REVIEW

of the

Canada Petroleum Resources Act

by

Rowland J. Harrison, Q.C.

Minister's Special Representative

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REVIEW OF THE *CANADA PETROLEUM RESOURCES ACT* BY THE MINISTER'S SPECIAL REPRESENTATIVE

Erratum: In Section 2.7 of the Report, references to the *Canadian Charter of Rights and Freedoms* should have instead been references to the *Constitution Act, 1982*. In addition, in footnote 71 the reference to *Part I of the Constitution Act, 1982* should instead be to *Part II* of that Act.

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1.0 INTRODUCTION

1.1 The *Canada Petroleum Resources Act*[1]

Petroleum exploration and development in Canada's northern and offshore areas[2] have a long history. The Norman Wells oil field in the Northwest Territories, for example, began production in 1920 and continues to produce today; it is generally considered to be the oldest producing oil field in Canada.[3] Canada's first offshore exploration well in salt water was drilled off Prince Edward Island in 1944.[4] The first wells on the continental shelf off Newfoundland were spudded in 1966.[5]

In the 1960s, exploration in the North, including in the Arctic Islands, was encouraged in furtherance of the government-of-the-day's "Northern Vision"[6] and in support of Canada's sovereignty claims in the area.[7] In the early 1980s, this activity was further promoted, and directly subsidized, by the regime introduced under the *National Energy Program*, to "[e]nsure active development of oil and gas rights" on frontier lands, which were described as being "increasingly attractive."[8] Exploration activity in the Beaufort Sea and Arctic Islands reached a

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1 R.S.C. 1985, c. 36 (2nd Supp.), as amended.

2 These areas were known since 1960 as the "Canada lands," as defined by paragraph 2(1)(f) of the 1960 *Canada Oil and Gas Regulations*, P.C. 1960-474. They were renamed "frontier lands" by section 2 of the *CPRA*.

3 Current production from the Norman Wells field is approximately 12,000 barrels per day.

4 Hillsborough #1, drilled by Island Development Co.: http://www.gov.pe.ca/photos/original/07gasoilwells.pdf.

5 By PanAm (later Amoco, now BP) and Imperial Oil: http://www.nr.gov.nl.ca/nr/energy/petroleum/offshore/milestones.pdf

6 See generally, *One Canada: Memoirs of the Right Honourable John G. Diefenbaker, The Years of Achievement 1957-1962* (Toronto: Macmillan of Canada, 1976).

7 See, for example, Hon. Alvin Hamilton, Minister of Northern Affairs and Natural Resources, House of Commons Debates, 10 July 1959, at p. 5826.

8 *The National Energy Program 1980*, Energy, Mines and Resources Canada, October 28, 1980, at p. 45.

peak in this period. However, no commercial development has followed, with the limited exception of the Bent Horn project on Cameron Island.[9]

The legal framework for issuing rights to undertake these activities can be traced back directly to at least the early 1900s, through an uninterrupted succession of regulations, originally promulgated under the *Dominion Lands Act*.[10] From 1953 on, the regulations were promulgated under the *Territorial Lands Act*[11]; in 1960, they were extended to offshore areas by joint promulgation under the *Public Lands Grants Act*.[12]

Today, the primary source of that framework for onshore and offshore areas outside the provinces is the *Canada Petroleum Resources Act* ('*CPRA*' or 'the Act').[13] The *CPRA* (and its counterparts off Newfoundland and Labrador and Nova Scotia, as discussed below) reflects, and has been shaped by, a regulatory history that spans more than a century.

The *CPRA* authorizes the issuance by the Crown of title rights to explore for, develop and produce petroleum in areas under federal jurisdiction[14] that are not covered by other legislation. The Act establishes the process by which these rights may be issued, defines the core rights that are granted by each form of licence, provides for a royalty to be imposed on production and establishes a fund to support related environmental studies. However, operations undertaken under the authority of these rights require separate regulatory approvals under the *CPRA*'s companion legislation, the *Canada Oil and Gas Operations Act* ('*COGOA*').[15]

When enacted in 1986, the *CPRA* applied to all areas in the Yukon Territory, the Northwest Territories[16] and Sable Island, and all offshore areas, not within a province, to the outer edge of the continental margin.[17] The application of the Act in some of these areas has since been withdrawn, by the implementation of subsequent political agreements.

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[9] The Bent Horn oil field was discovered in 1974 and produced a total of $4.5x10^5$ m^3 or 2.8 million barrels between 1985 and 1996. The field was abandoned before being fully depleted.

[10] Consolidated *Dominion Lands Act, 1879* and amendments thereto of 1880 and 1881, 43 Vic., Chap. 26 and 44 Vic., Chap. 16. The Act was repealed in 1950 and replaced by the *Territorial Lands Act*, S.C. 1950, c. 22, s. 26.

[11] *Territorial Oil and Gas Regulations*, P.C. 1953-525.

[12] *Canada Oil and Gas Regulations*, P.C. 1960-474.

[13] *Supra* note1.

[14] That is, federal areas outside the provinces.

[15] R.S.C. 1985, c. O-7, as amended.

[16] At that time, the Northwest Territories included Nunavut, which became a separate territory in 1999.

[17] Section 2, as enacted in 1986.

Offshore from Newfoundland and Labrador and Nova Scotia, the direct application of the *CPRA* has been superseded by implementation of the Atlantic Accord[18] and the Canada-Nova Scotia Offshore Petroleum Resources Accord,[19] respectively. However, the federal and provincial "mirror" legislation implementing these Accords largely incorporates the provisions of the *CPRA*; as a result, the principal elements of the rights disposition system enacted by the *CPRA* also apply in eastern offshore areas (although through different legal vehicles).

In the North, the application of the *CPRA* onshore was withdrawn by implementation of devolution agreements with the Yukon in 1993[20] and with the Northwest Territories in 2013.[21] The Act continues to apply in Nunavut and in most offshore areas north of latitude 60°N.

Ministerial responsibility for the *CPRA* is divided, with the Minister of Indigenous and Northern Affairs having responsibility for the administration of the Act where it applies in the North. The Minister of Natural Resources is responsible for the administration of the Act in other areas and is also the federal Minister responsible for the administration of legislation implementing the Atlantic Accord and the Canada-Nova Scotia Petroleum Resources Accord.

1.2 The Political, Policy and Legal Environment

Much has changed in recent decades in the political, legal and policy environment of the North, with significant implications for the management of northern petroleum resources. Land claims agreements with the Inuvialuit of the Inuvialuit Settlement Region in 1984[22] and with the Inuit of the Nunavut Settlement Area in 1993[23] both include provisions with respect to federal resource management responsibilities in the respective agreement areas. The devolution agreements with the Yukon and with the Northwest Territories, referred to above, also include provisions relevant to the federal management of petroleum resources in adjacent offshore areas.

