

# THE CANADIAN ARCTIC:

## THE CHANGING SEASCAPE OF OFFSHORE OIL AND GAS EXPLORATION ISSUES

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# The Canadian Arctic: The Changing Seascape of Offshore Oil and Gas Exploration Issues

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## INTRODUCTION

The Arctic is an area of continuing interest, first explored by its indigenous peoples who have lived there for thousands of years<sup>1</sup>. Curiosity about the Arctic has always been driven by commercial interests. Centuries ago, countries began the search for a navigable Northwest Passage, beginning with the voyages of John Cabot in 1497. In 1906 the first east to west transit was completed by Amundsen in the vessel *Gjøa*. Shortly thereafter, the Canadian Government, in its first expression of concern about its sovereignty in the Arctic (a concern that very much continues today), dispatched Captain Joseph-Elzéar Bernier in the *DGS Arctic*. Not until 1942 was a complete west to east transit completed in the *St. Roch* under the command of Captain Larsen who successfully sailed through the Northwest Passage from Vancouver to Halifax.

Commercial activity is no stranger to the Arctic. Whaling has been the most sustained of all activities and has been carried on since the 17<sup>th</sup> century. From 1610 to 1915 at least 39,000 ships went whaling in the Arctic<sup>2</sup>. The Arctic is, for the most part, an ocean surrounded by a number of coastal states inhabited by diverse populations. The coastal states are Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, Sweden and the United States. It continues to be a very busy place<sup>3</sup>.

The oil and gas industry has frequently cast its eye towards the Arctic. Exploration commenced in the Beaufort Sea in the 1960s with oil found in the MacKenzie Delta and at Prudhoe Bay<sup>4</sup>. Hydrocarbon exploration has recently become of interest again. In 2008 the United States geological survey ("USGS") concluded that perhaps up to one-third of the world's remaining recoverable reserves were located north of the Arctic Circle and that 84% of that was located offshore<sup>5</sup>. This is an intriguing possibility in and of itself. When combined with climate change, significant advances in vessel technology and worldwide decreasing safe sources of hydrocarbons, it is too good to resist.

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<sup>1</sup> The Arctic Climate Impact Assessment (ACIA), a joint project of the Arctic Council and the International Arctic Science Committee (IASC) describes the Arctic and its fragility very well. See especially chapter 1, section 1.5 (The Arctic: Geography, Climate, Ecology and People). It is available at <http://www.acia.uaf.edu>.

<sup>2</sup> The history of Arctic shipping has been well-described in a paper by Professor William Barr, Arctic historian at the Arctic Institute of North America at the University of Calgary. His paper concerning the history of Arctic shipping is available at [www.pame.is](http://www.pame.is).

<sup>3</sup> *Supra* fn. 1.

<sup>4</sup> An overview of oil and gas activities in the Arctic can be found at [www.amap.no](http://www.amap.no) and the article by Skjoldal and Thurston "Oil and Gas Activities in the Arctic", at that site.

<sup>5</sup> The USGS reported that undiscovered conventional oil and gas resources of the Arctic are estimated to be approximately 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas and 44 billion barrels of natural gas liquids. <http://pubs.usgs.gov/fs/2008/3049>

The current search for hydrocarbons in the Arctic is the continuation of commercial enterprise in the area. At the beginning of the 21<sup>st</sup> century much is transforming in the Arctic<sup>6</sup>. Climate change is converting the face of the Arctic seascape and landscape<sup>7</sup>. Shorter shipping routes for commercial vessels, longer seasons of safe navigation, consequent greater accessibility to oil and gas, greater interest in the preservation of the environment and of the lifestyles of the indigenous peoples of the Arctic have all coalesced to bring to the fore many different agendas. International organizations, nations, governmental agencies, regulatory agencies, private industries, and many others are intently pushing forward with their own agendas which will necessarily affect the search for, production and transportation of, hydrocarbons in the Arctic.

A complete appreciation of the many legal regimes relevant to the Arctic is complicated. This paper provides an overview of this multifaceted area of Canada and the contiguous waters over which Canada exercises jurisdiction. The paper reviews the ways in which the various parties at interest play out their roles in the Canadian Arctic. There is no other area of Canada that has so many different agendas at play. The transforming face of the Arctic environment will result in new laws and changes in the interests and mandates of international and national agencies as their sensitivities to the Arctic develop. All of this will result in a regulatory environment which at the present time is difficult to foresee.

This key message is that change in the Arctic is rapid. To properly understand it, we must take a very wide view of what is relevant and we must try to look ahead. In this paper, we restrict the view of relevance to issues affecting the offshore oil and gas business. We commence with a discussion of the International Conventions that have either a present impact in the Arctic or should be paid attention to for potential future application in Canada. This is followed by a discussion of the roles of a number of international organizations which are responsible for either administering International Conventions or are made up of countries having direct interests in Arctic matters. With this International umbrella in place, we discuss relevant issues of Canadian sovereignty. This is followed by a review of Canadian legislation applicable to the offshore oil and gas industry in the Arctic. The role of the National Energy Board ("NEB" or the "Board") as the principal regulator is addressed. We then outline the applicability of the three major Land Claims Agreements with Aboriginal groups in the North as they interact with offshore oil and gas exploration in the Arctic. We consider the potential implications of aboriginal cases currently before the Supreme Court of Canada as they may affect both the nature of the duty to consult and by whom that duty is owned. The conclusion represents our thoughts and speculation concerning the possible futures for offshore oil and gas development in the north.

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<sup>6</sup> The International Governance and Regulation of the Marine Arctic, three reports prepared for the WWF International Arctic Program (2010) accessible at [www.worldwildlife.org](http://www.worldwildlife.org).

<sup>7</sup> ACIA, Impacts of a Warming Arctic: Arctic Climate Impact Assessment. Cambridge University Press, 2004. <http://www.acia.uaf.edu>.

## **THE INTERNATIONAL FRAMEWORK**

### **1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>8</sup>**

#### The Limits of Canada and Canadian Waters

UNCLOS is an international treaty ratified by 158 countries, including all the countries which border on the Arctic Ocean with the exception of the United States. Canada's ratification was effective on November 7, 2003.

UNCLOS contains many Articles which can have an effect on offshore activities. As noted in *Offshore Hydrocarbon: Current Policy Context in the Marine Arctic*<sup>9</sup>, numerous articles in Part XII of UNCLOS are relevant:

Article 80 – which grants Coastal states "the exclusive right to authorize and regulate drilling on the Continental Shelf for all purposes".

Article 133(a) – regulating offshore hydrocarbon activity in the Area and requiring that such activities must be in accordance with the relevant provisions of UNCLOS.

Article 194 – Coastal states requirements to prevent, reduce and control marine pollution that may arise out of offshore oil and gas activities.

Article 196 – Coastal states to ensure that technology in offshore activities does not result in pollution.

Article 204 – Keep under surveillance the effects of activities permitted in the offshore area.

Article 235 – Compensate for damage caused by pollution.

One important function of UNCLOS is to set out the regime of maritime rights for coastal states<sup>10</sup>. This scheme has been adopted in Canada through the *Oceans Act*<sup>11</sup> which, in summary, provides as follows:

s. 5 sets out the process for determining baselines. Baselines smooth out coastlines by traversing straight across minor indentations and enclosing historic bays and other waters to which a coastal state has historic claims. Marine areas which are landward of the baselines are defined as internal waters. Baselines are defined by regulation.

s. 7 describes the internal waters and territorial sea as "part of Canada". Canadian federal law therefore applies in the internal waters and territorial sea in the same way that it applies onshore Canada. International law recognizes the right of innocent passage in the territorial sea but not in internal waters.

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<sup>8</sup> 1982 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3

<sup>9</sup> This paper can be accessed through the website of Arctic Transform at <http://Arctic-transform.org>.

<sup>10</sup> *Supra* fn 8, Section 2, Articles 3-15.

<sup>11</sup> S.C. 1996, c. 31

s. 10 defines the contiguous zone as between 12 and 24 nautical miles from the baselines. Canada's legislative powers drop off considerably in this area. Persons in the contiguous zone for whom reasonable grounds exist for fearing they are likely to commit violations of Canada's customs, fiscal, immigration or sanitary laws, may be refused entry into Canada.

s. 13 defines the "exclusive economic zone" as being between 12 and 200 nautical miles from the baselines. Within this area Canada has certain sovereign rights with regard to economic exploitation including, by s. 14(b)(iii) and 14(c) the sovereign right to protect and preserve the marine environment in the exclusive economic zone.

s. 17 defines the Continental Shelf of Canada in a way which has the potential to extend it beyond the exclusive economic zone depending on the "submerged prolongation of the land mass of Canada".

s. 18 confirms that Canada has sovereign rights over the Continental Shelf of Canada "for the purpose of exploring it and exploiting the mineral and other non-living natural resources of the seabed and subsoil of the Continental Shelf of Canada". These rights are derived from Article 77 of UNCLOS.

Whether or not any area forms part of the Continental Shelf of Canada beyond the exclusive economic zone involves analysis by the Commission on the Limits of the Continental Shelf (CLCS) set out in Annex II of UNCLOS. Article 4 of this Annex requires countries to submit their claims to the Commission within ten years from the date of their country's ratification. Canada must submit its evidence by December 7, 2013. The United States is not a party to the Convention<sup>12</sup>. The Commission will review the submission of Canada, then make recommendations regarding the outer limit of the Continental Shelf in accordance with its own guidelines. The final determination of the Continental Shelf is the right of Canada, it being the only coastal state that can establish the limits of its own Continental Shelf.

#### UNCLOS Article 82, Offshore Continental Shelf Royalty Payments

Article 82 of UNCLOS is relevant to the offshore oil and gas industry. The International Seabed Authority (ISA) which regulates the seabed pursuant to Section 4 of UNCLOS has recently published two studies concerning issues associated with the implementation of Article 82 of UNCLOS. These are ISA Technical Study: No. 4 (2009) and ISA Technical Study: No. 5 (2010)<sup>13</sup>.

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<sup>12</sup> Betsy Baker in *Filling an Arctic Gap: Legal and Regulatory Possibilities for Canadian-US Cooperation in the Beaufort Sea*, (2009) 34 Vermont Law Review 57 at 116 points out various provisions of UNCLOS that are particularly apposite to Canada-US cooperation. "Article 194(5), on protecting fragile ecosystems/endangered species habitats; Article 197, on cooperation for protection and preservation of the marine environment on a global or regional basis; Article 234, on ice-covered areas; Article 199, on contingency plans against pollution; Article 200, on studies, research programs and exchange of information and data; Article 204 on monitoring of the risks or effects of pollution; and Article 206 on assessment of potential effects of activities on the marine environment."

<sup>13</sup> ISA Technical Study: No. 4 (2009) - Issues associated with the Implementation of Article 82 of UNCLOS; ISA Technical Study: No. 5 (2010) Non-Living Resources of the Continental Shelf Beyond 200 Nautical Miles: Speculations on the Implementation of Article 82 of the United Nations Convention on the Law of the Sea.

Article 82 affects coastal States which have submitted a territorial claim to the portion of the continental shelf which extends beyond the Convention-mandated 200 nautical mile limit. This area is known as the Outer Continental Shelf (OCS). Article 82 obliges coastal States to pay what is essentially an international royalty through the ISA for the exploitation of the non-living resources within their respective OCS. Canada has laid claim to the OCS extending into both the Arctic and Atlantic Oceans. The Canada-Newfoundland Offshore Petroleum Board currently has exploration licences in areas outside the 200 nautical mile limit in the Northwest Atlantic<sup>14</sup>.

The ISA is authorized by UNCLOS to organize and control activity in the International Seabed Area, (the Area), which comprises those sections of ocean floor which are not part of a territorial claim by a state. At international law, the Area and its mineral resources are considered to be part of the "common heritage of all mankind." Because OCS claims will decrease the size of the Area and, concomitantly, the amount of resources in the Area, Article 82 was conceived as a compromise between the OCS interests of coastal States and those of land-locked and developing States which are net importers of mineral resources. The royalties collected from coastal States by the ISA in return for the exploitation of non-living resources in the OCS are to be disbursed to all Convention parties on the basis of "equitable sharing criteria"<sup>15</sup>, taking into account the interest and needs of developing States, particularly the least developed and land-locked among them." The ISA does not receive the benefit of OCS royalties, but is simply the entity responsible for their collection and distribution.

