

Appendix 3: Lifting the moratoria¹

The existing jurisdictional and regulatory setting.

The “existing state of affairs” is complex. It is necessary to distinguish among issues of constitutional jurisdiction, ownership, resource revenue sharing and regulatory responsibilities.

Geographically, issues of jurisdiction have been partly resolved but some uncertainty remains. At least as early as 1957, probably much earlier, British Columbia put forward claims to the offshore area, asserting Crown reserves over areas of the continental shelf out to the (then) boundaries of Canada’s territorial sea. Initial industry activity in exploration and drilling took place in the 1960s in a muddled setting, with confusion not just between federal and provincial permitting and licensing, but also with federal departments of energy (Energy, Mines and Resources) and environment (initially Fisheries and Forestry) announcing conflicting positions with respect to drilling permits.

By now the jurisdictional questions have been settled to some extent. “Respecting federal-provincial constitutional jurisdiction over offshore areas, Supreme Court of Canada cases have determined [1967] that the federal government has, vis-à-vis British Columbia, exclusive legislative authority regarding all waters and seabed areas west of Vancouver Island and the Queen Charlotte Islands. The waters and ocean floor between Vancouver Island and the mainland have been held [1984] to be within provincial jurisdiction. There is legal uncertainty regarding federal-provincial jurisdiction over the waters and sea floor between Vancouver Island and the Queen Charlotte Islands (Queen Charlotte Sound) and the waters and sea floor landward of the Queen Charlotte Islands (Hecate Strait).” (Cumming and McDorman, p.7)

In a footnote to the above comment, it is noted that in 1981 British Columbia declared that the waters and seabed landward of the straight baselines and fishery lines established along the west coast (the area of Hecate Strait and Queen Charlotte Sound) were a provincial Inland Marine Zone. (BC Order in Council 1347, 4 June 1981, made pursuant to section 87(g) of the Petroleum and Natural Gas Act, Rev. Stat. of BC 1979, ch 323). It is also speculated that “a clear articulation by the federal government of Canada that the waters of the Queen Charlotte Sound and Hecate Strait were internal waters would provide considerable strength to the BC position that the seabed of these waters, and the possible hydrocarbon resources located therein, are under provincial jurisdiction” (loc.cit.).

Thus it appears that the federal government would have authority to issue licenses or rights in the territorial sea, west of the low water mark of the outer coastline, that is, roughly, west of a line running north along the western side of Vancouver Island and the Queen Charlotte Islands, while in the internal waters landward of such a line, though the ownership by the province may be acknowledged, activities would be subject to joint jurisdiction. In similar situations of confused or overlapping jurisdiction, companies have dealt with the problem by holding both federal and provincial licenses, and governments have coordinated their issue of licenses correspondingly. (It should be emphasized, however, that such licenses now do not confer any right to specific exploratory or production activities; they merely secure the exclusive right of the licensee to apply for authorization to undertake such specific activities in the designated area or parcel of land.)

“The aboriginal rights component of the Canadian Constitution has implications for stakeholders that are potentially as significant as those arising from considerations of federalism. This is because offshore oil and gas projects may well be challenged in court on the basis that they infringe the aboriginal rights of First Nations in the area...In the context of offshore drilling, it is fishing rights that are most likely to be at issue. Aboriginal title could also be implicated, although this is considerably less likely...An offshore oil and gas project might interfere with an aboriginal fishing right if it is located in waters where an aboriginal fishing right is exercised and in a manner that potentially threatens the fish habitat...Both the federal and provincial governments are bound by s. 35 [of the Constitution Act]. Accordingly an infringement would

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occur where either government approves an offshore oil and gas project that (a) jeopardizes the fish supply which an aboriginal group has the constitutional right to fish or that (b) is located in waters subject to aboriginal title....[To justify such an infringement] meaningful consultation with aboriginal people, conducted in good faith, would almost certainly be required....In fact, consultation with affected aboriginal peoples is already a legal requirement under environmental legislation....(Extracts from “Offshore Oil and Gas and British Columbia: The Legal Framework. T. Murray Ranking, October 2, 2001.)

With respect to regulatory responsibilities, however, the federal government has legislative authority respecting “navigation and shipping”; “beacons, buoys and lighthouses” and presumably other structures or platforms; fisheries; and aspects of marine pollution. At the same time, the provincial government has legislative authority over all lands and mineral resources “in the province” and, more generally, through “property and civil rights”, all activities that take place in the province. (Cumming and McDorman, p. 9). Such authorities would be exercised simultaneously by both governments in all the geographical regions discussed.