In recent years, the exercise of resource management responsibilities has also been impacted significantly by evolving jurisprudence on the Crown's duty to consult and accommodate where Indigenous rights may be affected.

In parallel with these developments, public policy-making has become increasingly focused on climate change, with implications for northern resource development. On March 10, 2016, Prime Minister Justin Trudeau and President Barack Obama issued a *U.S.-Canada Joint*

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[18] http://www.servicenl.gov.nl.ca/printer/publications/aa_mou.pdf, amended in 2005: http://www.gov.nl.ca/atlanticaccord/agreement.htm.

[19] http://www.cnsopb.ns.ca/pdfs/Accord.pdf.

[20] https://www.aadnc-aandc.gc.ca/eng/1369314748335/1369314778328.

[21] http://devolution.gov.nt.ca/wp-content/uploads/2013/09/Final-Devolution-Agreement.pdf.

[22] http://www.inuvialuitland.com/resources/Inuvialuit_Final_Agreement.pdf.

[23] http://www.tunngavik.com/documents/publications/LAND_CLAIMS_AGREEMENT_NUNAVUT.pdf

Statement on Climate, Energy, and Arctic Leadership,[24] asserting that "greenhouse gas emissions…will have an outsized impact on the long-term health of the global Arctic…" The statement announced "a new partnership to embrace the opportunities and to confront the challenges in the changing Arctic," adding that:

> [F]or commercial activities in the Arctic – including shipping, fishing, and oil and gas exploration and development – we will set a world-class standard by basing development decisions and operations on scientific evidence.[25]

1.3 Appointment of Minister's Special Representative

On July 10, 2015, the then Minister of Aboriginal Affairs and Northern Development appointed Rowland J. Harrison, Q.C. as a Minister's Special Representative (MSR) "to conduct a comprehensive review of the operations of the *Canada Petroleum Resources Act*, to engage with aboriginal groups, stakeholders and other interested parties as appropriate, and to provide recommendations as to whether potential amendments should be made to the Act as it applies to the Arctic offshore" ('Review'). The Minister's letter of July 10, 2015 appointing the MSR is attached as Appendix I. The MSR's biography is attached in Appendix II.

With the beginning of the federal election on August 4, 2015, the MSR's Review was suspended. Following the swearing in of a new federal government on November 4, 2015, the Minister of Indigenous and Northern Affairs confirmed the MSR's appointment[26] and fixed May 31, 2016 as the date by which the MSR was required to report.

1.4 Terms of Reference, Process and Consultations

Further to the mandate to engage with aboriginal groups, stakeholders and other interested parties, a list of parties to be consulted was compiled. The MSR initiated direct contact with each party on the list attached as Appendix III and met in-person with most.

On January 11, 2016 the MSR circulated a "Scope and Process Guidance" document, which is attached as Appendix IV. The Terms of Reference for the Review are attached to that document and are included as part of Appendix IV.

Following an initial round of in-person discussions with several interested parties, on March 7, 2016 the MSR circulated an "Issues Discussion" paper, which is attached as Appendix V.

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[24] http://pm.gc.ca/eng/news/2016/03/10/us-canada-joint-statement-climate-energy-and-arctic-leadership.

[25] *Ibid* at p. 7.

[26] https://www.aadnc-aandc.gc.ca/eng/1436896797399/1436896823365.

The Issues Discussion paper invited parties to make written submissions to the MSR by April 11, 2016. A list of the written submissions received in response to that invitation is attached as Appendix VI. The submissions are available on request to:

> Petroleum and Mineral Resources Management Directorate
> Northern Affairs Organization
> Indigenous and Northern Affairs Canada
> 819-953-2087
> rights@aandc.gc.ca

1.5 Outline of the Report

The *CPRA* is a key component of the overall regime that applies to petroleum exploration, development and production in the North. Section 2 of the Report summarizes the main components of the broader regime, identifies the specific role of the *CPRA* and describes the Act's relationship to those other components.

As noted, the *CPRA* is the latest iteration of a rights issuance system that has evolved over more than a century. Section 3 of the Report describes the origins of the *CPRA* in that evolution and the Act's specific purpose of reversing certain features of legislation enacted under the 1980 *National Energy Program*.[27]

Section 4 of the Report analyzes the general scheme and key elements of the *CPRA*. Section 5 describes the administrative practice that is generally followed under the current Act, with reference to the application of the Act in a manner that supports government policies and meets emerging legal responsibilities, particularly with respect to Indigenous and treaty rights.

The MSR's assessment of the effectiveness and appropriateness of the *CPRA* is reported in two sections. Section 6 provides an overall assessment of the Act in the context of current policies and legal responsibilities. Section 7 reports on specific issues that were addressed during the Review.

The MSR's overall conclusions are summarized in Section 8, which also records the specific recommendations.

[27] *Supra* note 8.

2.0 THE NORTHERN OIL AND GAS REGIME

2.1 Sovereignty *versus* Security of Tenure

Legal frameworks for issuing rights to explore for, develop and produce petroleum resources are shaped by balancing the interests of the Crown, as "owner"[28] of the resources, with the interests of companies seeking to engage in those activities. The Crown's interests lie in optimizing the return from the development of public resources, "return" in this context comprising both direct economic return and the potential for resource development to be used by government to support overall national priorities. The state, as sovereign, is able to respond to changed circumstances, in the public interest, and is therefore able to "change the rules." Industry's primary interest, on the other hand, lies in ensuring that rights are secure and are insulated as far as possible from subsequent changes resulting from *ex post facto* state action. The watchword for industry is stability, or security of tenure; for government, it is responsiveness, as the public interest evolves.

Resource allocation systems seek to balance these respective interests, by giving assurances about security of tenure, while maintaining flexibility, recognizing that, at the end of the day, governments have an ongoing responsibility to uphold the public interest, supported by the sovereign authority to abjure their previous commitments, as changing circumstances may require.

2.2 The Crown as Resource "Owner" and as Regulator

In reviewing legal frameworks for petroleum development, it is important to recognize that the Crown occupies two roles. On the one hand, it is owner of the resource. In this capacity, its interests, as noted, are in managing the resource in support of overall national priorities. On the other hand, the state also has regulatory responsibilities with respect to safety, protection of the environment and resource conservation.[29] These two roles can conflict and are, therefore, often separated under regulatory frameworks.[30]

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[28] In offshore areas, the Crown enjoys "sovereign rights" under the *United Nations Convention on the Law of the Sea*, to explore and exploit the resources of the seabed. While sovereign rights do not amount to ownership in the usual sense, the distinction does not affect Canada's authority to legislate domestically for the granting of exploration and development rights in offshore areas.

[29] In its written submission in this Review (April 15, 2016), the Yukon government referred, at p. 1, to the two roles as "resource management" and "resource regulation."