Article 82 creates a three-stage process. During the offshore exploration and pre-production phase, no royalties are required. Once production commences, there is a five-year royalty-free grace period. Royalties are then triggered in the sixth year of production. Once triggered, Article 82 will require an annual payment or contribution in kind at an initial rate of one percent on the value or volume of all production, increasing thereafter by one percent annually until the rate reaches a maximum of seven percent in the 12<sup>th</sup> year of production. Resources which are used in connection with the exploitation are not considered to be part of the production and are exempt from the royalty calculation.

Study No. 4 examines and highlights many important issues relating to the ISA, land-locked and developing States, and OCS status. OCS production could begin as early as 2015. As noted in that Study<sup>16</sup>:

Although Article 82 has been dormant since the adoption of the Convention, there are coastal States, in particular in Canada (which is a State Party to the Convention) and the United States (which is not yet), that have granted prospecting and/or exploration licenses on their OCS. Typically, offshore petroleum and mineral development operates on a time frame that can span decades. Today's prospecting and exploration license may become a development and production license within perhaps 10-20 years of additional activity. However, it is possible that Article 82 revenues will come due as soon as 2015. Either way, Article 82 will soon awaken.

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<sup>14</sup> *Ibid.* Study 4, p. 3 and figure 1 at p. 4.

<sup>15</sup> *Supra* fn. 8, Article 82.

<sup>16</sup> *Ibid.* at p. xi.

In this regard, Study No. 4 notes that the commercial viability of offshore drilling in the OCS must be examined with the Article 82 regime in mind. The Article 82 royalty obligation should also be considered at the earliest stages, including the granting of exploration licences and even the planning of domestic royalty regimes:

At this time it appears that very few OCS States are aware of the significance of Article 82. OCS States need to become aware of the implications of Article 82 when defining the outer limits of the continental shelves and proceeding to offshore exploration and development<sup>17</sup>.

ISA Study No. 5 also concerns Article 82<sup>18</sup>. Study No. 5 refers to Canada as a "good example of a very wide margin Coastal State with a continental shelf already featuring intense exploitation of oil and gas at a range of water depths<sup>19</sup>. It is noted that Canada has two areas where potential continental shelf exploration beyond 200 miles is likely: off the east coast of Canada and in the Arctic Ocean<sup>20</sup>. This Study seems however to suggest that there is little potential beyond 200 miles in the Arctic Ocean:

Most of the offshore areas with the highest probability for the discovery of hydrocarbons (oil and natural gas) are well within the national jurisdiction of Arctic Ocean Littoral States and that the areas beyond 200 M in the Arctic Ocean basin are not seen as having a high or even middling probability for the recovery of hydrocarbon resources<sup>21</sup>.

The issue which is most likely to become contentious is whether the federal government will seek to offset its royalty obligations through its taxation powers, and, if so, what form that taxation will take. To date, no tax has been imposed. A conceivable scenario, however, is a tax imposed directly on the producing oil companies. Such a measure would surely give rise to federal-provincial rancour and would undoubtedly affect how companies interested in OCS production will act.

### **Safety of Life at Sea Convention (SOLAS)**

The sinking of the Titanic in 1912 gave a jumpstart to the development of an International regime to ensure marine safety<sup>22</sup>.

SOLAS has had a number of iterations now represented by SOLAS 1974<sup>23</sup>. Canada is a contracting state to SOLAS and is required to ensure that ships flying the Canadian flag comply with the various requirements of SOLAS. A number of the regulations and requirements of SOLAS have been enacted in Canada through regulations made pursuant to the *Canada Shipping Act, 2001*<sup>24</sup>.

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<sup>17</sup> At p. 47.

<sup>18</sup> *Supra* fn. 13.

<sup>19</sup> *Id.*, p. 49.

<sup>20</sup> *Id.*, p. 49.

<sup>21</sup> Ted L. McDorman, *The Continental Shelf Beyond 200 Miles: Law and Politics in the Arctic Ocean*, in: *The World Ocean in Globalization: Challenges for marine regions*, 21-23 August 2008, Oslo. Quoted at p. 20 of Study No. 5.

<sup>22</sup> A good overview of the current governance of shipping in the Arctic is VanderZwaag et al, *Governance of Arctic Marine Shipping* (2008) Dalhousie University.

<sup>23</sup> *1974 International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 U.N.T.S. 2.

<sup>24</sup> S.C. 2001, c. 26.

## **Pollution Conventions**

There are many International Conventions relating to pollution and discharge from ships. Insofar as Canada is concerned, these Conventions are given effect by the *Canada Shipping Act*<sup>25</sup>, 2001 and the *Marine Liability Act*<sup>26</sup> which share responsibility for issues arising out of oil pollution matters. As is noted later the *Arctic Waters Pollution Prevention Act* (AWPPA) has application also<sup>27</sup>.

## **Other Conventions/Agreements to Keep Your Eyes On**

### Agreement relating to the delimitation of the continental shelf between Greenland and Canada<sup>28</sup>

This Agreement sets out the dividing line between Greenland and the Canadian Arctic Islands "established for the purpose of each party's exploration and exploitation of the natural resources of that part of the continental shelf" (Article I). Article V provides that if a petroleum field may extend across the dividing line, the Parties shall seek to reach an agreement as to its exploitation.

### Agreement between the Government of Canada and the Kingdom of Denmark

There is an Agreement between Canada and Denmark (the two countries that share the longest maritime boundary in the world) entered into in 1983<sup>29</sup> and amended in 1991<sup>30</sup> entitled "For Cooperation Relating to the Marine Environment". Article 5 of that Agreement is relevant to the offshore:

The Parties shall take measures to ensure that installations engaged in exploration for or exploitation of the natural resources of the seabed and subsoil in their respective areas of responsibilities are designed, constructed, placed, equipped, marked, operated and maintained in such a manner that the risk of pollution of the marine environment is minimized.

The relevant lands are those which lie between Greenland and Canada<sup>31</sup>. There is considerable activity offshore Greenland where at present 13 licenses have been granted. The Scottish oil company, Cairn, has acquired a leading acreage position offshore Greenland, with interests in eight hydrocarbon exploration licenses. The semi-submersible Stena Don will be begin drilling as part of Cairn's exploration program offshore western Greenland in the summer of 2010<sup>32</sup>. What is of interest here is that these offshore prospects are off the west coast of Greenland

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<sup>25</sup> *Ibid.*

<sup>26</sup> S.C. 2001, c. 6.

<sup>27</sup> At p.14.

<sup>28</sup> CTS 1974/9, as amended by Exchange of Notes, December 16, 2009.

<sup>29</sup> E 101887-CTS 1983 no. 19

<sup>30</sup> E 101893-CTS 1991 no. 35.

<sup>31</sup> As recently as February 8, 2010, the Nunavut online newspaper ran an article indicating that Nunavut envies the way in which Greenland has moved ahead with its oil and gas activities. Oil and gas exploration in Nunavut ceased in 1985.

<sup>32</sup> Details concerning this activity see [www.cairnenergy.com](http://www.cairnenergy.com).

proximate to Baffin Island. The Greenland oil company, NunaOil/A/S is currently involved in a number of exploration licenses offshore western Greenland.<sup>33</sup>

Ospar Convention for the Protection of the Marine Environment of the North – East Atlantic<sup>3435</sup>

Ospar is the Convention by which 15 governments of the western coasts of Europe, together with the European Community cooperate to protect the marine environment of the northeast Atlantic. One of the areas covered by the Convention is the Arctic waters relevant to the member states which constitutes approximately 40% of the Ospar maritime area. The Ospar Commission<sup>36</sup> set up to administer the Convention recognizes that petroleum production is one of the most important human activities in the Arctic area<sup>37</sup>. The concept of "marine protected areas" is one of the articulated mandates of the Ospar Commission<sup>38</sup>. This concept has been statutorily recognized in Canada in the *Oceans Act* which will be discussed later<sup>39</sup>.

Multi-Lateral Conservation of Polar Bears Agreement – Oslo, November 15, 1973<sup>40</sup>

This 1973 agreement between the governments of Canada, Denmark, Norway, USSR and the United States recognizes the responsibility for coordination of actions to protect polar bears and commits all signatories to the protection of the ecosystems of polar bears and their migration corridors<sup>41</sup>.

The foregoing International Conventions are the footprint of world opinion. They represent an international consensus.

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<sup>33</sup> Maps for these licenses can be seen at [www.nunaoil.gl](http://www.nunaoil.gl). The presentation of NunaOil to the EU's Arctic communication in Brussels on October 29, 2009 at a seminar on the EU in the Arctic is informative. <http://uk.nanoq.gl/>

<sup>34</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic, in force 25 March 1998.

<sup>35</sup> At [www.ospar.org](http://www.ospar.org).

<sup>36</sup> The website for this commission is [www.ospar.org](http://www.ospar.org). All of the documents available from the Ospar Commission can be found at the foregoing website.

<sup>37</sup> Annex III to the Convention is concerned with "Prevention and Elimination of Pollution from Offshore Sources".

<sup>38</sup> See Molenaar & Alex G. Oude Elferink, *Utrecht Law Review*, vol. 5, Issue 1 (June) 2009, "Marine protected areas" in areas beyond national jurisdiction. The pioneering efforts under the "Ospar Convention". Available at [www.utrechtlawreview.org](http://www.utrechtlawreview.org). In 2003, the Commission recommended a network of marine-protected areas, which was accepted by the Ospar Commission. The Commission in 2006 published a "Guidance on Developing an Ecologically Coherent Network of Ospar Marine-Protected Areas (Reference No. 2006-3).

<sup>39</sup> At p. 12.

<sup>40</sup> CTS 1976/24.

<sup>41</sup> There is also a polar bear management agreement in place for the southern Beaufort Sea. See Brower et al., *The Polar Bear Management Agreement for the Southern Beaufort Sea: An Evaluation of the First Ten Years of a Unique Conservation Agreement* (2002) 55 *Arctic* 362.

## **RELEVANT INTERNATIONAL ORGANIZATIONS**

### **Council of the European Union**<sup>42</sup>

The Council of the European Union is the principal decision-making institution of the European Union (EU). It is composed of ministers from each state in the EU.

Since some states in the EU border on the Arctic, it is worthwhile paying attention to their work. On December 8, 2009, this Council reached certain conclusions concerning the Arctic<sup>43</sup>. It may be a first step towards an EU Arctic policy. The Council approved the three main policy objectives of the EU Commission in connection with the Arctic.

- Protecting and preserving the Arctic in unison with its population;
- Promoting sustainable use of natural resources;
- Contributing to enhanced governance in the Arctic through implementation of relevant agreements, frameworks and arrangements, and their further development.

### **The Arctic Council**<sup>44</sup>

The Arctic Council is a very important player in considering issues related to the Arctic. It was established in 1996 as a high level inter-governmental forum to provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the expressed involvement of Arctic indigenous communities. The Council is composed of the countries bordering on the Arctic Ocean. The Council also created "permanent participants" in order to ensure proper representation of Arctic indigenous representatives. These are the Aleut International Association, the Arctic Athabaskan Council, the Gwich'in Council International, Inuit Circumpolar Council, Saami Council and Russian Arctic Indigenous People of the North. The Council has created working groups which include the Arctic Contaminants Action Program; Arctic Monitoring and Assessment Program; Conservation of Arctic Flora and Fauna, Emergency Prevention; Preparedness and Response; Protection of the Arctic Marine Environment; and Sustainable Development Working Group.

The Arctic Council has published many documents that are relevant for consideration in offshore development. Five recent publications are noteworthy:

- Guidelines for the Transfer of Refined Oil and Oil Products in Arctic Waters (TROOP). These guidelines, published in November 2004: "are written for vessels that may be supplying Arctic communities, industries, and other vessels working in the Arctic. The aim of these Guidelines is to prevent cargo/fuel oil spillage, and the resulting environmental damage, during transfer between any two vessels or between a vessel and shore facility, in either direction".

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<sup>42</sup> <http://europa.eu>.

<sup>43</sup> [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/111814.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/111814.pdf).

<sup>44</sup> [www.Arctic-council.org](http://www.Arctic-council.org). All of the documents and publications of the Arctic Council referred in this paper can be accessed through this website.