It should be noted that the Oil and Gas Commission was created in British Columbia in 1998 to regulate exploration and production activities onshore in British Columbia, but the legislation is silent on any role with respect to offshore activities. A cursory reading of the mission and purposes shows nothing to exclude application of its powers to offshore resource questions. [See <http://www.ogc.gov.bc.ca/whoweare.asp>]

Existing provisions for environmental review

It seems reasonably clear that any proposal by a company or consortium of companies to undertake seismic surveys or exploratory drilling would trigger a review under the Canadian Environmental Assessment Act, and probably also under the BC Environmental Assessment Act. (It is not so clear that a bid for a license or exploration rights itself would do so.) Requirements for license or approvals under the Fisheries Act, the Navigable Waters Act, the NEB Act, or the Canada Oil and Gas Operations Act (among possibly many others) would trigger a requirement for an environmental assessment.

It should be noted that a mandated five-year review of the CEAA (1995) led to Bill C-19 being tabled in March, 2001, with proposed amendments to the Act; the Bill received second reading in June, and the Standing Committee on Environment and Sustainable Development began its review of the Bill on December 4, 2001. The Minister’s report to Parliament on the review process suggests little dramatic change to existing procedures, but emphasizes the importance of the joint review processes.

In British Columbia the present administration has indicated that as part of its core services review it is reviewing its environmental assessment processes and the present British Columbia Environmental Assessment Act along with many other legislative or regulatory provisions in the arena of land and resource planning, management and use.

The Regulatory Roadmaps Project of Erlandson and Associates provides detailed guides to the existing regulatory approval processes for oil and natural gas exploration and production in various offshore areas. [See <http://www.oilandgasguides.org> . Unfortunately there exists no such document for BC, but those which have already been created to describe the situation on the Atlantic and Arctic coasts illustrate well enough the extraordinary complexity of the approval and oversight processes involved.

Within the overall framework of a Canada-Wide Accord on Environmental Harmonization negotiated within the Canadian Council of Ministers of Environment, Canada and British Columbia have signed a bilateral harmonization agreement on environmental assessment cooperation. Under this agreement, for any proposal requiring both a federal and a provincial environmental assessment, a harmonized review process would be developed, with the goal of meeting all the requirements for review, federal, provincial or other, through a single unified process. The agreement presently in force provides that where both CEAA and BCEAA are triggered, the joint review process will be undertaken and completed using the BC environmental assessment process.

This present sub-agreement with BC under the CCME Harmonization Framework expires in April, 2002, and must be extended or re-negotiated. In the present setting, with both federal amendments in process and

provincial review of its environmental assessment legislation and processes underway, re-negotiation of the harmonization sub-agreement may be difficult or delayed, and hence the provisions for a joint process may be difficult to establish for some time. However, none of this need come into play until there is some industry application to consider. And not all activity necessarily triggers a requirement for review under both Acts; it will be necessary to identify what sorts of applications do so.

As noted below, it seems likely that the process of negotiating some form of Pacific Accord paralleling the existing Atlantic Accords implemented with both Nova Scotia and Newfoundland and Labrador may involve creation of mirror legislation, with either a continuing joint Offshore Board or provision for project-specific independent review panels to carry out necessary environmental reviews and assessments, all entailing increasingly extensive public hearings.

Such a coordinated environmental assessment was carried out for the Sable Island Offshore Energy Project. A five-person review panel was appointed in 1996; the joint review report was released in October 1997. The various regulatory agencies having jurisdiction adopted various recommendations or conditions of the review panel prior to giving their approval to project proposals. (It's worth noting that the precedent of NEB leadership in the Sable Island review process reflected the crucial character of the interprovincial pipeline involved, a matter beyond the powers of the Offshore Board itself. A similar situation does not exist here, so the basis for NEB involvement in a similar review panel might be somewhat different.)

At another level, within the federal government, it appears that any federal move to end the existing policy of refusing to entertain applications for new drilling licenses or for exploratory activity under existing licenses offshore British Columbia would be subject in the first instance to the 1999 Cabinet Directive on Strategic Environmental Assessment of Policy, Plan and Program proposals. This Directive, intended to provide the overarching policy review to complement the legal framework provided by the Canadian Environmental Assessment Act for environmental assessments on projects requiring federal government permits or authorizations, requires that a strategic environmental assessment be undertaken on any general policy or program proposal submitted to a Minister or to Cabinet for approval when implementation of the proposal may result in important environmental effects.

It is not clear whether similar requirements for formal strategic environmental assessment at a policy level exist in BC, but presumably any decision to move forward with a general measure to 'lift the moratorium' will require a Cabinet Submission by the Minister of Energy and Mines; such a Cabinet Submission will require attention to implications with respect to environment and sustainable development. Thereafter provisions of the BCEAA will presumably require that any specific project proposals be reviewed, again presumably under the provisions for a fully harmonized process.