[30] In the aftermath of the *Deep Horizon* disaster in the Gulf of Mexico in 2010, the functions of the U.S. Bureau of Ocean Energy Management, Regulation and Enforcement (formerly the Minerals Management Service) were divided between the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement: http://www.boemre.gov/. In its submission in this Review (April 4, 2016), the Canadian Association of Petroleum Producers (CAPP) stated, at p. 5: "The separation of the rights process from activity management is an important distinction that CAPP supports."

The federal Canadian legal framework reflects these two functions. The subject-matter of the *CPRA* is the exercise of the federal Crown's role as resource owner, whereas its regulatory responsibilities with respect to oil and gas exploration, development and production are exercised mainly under the *Canada Oil and Gas Operations Act* ('*COGOA*').[31] The *CPRA* deals with the issuance by the Crown of "title" rights to explore for, develop and produce petroleum, while activities undertaken in pursuit of those rights are regulated under the *COGOA*.

While the *CPRA* and the *COGOA* operate in parallel, and cannot be considered in isolation from each other, the MSR's mandate was explicitly to undertake a review of the *CPRA*, and not directly of the *COGOA*. The mandate did, however, require the MSR to prepare "a report that examines key legislation, regulation, policy and contractual arrangements that comprise the Northern oil and gas regime."

2.3 Key Legislation

2.3.1 *Canada Petroleum Resources Act*

The focus of the *CPRA* is on the Crown's role as resource owner. The principal role of the Act is to establish a framework for the issuance of "interests in petroleum in relation to frontier lands."[32] "Interests" is the collective term for the various "title" rights that are provided for in the Act,[33] the main forms of which are exploration licences, significant discovery licences and production licences. The Act defines the rights that are acquired under each of these licences, as described in more detail in following sections.

The Act prescribes the process for issuing interests with respect to Crown reserve lands.[34] Generally, the issuance of an interest must follow a public call for bids. Any proposed terms and conditions must be specified in the call for bids. The central element of the process is that the selection of a winning bid must be on the basis of a "sole criterion" specified in the call for bids.[35]

The Act provides for royalties on production to be prescribed by regulation.[36] It also establishes the Environmental Studies Research Fund ('ESRF'), into which all interest owners

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[31] *Supra* note 15.

[32] *CPRA*, Long title.

[33] Section 2

[34] Part II.

[35] Paragraph 14(3)(*g*).

[36] Part VI.

are required to pay an amount calculated by reference to the number of hectares included in the relevant interest.[37]

The transitional provisions of the Act carried forward various rights that were in force at the date of commencement of the Act.[38] Generally, the owners of former permits, former special renewal permits, former exploration agreements and former leases were required to negotiate replacement exploration licences under the *CPRA*.[39] These provisions are now largely spent, with two important exceptions. Firstly, where negotiations for a replacement exploration licence were not completed within the prescribed time for any reason not attributable to the interest owner, the Minister is required to extend the negotiation period.[40] Secondly, former interests in significant discovery areas are continued as significant discovery licences that are deemed to have been issued under the *CPRA*.[41]

Other parts of the Act deal with related matters, including transfers, assignments and registration of interests,[42] and administration and enforcement.[43]

As noted, ministerial responsibility for the *CPRA* in areas that are the subject of this report rests with the Minister of Indigenous and Northern Affairs.

2.3.2 *Canada Oil and Gas Operations Act*

The focus of the *COGOA*, as reflected in the Act's explicit statement of purpose, is the Crown's regulatory responsibility to promote, *inter alia*, safety, protection of the environment and conservation of oil and gas resources.[44] Section 4 prohibits any person from carrying on any work or activity related to the exploration or drilling for or the production, conservation, processing or transportation of oil or gas in any area where the *COGOA* applies unless that person is the holder of an operating licence and an authorization for each work or activity.

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[37] Part VII.

[38] Part X.

[39] Sections 113 and 114.

[40] Section 115. Some former interests in "moratorium" areas have not yet been negotiated into exploration licences under the *CPRA*.

[41] Subsections 110(3) and (4). It is under these provisions that many of the current SDLs in the North continue in force.

[42] Part VIII.

[43] Part IX.

[44] *Supra* note 15, section 2.1.

The distinction between interests issued under the *CPRA* and authorizations required under the *COGOA* is broadly analogous to the distinction between ownership rights to land, on the one hand, and, on the other hand, building permits (including compliance with building codes) that are required for construction activities on that land.

Authority with respect to most of the functions under the *COGOA* is generally vested in the National Energy Board ('NEB'). The NEB also has some specific functions under the *CPRA*, in making declarations of significant and commercial discoveries, but these technical functions do not confer on the NEB any authority with respect to the rights issuance process.

The *CPRA* and the *COGOA* establish a comprehensive legal framework for issuance by the Crown of rights to explore for, develop and produce oil and gas resources and, with the *Canadian Environmental Assessment Act, 2012*,[45] for regulating activities and operations in relation to those rights.

2.4 Licence Terms and Conditions and Contractual Arrangements

The rights granted by exploration, significant discovery and production licences issued under the *CPRA* are defined by the Act itself, as is discussed further below. However, additional terms and conditions can be included in a licence, provided that such terms and conditions are specified in advance in the relevant call for bids.[46] Other terms and conditions for exploration licences may be prescribed or agreed to, so long as they are not inconsistent with the Act or regulations.[47]

It is also noted that, while contractual arrangements among interest holders do not bind the Crown, such arrangements, particularly with respect to fractional interests with multiple owners, can have implications for the administration of both the *CPRA* and the *COGOA* (for example, for the registration and administration of interests under the former and for application of the pooling and unitization provisions of the latter).

2.5 *Canadian Environmental Assessment Act, 2012*

Under the *Canadian Environmental Assessment Act, 2012* ('*CEA Act, 2012*'),[48] the environmental effects of certain designated oil and gas projects must be assessed by the National

[45] S.C. 2012, c.19, s.52.

[46] *CPRA* paragraph 14(3)(*c*).

[47] *CPRA* subsection 24(1).

[48] *Supra* note 45.

Energy Board as a "responsible authority."[49] The requirements of the *CEA Act, 2012* do not, however, apply directly to matters under the *CPRA*.

2.6 Land Claims Agreements and Devolution

The political and legal landscape of northern Canada has been fundamentally restructured by the settlement and implementation of Indigenous lands claims agreements and the parallel process of devolving federal powers to the territorial governments. The Inuvialuit Final Agreement (the 'IFA')[50] and the Nunavut Land Claims Agreement (the 'NLCA')[51] include provisions that have implications for the ongoing administration of the *CPRA*. Devolution agreements effect the transfer of responsibility for resource management to territorial governments, with the direct result that the application of the *CPRA* is displaced within the territories. However, the devolution agreements also include provisions recognizing an ongoing role for territorial governments in the application of the *CPRA* in adjacent offshore areas.