- Arctic Marine Shipping Assessment 2009 Report (AMSA). This very thorough Report was predicated on the view of the Arctic Council that:

The Arctic is undergoing extraordinary transformations early in the 21<sup>st</sup> century. Natural Resource development, governance challenges, climate change and marine infrastructure issues are influencing current and future marine uses of the Arctic.

AMSA makes a number of findings including one which is particularly relevant to offshore oil and gas:

Arctic natural resource development (hydrocarbons, hard minerals and fisheries) and regional trade are the key drivers of future Arctic marine activity. However there are many other factors and uncertainties of importance including governance, Arctic state cooperation, oil prices, changes in global trade, climate change variability, new resource discoveries, marine insurance industry roles, multiple use conflicts and Arctic marine technologies.

- Arctic Offshore Oil and Gas Guidelines 2009 were first developed by the Arctic Council in 1997 and have been updated and improved. These Guidelines recognize:

A number of legal instruments related to offshore oil and gas activities exist, eg. United Nations Convention on the Law of the Sea; the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78); The London Convention 1972; and regional Conventions such as OSPAR. Arctic petroleum activities must be conducted in compliance with applicable international law.

The purpose of the Guidelines is expressed as "intended to be of use to the Arctic Nations for offshore oil and gas activities during planning, exploration, development, production and decommissioning."

These Guidelines describe the environmental assessment process currently in effect for Canadian offshore oil and gas activities and note the impact of the Inuvialuit settlement region and the Nunavut settlement area<sup>45</sup>.

- Arctic Climate Impact Assessment (ACIA).

This was a joint project of the Arctic Council and the International Arctic Science Committee to evaluate and synthesize knowledge on climate variability, climate change and increased ultraviolet radiation and their consequences. The ACIA overview report contains a number of key findings including that animal species, diversity, ranges and distributions will change; reduced sea ice is very likely to increase marine transport and

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<sup>45</sup> At p. 84 which notes: Efforts are underway to design a pilot, multi stakeholder regional environmental process for the Beaufort Basin. This study is being considered in anticipation of renewed investment in hydrocarbon exploration in the Beaufort over the next decade and is expected to inform and simplify downstream project-liable assessments and regulatory decision.

access to resources; indigenous communities are facing major economic and cultural impacts<sup>46</sup>.

- Arctic Pollution 2009

This 2009 report is useful to understand the many ways in which pollutants can affect the Arctic. It makes clear that the Arctic is not a "closed region" and that what occurs there may have its origin a great distance away.

### **The International Maritime Organization (IMO)**

IMO is the lead agency of the United Nations responsible for issues related to the global maritime industry. In addition to playing a key role in the development of SOLAS and its many iterations, IMO was at the helm of an international effort to agree upon an International Convention concerning offshore drilling units. The so-called MODU Code was completed by IMO in 1989 and while it proposes a very broad international framework for offshore matters, no International Convention has been forthcoming<sup>47</sup>. Recently the Maritime Safety Committee of IMO at its meetings in May and June 2009 approved a draft MODU Code which revised and updated the 1989 version and will be submitted to the IMO Assembly for adoption<sup>48</sup>. The New MODU Code is described as providing:

An international standard for mobile offshore drilling units of new construction, to facilitate the international movement and operation of these units and ensure a level of safety equivalent to that required by the SOLAS Convention and the 1988 Protocol to the Load Lines Convention for conventional ships engaged on international voyages<sup>49</sup>.

In 2002 IMO approved "Guidelines for Ships Operating in Arctic Ice-Covered Waters"<sup>50</sup>. These guidelines were communicated to ship owners and other parties operating vessels in the Arctic. They relate to vessels operating in Arctic ice-covered waters while engaged in international voyages. The Guidelines are an active part of the international attention of the shipping community currently focused on the Arctic<sup>51</sup>. It is worth noting how quickly things are moving internationally. The IMO General Assembly, on December 2, 2009, adopted a Resolution intended to make the Guidelines mandatory "for ships constructed on or after 1 January 2011 and those constructed before that date "as far as is reasonable and practicable"<sup>52</sup>. This has been quickly followed up by the IMO Sub-Committee on Ship Design and Equipment at their meetings in February 2010 which established a correspondence group to further develop an international code of safety for ships operating in polar waters<sup>53</sup>. These developments will certainly have an impact on vessels operating in the Canadian Arctic.

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<sup>46</sup> [www.acia.uaf.edu](http://www.acia.uaf.edu). See also Koivurova, *Governance of Protected Areas in the Arctic* (2009) Utrecht Law Review.org44. Accessible at [www.utrechtlawreview.org](http://www.utrechtlawreview.org).

<sup>47</sup> Resolution A.649(6).

<sup>48</sup> MSC, 86<sup>th</sup> session: 27 May - 5 June 2009.

<sup>49</sup> *Ibid.*

<sup>50</sup> MSC\Circ. 1056 – MEPC\Circ. 399 (23 December 2002).

<sup>51</sup> Also relevant are the activities of IMO in connection with ensuring the safe return to port of passenger ships following a casualty, addressed by the IMO Marine Safety Committee in MSC.1/Circ. 1214 (2006). This has been followed up by changes to SOLAS implementation of regulations concerning Safe Return to Port.

<sup>52</sup> IMO Resolution A.1024 (26) January 18, 2010. These guidelines are now referable to "Ships Operating in Polar Waters". These guidelines now encompass the Antarctic as well.

<sup>53</sup> 53<sup>rd</sup> Session: 22 – 26 February 2010.

### **International Seabed Authority**

This is the organization set up pursuant to Article 156 of UNCLOS which is in charge of organizing and controlling activities in the Area (defined in UNCLOS as the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction) as discussed earlier in this paper in relation to Article 82 of UNCLOS and the potential for offshore Continental Shelf royalty payments.

### **The International Association of Classification Societies (IACS)**

This is the agglomeration of Classification Societies such as Det Norske Veritas (DNV) and the American Bureau of Shipping (ABS). These organizations, in conjunction with insurance interests and vessel owners and operators, regulate the construction and periodic surveys of ships to ensure compliance with safe standards. DNV has a series of rules related to ship operation in cold climates<sup>54</sup>. ABS has published technical papers addressing the issue of winterization guidelines operating in Arctic waters<sup>55</sup>.

### **CANADIAN SOVEREIGNTY OVER THE ARCTIC**

In the section of this paper dealing with UNCLOS, we have already described the nature of the various interests accorded to a coastal state depending on the proximity of the area to the coastal state. The discussion in this section focuses on boundary issues involving the Arctic between Canada and other nations. These issues are increasingly important as climate change changes the face of the Arctic.

On August 12, 2006, Prime Minister Harper speaking in Iqaluit stated Canada's position:

And I am here today to make it absolutely clear there is no question about Canada's Arctic border. It extends from the northern tip of Labrador all the way up the east coast of Ellesmere Island to Alert. Then it traces the western perimeter of the Queen Elizabeth Islands down to the Beaufort Sea. From there it hugs the coasts of the Northwest Territories and Yukon to the Canada-US border at Alaska. All along the border, our jurisdiction extends outward 200 miles into the surrounding sea, just as it does along our Atlantic and Pacific coastlines<sup>56</sup>.

There are two issues. One is disagreement as to sovereign rights per se and secondly, disagreement as to the extent of Canada's sovereign rights involving rights of passage through the waters of the Canadian Arctic.

On the issue of sovereignty per se, there is an area of the Beaufort Sea over which both Canada and the United States claim sovereignty<sup>57</sup>. The area in question is approximately 6,250 square nautical miles<sup>58</sup>. There are two Canadian issued exploration licenses in this disputed

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<sup>54</sup> e.g. DNV Maritime Ship Operation in Cold Climates.

<sup>55</sup> e.g. ABS Technical Papers 2007, Conachecy et al Winterization Guidelines for Vessels Operating in Arctic Waters.

<sup>56</sup> <http://pm.gc.ca/eng/media.asp?id=1275>

<sup>57</sup> See map at Appendix A, Indian and Northern Affairs, Northern Oil and Gas Branch, Oil & Gas Dispositions Beaufort Sea & MacKenzie Delta February 2010.

<sup>58</sup> David H. Gray, Canada's Unresolved Maritime Boundaries, IBRU Boundary and Security Bulletin 1997 accessible at [http://www.dur.ac.uk/resources/ibru/publications/full/bsb5-3\\_gray.pdf](http://www.dur.ac.uk/resources/ibru/publications/full/bsb5-3_gray.pdf).

area which are currently under work prohibition orders in accordance with s. 12(1)(a) of the *Canadian Petroleum Resources Act*<sup>59</sup>. These are EL 317 and EL 329 issued respectively to Talisman Energy and BP Canada Energy<sup>60</sup>. Canadian and American icebreakers CCGS *Louis St. Laurent* and USC GC *Hely* have been mapping the bottom of the Arctic Ocean in order to make submissions to the ISA concerning the extent of the Continental Shelf. In 2010 these icebreakers, for the first time, are venturing into the area where these two exploration licenses are situated.

On the second issue of the extent of sovereign rights, there is a difference of opinion between Canada and the United States as to the nature of the sovereignty rights claimed by Canada in the Northwest Passage. The position taken by Prime Minister Harper is consistent with the position that virtually all the waters of the Northwest Passage are landward of the baselines and would therefore constitute internal waters of Canada. The United States is of the view that since this is a strait used for international navigation, it is not part of Canada's internal waters<sup>61</sup>. A potential bar fight perhaps but unlikely. Article 234 of UNCLOS gives a coastal state a number of rights with respect to ice covered areas regardless of any territorially based claim of sovereignty:

234. Coastal states have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions in the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

Insofar as the Northwest Passage is concerned, it has been suggested that the effect of Article 234 is to trump the free right of navigation in an international strait articulated in Article 233<sup>62</sup>.

It may be worthy of note however that in November of 2008, the Commission of the European Communities (the executive body of the EU) issued a communication to the European Parliament concerning the European Union and the Arctic region. While recognizing that there were "different interpretations of the conditions for passage of ships in some Arctic waters, especially in the Northwest Passage", the Commission urged its members to "defend the principle of freedom of navigation and the right of innocent passage in the newly opened routes and areas"<sup>63</sup>. This statement leans toward the position taken by the United States that the Northwest Passage is an international strait. A reduction of ice in the Northwest Passage due to climate change has obviously drawn the attention of the EU to this issue<sup>64</sup>.

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<sup>59</sup> R.S., 1985, c.36.

<sup>60</sup> Indian and Northern Affairs Canada, Northern Oil and Gas Annual Report 2008 at p. 16, accessible at [www.ainc-inac.gc.ca](http://www.ainc-inac.gc.ca). See also in the book McDorman, *Saltwater Neighbours, International Ocean Law Relations Between United States and Canada* (2009), Oxford University at p. 187.

<sup>61</sup> *Ibid.* at p. 232-233.

<sup>62</sup> *Ibid.* at p. 233.

<sup>63</sup> At [www.ospar.org](http://www.ospar.org).

<sup>64</sup> An excellent review of the Canadian Situation Concerning Arctic Sovereignty is R. McNab, "Use it or Lose it" in *Arctic Canada: Action Agenda or Election Hype* [2009] 34 *Vermont Law Review* 3. See also McNab in the

## **CANADIAN LAW RELEVANT TO MARINE ISSUES IN THE ARCTIC**

The preceding discussions outlining the roles of International Conventions and international organizations are particularly relevant to the body of Canadian law governing oil and gas related marine issues in the Arctic. In this section we will focus on Canadian legislation that deals with such issues.

### **Marine Liability Act**<sup>65</sup>

The International Convention on Civil Liability for Oil Pollution Damage in 1969 as amended by the 1976 and 1992 protocols are part of this *Act* which applies to ship-source pollution occurring in Arctic waters<sup>66</sup>.

The *Marine Liability Act*, however, does not apply to pollution emanating from "a drilling ship that is on location and engaged in the exploration or exploitation of the sea-bed or its subsoil insofar as a discharge of a pollutant emanates from those activities". Nor do the pollution sections apply "to a floating storage unit or floating production, storage and off-loading unit unless it is carrying oil as a cargo on a voyage to or from a port or terminal outside an offshore oil field"<sup>67</sup>.

