MODELS FOR GOVERNANCE OF THE BRITISH COLUMBIA OFFSHORE: POSSIBLE LESSONS FROM AUSTRALIA

I have been asked to discuss what the Australian experience might suggest regarding governance models for petroleum development offshore British Columbia.

I first explain why the Australian experience may be relevant. Second, I outline the arrangements there for governing offshore petroleum. Third, I touch on recent Australian developments concerning aboriginal rights and title, and how they may impact offshore petroleum development. Fourth, I suggest some lessons offered by the Australian experience. I conclude with a few observations about some key points to consider in designing mechanisms for governing offshore British Columbia.

1. WHY IS THE AUSTRALIAN EXPERIENCE OF POTENTIAL INTEREST?

Like Canada, Australia is a federal state. It consists of six states and several territories (of which the Northern Territory is of the most interest for present purposes). All its states and the Northern Territories have extensive coastlines.

The Australian experience with offshore petroleum is of longer duration and more extensive than Canada's. Significant offshore discoveries first occurred in the mid-1960s, and offshore petroleum activity continues to be a major lubricant for the country's economic growth.

Like Canada, offshore petroleum development has been, at times, a source of friction between the federal (Commonwealth) and state governments. Since the early 1960s, interactions between those governments have taken various forms, including litigation, negotiation and agreement.

Present arrangements flow primarily from the 1979 Offshore Constitutional Settlement (OCS). The OCS replaced a 1967 federal-state arrangement which fell apart when a High Court decision (***New South Wales***) upheld Commonwealth legislation declaring federal sovereignty over the continental shelf and the territorial sea.

While the above factors make Australia of interest to Canada, there are constitutional and other differences between the two countries that need to be kept in mind. Among these are the fact that most legislative powers are concurrent rather than exclusive (as in the case in Canada), with the residue falling to state Parliaments. The Commonwealth, however, has the power to make laws for the peace, order, and good government of the Commonwealth, including interstate and international trade and commerce, taxation, defence, fisheries beyond territorial limits, and external affairs. The ***New South Wales*** case gave the Commonwealth considerable ability to influence the direction taken in managing offshore petroleum.

Australia is also a country where aboriginal issues have been, and continue to be, significant. Although there has not been constitutional recognition of aboriginal rights (as there has been in Canada), both levels of government have been involved in legislating and in litigation.

In a 1989 study comparing Canada and Australia, I concluded that there were several things Canada could learn from the Australian experience. I maintain that view, especially in light of some intervening changes.

My 1989 study did not consider aboriginal entitlement to the offshore; at that time, such questions had not emerged as major issues in either country. My remarks deal only briefly with the possible impact on offshore petroleum activities of recent Australian developments concerning aboriginal title and rights. I do not address many other significant matters, such as intergovernmental financial arrangements. The focus is on governance and, to the extent it is related to governance, the exercise of legislative authority.

2. AN OVERVIEW OF AUSTRALIA'S INSTITUTIONAL ARRANGEMENTS FOR OFFSHORE PETROLEUM

In brief, in the 1979 OCS it was agreed that the Commonwealth would pass legislation giving legislative authority to the states over a three-mile territorial sea. State legislation governing petroleum activity in its coastal waters (the territorial sea and internal waters) was, to the extent practicable, to be based on a Common Mining Code for the country's entire offshore. Therefore, a key underlying concept was that there would be legislative uniformity throughout the offshore areas.

Outside the territorial sea (in the so-called adjacent areas), the Commonwealth's *Petroleum and Submerged Lands Act* (*PSLA*) would apply, with day-to-day administration resting in the hands of a Designated Authority (DA) who, typically, would be the relevant state minister. Certain central matters (including the opening of areas for permits, the granting and renewal of exploration permits and production licences, the approval of instruments creating interests in permits or licences, and the determination of licence or permit conditions) would rest with a Joint Authority (JA) consisting of the affected state and Commonwealth ministers. The Commonwealth minister would have the final say in the event of disagreement.

In 1983, the Commonwealth issued Guidelines pertaining to the handling of JA matters. Intended to ensure a uniform and consistent approach to the administration of the *PSLA*, the Guidelines clarified how the Commonwealth/state interaction would be handled.

Most of the JA's decision-making is handled on paper. Typically, the state DA participates in the JA. If there is a disagreement between the two levels of government, or if the state minister has not replied to a proposed Commonwealth decision within 30 days, the Commonwealth minister can make the decision. In practice, if there are differences of opinion, government officials attempt to resolve the matter by negotiation.

The DA/JA arrangements, and alterations thereto, are often discussed at the government-to-government and civil service level through two key institutions. At the ministerial level, there is a country-wide Council; at the civil service level, there is the ministerial Council's standing committee on offshore petroleum legislation. Both groups meet regularly.