The basic principles of the IFA, "expressed by the Inuvialuit and recognized by Canada", include "enabl[ing] Inuvialuit to be equal and meaningful participants in the northern and national economy and society."[52] Specific provisions that relate directly to federal resource management responsibilities include subsection 11(36), which provides that no licence or approval for any proposed development shall be issued unless the environmental screening and review provisions of the IFA have been complied with. Subsection 16(11) requires that guidelines "relating to social and economic interests, including employment, education, training and business opportunities to favour natives, shall be considered and applied, as reasonably possible, to each application for exploration, development or production rights."

The Canadian Association of Petroleum Producers ('CAPP') commented in its submission in the Review:

> Since the first round of offshore activity in the Beaufort Sea (1970-1989), the conclusion and implementation of the [IFA] has made a critical difference in how development proceeds in the region. The IFA gives the Inuvialuit a stake in all economic development and a role in governing how oil and gas activities proceed.[53]

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[49] Section 15.

[50] http://www.irc.inuvialuit.com/about/Inuvialuit%20Final%20Agreement-Amended%20April%202005.pdf.

[51] http://www.gov.nu.ca/sites/default/files/files/013%20-%20Nunavut-Land-Claims-Agreement-English.pdf.

[52] Principles 1(b).

[53] CAPP submission (April 4, 2016) at p. iii.

The federal government is also bound by the 2013 Northwest Territories Lands and Resources Devolution Agreement ('NWT Devolution Agreement')[54] with the Government of the Northwest Territories ('GNWT'). The Inuvialuit Regional Corporation ('IRC'), with others, is a party to the NWT Devolution Agreement. Section 3.20 requires Canada and the GNWT, with the participation of the IRC, to commence negotiations for the management of oil and gas resources in the Beaufort Sea.

Schedule 6 to the NWT Devolution Agreement is an Agreement for Coordination and Cooperation in the Management and Administration of Petroleum Resources in the Inuvialuit Settlement Region ('Coordination Agreement'). The Coordination Agreement applies particularly to resources that straddle or potentially straddle the onshore and the offshore.

In the Nunavut Settlement Area in the eastern Arctic, the statement of objectives in the preamble to the NLCA includes "provid[ing] for certainty and clarity…of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore [and providing] Inuit with…means of participating in economic opportunities…"[55] The NLCA includes specific consultation obligations with respect to opening lands for petroleum exploration and with respect to the preparation of benefits plans.[56] The NLCA anticipates the subsequent development of northern energy and minerals accords.[57]

In 2008, the NLCA was supplemented by the Lands and Resources Devolution Negotiation Protocol between Canada, the Government of Nunavut and Nunavut Tunngavik Incorporated ('Negotiation Protocol').[58] The Negotiation Protocol contemplates an agreement for the transfer to the Government of Nunavut of responsibilities for the management of lands and resources, including specifically oil and gas, both onshore and in certain offshore areas.[59]

Under the 1993 Yukon Oil and Gas Accord ('Yukon Accord'),[60] the federal government agreed to transfer administrative and legislative powers and responsibilities for the management of onshore oil and gas resources.[61] The Yukon Accord included a commitment to commence

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54 http://devolution.gov.nt.ca/wp-content/uploads/2013/09/Final-Devolution-Agreement.pdf.

55 *Supra* note 51, Preamble.

56 Articles 27.1.1 and 27.1.2.

57 Article 28.

58 http://www.eia.gov.nu.ca/pdf/devolution%20protocol_eng.pdf

59 *Ibid* clause 3.

60 https://www.aadnc-aandc.gc.ca/eng/1369314748335/1369314778328

61 Implemented in 1998.

negotiations for the finalization of shared offshore administrative and legislative responsibilities and revenue sharing.[62] In 2008, Canada and Yukon signed a Memorandum of Understanding concerning the Interim Provisions of the Canada-Yukon Oil and Gas Accord in relation to the Offshore (the 'Canada-Yukon MOU').[63] The purposes of the Canada-Yukon MOU include furthering cooperation and consultation with a view to facilitating implementation of the Canada-Yukon Accord and coordinating policies affecting matters in the offshore,[64] as well as providing opportunities for Yukon to become involved in offshore management issues.[65]

In its submission in this Review, the Yukon government also referred to the 1985 policy statement of the federal government entitled *Canada's Energy Frontiers: A Framework for Investment and Jobs*.[66] That statement, which is discussed further below,[67] after referring to the then recently-concluded arrangements with Newfoundland and Labrador and with Nova Scotia for joint management of offshore resources,[68] added:

> The Government of Canada has a clear commitment to shared management with other coastal provinces, and in the North. The structure and scope of shared management will be matters for bilateral discussions and may vary according to regional circumstances and priorities. The decisions set out here neither anticipate nor prejudice the outcome of these discussions. They do set a broad and consistent policy framework within which equality in shared management can be fully realized.[69]

Referring specifically to this 1985 statement, Yukon observed in its submission in this Review:

> Canada's commitment to shared management (based on the principle of equality of governments) with Northern governments is still relevant today and consistent with the 1993 Accord…[70]

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[62] Article 11.1.

[63] http://www.emr.gov.yk.ca/oilandgas/pdf/MOU_Yukon_Oil_and_Gas_Accord_Signed_Dec_2008.pdf

[64] The "offshore" is defined by Article 3.10 of the Canada-Yukon Oil and Gas Accord as "the area underlying that part of the Beaufort Sea over which Canada, as of the date of this Accord, has the authority to legislate and the right to explore for or exploit Oil and Gas."

[65] Article 1.

[66] http://www.aadnc-aandc.gc.ca/eng/1315410409776/1315410817938

[67] Section 6.1.

[68] Discussed *supra* Section 1.1.

[69] At p. 2.

[70] Cover letter dated April 15, 2016 at p. 2.

Each of these land claims and devolution agreements, and the 1985 policy statement, includes commitments that have a direct bearing on the role of northern Indigenous communities and territorial governments in matters that affect the ongoing administration of the *CPRA* and, accordingly, each is an important component of the overall northern oil and gas regime.

2.7 The Duty to Consult

Since the enactment of the *CPRA* in 1986, a substantial body of jurisprudence has emerged around the rights of the Aboriginal peoples of Canada, as enshrined in section 35 of the *Constitution Act, 1982*,[71] particularly with respect to the legal obligation of the Crown to consult and accommodate where Aboriginal rights may be affected. The obligation now plays a particularly significant role in the context of federal decision-making with respect to natural resource exploration and development, including the administration of the *CPRA*.

In addition to section 35 of the *Constitution Act, 1982*, many comprehensive land claims agreements include a contractual obligation on the part of the Crown to consult with Indigenous groups where a change in legislation is proposed.