Pollution caused by the transportation of oil as opposed to its production are addressed in the *Marine Liability Act*<sup>68</sup> whereas oil and gas exploration and production are addressed in the *Canada Oil and Gas Operations Act*<sup>69</sup>. There is an exception to this as we shall see when we come to consider the *Arctic Waters Pollution Prevention Act*<sup>70</sup> and the Arctic Waters Pollution Prevention Regulations<sup>71</sup>.

### **The Canada Shipping Act 2001**<sup>72</sup>

The *Canada Shipping Act 2001* is the major piece of Canadian legislation generally applicable to shipping-related issues. The pollution prevention provisions of the *Canada Shipping Act* are related to prosecutions but generally exempt the oil and gas industry and do not apply:

...in respect of a discharge of oil or gas from a vessel that is on location and engaged in the exploration or drilling for, or the production, conservation or processing of, oil or gas in an area described in paragraph 3(a) or (b) of the *Canada Oil and Gas Operations Act*, insofar as a discharge emanates from those activities<sup>73</sup>.

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fall/winter 2009 Meridian Magazine, the publication of the Canadian Polar Commission "A Tale of Two Cities: Washington, Ottawa and Arctic Governance", accessible at <http://www.polarcom.gc.ca>.

<sup>65</sup> S.C. 2001, c.6.

<sup>66</sup> *Ibid.* Part 6.

<sup>67</sup> *Ibid.* s. 49(2).

<sup>68</sup> *Ibid.*

<sup>69</sup> R.S., 1985, c. O-7.

<sup>70</sup> R.S., 1985, c. A-12.

<sup>71</sup> C.R.C., c. 354.

<sup>72</sup> S.C., 2001, c. 26.

<sup>73</sup> *Ibid.* s. 186(2).

There are a number of Regulations made under the *Canada Shipping Act* that are relevant to Arctic waters including the Ballast Water Control and Management Regulations<sup>74</sup>. These regulations are applicable to the shipping safety control zones in the Arctic and also waters in the exclusive economic zone of Canada<sup>75</sup>. The issue of discharges of waste is one of concern to the offshore industry and is more particularly dealt with in the *Canada Oil and Gas Operations Act*.

Transport Canada has the overall responsibility for matters relating to shipping and within their mandate are such agencies as the Pollution Prevention Branch, the Canadian Coast Guard and many others. Discharging their responsibilities related to the Arctic, Transport Canada has published a number of guidelines related to Arctic operations which include TP11663 concerning the operation of tankers and barges in the Arctic, TP12259 which characterizes the relative risk which different ice conditions pose to the structure of different ships and TP12260 which describes equivalent structural requirements for Arctic class ships as prescribed by the Arctic shipping pollution prevention regulations.

The Arctic marine traffic system known as NORDREG is operated by the Marine Communications and Traffic Services personnel. It keeps track of all traffic north of 60° N. In August 2008, the reporting zone was extended to 200 miles thus making it consistent with the AWPPA 200 mile jurisdiction and with Canada's claims to Arctic sovereignty. Reporting to NORDREG remains voluntary.

### **The Oceans Act**

As noted earlier, this Statute has brought into Canadian legislation the UNCLOS regime of maritime rights for coastal states.

Section 20 confirms that Canadian federal laws apply on Continental Shelf installations engaged in hydrocarbon exploration. Part II of the *Act* sets in motion the development of an "oceans management strategy"<sup>76</sup> for Canada and its waters. Section 35 defines a "marine protected area" as follows:

A marine protected area is an area of the sea that forms part of the internal waters of Canada, the territorial sea of Canada or the exclusive economic zone of Canada and has been designated under this section for special protection. ...

An area off Nova Scotia known as the Gully has been designated as such a marine protected area (MPA). This area is close to two exploration licenses.

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<sup>74</sup> SOR/2006-129.

<sup>75</sup> *Ibid.* s. 1.

<sup>76</sup> *Ibid.* s. 28 and following. S. 29 describes the strategy as: "The Minister, in collaboration with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, shall lead and facilitate the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems in waters that form part of Canada or which in Canada has sovereign rights under international law.

The Canada Nova Scotia Offshore Petroleum Board (CNSOPB) policy prohibits oil and gas activity within the Gully MPA boundaries. A number of years ago the CNSOPB published on its website a document concerning environmental assessments and potential exploratory drilling activities on these exploration licenses<sup>77</sup>. In 2009, Encana published a document concerning the installation of well-head protection structures, *inter alia*, in the Sable Island area and the Gully MPA<sup>78</sup>. This document annexes the "Encana Code of Practice for the Gully MPA"<sup>79</sup>. The Code provides in part that<sup>80</sup>:

Encana will not conduct drilling or seismic operations inside the Gully MPA. In addition, no vessels are permitted within the Gully MPA and aircraft in regular transit to and from any vessels, drilling units or facilities are restricted to flying at a height of at least 500 m.

This Code also highlights concerns with marine mammals, the effects of noise on the area and the potential effects of spills<sup>81</sup>.

These restrictions on activities in areas designated as a MPAs have their birth in the Ospar Commission<sup>82</sup>.

In connection with the Gully, Regulations have been made pursuant to the *Oceans Act*<sup>83</sup>. These regulations provide for varying degrees of management of the MPA and include designated "prohibited activities". One such prohibited activity is:

4(c) carry out any activity-including depositing, discharge or dumping any substance, or causing any substance to be deposited, discharged or dumped in the Gully Marine Protected Area **or in the vicinity of that Area** that is likely to result in the disturbance, damage or destruction or removal of anything referred to in paragraph (a) or (b). (emphasis added)

Things not to be removed include any living marine organism or any part of its habitat<sup>84</sup>.

As part of its mandate under Part II of the *Ocean Act* concerning oceans management strategy, the government has also identified the Beaufort Sea as a large ocean management area (LOMA). As noted on the Fisheries and Oceans website, LOMAs "are delineated so that ecosystem health and economic development issues within their boundaries can be addressed and suitably managed"<sup>85</sup>.

The United Nations Environment Program (UNEP) has a very active program in connection with the designation of MPAs. In describing protected areas their website says:

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<sup>77</sup> CNOSPB, Exploratory Drilling Activities on Exploration Licenses 2415 and 2416. Scoping document for the environment assessment, available at [www.cnsopb.ns.ca](http://www.cnsopb.ns.ca)

<sup>78</sup> 2009 Well-Head Protection Structures Installation Environmental Protection Plan / Environmental Effects Monitoring Plan. Available at [www.cnsopb.ns.ca](http://www.cnsopb.ns.ca).

<sup>79</sup> Encana Code of Practice for the Gully Marine Protected Area, accessible at [www.encana.com](http://www.encana.com).

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.* at p. 4.

<sup>82</sup> Described at p. 8.

<sup>83</sup> Gully Marine Protected Area Regulations, SOR/2004-112.

<sup>84</sup> *Ibid.* 4(b) and (c).

<sup>85</sup> Can be accessed through <http://www.dfo-mpo-gc-ca>.

Protected areas are very important for conserving biodiversity. In these areas, human activities are managed to achieve specific conservation goals, for example, to protect a certain species or to conserve a representative habitat or ecosystem. The Arctic has many terrestrial protected areas, but is generally lacking in marine protected areas (MPAs). As the climate warms and the sea ice melts, there will be greater access for activities such as fishing, oil and gas exploration, and tourism. MPAs will become increasingly important to protect Arctic marine ecosystems.<sup>86</sup>

Given the experience to date in eastern Canada, the development of MPAs in the Arctic is an area to watch.

### **Arctic Waters Pollution Prevention Act (AWPPA)**<sup>87</sup>

The original iteration of this Statute applied to 100 miles offshore. As part of Canada's continuing assertion of sovereignty in the Arctic, in 2009 it was amended to extend its application to 200 miles<sup>88</sup>.

This Act generally prohibits the "deposit of waste of any type in the Arctic waters"<sup>89</sup>. The statute imposes civil liability resulting from prohibited deposits on a number of entities including:

Any person who is engaged in exploring for, developing or exploiting any natural resource on any land adjacent to the Arctic waters or in any submarine area subjacent to the Arctic waters<sup>90</sup>.

"Waste" is defined very generously and certainly would include the products of oil exploration and development<sup>91</sup>.

The Arctic Waters Pollution Prevention Regulations<sup>92</sup> set the limits of liability for the offences created by the AWPPA. The limit for an operation engaged in exploring for, developing or exploiting oil and gas, is \$40 million<sup>93</sup>. The nature of the liability is described in the statute as "absolute and does not depend on proof of fault or negligence"<sup>94</sup>. Arguably this limit is not relevant where fault or negligence is involved.

The Arctic Shipping Pollution Regulations<sup>95</sup> are the most important set of regulations governing shipping in the Arctic. The regulations prescribe "shipping safety control zones"<sup>96</sup> in the Arctic and define the types of vessels that are permitted to navigate in these zones, the times of year when such navigation can take place and many other requirements such as having on board

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<sup>86</sup> The work of UNEP in coordination with Grid-Arendal is available at [www.grida.no/](http://www.grida.no/) and also at [www.unep.org/](http://www.unep.org/).

<sup>87</sup> R.S., c. 2(1<sup>st</sup> supp.)

<sup>88</sup> R.S., c. 11, s.1.

<sup>89</sup> *Supra* fn 86, s. 4(1).

<sup>90</sup> *Ibid.* s. 6(1)(a).

<sup>91</sup> *Ibid.* s. 2.

<sup>92</sup> C.R.C., c. 354

<sup>93</sup> *Ibid.* s. 8(f).

<sup>94</sup> *Supra* fn 86, s.7(1).

<sup>95</sup> C.R.C., c.353.

<sup>96</sup> Per Schedule VIII pursuant to the authority of s.11 of the AWPPA.

Arctic pollution prevention certificates<sup>97</sup> and ice navigators<sup>98</sup>. These regulations extend to vessels which are not Canadian flagged and in the context of the transportation of oil, s. 6 of the regulations is directed to the movement of oil tankers, and sets out seasonal travel restrictions in Arctic waters based on the type and construction of the tanker and the quantity and characteristic of the ice on the intended route.

### **Coasting Trade Act**<sup>99</sup>

This Statute governs the use of foreign ships in the coasting trade of Canada which includes waters above the Continental Shelf of Canada insofar as that relates to "the exploration, exploitation or transportation of the mineral or non-living natural resources of the Continental Shelf of Canada"<sup>100</sup>. This provision recognizes that vessels were engaged in hydrocarbon exploration above the Continental Shelf are not engaged in international voyages but are rather present in Canadian water to exploit resources.

Foreign vessels wishing to operate in the oil exploration business are required to make application to the Canadian Transportation Agency which, in appropriate circumstances, may issue a Coasting Trade License for that vessel's Canadian operation<sup>101</sup>. The question asked by the CTA is whether or not there is a Canadian vessel able to carry out the work for which the foreign vessel is applying. In addition to the obvious, a "ship" will include most drilling structures commonly associated with offshore oil exploration<sup>102</sup>.

### **OIL AND GAS LAW RELEVANT TO THE ARCTIC**

Petroleum resource management jurisdiction in the Arctic is governed by the *Canada Petroleum Resources Act* (CPRA)<sup>103</sup> and the *Canada Oil and Gas Operations Act* (COGOA)<sup>104</sup>.

The CPRA governs the allocation of Crown lands to the private sector, tenure to the allocated rights and the setting and collection of royalties. It is the statute under which the federal government provides permission for oil and gas exploration to occur on Crown lands.

The COGOA governs the exploration, drilling, production, conservation, processing and transportation of oil and gas.

These statutes are well known to Canadian oil and gas lawyers and in this section we will highlight only those areas that seem to be of direct interest to offshore hydrocarbon exploration.

COGOA applies to waters above the Continental Shelf<sup>105</sup>.

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<sup>97</sup> *Ibid.* s. 12.

<sup>98</sup> *Ibid.* s. 26.

<sup>99</sup> S.C. 1992, c. 31.

<sup>100</sup> *Ibid.* s. 2(1).

<sup>101</sup> *Ibid.* s. 4.

<sup>102</sup> The *Coasting Trade Act* definition of "ship" is the same as "vessel" in s.2 of the *Canada Shipping Act, 2001* which provides: "Means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above the water, without regard to method or lack of propulsion". Such units as semi-submersible drilling rigs, jack-up rigs and some Arctic drilling caissons qualify. The Molikpaq, an Arctic drilling caisson which drilled in the Beaufort in the 1980s was registered as a ship with the Registry of Shipping for Canada.