Uniformity in the treatment of various offshore areas is partially accomplished by the use of Commonwealth Guidelines, which cover a vast range of matters. Another regulatory device, Directions, has also been used to promote uniformity. The latter (lacking the formality of regulations which, under the Australian system, have to be put before both the House of Representatives and the Senate) are normally finalized through the standing committee; the former are issued following some state input. Thomas has recently criticized guidelines that purport to guide the exercise of JA discretion as being without a proper legal basis.

Although there are time limits for Commonwealth/state decision-making, there are still complaints from state governments and industry about delays. The distance between Canberra, Australia's capital, and Perth, the capital of Western Australia (where much of the offshore petroleum activity has occurred) is not unlike the distance between Ottawa and Victoria. On the other hand, industry considers its interactions with the DAs on matters within their jurisdiction to be relatively straightforward.

To summarize, Australia's intergovernmental arrangements for the offshore are organized differently than Canada's. States have control over their internal waters and the territorial sea, while there are co-operative mechanisms for governing the Commonwealth-controlled adjacent areas. Rather than the largely independent boards found in Canada, Australia's co-operative governance mechanisms are ministerial, with a Commonwealth override in regard to key issues. An attempt has been made to have uniform legislation apply throughout the offshore, whether the area is under state or joint administration. Virtually identical arrangements apply to the entire country.

Have these mechanisms been successful? In my 1989 study, I noted that the objective of legislative uniformity had been imperfectly achieved; that Commonwealth/state friction continued to some extent; and that the Commonwealth had gradually moved to consolidate its authority over the adjacent areas. Recent literature suggests that these trends have continued in the past 15 years.

For example, since about 1983, at the instigation of the Commonwealth government there has been a steady increase in the authority of the JAs. Among other things, amendments to the *PSLA* have transferred from the DAs to the JAs the power to vary the rate of petroleum production; to vary, suspend or exempt from compliance with the conditions of various title documents; to determine the amount of petroleum to be assigned from a pool that is in more than one licence area; and to make directions concerning unitization. As well, the Commonwealth minister can give directions to the DA about what records and documents must be kept by those carrying out operations in the offshore areas under Commonwealth control.

Most of these changes have been defended by the Commonwealth as reflecting genuine national concerns, including revenue-raising. While the states have not necessarily welcomed the revised arrangements, they have had little choice because of the Commonwealth's underlying legal authority over much of the offshore.

According to a high-ranking Commonwealth official in 2000 (Hartwell), a 1997 stakeholder survey concluded that the Australian system was working relatively well, with some room for improvement (including a need for reduction in duplication). The survey suggested that the Commonwealth government ought to leave more day-to-day matters in the hands of the DAs and focus on major policy matters including native title, taxation and the environment. These matters are apparently being addressed.

He also noted, however, that new Commonwealth environmental legislation might complicate offshore petroleum regulation and require bilateral Commonwealth/state agreements. He added that, in relation to safety matters, there was widespread confusion over the application of laws and regulations. The latter point deserves elaboration because it helps to underscore the fragility of Australia's governance model.

Since the 1988 Piper Alpha disaster in the North Sea, offshore safety has been a continuing focus of concern in Australia. There have been various studies proposing various changes, some of which have been implemented. The Commonwealth has adopted a "safety case regime", which requires operators to submit to regulators a safety case in respect of each installation. Commonwealth occupational health and safety laws apply to the offshore when the adjacent state has no occupational health and safety provisions.

In 1999, the Commonwealth initiated a review of the safety case regime, overseen by a Steering Committee comprising representatives of both levels of government, industry and the workforce. As part of the process, an independent review team was employed to assess the effectiveness of the offshore safety regime. (DISR)

The independent review team concluded that the offshore regime relating to health, safety and the environment was complicated and insufficient. It found that the role of the DAs was unclear and undefined. It recommended the establishment of a national petroleum safety authority reporting to the Commonwealth minister, based on one of three possible models. It favoured the centralization of safety regulation through a single agency in order to ensure an appropriate, effective and cost-efficient approach. It recognized that this model would conflict with the 1979 OCS.

Perhaps predictably, reactions to these proposals were mixed. Generally, the states were opposed, largely viewing the current system as adequate. Industry and the workforce were in favour of a national regulatory authority. Although recognizing the delicate political problems posed, the Commonwealth saw the establishment of a single national regulator as being in the interests of offshore safety. The Steering Committee itself was unable to reach a consensus since its members functioned as representatives of the various stakeholder groups.

Recent information on a Commonwealth website suggests that it intends to move forward on establishing a national regulatory agency by the end of 2004.

3. ABORIGINAL RIGHTS AND TITLE AND THE AUSTRALIAN OFFSHORE

It would require another paper to treat comprehensively aboriginal issues relating to the Australian offshore. Some incomplete observations follow.