2.8 General Government Policies

At the time of enactment of the *CPRA* in 1986, the government published a policy statement outlining the purposes of the Act, entitled *Canada's Energy Frontiers: A Framework for Investment and Jobs*.[72] The continued relevance of that policy statement was questioned during this Review.

Today, the Act must also be applied in the context of other general government policies, particularly with respect to the North,[73] and evolving policies with respect to climate change.[74]

In administering the Act, the Minister must also comply with the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*,[75] under which Ministers expect a strategic environmental assessment of a policy, plan or program proposal when the proposal is submitted to a Minister or Cabinet for approval and "implementation of the proposal may result in important environmental effects, either positive or negative."[76]

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[71] Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c. 11.

[72] http://www.aadnc-aandc.gc.ca/eng/1315410409776/1315410817938.

[73] http://www.northernstrategy.gc.ca/index-eng.asp.

[74] http://www.climatechange.gc.ca/default.asp?lang=En&n=72F16A84-1.

[75] http://www.ceaa.gc.ca/default.asp?lang=En&n=b3186435-1.

[76] *Ibid*.

2.9 Summary

The core components of the Northern oil and gas regime are enshrined in the *CPRA* and the *COGOA*, together with the *CEA Act, 2012*. The rights regime in particular also includes licence terms and conditions and, to a lesser extent, consideration of contractual arrangements among interest holders. Further, the *CPRA* must be implemented having regard to land claims agreements, devolution agreements and general government policies and directives,[77] while respecting the constitutional rights of Aboriginal peoples. Together, the Northern oil and gas regime comprises all of these components.

[77] See further discussion in Section 6.3 below under Purpose Statement.

3.0 ORIGINS OF THE *CPRA*

As noted, the history of the regulatory framework for petroleum exploration and development in northern and offshore areas can be traced to regulations first promulgated in the early 1900s. The immediate antecedent of the *CPRA*, however, was the 1982 *Canada Oil and Gas Act* (which, to avoid confusion with the *COGOA*, is referred to herein as '*COGA, 1982*'),[78] which implemented key elements of the *National Energy Program* that had been tabled on October 28, 1980.[79]

Beginning in the 1970s, the federal government undertook a review of the framework for issuing exploration and development rights for northern and offshore areas.[80] The review concluded that vast areas of the Canada lands were held under long-term permits and leases, with only limited obligations to undertake exploration activities that were commensurate with the potential of those areas. Replacing vested rights under existing permits and leases, however, would require legislation to impose new requirements.

In 1976, the government announced its intention to overhaul the Canada lands regime, with the tabling of *A Statement of Policy on a Proposed Petroleum and Natural Gas Act and New Canada Oil and Gas Land Regulations*,[81] generally referred to as the Green Paper. Bill C-20 to implement the Green Paper policy was subsequently tabled on December 20, 1977, but lapsed.

The initiative to overhaul the regime was revived with the tabling of the *National Energy Program* in 1980 and the subsequent enactment of Bill C-48 for the *COGA, 1982*, which was proclaimed in force on March 5, 1982.

The explicit purpose of the *COGA, 1982* was to replace existing exploration rights in northern and offshore areas[82] with negotiated rights. The *COGA, 1982* implicitly acknowledged that the requirement amounted to compulsory acquisition of prior vested rights, subject to the

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[78] Enacted as S.C. 1980-81-82-83, c. 81, widely known as 'Bill C-48.'

[79] *Supra* note 8.

[80] The rights issuance and management regime was then found in the *Canada Oil and Gas Land Regulations*, which had been consolidated in 1961 as P.C. 1961-797, now C.R.C., c. 1518, generally known as the 'Canada Lands Regulations.' The Canada Lands Regulations remain in force under subsection 112(1) of the *CPRA*.

[81] Energy, Mines and Resources Canada, May 1976.

[82] Most of these rights were then in the form of permits or leases that had been issued under the Canada Lands Regulations.

right to negotiate successor rights in accordance with the *COGA, 1982*.[83] It was expressly provided that no compensation was payable for any acquired rights that were replaced by rights under that Act.[84]

The *COGA, 1982* included numerous provisions conferring broad discretion on the Minister, particularly with respect to the process for issuing exploration rights. As noted, existing rights were replaced with a right to negotiate an exploration agreement with the Minister. No terms for such replacement exploration agreements were specified, thus giving the Minister wide discretion with respect to the terms that could be demanded.

Where the Minister proposed to enter into an exploration agreement for Crown reserve lands, the Act simply required the publication of a notice calling for the submission of proposals.[85] No terms were required to be published in advance, again giving the Minister broad discretion with respect to the terms that might ultimately be included in an exploration agreement. Furthermore, the notice requirement could be dispensed with where "the Minister does not consider it to be in the public interest to give such notice owing to the area or location of the available Canada lands or the need to act expeditiously."[86]

The rights issuance process under the *COGA, 1982* was opaque and largely discretionary.

In 1985, the government noted that the *National Energy Program*, including the *COGA, 1982* had been "very strongly criticized by the oil industry, Canadian business in general, and by our trading co-venturers."[87] The U.S. government also protested, arguing that the rights of U.S. national corporations had been expropriated without compensation.[88]

Against this background, the overarching purpose of the *CPRA* was to establish a "new energy policy direction"[89] and address the elements of the *COGA, 1982* that had been the focus of widespread criticism, including "the far-reaching powers and administrative discretion provided under that Act [that had] discouraged investment and job creation."[90] The principal role

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[83] *COGA, 1982*, section 61. Bill C-20 had been explicit on the point, including a heading "Termination of Acquired Rights Without Compensation."

[84] *COGA, 1982*, subsection 61(2).

[85] *Ibid* section 11.

[86] *Ibid* section 12.

[87] *Canada's Energy Frontiers: A Framework for Investment and Jobs*, *supra* note 72, at p. 2.

[88] Many of the rights holders in northern and offshore areas at the time were subsidiaries of U.S. corporations.

[89] *Canada's Energy Frontiers: A Framework for Investment and Jobs*, *supra* note 72, at p. 1.

[90] *Ibid* at p. 7.

of the *CPRA* was to enshrine a rights issuance process that would be market-responsive and transparent and that would provide security of tenure for rights holders, with a significantly constrained role for the exercise of Ministerial discretion. At the same time, the Act was intended to retain for the Crown the ability to make threshold determinations with respect to when, where and on what terms and conditions rights would be issued.