<sup>103</sup> R.S., 1985, c. 36 (2<sup>nd</sup> Supp.).

<sup>104</sup> R.S., 1985, c. O-7.

Petroleum discharges, emissions or escapes are regulated in cases where such events do not constitute vessel discharges covered by the *Canada Shipping Act, 2001* or the *Marine Liability Act*<sup>106</sup>. Oil and gas discharges, emissions or escapes are also covered by COGOA. The Act imposes strict liability for actual loss or damage incurred<sup>107</sup>. Such damages include loss of income, including future income and with respect to any aboriginal peoples of Canada, includes loss of hunting, fishing and gathering opportunities<sup>108</sup>.

Effective 2010, a new version of the Canada Oil and Gas Drilling and Production Regulations<sup>109</sup> came into effect. Coincident with their coming into effect, the National Energy Board issued "draft safety plan guidelines"<sup>110</sup> which are intended to be read with the safety plan requirements of the regulations and to "provide assistance to interested parties in understanding the requirements of the DP Regs and how those requirements could be met"<sup>111</sup>. Various aspects of offshore exploration are addressed including:

- When using a MODU, the operator should submit a safety case developed in accordance with the International Association of Drilling Contractors (IADC), HSE case guideline for mobile offshore drilling units<sup>112</sup>.
- Where marine vessels are used, the operator should take advantage of the ship's international safety management certification and ensure that the vessel has a valid ISM certificate<sup>113</sup>.
- An operator may rely on a Certificate of Fitness as third party verification of regulatory requirements. The guidelines, however, note that these certificates do not relieve the operator of overall accountability for the equipment<sup>114</sup>.

The NEB has been sensitive to the effect of sound, particularly seismic noises. In 2008, the NEB issued a statement with respect to the mitigation of seismic sound in the marine environment<sup>115</sup>.

One can anticipate that the issue of noise and the environment may well raise its head in connection with the Arctic. It certainly has been an issue with environmental groups in the United States. Very recently, the Supreme Court of the United States in *Winter v. Natural Resources Defence Council*<sup>116</sup> considered whether sonar use by the US Navy was causing

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<sup>105</sup> *Ibid.* s. 3(b).

<sup>106</sup> *Ibid.* s. 24.

<sup>107</sup> *Ibid.* s. 26(2).

<sup>108</sup> *Ibid.* s. 24(3).

<sup>109</sup> SOR/2009-315.

<sup>110</sup> The NEB website at [www.neb-one.gc.ca](http://www.neb-one.gc.ca) found under "North/Offshore".

<sup>111</sup> *Ibid.* at p. 1.

<sup>112</sup> *Ibid.* at p. 10. The IADC document referred to can be accessed at [www.iadc.org](http://www.iadc.org).

<sup>113</sup> *Ibid.* at p. 10. The ISM Code 2002 is a document produced by IMO to provide an international standard for the safe management operation of ships and for pollution prevention and can be accessed at [www.imo.org](http://www.imo.org).

<sup>114</sup> *Ibid.* p. 18. See also Canada Oil and Gas Certificate of Fitness Regulations, SOR/96-114. The comment in the guidelines concerning the continuing obligations of the operator are comparable in the shipping world to the well-known rule that a shipowner cannot delegate to a third party the obligation to have a seaworthy vessel.

<sup>115</sup> July 2008, accessible at [www.neb-one.gc.ca](http://www.neb-one.gc.ca).

<sup>116</sup> (2008) 129 S. Ct. 365.

irreparable harm to a number of species of marine mammals, including dolphins, whales and sea lions. The court found in favour of the Navy. As with many issues, it is often useful to turn one's attention to what is going on in the American courts.

Recently the NEB decided to review its policy concerning Same Season Relief Well (SSRW) capability in the Beaufort Sea, calling it a matter of "significant public concern"<sup>117</sup>. On February 5, 2010, the Board issued a hearing order MH-1-2010 regarding National Energy Board policy for SSRW capability for drilling in the Beaufort Sea<sup>118</sup>. The Board solicited written representations from interested parties and arranged for a technical conference. Interestingly, the Board had earlier decided on August 13, 2009, insofar as the SSRW policy was concerned to withdraw its delegation of powers to its chief conservation officer and indicated that any matter dealing with SSRW capability would from now on "be directly handled by the Board"<sup>119</sup>.

The SSRW "policy" has a long history<sup>120</sup>. It was formulated in the 1970s and approved by the Canadian government. The policy was designed to ensure that when a well was being drilled in the Beaufort Sea during the open water season, there would be appropriate drilling equipment in the area that, in the event of a blow-out, could be moved to the site to complete a relief well before the ice conditions became so severe that the drilling equipment could no longer operate. This meant that the second unit had to be designated and arrangements in place to ensure that the unit could move to the location and be used to complete a relief well within a limited period of time<sup>121</sup>, certainly within the same drilling season. In 1989 when COGLA (Canadian Oil and Gas Lands Administration) was the Canadian government entity responsible for regulating the offshore it reviewed the SSRW policy but no changes were made to it<sup>122</sup>.

In 1991 the Canadian government created the Beaufort Sea Steering Committee (BSSC) to assess various concerns relating to government preparedness for an oil spill resulting from an oil well blow-out in the Beaufort Sea. This committee produced a multi-volume report in April 1991. Volume 7 of that report dealt exclusively with the issue of the SSRW. Volume 7 makes it clear that the SSRW policy was based on the ability of drill ships and their support fleets in the mid-1970s. No change to the SSRW policy was forthcoming from this 1991 review.

As a result of the 2010 NEB decision to review its policy concerning SSRW, a number of oil companies and drilling contractors made written submissions to the NEB<sup>123</sup>. These submissions are technical in nature and identify a number of issues including:

- The existing SSRW is not feasible as the industry begins drilling in the deepwater Beaufort Sea where there are much deeper water depths, more severe ice conditions and deeper and more complex wells.
- Ice coverage and the presence of multi-year ice increase as drilling moves towards the edge of the Continental Shelf.

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<sup>117</sup> 24 August 2009 NEB file Ad-GA-RG-COGDPR 01 accessible at [www.neb-one.gc.ca](http://www.neb-one.gc.ca).

<sup>118</sup> NEB file OF-EP-Well 05.

<sup>119</sup> 24 August 2009 NEB file Ad-GA-RG-COGDPR 01 accessible at [www.neb-one.gc.ca](http://www.neb-one.gc.ca).

<sup>120</sup> All the documents referred to in this section can be found on the National Energy Board website.

<sup>121</sup> COGLA Engineering Branch, Policy On Relief Well Drilling "Beaufort Sea", a commentary. Oct./1989.

<sup>122</sup> *Ibid.*

<sup>123</sup> These can be accessed at [www.neb-1-gc.ca](http://www.neb-1-gc.ca).

- Multi-season wells will continue as drilling moves onto the slope of the Continental Shelf itself.
- Significant technical improvements have been made by the industry since the current SSRW policy was put in place which allow for a preventative rather than reactive approach to the relief well issue.
- Completing the drilling of a relief well, the killing of the original well and safe suspension of both during a single season is not possible in the deepwater Beaufort Sea.

These articulated issues highlight a number of points. Firstly, they recognize that drilling in the Beaufort is increasingly moving to deeper water and potentially out to the Continental Shelf itself. This will highlight issues for oil companies related to UNCLOS Article 82 discussed earlier<sup>124</sup>. The number of submissions is indicative of a renewed interest in deepwater drilling in the Beaufort Sea and the Arctic.

The SSRW review was initiated before the March 2010 explosion and sinking of the transoceanic rig "*Deep Water Horizon*" in the Gulf of Mexico. That event caused the NEB to cancel its proposed technical hearings concerning SSRW capability. It is, however, still useful to consider submissions that had been made since they certainly highlight the then current views of the oil companies and contractors.

In response to the *Deep Water Horizon* incident, the NEB, in June 2010, announced a "Public Review of Arctic Safety and Environment Offshore Drilling Requirements". This review is intended to:

Engage industry and the public in examining the best available information concerning the hazards, risks and mitigation measures associated with offshore drilling activities in the Canadian Arctic and the measures to both prevent and respond to accidents and malfunctions.

(More details are available on the NEB website.)

## **THE ABORIGINAL ISSUES**

The Federal Government has concluded a number of land claims agreements in the North. The major ones for consideration in this section are the agreements with the Nunavummiut and Inuvialuit People of northern Canada. These agreements play an important part in the consideration of future oil and gas developments offshore northern Canada. These major agreements are the Inuvialuit Final Agreement,<sup>125</sup> the Nunavut Land Claims Agreement<sup>126</sup>, and,

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<sup>124</sup> At p.4. Resolution of competing interests in hydrocarbons that may straddle the OCS of a Coastal state and its 200 mile economic zone. Since a royalty payment due under Article 82 is dependent on production, one can envisage disputes concerning the common law rule of capture. ISA Study No. 4 referred to in fn 13 highlights this issue at p. 62.

<sup>125</sup> See the Western Arctic Claim, The Inuvialuit Final Agreement, signed 5 June 1984 by the Inuvialuit and the Government of Canada [IFA]. For settlement legislation see Western Arctic (Inuvialuit) Claims Settlement Act, R.S.C. 1984, c.24.

<sup>126</sup> Nunavut Land Claims Agreement signed May 25, 1993 [NLCA]; for settlement legislation see Nunavut Land Claims Agreement Act, R.S.C. 1993, c.29.

to some extent, the North Baffin Regional Land Use Plan<sup>127</sup> (collectively, the "Agreements"). The Agreements must be considered with the pronouncements of the Supreme Court in *Haida Nation v. B.C. & Weyerhaeuser*,<sup>128</sup> a 2004 decision rendered subsequent to the Agreements. This decision both establishes and defines the duty of the Crown to consult with, and accommodate, the indigenous peoples of the Arctic, particularly where government activities have the potential of negatively impacting Aboriginal or Treaty Rights.

In this section we discuss the Agreements and the duty to consult followed by a consideration of two cases currently before the Supreme Court of Canada which have the potential to impose a continuing duty to consult on already concluded Final Agreements and, secondly, to enlarge beyond government the actual obligation to consult. Finally we discuss the interaction of offshore oil and gas development with Aboriginal issues and point out some international developments in matters involving Aboriginal Title to sea spaces.

### **The Inuvialuit Final Agreement (IFA)**

The Inuvialuit Final Agreement is the first land claim settled north of the 60<sup>th</sup> parallel in Canada. The *IFA* gives the Inuvialuit the right to fully participate in decision making processes that may affect conservation and economic development related to the Beaufort Sea.<sup>129</sup>

The Inuvialuit have legal control over their land with ownership of 91,000 square kilometres (35,000 square miles) of land including 13,000 square kilometres (5,000 square miles) with subsurface rights to oil, gas and minerals. The *IFA* is based on sustainable development and one of the primary goals of the *IFA* is to enable the Inuvialuit to be equal and meaningful participants in the northern and national economy and society while preserving their cultural identity and values within the changing northern environment. Along with the goal of protecting and preserving Arctic wildlife, environment and biological productivity these goals will have a significant impact on offshore developments in the Arctic region.

The language of the *IFA* is the first source of legal authority when dealing with issues of consultation, accommodation or future Rights and Title claims by the Inuvialuit over the Arctic sea beds, however, the common law and the Constitution always play a role in determining Rights of Aboriginal people. The definition of development in the *IFA* is important when considering offshore development in the Arctic. The definition includes:

any commercial or industrial undertaking or venture, including support and transportation facilities related to the extraction of non-renewable resources from the Beaufort Sea, other than commercial wildlife harvesting.<sup>130</sup>

The *IFA* provides explicit water rights and the requirement of participation agreements with the Inuvialuit people, both of which may have a significant impact on offshore development in the Arctic as the Inuvialuit people have been "granted title in fee simple absolute to the beds of all lakes, rivers, and other water bodies found in Inuvialuit lands." The Crown does retain

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<sup>127</sup> *North Baffin Regional Land Use Plan* online: The Nunavut Planning Commission <http://www.nunavut.ca/en/about-commission/important-information/approved-plans> [NBRLUP].

<sup>128</sup> [2004] 3 S.C.R. 511, 2004 SCC 73 [*Haida*].