A recent High Court decision (***Risk***) concluded that the seabed of bays or gulfs within the limits of the Northern Territory could not be the subject of a claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The Court observed that its decision did not address whether a claim might be made to "lands" or "waters" under the *Native Title Act 1993* (Cth) (*NTA*). (The *NTA* sets up a procedure for determining the existence of native title, for extinguishing rights, and for compensating those whose title has been extinguished. As of mid-2002, there were more than 600 active claimant applications.)

Another case (***Ward***), issued two months after ***Risk***, concerned the application of the *NTA* to petroleum and minerals, but not in the offshore. The High Court found there was no evidence of traditional law, custom or use related to petroleum or minerals, adding that, in any event, native title rights would have been extinguished in Western Australia by virtue of state legislation.

Lower court decisions (for example, ***Lardil*** and ***Harris***) have rejected native title claims arising from mooring, boating and tourism permits in the offshore on the basis of various more technical arguments. An earlier High Court case (***Yarmirr***) gave some recognition to communal native title (including the ability to harvest food and to visit places of cultural significance) in relation to the sea and seabed, within a 12-mile territorial sea. It rejected, however, any notion that such rights might be exclusive. The particular claim in ***Yarmirr*** failed due to lack of evidence.

One author (Michael Hunt) has concluded that aboriginal issues continue to impact offshore petroleum developments in at least two ways. First, there are a number of areas where offshore exploration includes islands. In those cases, title negotiations with aboriginal claimants may be required under the *NTA*. Second (and, according to him, more importantly), petroleum companies will be required to negotiate with aboriginal claimants where onshore land is required for offshore petroleum treatment facilities.

This very superficial review suggests that, in Australia, aboriginal questions affecting offshore petroleum activities are escalating. It may be worthwhile to examine further how such claims are being resolved.

4. POSSIBLE LESSONS FROM AUSTRALIA

The 1975 High Court decision concerning the offshore gave the Commonwealth considerable power to influence the shape of governance mechanisms for petroleum, regardless of state

preferences. The Commonwealth government nevertheless opted, in 1979, for a form of co-operative federalism. Although the mechanism adopted (the DA/JA system) involved sharing power and administration with the states, the underlying idea was that all areas of the offshore would be governed by relatively common legislative schemes.

That system (which precedes Canada's by almost a decade) has enjoyed considerable success. But some cracks have appeared. Certain problems have been addressed by a power transfer from the DAs to the JAs, where the Commonwealth has ultimate control. Difficulties in procuring uniform legislation in a timely fashion have been partially resolved by using administrative Guidelines and Directions, some of which are viewed by industry lawyers as being of questionable validity. Concerns subsist about the ability of the system to respond quickly and efficiently to the needs of offshore decision-making and regulation.

As illustrated by recent debates over offshore safety, the objectives of legislative and administrative uniformity and clarity have been imperfectly achieved. The fact that the Commonwealth seems poised to establish a single national offshore petroleum safety agency to regulate activities in Commonwealth waters suggests that, in its view and notwithstanding contrary state opinions, the present system is inadequate. The Australian experience deserves further monitoring.

5. KEY POINTS FOR GOVERNANCE OF THE BRITISH COLUMBIA OFFSHORE

To conclude, let me offer some modest observations for those who will be responsible for shaping the future administration of British Columbia's offshore petroleum development.

First, no assumptions should be made that the Newfoundland and Nova Scotia models are appropriate for British Columbia. Both are the product of particular times and peculiar political circumstances.

Although there may be an inclination to view those structures as an appropriate starting point, a careful assessment of the intergovernmental boards should be made to ensure that, with or without alteration, they would provide an effective mechanism for British Columbia. Hudec and Penick, for example, have suggested several areas of possible improvement. In their view, the "single window" of regulation has not worked as intended. The Offshore Accords, and the legislation that flows from them, are difficult to amend and too rigid to respond quickly to changing regulatory needs (such as the desirability of shifting from prescriptive to result-oriented regulation). They opine that this inflexibility has sometimes caused the federal government to bypass the board system. The overall system may be too complex. They raise the possibility of assigning such matters as local benefits to the province, while leaving operational, safety and environmental issues to the National Energy Board. It is interesting to note that some of their criticisms (such as the rigid and cumbersome nature of the arrangements) are similar to assessments of the Australian system.

This is not an exhaustive list, of course. It is merely intended to underscore that the governance issue for British Columbia should be approached with an open mind.

A second and related point is that any model for British Columbia will need to keep aboriginal concerns front and centre. The Nova Scotia and Newfoundland experiences offer no help in this regard. It is apparent from Australia that such matters will continue to arise. The imperative in Canada is even greater, given our Constitution and judicially-imposed requirements for consultation with aboriginals whose rights may be affected by legislation and resource development.

Third, whatever model is adopted, legitimate national issues cannot be ignored. The environment is one; safety is another. Hudec and Penick assert that the procedural morass of present east coast arrangements advances neither to current international standards. The fact that Australia's offshore co-operative federalism approach seems also to have fallen short in this regard should cause reflection.

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