The Moratoria

With this understanding of the current situation with respect to jurisdictional questions, regulatory authorities and assessment processes, we can move on to ask what is the present moratorium, and where matters would rest if it were ended.

The answer seems to be that the present 'moratoria' on exploration for or development of hydrocarbon resources offshore British Columbia currently exist essentially as a legacy of a variety of announcements going back over four decades. As a result of this legacy, both the federal and provincial governments are understood to be unwilling to consider any new claims or applications for licenses to areas of seabed offshore British Columbia, or to entertain proposals for activity under any existing licenses. At the same time, it seems that any existing license holders have been exempted from any obligations to undertake activities as a condition of their license, and thus are in the position of having their existing claims protected, in effect, without the usual obligations to work them.

A fascinating glimpse into the origins—or at least early stages—of the debate is offered by an exchange in Hansard for April 20, 1972. Tommy Douglas, at the time MP for Nanaimo-Cowichan-The Islands, questions whether oil drilling permits issued by the Minister of Energy, Mines and Resources (Donald MacDonald) to Petrotar Development covering 2.7 million acres in Queen Charlotte Sound had or had not

been revoked. He noted that David Anderson, at the time MP for Esquimalt-Saanich, had assured the public that no such permits would be issued for exploration of offshore areas without the approval of the Minister of the [then new] Department of the Environment. The Minister of Environment himself [Jack Davis] was quoted as saying there would be action to recover the permits (though it appears this never happened).

In response, Jack Cullen, Parliamentary Secretary to the Minister of Energy, Mines and Resources, enunciated what might be taken as the federal government policy at the time: “With the concurrence of my Minister (the Minister of Energy, Mines and Resources), the Minister of Environment (Mr. Davis) announced in Vancouver on March 13 (1972) that exploration and drilling for oil would be excluded from sensitive offshore zones. Our departments will work together on definition of these offshore zones. ...If any of Petrotar’s permits should fall within environmentally sensitive zones, then we will be discussing with that company the kinds and conditions of work which will not be allowed. I should like to confirm the government’s position that subject to this zoning, exploration and drilling will be encouraged in the offshore frontier in strict adherence to regulations currently enforced by my department and judged to be among the most stringent anywhere in the world.” (Hansard, pp 1507-1508, April 20, 1972)

Subsequently the federal government position hardened, it seems. Some accounts refer to a mythical 1972 federal Order in Council establishing formally a moratorium on oil and gas drilling, on the recommendation of the Commons Special Committee on Environmental Pollution founded and chaired by David Anderson. In fact the report of this committee dealt with fears of oil spills from tankers traveling the West Coast from Alaska to Washington, carrying oil from the newly-exploited Prudhoe Bay fields. But the expression of these concerns did raise questions about the inconsistency of Canadian battles with the United States over tankers and oil spills while proposals for seismic exploration (perhaps using dynamite) and applications for drilling licenses in Georgia Strait or Queen Charlotte Basin were being routinely approved by another arm of the same Canadian federal government.

An article in the December 31, 2001 issue of *The Globe and Mail* contains the following account of the federal decision at that time. “Mr. Anderson [federal Minister of Environment David Anderson] said he was also personally responsible for the federal moratorium on drilling for oil and gas off the West Coast. He had urged former prime minister Pierre Trudeau to impose the moratorium, arguing that Canada could not logically express concern [in the US] about oil-tanker traffic while allowing oil companies to drill for oil in the same water. The moratorium was imposed in 1972.”

Extensive searching, apparently by many people, has not turned up any 1972 Order-in-Council, despite the fact that its existence is asserted in authoritative journals (but with citation only to secondary sources which themselves cite no sources.)

In a personal conversation January 13, 2002, the Minister indicated that he knew of no Order in Council or other formal instrument establishing the moratorium. He noted that many people misunderstand the nature of the moratorium: in fact its central effect is not a prohibition on drilling activity, it is to lift from licenseholders any obligations to undertake work under those licenses, since the government would not be prepared to approve such activities in any case.

In one version, it all seems fairly clear. In the Sierra Legal Defence Fund publication *A Crude Solution* it is said that “the legal mechanism invoking the moratorium is quite simple and could easily be changed...” A box in the text explains the situation as seen by SLDF: “The current provincial moratorium traces back to a 1981 Order in Council, which reserved lands offshore to the province and placed a moratorium on oil drilling. All that is required to lift this moratorium is a new Order in Council. The federal moratorium is even easier to lift. But until such time as it is is, no offshore activity can proceed. ‘The [federal] moratorium is just an administrative agreement between the federal and the provincial government’ Heather Dabaghi, an adviser on land management for the federal Department of Natural Resources, explained in a Monday Magazine article in May, 1995. ‘There’s nothing set out in legislation, but periodically we announce that the moratorium is still in place.’