<sup>129</sup> "Beaufort Sea", online: Oceans North Canada <http://www.oceansnorth.org>. The Inuvialuit settlement region includes the Beaufort Sea.

<sup>130</sup> *Supra* note 124 at s. 2.

ownership of all waters in the Inuvialuit Settlement Region, however, as a consequence of the common law duty to consult and the rights granted in the IFA, the Inuvialuit people play an important role in the economic development of the Arctic region.<sup>131</sup>

The Arctic Offshore Oil and Gas Guidelines<sup>132</sup> provide a useful summary of the government agencies at play. The National Energy Board (NEB), pursuant to the *Canada Oil and Gas Operations Act*<sup>133</sup> has the primary responsibility for authorizing oil and gas activity in Canada's Arctic region, while Indian and Northern Affairs is responsible for issuing licenses for exploration, significant discovery and development licenses under the *Canada Petroleum Resources Act*.<sup>134</sup>

The development activity taking place in the Beaufort Sea will certainly attract the provisions of the *IFA*, particularly Section 11 which outlines the environmental screening and review process and Section 7.<sup>135</sup>

### **The Nunavut Land Claims Agreement (NLCA)**

The *NLCA* is the largest Aboriginal land claim settlement in Canadian history. When the Agreement was signed, contemporaneous legislation created the new territory of Nunavut on April 1, 1999. The Nunavut Land Claims Agreement gives title to Inuit-owned lands measuring about 350,000 square kilometres (of the total area of Nunavut of 1.9 million square kilometres), of which about 35,000 square kilometres include mineral rights. The first objective of the *NLCA* to have a direct impact on offshore development in the Arctic is:

to provide for certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore.<sup>136</sup>

Article 11 of the *NLCA* addresses land use planning. Land is defined to include, "water and resources including wildlife."<sup>137</sup> The Nunavut Planning Commission has an important mandate under the *NLCA* to prepare and implement land use plans that guide and direct resource use and development. Land use plans tell others how Inuit want the land and water used today and into the future. Any development in the Arctic that impacts the area covered by the *NLCA* is bound by a consultation and approval process as outlined in Article 12 of the *NLCA*, Development Impact. This Article has a detailed approval process that is carried out by the Nunavut Impact Review Board (NIRB). Because of settlement of land claim agreements the approval of projects or issuing of licences under the *CPRA* requires different environmental assessment processes in different regions of the Arctic.<sup>138</sup> Article 12 of the *NLCA* outlines the sole environmental assessment process applicable to the Nunavut Settlement Region which can be a lengthy process.

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<sup>131</sup> *Ibid.* at s. 7(2).

<sup>132</sup> *Arctic Offshore Oil and Gas Guidelines* online: Arctic Council <http://www.artic-council.org>.

<sup>133</sup> R.S. 1985, c. O-7 [*COGOA*].

<sup>134</sup> R.S. 1985, c. 36 (2<sup>nd</sup> Supp.) [*CPRA*]. See also *Oil & Gas Approvals in the Beaufort Sea, A Guide to Regulatory Approval Processes for Oil and Natural Gas Exploration and Production on Canada's Frontier Lands in the Beaufort Sea, the Regulatory Roadmaps Projects*, 2002 accessible at <http://www.oilandgasguides.com>.

<sup>135</sup> *Supra* note 124 at ss. 7, 11(1), and 11(3).

<sup>136</sup> *Supra* note 125, *Nunavut Land Claims Agreement Act*, at Preamble.

<sup>137</sup> *Ibid.* *NLCA*, at Article 11.1.2.

<sup>138</sup> *Supra* note 133.

### **North Baffin Regional Land Use Plan (NBRLUP)**

The NBRLUP was effective June 20, 2000. It was prepared by the Nunavut Planning Commission (NPC) in accordance with the procedure for public consultation and government review and required by Article 11 of the *NLCA*, *supra*. Since the original NBRLUP plan was approved, the *NLCA* has come into effect. The NPC was established as a result of the creation of the *NLCA*. The NPC established a process of land use planning throughout Nunavut. The land users want a balance between uses in the region. The NPC, after a review and consultation, with the people in the affected communities and other interested parties, believed that general direction on how land should be used and how land users should cooperate in their use of the land continues to be the best way to establish a balance between users.<sup>139</sup>

Since the inception of the *NLCA*, the original NBRLUP has been revised. The revised land use plan encourages and supports current initiatives for community involvement in land use decision making, and introduces new means of accomplishing this involvement. Article 3.5 addresses Marine and Terrestrial Transportation in the following terms:

The NPC does not support year round Arctic shipping because of the uncertainty about its effects on regional residents and the environment and wildlife.<sup>140</sup>

Articles 3.5.1 to Article 3.5.12 provide a detailed analysis of the requirements for shipping activity under the terms of the NBRLUP.<sup>141</sup>

Similar issues concerning mineral exploration and production are outlined in Article 3.6. The NPC recognizes the value and contribution of mineral exploration and development in the northern region, and supports industry's access to land for exploration while at the same time emphasizing the need of industry to be sensitive to the changed approval process introduced under the *NLCA*.<sup>142</sup>

Article 3.7 of the NBRLUP addresses similar concerns with respect to oil and gas exploration and production and provides for the duty to consult with the native people of the Arctic region that are affected by this type of development. The Department of Indian and Northern Affairs Development and other relevant departments of the Nunavut Government have a responsibility to ensure the communities receive the best information available concerning the risks and benefits of oil and gas exploration and production and promote information sharing among the local people and those that have knowledge or experience in drilling, in ice-infested waters and in strong ocean currents (e.g., residents, researchers, drilling operators in the Beaufort Sea and the east coast regions). The Government must ensure that communities are involved in setting research priorities and participating in research while being able to access independent (including government and industry) sources of information. It must be clear that the communities comprehend the research results. Lastly, oil and gas exploration companies must continually work to reduce any negative effects their work may have on the environment. Their

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<sup>139</sup> *Supra* note 126.

<sup>140</sup> *Ibid.* at p. 45.

<sup>141</sup> *Ibid.* at pp. 45-46.

<sup>142</sup> *Ibid.* at p. 49.

activities must align with the rights and benefits afforded the Aboriginal people through the Impact and Benefits Agreements in the *NLCA*.<sup>143</sup>

### **The Duty To Consult Aboriginal people**

Consultation is any discussion, negotiation or meeting used to justify Crown infringement of Aboriginal and Treaty Rights. The duty to consult is constitutionally-based law that provides a form of protection to Aboriginal Rights and Treaty Rights from activities that can have a negative impact on those Rights. The protection includes both procedural and substantive rights. Factors that are integral to a successful consultation process with Aboriginal people include early notification in the development process, well in advance of the required permits, licences, leases, and other approvals.<sup>144</sup> It is important to bear in mind however, that although consultation is the first step, accommodation is also a key step in the process. Early engagement of the Indigenous people in the Arctic is integral to a successful project.

The duty of the government to consult with and potentially accommodate the needs and interests of Aboriginal peoples is grounded in the principle of the honour of the Crown, which must be given a broad, liberal understanding, best stated by the Supreme Court in *Haida*. While the asserted but unproven Aboriginal Rights and Title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot casually run roughshod over Aboriginal interests, particularly where claims affecting these interests are being sought in the process of treaty negotiation and proof. In *Haida, supra*, the Court held, "the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution."<sup>145</sup>

The Supreme Court in *Haida, supra*, held that the Crown has a legal duty to consult with Aboriginal People where there is a proven Aboriginal or Treaty Right, potential Aboriginal or Treaty Right or a "credible but unproven claim."<sup>146</sup> When assessing whether or not there is an existing duty the question is whether the government had real or constructive knowledge of the potential existence of Aboriginal Rights or Title and contemplated conduct that may negatively impact these Rights or Title.

The Crown does not have a duty to reach an agreement with the Aboriginal people, but it must commit to participate, in good faith, to a meaningful consultation process. Consultation implies the possibility of a duty to accommodate Aboriginal interests. Thus far, entities other than the Crown have not been held responsible for the failure to discharge the Crown's duty to consult and accommodate Aboriginal people. The duty stems from the honour of the Crown and its assumption of sovereignty over land and its resources that were previously held by the Aboriginal people and this duty cannot be delegated to third parties but this does not mean that third parties can never be held liable to Aboriginal people. If third parties act negligently toward Aboriginal people where a duty of care exists or if third parties breach contracts with Aboriginal people, they can be held legally liable.<sup>147</sup>

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<sup>143</sup> *Ibid.*

<sup>144</sup> Naomi Metallic, "Consultation & Accommodation Developments Across Canada" (Paper presented at the 2<sup>nd</sup> Annual *INSIGHT* Aboriginal Law and Economic Development Forum, 18 February 2010) [unpublished].

<sup>145</sup> *Supra* note 127, at para. 32.

<sup>146</sup> *Ibid.* at para. 37.

<sup>147</sup> *Ibid.*

### ***Arctic Consultation with Aboriginals***

As noted earlier in this paper, the Government of Canada has a long history of consultation with the Inuvialuit people of the Arctic. Negotiations began in 1974 and the *ILA* concluded the process. Many provisions in the *ILA* describe the consultation requirement that the Government of Canada has with the Inuvialuit people. This requirement includes matters involving Crown land, water rights, administration of rights, participation agreements, environmental screening and more. These processes have been imbedded in the negotiation process involving development in the Inuvialuit Settlement Region. More specifically, section 7 of the *IFA* states that subject to the *IFA*, holders of oil and gas, coal, mineral and quarrying rights on Inuvialuit 7(1)(a) lands (4200 square miles of land in the Western Arctic Region and 800 square miles of land in Cape Bathurst) and holders of quarrying rights issued before December 31, 1983 on Inuvialuit 7(1)(b) lands (Inuvialuit lands selected by agreement between COPE and Canada, as described in s. 9(5) of the *IFA*), are entitled to enjoy the rights (including renewals) until they are terminated. Canada must continue to administer the rights of these interest holders. Certain discretionary decisions must be made with the consent of the Inuvialuit, where the economic interest of the Inuvialuit is prejudiced and the administration of the rights can be transferred to the Inuvialuit, if the holder and the Inuvialuit agree.<sup>148</sup> Section 7(75) of the *IFA* refers specifically to the extraction of subsurface resources in the Pingo Canadian Landmark. It states that, "any future exploration for or extraction of the subsurface resources of the Pingo Canadian Landmark shall be carried out from outside the site in a manner that does not damage the pingos." The Government's duty to consult is clearly outlined in s. 7(73) which holds that, "The Pingo Canadian Landmark shall be managed under the National Parks Act, in consultation with the Inuvialuit Land Administration and the people of Tuktoyaktuk, as a joint management regime." Finally, every application for exploration, development or production rights on Crown within the Inuvialuit Settlement Region must apply general government guidelines relating to social and economic interests to favour Aboriginals as per section 16 of the *IFA*.<sup>149</sup>

Pursuant to the *NLCA* the Nunavut Planning Commission was created as an independent public agency, drawing its authority from the *NLCA*. The NPC has distinct authority and decision making power and it is the NPC's responsibility to make final decisions on how land use plans will be developed and how the plans will manage the land in Nunavut<sup>150</sup>. The Nunavut Planning Commission has an important mandate under the *NLCA* to prepare and implement land use plans that guide and direct resource use and development. Land use plans tell others how Inuit want the land and water used today and into the future. Because of settlement of land claim agreements the approval of projects or issuing of licences under the *CPRA* requires different environmental assessment process in different regions of the North.<sup>151</sup> This is one example of the type of communication and consultation the Government must have with the Aboriginal people when considering economic development in the Arctic region. This is particularly important because the oil and gas reserves in Nunavut are among some of the largest and have been lying dormant since 1985. As well, the Nunavut Government has no control over the development of the offshore oil and gas market as that is the jurisdiction of the Federal Government with all the decision making power being in southern Canada.<sup>152</sup>

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<sup>148</sup> Northwest Territories Inuvialuit Settlement Region Lands, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/enr/lids/pubs/jrlr/b2nwt-eng.pdf> at p. 25.

<sup>149</sup> *Supra* note 124.

<sup>150</sup> *About the Commission*, online: Nunavut Planning Commission <http://www.nunavut.ca>.

<sup>151</sup> *Supra* note 133.