4.0 THE SCHEME OF THE *CPRA*

4.1 Underlying Principles

The approach of the *CPRA* reflects several underlying principles. First among these is the principle that, with limited exceptions, rights can be awarded only as the result of a transparent, competitive bidding process. This contrasts with "concession" systems (and with the rights issuance process under the *COGA, 1982*) in which rights are frequently awarded after a negotiation process in which participants are usually not aware of the terms that other competing participants are prepared to agree to. By comparison, the *CPRA* includes detailed "General Rules Relating to Issuance of Interests."[91] At the same time, there is no obligation under the Act to initiate the rights issuance process, thus retaining for the government a broad discretion to determine when, where, and on what terms, rights will be made available for bids.

Secondly, the *CPRA* reflects the principle that, generally, rights once issued should be secure, a principle that is reflected in several elements of the Act. For example, the Act itself defines the core rights that are granted by the various forms of licence. As a result, these core rights can be changed only by amendment of the Act. Further, they include rights to develop and produce from any discoveries that result from exploration. They also include the right to continue to hold any significant discoveries until such discoveries are determined to be commercial and then to develop and produce from such discoveries under a production licence. The security of these rights is supported by the fact that there are only limited circumstances in which they could be affected negatively by the subsequent exercise of discretion.

Thirdly, the Act supports the recirculation of potential exploration areas by providing that, at the end of the term of an exploration licence, all areas that are not carried forward into either a significant discovery licence or production licence (that is to say, all areas other than discovery areas) revert to Crown reserve land and thus are potentially available, through the call for bids process, for exploration by others.[92]

Fourthly, the Act includes provisions that are intended to facilitate implementation of the concept of unitary development. The essence of the concept is that, from the perspectives of resource conservation, engineering efficiency and protection of the environment, petroleum reservoirs are best developed as a single unit, while recognizing that scattered ownership patterns may exist among the holders of rights to develop and produce from sections of any particular reservoir. Prior to the *CPRA*, interest owners were required at various points during the terms of their exploration rights to relinquish to the Crown up to 50 per cent of the area covered by their original rights, on a checker-board pattern. The resulting scattered ownership patterns were not

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[91] Part II.

[92] Subsection 26(6). See also *Canada's Energy Frontiers: A Framework for Investment and Jobs*, *supra* note 72, at p. 10.

conducive to formulating cohesive exploration and development plans. Relinquishment was abandoned as a requirement of exploration rights by the mid-1980s, before the enactment of the *CPRA*. Certain provisions in the Act, such as those allowing for consolidation of licences, are available to encourage and support unitary development.

4.2 Types of Licences

4.2.1 Exploration Licences

An exploration licence (EL) issued under the *CPRA* confers the right to explore for, and the exclusive right to drill and test for, petroleum on the lands subject to the licence, the exclusive right to develop those lands in order to produce petroleum and the exclusive right to obtain a production licence.

Subsection 26(2) of the Act provides that the term of an EL "shall not exceed nine years from the effective date of the licence and shall not be extended or renewed." However, where the drilling of a well has been commenced on the licence area prior to the expiration of the licence term, the EL is continued "while the drilling of that well is being pursued diligently and for so long thereafter as may be necessary to determine the existence of a significant discovery based on the results of that well."[93]

4.2.2 Significant Discovery Licences

Where a declaration of significant discovery has been made, the holder of an EL with respect to the relevant lands is entitled to be issued a significant discovery licence (SDL) for the area of the discovery, which the Minister has no discretion to refuse.[94] SDLs confer the same rights as those conferred by ELs, namely, the right to explore for, and the exclusive right to drill and test for, petroleum on the lands subject to the licence, the exclusive right to develop those lands in order to produce petroleum and the exclusive right to obtain a production licence. Unlike ELs, however, SDLs do not have a fixed term and continue in force for so long as the relevant declaration of significant discovery remains in force.[95]

4.2.3 Production Licences

Where a declaration of commercial discovery has been made, the holder of an EL or an SDL with respect to the relevant lands is entitled to be issued a production licence (PL) for the area of the declaration of commercial discovery, which the Minister has no discretion to refuse.[96]

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[93] Subsection 27(1).

[94] Subsection 30(1).

[95] Subsection 32(3). This feature of SDLs is discussed in detail in Section 7.3 below.

[96] Section 38.

In addition to the exploration and development rights conferred by ELs and SDLs, a PL confers "the exclusive right to produce petroleum…and title to the petroleum" produced from the relevant lands.[97]

The term of a PL is 25 years, with automatic extension of that term where petroleum is being produced at the end of the 25 years.[98] The Minister has a discretion to extend the term of a PL where commercial production has ceased but the Minister has "reasonable grounds to believe that commercial production…will recommence…"[99]

4.2.4 The "Hierarchy" of Licences

The *CPRA* establishes a "hierarchy" of licences, whereby an interest owner would normally be expected to progress from an exploration licence (EL) to a significant discovery licence (SDL) to a production licence (PL). The Act does not, however, require this progression. For example, where a discovery well drilled under an EL supported a declaration of commercial rather than significant discovery, the owner of the relevant EL could proceed directly to a PL, without proceeding through an intermediate SDL. Further, where the area of a declaration of significant discovery or a declaration of commercial discovery includes Crown reserve lands, the Minister can proceed directly to initiate the call for bids process for an SDL or a PL, as the case may be, for those Crown reserve lands, an option that has been used.[100]

4.2.5 Other Interests under the *CPRA*

For completeness, it is noted that there are other types of title interests under the *CPRA*. These include a group of grandfathered leases,[101] as well as former permits, former special renewal permits or former exploration agreements,[102] originally issued under either the *Canada Oil and Gas Land Regulations*[103] or the *COGA, 1982*.[104] Apart from significant discovery

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[97] Subsection 37(1).

[98] Subsection 41(3).

[99] Subsection 41(4).

[100] In 2012-2013, a Call for Bids was initiated for a significant discovery licence for the Bent Horn oil field on Cameron Island: https://www.aadnc-aandc.gc.ca/eng/1360881253918/1360881366965#chp1. No bids were received.

[101] Subsection 114(4).

[102] *CPRA* sections 112, 113 and 114.

[103] *Supra* note 80.

[104] *Supra* note 78.

licences that originated with discoveries that predated the *CPRA*,[105] these "legacy" interests are not affected by the matters addressed in this report. There is also provision for subsurface storage licences,[106] which also are not affected by the issues addressed herein.

4.3 Rights Issuance Process as Prescribed by the Act

As noted above, the underlying principle of the rights issuance process under the *CPRA* is transparency and objectivity. The Act includes several detailed requirements that enshrine this principle. This section of the Report outlines the relevant provisions of the Act. The following Section 5 of the Report describes administrative practice within the framework of these requirements.

With limited exceptions, licences in relation to Crown reserve lands may only be issued after publication by the Minister of a call for bids, with the winning bid selected in accordance with the process prescribed by the Act.[107] A call for bids must include, *inter alia*, the terms and conditions subject to which the interest is to be issued and any terms and conditions that a bid must satisfy to be considered by the Minister.[108] All such terms and conditions must be accepted by all bidders.

