administering the fund, it wished that the parameters for administering the fund be set in formal consultation with the federal government and the C-NSOPB, and that notice of disbursements from the fund be given publicly.

The Commissioner acknowledged that at this stage in the process the proponent could not be expected to have detailed provisions addressing the requirements of ss. 45(3)(c) and 45(4) of the *Accord Acts*. Nevertheless, she felt there was an absence of provisions on matters apart from providing the funds. The Commissioner expressed the view that under the OSEA, EnCana's sole responsibility was to contribute funds and the province assumed responsibility for education and training, research and development and ensuring access for the disadvantaged. While the OSEA recognizes the C-NSOPB's jurisdiction with respect to the Benefits Plan, the Commissioner found that under the proposed Benefits Plan, the C-NSOPB would not have any authority to require EnCana to actively participate in education and training, research and development and providing access to the disadvantaged.

Accordingly, the Commissioner found that the proposed funding arrangement with the province set out in the OSEA did not meet the requirements of a Benefits Plan with respect to education and training, research and development and access for disadvantaged individuals and groups. She therefore recommended that the C-NSOPB require as a condition of approval that EnCana file a Benefits Plan that satisfied these requirements.

The C-NSOPB recognized that the OSEA will provide significant local benefits. Nevertheless the Board accepted the recommendations of the Commissioner and concluded that the Benefits Plan failed to address certain statutory requirements which it corrected through the imposition of conditions of approval of the Benefits Plan.⁶³

b. *Utility of the OSEA*

The fragmentation of interests, obligations and responsibilities surrounding Benefits Plans has the potential to create undesirable results.

For the proponents of projects, it is important to know the rules of engagement before committing to significant investments. There appears to be a strong pattern of willingness by proponents not only to commit in good faith to the principles behind the benefits, but to make concrete commitments beyond those principles. However, difficulty arises for the proponents in making commitments which are dependent upon factors they cannot control, such as the responsiveness of the local economy to opportunities created by the project. To a certain extent, the success of a Benefits Plan will depend upon the strategies developed and undertaken while moving into the development phase of a project. The Development Plan necessarily focuses upon the configuration and feasibility of a project rather than the details for implementing it. For this reason, it is not uncommon for the Boards to approve Benefits Plans subject to conditions requiring more details of how the plan will be actualized. The *Accord Acts* themselves seem to contemplate this development; public reviews by the Board require the proponent to make available to the public a "preliminary" Benefits Plan.⁶⁴

The Boards, for their part, have a responsibility to review and to consider the approval of Benefits Plans and then to oversee and monitor the implementation of those plans through the course of a project. Their jurisdiction is limited. They cannot mandate levels of employment or the extent to which contracts are awarded locally. The withholding of work authorizations pending amendment to the Benefits Plan is a blunt instrument the use of which will invite acrimony and likely litigation.⁶⁵

For the provinces, aggrieved by their share of the royalties for the proposed project, the objective is to maximize the project's impact upon employment and the local economy. Investment in education and training, research and development and support for disadvantaged groups offers

63. *Supra* note 3 at 1, 36-46.

64. *Nova Scotia Accord Acts*, *supra* note 2, s. 44(2)(d); *Newfoundland Accord Acts*, *supra* note 37, s. 44(2)(c).

65. *Nova Scotia Accord Acts*, *ibid.*, s. 142(1)(b); *Newfoundland Accord Acts*, *ibid.*, s. 138(1)(b).

strategic initiatives leading to sustainable improvement of economic and social conditions. The concentrated attention of provincial governments upon Benefits Plans is therefore understandable. The Boards, not the provinces, however, are the regulators. The authority of the provincial Ministers to accept or reject a Development Plan as a fundamental decision is also a particularly blunt instrument.⁶⁶ The use of this instrument is likely not in the interests of the province where there is a need to create a critical mass and momentum in the offshore oil and gas industry with the aim of promoting further exploration and development. Similarly, for a province to adopt a disputative stance in public review proceedings concerning the development and Benefits Plans would not convey a welcoming environment for industry.

The issuance of joint directives by the federal and provincial Ministers to the Board regarding Benefits Plans is an option that has not yet been pursued.⁶⁷ The practicality of such an approach, however, is questionable as the success of each project depends upon the ingenuity and entrepreneurial skills of the proponents in solving the technical and economic challenges of developing the discovered reservoir. Directives that inhibit this in any way would not be helpful.

In 2004, the C-NLOPB introduced "Guidelines for Research and Development Expenditures" for Benefits Plans made under the Newfoundland Accord Acts.⁶⁸ These guidelines contemplate benchmarks based on Canadian oil and gas industry practice, proportionate to the anticipated revenue from a project. The C-NSOPB is reviewing its guidelines for the preparation of Benefits Plans and suggested revisions are expected to be circulated for review and comment later in 2007. The Board has indicated its intention to mirror the Canada-Newfoundland and Labrador guidelines to the extent possible.⁶⁹

The C-NLOPB initiatives spurred litigation on the part of the operators of the Hibernia and Terra Nova projects which challenged the Board's authority to establish and impose specific requirements for expenditures on research and development. While the trial judge upheld the Board's jurisdiction, the case is now on appeal.⁷⁰

66. *Nova Scotia Accord Acts, ibid.*, s. 35; *Newfoundland Accord Acts, ibid.*, s. 34(2).