<sup>152</sup> Nunatsiak Online, News Release, "NPC promises draft Nunavut land use plan by fall" (24 March 2010), online: [http://www.nunatsiaqonline.ca/stories/article/98789\\_ottawa\\_to\\_hunt\\_for\\_oil\\_in\\_nunavuts\\_lancaster\\_sound/](http://www.nunatsiaqonline.ca/stories/article/98789_ottawa_to_hunt_for_oil_in_nunavuts_lancaster_sound/).

Under the NBRLUP, there are many processes to be followed when considering development in the North Baffin region of the Arctic. Activities involving the development of shipping routes, mining exploration and production and/or oil and gas exploration and production, all require a consultation process with the North Baffin people. The NPC recognizes the value and contribution of mineral exploration and development in the northern region, and supports industry's access to land for exploration while at the same time it emphasizes industry's need to be sensitive to the changed approval process introduced under the *NLCA*. There is a need for adequate communication and consultation prior to commencement of exploration or other work, and the necessity to take into account the very real desire of the people of the region to share in the benefits that mining, oil and gas produces.<sup>153</sup>

### ***Developments in the Jurisprudence on Consultation and Aboriginal Rights***

#### ***Little Salmon / Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)***<sup>154</sup>

In this case, Little Salmon Carmacks First Nation brought a claim against the Yukon Government for failure to comply with a legal duty to consult and, where possible, accommodate Little Salmon in respect of an application by Larry Paulsen for an agricultural grant of Crown land located in the traditional territory of the First Nation and the trapline of Johnny Sam, a member of Little Salmon. This case was heard by the Supreme Court of Canada in 2009. It has the potential to affect what may have been considered to be the finality of existing comprehensive land claim agreements including the IFA and the NCLA. Notwithstanding the fact that an agreement may be called a Final Agreement, the trial judge in *Little Salmon*<sup>155</sup> ruled that this does not abrogate the common law duty to consult with respect to Final Agreements. The Yukon Court of Appeal, while finding that the duty to consult had been met by the Yukon government, reaffirmed the ruling of the Supreme Court of Canada in *R. v. Kapp*<sup>156</sup>, that "there can be no doubt that the duty to consult is recognized as a constitutional duty."<sup>157</sup>

The Yukon government had argued that the duty to consult and accommodate does not apply where the duty to consult has been defined and limited to specific circumstances in the Final Agreement. They also argued that the "honour of the crown" does apply to the Final Agreement, but it should not be used to undermine the certainty intended to be achieved by a final agreement. The Yukon Court of Appeal disagreed.

The following passage from the *Little Salmon* case reiterate the positions of both parties and clarify the issue:

The Yukon Government acknowledges that the honour of the Crown applies to the terms of the Final Agreement. However, it says that the right to transfer land in the Traditional Territory of the First Nation is not limited by any term in the Final Agreement. It further states that the interpretation of the Certainty clause and the specific terms of the duty to consult set out in the Final Agreement support the proposition that there is no other duty to consult that should be applied. In its own words:

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<sup>153</sup> *Ibid.*

<sup>154</sup> 2008 YKCA 13 [*Little Salmon*].

<sup>155</sup> 2007 YKSC 28.

<sup>156</sup> 2008 SCC 41, [2008] 2 S.C.R. 483.

<sup>157</sup> *Supra* note 153, at para. 88.

"The respondents say that any common law duty to consult and accommodate which might otherwise have arisen in this case has been replaced by the rights set out in the Final Agreement which is a land claims agreement within the meaning of section 35 of the *Constitution Act*, 1982 and thus a constitutionally entrenched treaty.

...

The primary objective of the Final Agreement was to bring about a reconciliation of government interests and Aboriginal Rights by giving the parties to the treaty certainty as to the nature and extent of their Rights and obligations, including the rights of the parties to own and use lands. To add to or alter the nature of those Final Agreement obligations would actually challenge the certainty the parties wished to achieve and thereby undermine the process of reconciliation.

...

By carrying out its obligations to the First Nation under the treaty, Yukon acts consistently with the honour of the Crown. While the honour of the Crown infuses the interpretation of the treaty, it should not be invoked to undermine the certainty that this modern treaty is intended to achieve."<sup>158</sup>

Finally, the Yukon Government submitted that, "its consultation with Yukon First Nations with Final Agreements is not a legal obligation but good practice and the same policy applies to municipal governments, non-government organizations and private citizens."<sup>159</sup> This is one of the issues to hopefully be determined by the Supreme Court of Canada shortly.

The outcome of this case may have considerable impact on the sanctity of Final Agreements when considering future developments in Arctic waters. The agreements that are currently in place, the *IFA*, the *NLCA* and the *NBRLUP* all contain provisions for the rights of Indigenous peoples. This was also the case in *Little Salmon* which contained a provision in the Final Agreement that:

Settlement Agreements shall not affect the ability of Aboriginal people of the Yukon to exercise, or benefit from any existing or future constitutional rights for Aboriginal people that may be applicable to them.<sup>160</sup>

*Little Salmon* clearly raises the issue that the extent of the Crown's singular obligation to consult Indigenous peoples may not end with the language of a Final Agreement. What this case tells us is that despite the consultation language in final agreements, this may not be the extent of the Crown's obligation to consult Indigenous peoples.

*Rio Tinto Alcan Inc v. Carrier Sekani Tribal Council*<sup>161</sup>

This appeal is scheduled to be heard by the Supreme Court of Canada in May, 2010. The decision in this case is integral to the extent of the duty owed by administrative bodies to consult Aboriginal peoples.

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<sup>158</sup> *Ibid.* at para. 52.

<sup>159</sup> *Ibid.* at para. 21.

<sup>160</sup> *Ibid.* at para. 29.

<sup>161</sup> 2009 BCCA 67 [*Rio Tinto*].

Alcan had developed both an aluminum smelter in Kitimat, and power facilities in Kemano, a nearby community, in order to provide power to their facilities. The construction of the power facilities in the 1950s involved the creation of reservoir as well as the re-routing of the Nechako River. The Crown granted Alcan the necessary water licences in order to carry out this construction and operation. British Columbia Hydro and Power Authority (B.C.Hydro) wanted to buy electricity from Rio Tinto Alcan Inc. (Alcan) in accordance with an Energy Purchase Agreement (EPA) made in 2007.

The Carrier Sekani Tribal Council alleged that the Crown did not fulfill its duty to consult them before B.C. Hydro entered into the EPA and sought to be heard by the British Columbia Utilities Commission. The interest of the Tribal Council was in water and related resources. They claimed that the diversion of water for Alcan's use was an infringement of the Tribal Council's Rights and Title as they were never consulted. The British Columbia Court of Appeal reiterated the language of *Haida* that the duty to consult is not necessarily to agree or to make compromises, rather, the duty to discuss must be open to accommodation when necessary. The Court found that:

B.C. Hydro, as a Crown corporation, was taking commercial advantage of an assumed infringement on a massive scale, without consultation.<sup>162</sup>

The Court of Appeal found in favour of the Tribal Council and ruled that the matter be sent back to the British Columbia Utilities Commission to hear arguments on whether there was a duty to consult and if necessary, accommodate, and if so, was that duty met by the Crown in respect of the filing of the EPA. This case is important since it may have the effect of extending the duty to consult beyond Crown corporations to any administrative body that is in the position of authorizing and issuing permits that allow activities to occur that may have a negative impact on Aboriginal Rights or Title.

The National Energy Board is very cognizant of the extent and nature of the duty to consult. In July 2008, the NEB published a commentary entitled "Consideration of Aboriginal Concerns in National Energy Board Decisions".<sup>163</sup> This document attempts to explain how the board takes into account the rights or interests of Aboriginal people in reaching its decisions. The board outlines the ways in which it requires project applicants to consider Aboriginal concerns. Apparently aware of issues concerning the duty to consult, the board states:

Because the Board is a quasi-judicial tribunal and operates much like the court, it can only consider evidence filed by the applicant and any interested parties in the hearing. The common law rules of natural justice mean that the Board cannot engage in one-on-one discussions with any interested parties outside of the hearing process. However, the Board does take steps to ensure that it has sufficient evidence before it makes its decision, including evidence the impact of the proposed project may have on Aboriginal peoples.<sup>164</sup>

### **Arctic Oil and Gas and Aboriginal Interests**

According to the Beaufort Sea Regional Strategic Plan of Action, "there is a renewed interest in oil and gas exploration and development in the Mackenzie Delta-Beaufort Sea region of

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<sup>162</sup> *Ibid.* at para. 13.

<sup>163</sup> Accessible at NEB website: <http://www.neb.gc.ca>.

<sup>164</sup> *Ibid.*

Canada's western Arctic".<sup>165</sup> The offshore oil and gas situation in the Arctic region is much different today than it was two decades ago when oil and gas play in the offshore was at its all time high. The IFA is the most relevant land claim agreement, which is also influenced by land claims in the Yukon. This land claim settlement process has served to affirm modern day forms of governance and the role of the region's Indigenous and local inhabitants in the planning process, such as offshore co-management regimes and environmental assessment processes, details of which can be found at Appendix III of the *IFA*. Under the 1993 *Canada Yukon Oil and Gas Accord*<sup>166</sup>, the federal government made a commitment to negotiate a shared offshore management regime and revenue sharing arrangement in the Beaufort Sea with the Yukon government and it is expected that the same responsibility for the management of oil and gas, in the Northwest Territories will be similar under the devolution process.<sup>167</sup>

Oil and gas activities will have a significant impact on the region, particularly for the Inuvialuit, as well as the NWT and Yukon. Though this opportunity will offer benefits and opportunities, such as employment and business opportunities and increased government revenues, it also has the potential for adverse impacts, both social and environmental. Since the oil and gas activity began in the Beaufort, much knowledge has been gained from reports such as *Environmental Impacts of Arctic Oil and Gas Development* (1975) and the *Beaufort Sea Project Technical Report Series* (1977), to more recent initiatives like the Northern Oil and Gas Action Program (NOGAP) and the Environmental Studies Research Fund (ESRF) but challenges remain for industry and regulators. These challenges include an evolving regulatory environment, biophysical and socio-economic knowledge gaps, the impacts of climate change, and lack of infrastructure.<sup>168</sup>

According to a 2004 report of the Offshore Oil and Gas Industry, "Nunavut has been estimated to contain as much as 10 per cent of Canada's conventional crude oil resources and nearly one-quarter of our natural gas resources."<sup>169</sup> The development of Arctic petroleum resources has been dormant for many years due to high costs, complex regulatory environment, Aboriginal issues, short seasons, and environmental issues involved in building production and transportation systems to distant markets. Since 1985, the landscape with respect to Aboriginal Rights has changed and now any development in Nunavut will be subject to the NLCA and the NBRLUP.

On April, 8, 2010, a story from the Nunavut News entitled, "Ottawa to hunt for oil in Nunavut's Lancaster Sound - Geological Survey project goes forward despite marine park declaration," has raised some controversy over offshore oil and gas development. At the same time that the Federal Government was hailing Lancaster Sound a recent example of the Conservative Government's commitment to conservation, federal officials from the Geological Survey of Canada, a division of Natural Resources Canada, were seeking approval for a research expedition in the Summer of 2010, to board a German icebreaker, the *Polarstern* and study the petroleum potential of Lancaster Sound.<sup>170</sup> Given all of the other factors at play in the north and

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<sup>165</sup> Beaufort Sea Strategic Regional Plan of Action, online:

<http://www.bsstrpa.ca/uploads/RPA%20Interim%20Draft%20Feb.28.doc> at p. 3.

<sup>166</sup> S.C. 1998, c. 5.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Supra* note 160.

<sup>169</sup> Canada's Offshore Oil and Gas industry as viewed by the Government of British Columbia at <http://www.gov.bc.ca/empr/> at p. 3.

<sup>170</sup> *Supra* note 151.

the decrease in the availability of hydrocarbons, offshore oil and gas development in Nunavut may have a rebirth.