Most fundamental to the integrity of the process is the requirement that the call for bids shall specify:

> (*g*) the **sole criterion** that the Minister will apply in assessing bids submitted in response to the call.[109]

The Act then provides that a bid shall not be selected unless it satisfies the terms and conditions specified in the call and:

> (*b*) the selection is made on the basis of the [sole] criterion specified in the call.[110]

The result of these requirements is that all participants in a call for bids compete on the same terms, with bids being assessed on the basis of the same single criterion.

The integrity of the process is further supported by requiring that the Minister publish a notice of the terms and conditions of the winning bid.[111] The terms and conditions of the licence

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[105] That is to say, most of the significant discovery licences currently in force under the *CPRA* in the North.

[106] Section 43.

[107] Section 14.

[108] Subsection 14(3).

[109] Paragraph 14(3). Emphasis added.

[110] Subsection 15(1).

when issued shall be "substantially consistent" with those specified in the relevant call for bids[112] and must be published in a further notice.[113]

While the details of the call for bids process are structured in the interests of transparency and objectivity, the Minister retains wide discretion prior to initiating a call for bids.

Firstly, the Act imposes no obligation on the Minister to **initiate** the call for bids process. The decision to issue a call for bids, the factors to be considered in making that decision (and any process leading up to the decision) are entirely within the discretion of the Minister.

Secondly, while a call for bids must specify the "sole criterion" to be applied in selecting a winning bid, the Act at the same time provides wide discretion to prescribe **other** terms and conditions to which a licence will be subject, provided only that such terms and conditions are specified in the call for bids and are therefore applicable to all bids.

Thirdly, the sole bidding criterion itself may be selected at the Minister's discretion. While the usual practice has been to specify work bonuses as the sole criterion for awarding exploration licences, cash bonus bidding has been specified.[114]

Finally, the Act expressly provides that the Minister may reject all bids and is not required to issue a licence as a result of a call for bids.[115]

The Act specifies only limited circumstances in which the Minister may issue an interest in relation to Crown reserve lands without following the prescribed call for bids process. In addition to correcting errors,[116] the Minister may directly issue an interest in relation to Crown reserve lands:

> …in exchange for the surrender by the interest owner, at the request of the Minister, of any other interest or a share in any other interest, in relation to all or any portion of the frontier lands subject to that other interest.[117]

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[111] Subsection 15(2).

[112] Subsection 15(3).

[113] Subsection 15(4).

[114] A cash bonus was specified as the bidding criterion in the call for bids for a significant discovery licence for the Bent Horn field on Cameron Island in 2012-2103. See *supra* note 100.

[115] Subsection 16(1).

[116] Paragraph 17(1)(*a*).

[117] Paragraph 17(1)(*b*).

At the time of enactment of the *CPRA*, it was anticipated that this possibility of exchanging interests could be helpful in the context of aboriginal land claims negotiations.

In addition to the wide discretion that the Minister retains with respect to initiating the rights issuance process, two other features of the Act should be noted. Firstly, the Governor in Council may prohibit the issuance of interests in relation to such lands as are specified in the order.[118] At the time of enactment of the Act, it was contemplated that such a prohibition order might be made to facilitate land claims negotiations, to assist in the negotiation of international boundary disputes or in cases of serious environmental sensitivity.

Secondly, the Governor in Council may prohibit work or activity on any lands subject to an interest in the case of:

> (*a*) disagreement with any government concerning the location of an international boundary,
>
> (*b*) an environmental or social problem of a serious nature, or
>
> (*c*) dangerous or extreme weather conditions affecting the health or safety of people or the safety of equipment…[119]

Where such an order is made, the requirements under the relevant interest are suspended and the term of the interest is extended for the period that the order is in effect.[120] This provision was included in the Act to provide a mechanism for formalizing "moratoriums" for reasons ranging from environmental concerns to boundary disputes.

To summarize, the *CPRA* establishes a transparent and objective call for bids process for issuing rights, while at the same time retaining for the Minister wide overall discretion with respect to initiating the process. Specifically, the Minister's discretion extends to determining when, where and on what terms and conditions interests may be issued in relation to Crown reserve lands. Furthermore, the Governor in Council is empowered to prohibit the issuance of licences in specified areas and to prohibit activities in limited circumstances.

4.4 Benefits Plans

Section 21 of the *Act* provides that no work or activity on any area that is subject to a licence shall be commenced until the Minister has approved a benefits plan as required under the *COGOA* for the employment of Canadians and for providing Canadian manufacturers, consultants, contractors and service companies "with a full and fair opportunity to participate on

[118] Subsection 10(1).

[119] Subsection 12(1).

[120] Subsections 12(2) and (3).

a competitive basis in the supply of goods and services…"[121] More detailed requirements are spelled out in the *COGOA*, thereby linking benefits directly to the activities that generate such benefits and which must be authorized under that Act.[122]

4.5 Royalties

The *CPRA* reserves to the federal Crown a royalty in respect of all petroleum produced from lands subject to the Act and imposes direct liability for payment thereof on all holders of any share in the relevant production licence.[123] Details of the royalty scheme and royalty rates, however, are prescribed by regulation, not by the Act itself.[124]

4.6 Environmental Studies Research Fund

Part VII of the Act establishes the Environmental Studies Research Fund ('ESRF') "to finance environmental and social studies pertaining to the manner in which, and the terms and conditions under which, exploration, development and production activities on frontier lands…should be conducted."[125] Payments into the ESRF are levied on interest owners, calculated as a product of the number of hectares under licence and the rate fixed by the Minister for the relevant region. The ESRF is administered by the Environmental Studies Management Board appointed jointly by the two Ministers responsible under the Act.

4.7 Transfers, Assignments and Registration

Part VIII of the Act deals with the establishment of a public register of interests and provides for the registration of security interests. The Act requires notice to the Minister of any agreement or arrangement that is or may result in a disposition of an interest or a share therein.[126] The Act does not, however, require any Ministerial approval of such agreements or arrangements.

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[121] *COGOA*, *supra* note 15, section 5.2.

[122] *Ibid*.

[123] Part VI.

[124] See *Frontier Lands Petroleum Royalty Regulations*, SOR/92-26.

[125] *CPRA* subsection 76(2).

[126] Section 85.

5.0 ADMINISTRATION OF THE *CPRA*

5.1 Permissive or Enabling Character of the Act

As noted earlier, the basic framework for the rights issuance process under the Act is permissive, or enabling – the Act does not require the Minister to initiate a call for bids. Furthermore, the Act imposes no limitation on the Minister's ability to establish administrative preconditions, either procedural or substantive, that must be met before proceeding to a decision to initiate a call for bids. As discussed, the Minister also has a wide discretion to specify in a call for bids the terms and conditions to be incorporated into a licence. The Minister may reject all bids. The Act thus provides the Minister with wide discretion to determine when, where and on what terms and conditions a licence will be issued through the call for bids process.