67. *Nova Scotia Accord Acts, ibid.*, s. 41(1)(b).

68. *Canada – Newfoundland and Labrador Benefits Plan Guidelines* (St. John's: Canada – Newfoundland and Labrador Offshore Petroleum Board, February 2006), Appendix II, online: C-NLOPB <<http://www.cnlopb.nl.ca/>>.

69. C-NSOPB *Annual Report*, *supra* note 32 at 28; *supra* note 3 at 34.

70. *Hibernia Management and Development Co. Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 2007 NLTD 14.

The imposition of these guidelines appears to impose research and development expenditures upon the Hibernia and Terra-Nova projects of 0.45 per cent and 0.48 per cent respectively of the total project revenue – a comparable percentage to that contained in the OSEA. It is clearly preferable, however, for industry to understand such requirements in advance of making an investment in a project rather than to be faced with the imposition of such an obligation after the fact.

The Deep Panuke OSEA avoided disagreement and protracted regulatory review regarding commitments to employment levels in the province and appropriate levels of investment in education and training and research and development. Where the province and proponent are able voluntarily to reach a balance and reasonable resolution, this is clearly an advantage to the project in terms of obtaining public acceptance and regulatory approvals. The essential substance of the OSEA was not challenged in the Deep Panuke hearings or undermined in either the Commissioner's Report or the C-NSOPB Decision Report. The conditions of approval requiring further provisions relating to the manner in which expenditures would be made on education and training and research and development are not inconsistent with other decisions of the boards concerning preliminary Benefits Plans. It is noteworthy that the C-NSOPB did not express disagreement with either the OSEA employment commitments or its terms respecting contributions to education and training and research and development.

The government of Newfoundland and Labrador appears to favour separate agreements with proponents of new projects to address issues such as local benefits. The recently-concluded Memorandum of Understanding for Hebron Development, although perhaps more noteworthy for the province's attaining a 4.9 per cent equity position in the project, addresses the securing of more employment hours for the project through engineering and installation of a gravity based structure for production.⁷¹ The recent Newfoundland Labrador Energy Plan⁷² does not explicitly identify an agreement between a proponent for an offshore oil and gas project and the province as desirable. The policy actions identified in the plan, however, suggest that the government, following its pattern on the Hebron project,

71. Government of Newfoundland and Labrador, News Release, "Equity, Improved Royalty Regime and Outstanding Local Benefits Highlights of Memorandum of Understanding for Hebron Development" (22 August 2007), online: NL Gov. <<http://www.releases.gov.nl.ca/releases/2007/excc/0822n02.htm>>.

72. *Focusing Our Energy: Newfoundland Labrador Energy Plan* (St. John's: Government of Newfoundland and Labrador, September 2007), online: NL Gov. <www.gov.nl.ca/energyplan/EnergyReport.pdf>.

will pursue such agreements. The government of Newfoundland and Labrador has a policy to obtain a ten per cent equity position on all future oil and gas projects requiring Development Plan approval⁷³ and will request companies to provide an assessment of the feasibility and provincial benefits of refining oil or other secondary processing opportunities in Newfoundland and Labrador prior to submitting a Development Plan.⁷⁴ The energy plan expresses an objective of making local energy expenditures more sustainable in the long term with a view to helping local businesses use capabilities developed through large scale projects to compete for export opportunities. The province wishes strategically to build export capacity through targeting investment on supply and services industries which have potential to greater capitalize on competitive advantages in Newfoundland and Labrador.⁷⁵

Conclusion

The Deep Panuke Project in many respects followed the path and pattern of approvals for earlier energy projects in the Atlantic offshore. The regulatory review process for Deep Panuke reflects some refinements and streamlining from earlier projects, including the earlier Development Plan Application for the same reservoir. The treatment of the earlier CSR in the 2007 Environmental Assessment, also carried out at a Comprehensive Study Report level, is the unique aspect of the regulatory review of this project. This avoided duplication of effort and expense. The regulators consistently conducted their environmental assessment of alternative ways of carrying out the project by determining whether each of the alternatives would be likely to cause a significant environmental effect. The regulators refrained from determining which of the alternatives was more desirable from an environmental perspective. Through an OSEA, the proponent and the province addressed many potentially contentious issues regarding the Benefits Plan. While there remains the question of the specific manner in which funds to be provided through the OSEA will be allocated for research and development, education and training, and support of disadvantaged groups to the satisfaction of the province, the Boards, the proponents and stakeholders, one would nevertheless expect to see continued use of this mechanism as a means of addressing interests of government, proponents and the public regarding the form and substance of Benefits Plans.

73. *Ibid.* at 20.

74. *Ibid.* at 27.

75. *Ibid.* at 26-27.