### **Developments In Aboriginal Title To Sea Spaces**

In Canada today, there are a number of settled land claims agreements that expressly extinguish Aboriginal claims to sea spaces.<sup>171</sup> Section 3(4) of the *IFA* conveys to the Crown, "all...Aboriginal claims, Rights, Title and interests...in and to the Northwest Territories and Yukon Territory and adjacent off-shore areas..." and Article 15.2.3 of the *NLCA* states that, "[t]here shall be no Inuit Owned Land in marine areas."<sup>172</sup>

There is one agreement, however, that does recognize Aboriginal Title to sea spaces, although it does come with a qualification. Chapter 4 of the Labrador Inuit Land Claims Agreement (*LILCA*) provides the Inuit with special rights in "approximately 28,000 square miles of land and 18,800 square miles of tidal waters located within Canada's twelve-mile territorial sea." Also included are a number of water lots that extend out under the ocean with an area of approximately 22.25 square miles that have been included in the defined "Labrador Inuit Lands". Paragraph 4.4.3(a) the *LILCA* provides that the Inuit estate in Labrador Inuit Lands under section 4.4.1 extends to:

- a. the sea bed within the boundaries of Water Lots set out in the Map Atlas (shown for illustrative purposes only in schedule 4-D) and described in appendix A-3 Part 4, but does not include ownership of Tidal Waters above the sea bed within the boundaries of the Water Lots; and
- b. all lands covered by Water that are within the boundaries of Labrador Inuit Lands, but does not include ownership of Water.<sup>173</sup>

Noteworthy when discussing Aboriginal Title in Canada is the Supreme Court in *Delgamuukw v. British Columbia*.<sup>174</sup> *Delgamuukw* is the seminal case in Canada for claims of Aboriginal Title. The principles set out in *Delgamuukw* deal with Aboriginal Title to land, not sea spaces. There have been arguments that there is no reason why those same principles could not be applied to sea spaces, however, it has not yet been considered. Academics claim that the difficulty will likely arise in meeting one of the requirements of the test in *Delgamuukw* to prove title, this being sufficient evidence of exclusive occupation at the time of British or Canadian sovereignty.<sup>175</sup>

It is difficult to know whether arguments concerning Aboriginal Title to sea spaces may find favour in Canada. There are however such types of developments in Aboriginal Title to sea spaces being argued in other parts of the world. If title to water was recognized, this could have

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<sup>171</sup> C. Rebecca Brown & James I. Reynolds, "Aboriginal Title to Sea Spaces: A Comparative Study" (2004) 37 U.B.C.L. Rev. 449-493 at para.27 [*Brown and Reynolds*].

<sup>172</sup> *Ibid.*

<sup>173</sup> Labrador Inuit Land Claims Agreement signed 22 January 2005 by the Labrador Inuit Association, Her Majesty the Queen in the Right of Newfoundland and Her Majesty the Queen in the Right of Canada [Labrador Inuit Land Claims Agreement]. For settlement legislation see Labrador Inuit Land Claims Agreement Act, S.C. 2005, c.27 [*LILCA*].

<sup>174</sup> [1997] 3. S.C.R. 1010 [*Delgamuukw*].

<sup>175</sup> *Supra* note 170.

a considerable impact on the consultation duty of the Crown and the oil and gas industry. It is unlikely that the Federal Government would lose control over the jurisdiction and regulation of the offshore, but not as difficult to imagine the possibility of Aboriginal governments gaining control over the inland waters and sea beds. Existing agreements would have to be amended to recognize the broadened rights and the duty to consult would become more stringent given increased marine traffic, potential for economic development and conservation issues.

Developments in Aboriginal Title to sea spaces in Alaska, Australia and New Zealand are worthy of review here since they may affect the Canadian legal landscape.

### United States - Alaska

Before Alaska became a state there was some recognition that Aboriginal peoples may have claim to sea spaces by virtue of the Supreme Court of the United States decision that Congress had the authority to create a reservation that included adjacent waters and submerged lands, as well as the upland.<sup>176</sup> However, since Alaska has become a state, the law has taken a different course as is evident in *Inupiat Community of Arctic Slope v. United States*<sup>177</sup> where the Inupiat People tried to claim rights to an area lying three to sixty-five miles offshore in the Beaufort and Chukchi Seas. The Inupiat People claimed that they had valid Aboriginal Title to the area including the exclusive use and occupancy of the adjacent sea from time before human memory. Based on this contention the Inupiat People claimed that this established their rights to the surface of the sea, the water column beneath it, the seabed and the minerals lying beneath the seabed. Not only did the Inupiat seek an injunction to prevent the U.S. government and oil companies from interfering with their rights, they sought a declaration of their title to and control over the area and damages.

The claim of the Inupiat People was rejected on the basis that the U.S. Supreme Court previously held that the government of the United States had paramount rights in the sea waters lying seaward of the ordinary low-water mark. This claim of federal paramountcy is also found in Canadian cases where Aboriginal groups have attempted to establish Aboriginal Title. There is, however, one significant difference from the Alaskan arguments which is that in Canada the *Oceans Act*<sup>178</sup> provides protection of Aboriginal or Treaty Rights. The *Oceans Act* states:

For greater certainty, nothing in this Act shall be construed as to abrogate or derogate from any existing Aboriginal or Treaty Rights of the Aboriginal peoples of Canada under section 35 of the Constitution Act, 1982.<sup>179</sup>

The above section must be seen as making the *Oceans Act* subject to Aboriginal or Treaty Rights. Section 8 of the *Oceans Act* vests in Canada title to the seabed and subsoil below the internal waters of Canada and the territorial sea of Canada.

### Australia

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<sup>176</sup> *Alaska Pacific Fisheries v. United States*, 39 S. Ct. 40 (1918).

<sup>177</sup> 548 F. Supp. 182 (U.S. District Ct. Alaska, 1982), aff'd 746 F. 2d 570 (9<sup>th</sup> Cir., 1984), cert. denied 474 U.S. 820 (1985).

<sup>178</sup> R.S.C. 1996, c. 31 [*Oceans Act*].

<sup>179</sup> *Ibid.* at s. 2.1.

The seminal case of the High Court of Australia is the *Commonwealth of Australia v. Yarmirr*<sup>180</sup> where the Court had to decide the claim of Aboriginal peoples to exclusive Rights and interests to the sea and the seabed in Northern Australia. The issue on appeal in this case was the recognition by the common law of Aboriginal Rights and interests in the seabed. The Court's discussion of these rights included common law principles found in the Canadian common law as well. These principles include the territorial reach of the common law, the requirement that in order to find Aboriginal Title there is a need for a radical title in the Crown and finally the relevance of Crown assertion of sovereignty over areas beyond the low-water mark.

In consideration of these issues the High Court of Australia held:

...the common law will recognise rights and interests which are of the kind the subject of the determination in this matter and it will do so by affording remedies for their enforcement and protection.<sup>181</sup>

It is not idle to consider that a Canadian court might reach a similar decision upon review of common law principles. The burden of proof for the Aboriginal group would be to establish that Title or Rights pre-existed with respect to a certain area of sea space.

### New Zealand

New Zealand has always recognized the common law principle of Aboriginal Title and therefore much of its jurisprudence is based on legislation. One of the major differences between New Zealand common law and Canadian common law is that there is no provision in New Zealand common law to consider possible extinguishment of Aboriginal Rights. In New Zealand Aboriginal Title is based on customary values and practices at the time of the claim and not as in Canada, at the time of British sovereignty. As a result, New Zealand's Aboriginal jurisprudence is of interest to Canada's Aboriginal law.<sup>182</sup> Currently there is no New Zealand case law reviewed involve claims to sea spaces.

### Implications of International Views on Aboriginal Title to Sea Spaces

In considering the effect of the foregoing jurisprudence, it is noteworthy that some writers have concluded that the outcomes of these title claims are dependent upon local customary law, rather than broad common law principles. As put by one writer:

...[C]are must be exercised in the use of judicial authorities of other former colonies and territories of the crown because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organisation of the Indigenous peoples concerned and applicable geographic or social considerations...

The ways in which each of the former colonies and territories of the Crown addressed the reconciliation between native title and the legal doctrine of tenure sustaining estates in land varied so markedly from one former territory to the other and were affected so profoundly by local

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<sup>180</sup> (2001) 208 C.L.R. 1 [*Yarmirr*].

<sup>181</sup> *Ibid.* at para. 76.

<sup>182</sup> *R. v. Symonds*, [1847] N.Z.P.C.C. 387; see also *Nireaha Tamaki v. Baker*, [1901] N.Z.P.C.C. 371.

considerations (legal and otherwise) that is virtually impossible to derive applicable common themes of legal principle.<sup>183</sup>

The United Nations Declaration on the Rights of Indigenous people, ratified by the UN General Assembly in 2006 is also noteworthy. The consultation provisions are quite broad and while Canada has not yet ratified it, ratification would have the potential to significantly affect the duty to consult and accommodate doctrine that we know today in Canada. The consultation provisions state:

*Article 19*

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

*Article 32(2)*

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>184</sup>

**CONCLUSION:**

The Arctic is very complex. It has many levels of regulation and persuasion. The WWF papers on Governance and Regulation of the Arctic conclude that substantial reform of the international regime in the Arctic is urgently required. As the report states:

It is submitted that the need for reform as such is not disputed. There is no scientific disagreement that the Arctic is rapidly changing. Rather, the debate focuses on the pace of change and future projections. The governance and regulatory regime that currently exists in the Arctic may have been adequate for an environment that largely restricted human activity for most of the year. But when the Arctic Ocean becomes increasingly similar to regional seas in other parts of the world for ever longer parts of the year adequacy can no longer be assumed.<sup>185</sup>

International cooperation is laudatory. This cooperation, very productive of "guidelines", does not quickly lead to enforceable rules. One of the most salient points of the WWF study is that there is very little in the Arctic other than guidelines. The reason why we have paid so much attention in this paper to the great number of consensual arrangements is that they tend to be

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<sup>183</sup> *Fejo v. Northern Territory* (1998), 156 A.L.R. 721 (H.C.A.) at paras. 101 and 103.

<sup>184</sup> *United Nations Declaration on the Rights of Indigenous people*, online: The United Nations Permanent Forum on Indigenous Issues < <http://www.un.org/esa/socdev/unpfii/en/declaration> > at Articles 19 and 32(2).

<sup>185</sup> *Supra* fn 6 at p. 62.

the starting place for eventual domestic laws. The discussion of marine-protected areas is but one of many examples.

The slow pace of the development of domestic laws resulting from international cooperation can, however, change very quickly. Change to the rapid enactment of laws tends to occur as a result of unforeseen and usually unfortunate events. The "*Titanic*" gave rise to the SOLAS Convention and its many rules concerning the safety of ships at sea. The sinking of the "*Ocean Ranger*" off the coast of Newfoundland in 1982 produced many changes in regulation of the offshore industry and also in the design and construction of offshore drilling units. The "*Deepwater Horizon*" incident has the potential to produce many changes to offshore exploration. It is doubtful whether the NEB review of offshore drilling in the Arctic would be happening were it not for the "*Deepwater Horizon*". Most importantly, that review serves to highlight the many agendas that are relevant for consideration in the Arctic.

It is more than ever necessary to consider the broad view when thinking about the Arctic. Charles Emerson in *The Future History of the Arctic*<sup>186</sup>, after a very interesting and thorough review of the past, present and potential future of the Arctic suggests that the future Arctic may be:

...a zone of global cooperation, a focus for scientific research and global environmental stewardship. More likely, however, is the image of the Arctic as a battleground, fought over not just by states but by the different economic and political interests that are jostling for their part of the Arctic future, trying either to develop its economic potential or to protect its environment. A battleground does not mean war, but it does mean conflict and competition: political, economic, cultural, and diplomatic.

There is no fatality to such a conclusion – though history and current events support it. The institutions of global governance will likely avert some potential for conflict or channel it into bureaucratic resolution. Economic and environmental groups may yet achieve the kind of cooperative approach that would put their objectives in balance, rather than in more confrontational opposition to one another. Arctic countries could find a way of articulating a common vision of the Arctic's future and cooperating to achieve it. Perhaps. But as the Arctic enters the course of global history and its uniqueness is taken from it, the likelihood of the Arctic escaping the real politik of the rest of the world seems low. We no longer deal with the Arctic as we would wish it to be – in the future, we will have to deal with the Arctic as it is.<sup>187</sup>

The continued development of the offshore oil and gas industry in the Canadian Arctic will take place in this rapidly changing environment.

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<sup>186</sup> Emerson, *The Future History of the Arctic*, PublicAffairs (2010).

<sup>187</sup> *Ibid*, at p. 314.

# APPENDIX "A"