It seems likely that this description refers to a federal government undertaking (following a 1989 BC announcement) not to proceed with authorization of further activity until British Columbia was prepared to do so, and perhaps it is the same understanding that gives rise to references to an alleged annual letter from an unidentified federal official to licenseholders assuring that a lack of activity would not jeopardize their licenses.

Telephone conversation with an official in the Frontier Lands Management group of Natural Resources Canada, which is responsible for the administration of the federal offshore lands, confirms that in fact the present situation is simply the policy of the Minister that the Department will not entertain applications for new licenses, or for work under existing licenses, and has relieved existing licenseholders of their responsibility to undertake the work obligations normally present as a condition of holding a license. Initially this exemption from work requirements had to be extended and confirmed annually; under present regulations this is no longer the case. A decision by the Minister to initiate a land sale, or to invite companies to renegotiate existing licenses, would effectively end the federal moratorium. But it is the policy of the federal government not to initiate such measures without the concurrence of the provincial governments concerned.

Thus the administrative history of the federal moratorium seems somewhat cloudy: it is not clear that any single piece of paper exists to establish or describe the federal moratorium. There is a straightforward process to repeal an Order in Council if one existed. Though there seems clearly to be a policy, it is not yet clear whether any explicit policy statement exists. Spokespeople for Environment Canada insist, and Minister Anderson confirms, that his position is clear: If there were a concrete site-specific proposal advanced, it would have to meet all the stringent requirements of the existing legislation as to environmental assessment and review, including the responsibility to prepare all the studies necessary to such a review, but there would be no bar to consideration of such a proposal. New proposals could be submitted, in other words, through the relevant review procedures, which themselves would have the task of establishing that the proposed activity would not have unacceptable environmental or social impacts.

The case in British Columbia is also somewhat ambiguous. As noted above, a 1982 Order in Council defined a provincial Inland Marine Zone and established regulations banning drilling in it (Reg 10/82). Following the extensive 1986 review of Chevron's proposals for a program of exploratory drilling, consideration was given to lifting that prohibition, but the Nestucca Barge and Exxon Valdez oil spills intervened. The Province announced in 1989 that there would be no drilling for at least five years.

In 1994, a new Order in Council (OIC 248) and a new regulation (55/94) revised Regulation 10/82, dropping Note 2 to Schedule 2. And so, it seems, any formal prohibition on drilling offshore ended. Presumably British Columbia now could simply declare that there is no moratorium, that the provincial government is also willing to consider applications under the existing legislative and regulatory regime.

It thus appears that the moratoria could be 'lifted' either actively, as a positive decision by either government, or by implication, simply by federal and provincial governments indicating a willingness to entertain new applications for exploratory activity under the existing regulatory regime, or new applications for licenses to undertake such activity. It appears inevitable that any such application would trigger both the Canadian Environmental Assessment Act and the BC Environmental Assessment Act (as discussed below).

As noted above, to bring clarity to the regulatory regime under which oil or gas exploration or development would proceed, there would have to be mutual agreement in bilateral discussions, with a comprehensive accord on commitments to a process for environmental review, perhaps with mirror legislation governing administration, regulation and environmental review, perhaps with some new Joint Board, perhaps involving augmented responsibilities assumed by British Columbia's existing Oil and Gas Commission. Such an accord must also address resolution of First Nations claims and concerns.

In the case of British Columbia, major questions about resource revenue sharing with aboriginal communities will have to be addressed along with federal-provincial accords on resource revenues, in negotiations separate from any required environmental reviews. The potential difficulty of any such

negotiations might be illustrated by the fact that the National Round Table on the Environment and the Economy was unable to find any consensus around the 'free entry' provisions applying to mineral rights in the North West Territory. (See the State of the Debate report on Aboriginal Communities and Non-Renewable Resource Development, NRTEE, 2001, which also provides useful illustrations of provisions for equity participation by aboriginal communities, employment guarantees and similar provisions related to economic benefits, all features of the approval processes and operational procedures now in place on the East Coast.)

In negotiating a Pacific Accord, there are some other lessons to be learned from recent experience in Atlantic Canada. First, on design issues, the Government of Nova Scotia in November 2001 introduced legislation to separate the industry promotion responsibilities of the Offshore Board from potentially conflicting responsibilities for health, safety and environmental integrity. Second, on resource sharing questions, it obviously will be necessary to take into account the interactions with other features of fiscal federalism, particularly the workings (in BC, the non-workings) of the Equalization Program.