Additionally, the Act also includes mechanisms for prohibiting the issuance of interests in specified lands[127] and, in certain circumstances, for prohibiting activities on lands that are subject to an interest.[128]

Together, these elements of the Act provide wide flexibility to ensure that the Act is applied in support of relevant government policies, in meeting responsibilities under land claims and devolution agreements and in compliance with legal obligations to Aboriginal peoples.[129]

5.2 Administrative Practice under the *CPRA*

Within the enabling framework of the *CPRA*, it has been the practice of the Minister to engage in various consultations before initiating a call for bids, as described in the Minister's *Northern Oil and Gas Annual Report 2015* to Parliament:

> In accordance with the provisions of land claim agreements, Indigenous and Northern Affairs Canada (INAC) consults Indigenous communities and organizations on the terms and conditions of the issuance and related matters prior to rights issuance. Similarly, the Department consults and engages territorial governments and other federal departments with environmental knowledge and scientific information relevant to oil and gas exploration and development. After consideration of this information, the areas open for exploration may be adjusted.[130]

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[127] Subsection 10(1).

[128] Subsection 12(1).

[129] See: https://www.aadnc-aandc.gc.ca/eng/1100100036364/1100100036369.

[130] *Northern Oil and Gas Report Annual Report 2015*, tabled in Parliament on May 5, 2016, https://www.aadnc-aandc.gc.ca/eng/1462475616893/1462475684959, at p. 12. The Act is administered by the Petroleum and Mineral Resources Management Directorate: https://www.aadnc-aandc.gc.ca/eng/1100100036087/1100100036091.

This practice reflects the wide discretion that is retained by the Minister in initiating the call for bids process.

It has also been the administrative practice before initiating a call for bids to issue a call for nominations, inviting requests that certain areas be included in the call for bids. The Minister, in selecting lands to be included in a call for bids, is required to consider any request, reflecting the Act's market-responsive approach.[131] The Minister is not, however, required to proceed to issue a call for bids for any lands that are so requested. The practice of calling for nominations has the added benefit of providing an opportunity for other potentially affected interests to be identified and considered before initiating the call for bids process.

[131] *CPRA*, subsection 14(2).

6.0 GENERAL ASSESSMENT OF THE EFFECTIVENESS OF THE *CPRA*

6.1 Original Purpose of the *CPRA*

> The *CPRA* does not include a statement of purpose; the Act is simply entitled:
>
> An Act to regulate interests in petroleum in relation to frontier lands, to amend the Oil and Gas Production and Conservation Act and to repeal the Canada Oil and Gas Act.

However, concurrently with the tabling of the Act in 1985, the government released a policy statement entitled *Canada's Energy Frontiers: A Framework for Investment and Jobs*.[132] It is clear from both the title and the contents of this statement that the original policy purpose underlying the Act when it was tabled in 1985 was to establish a "new energy policy direction,"[133] by enabling development of frontier petroleum resources within a "framework for the creation of jobs and investment,"[134] supported by specific measures aimed at establishing a "simple, clear and market-driven [process]…to promote efficient and timely exploration…"[135]

The level of petroleum exploration activity in areas under the authority of the Minister of Indigenous and Northern Affairs has been low since the 1980s. Indeed, in the 30 years since enactment of the *CPRA*, only one exploration well has been drilled in the Beaufort Sea under the authority of new exploration licences first issued under the Act.[136]

As of December 31, 2015 there were 15 ELs in force in the area under the authority of the Minister.[137] However, the number of ELs in force, the rate of issuance of ELs and the level of drilling activity alone are not reliable indicators of whether the Act has been successful in achieving its original purpose of promoting exploration. Geological prospectivity, logistics and economics are more immediate determinants in industry's decision-making processes. The Act's effectiveness as measured against its original purpose – and in particular its reliance on a "market-driven" approach – is better evaluated by asking whether there is any evidence that the Act has presented obstacles that might have discouraged investment. Does the *CPRA* present any barriers to entry – or disincentives – for industry in determining whether to bid on exploration licences?

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[132] *Supra* note 72.

[133] *Ibid* at p. 1. See discussion of Underlying Principles in Section 4.1above.

[134] *Ibid* at p. 19.

[135] *Ibid* at pp. 8 and 10.

[136] See further discussion below at Section 7.2.2, particularly at notes 181-186.

[137] Including two ELs that are under a work prohibition order. *Northern Oil and Gas Report Annual Report 2015*: https://www.aadnc-aandc.gc.ca/eng/1462475616893/1462475684959, at p. 8.

There was no suggestion during the course of this Review that the *CPRA* has presented obstacles to prospective bidders for exploration and development rights in northern areas. In its submission, the Canadian Association of Petroleum Producers (CAPP) stated:

> CAPP broadly commends the structure and administration of the CPRA. The framework provides clarity and stability for decisions with long time horizons. Rights issuance is workable and accountable. The system provides the Crown with control over the resource and permits flexibility to respond to events, for example, adaptation to rapidly evolving governance arrangements.[138]

In the cover letter to its submission, Imperial Oil Limited ('Imperial') stated:

> The intent and structure of the Act is fundamentally sound and we support a continuation of the existing legislation, including the hierarchy of exploration, significant discovery, and production licences.[139]

Chevron Canada Limited stated in its submission that the *CPRA* "has proved to be extremely robust and flexible over the last three decades or so."[140]

In light of these overall assessments of the Act, it would appear that the low level of activity in northern areas since the early to mid-1980s is attributable to factors other than the *CPRA*. It is noted that, off the east coast, where essentially the same provisions apply through the legislation implementing the joint management agreements with Newfoundland and Labrador and with Nova Scotia,[141] regular calls for bids have been held successfully, leading to active exploration programs. In its submission, CAPP described Atlantic Canada as having "a thriving offshore oil and gas industry."[142] CAPP attributed the low level of activity in the Arctic offshore in recent years to other factors, including "escalating costs and increased complexity of oil and gas operations in the Arctic offshore relative to Atlantic Canada."[143]

Criticisms of the Act in submissions from non-industry participants in the Review were largely concerned with what were argued to be omissions from the Act, rather than with the structure of the rights allocation process itself. While recommendations were made for significant additions to the Act, it was not suggested that the Act should be replaced or that the call for bids process itself should be fundamentally restructured.

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[138] CAPP submission (April 4, 2016), at p. iv.

[139] Cover letter to Imperial submission dated April 12, 2016.

[140] Chevron letter dated April 11, 2016.

[141] Discussed *supra* at notes 18 and 19.

[142] Submission dated April 4, 2016, at p. 6.

[143] *Ibid* at p. 7.

The MSR has concluded that the *CPRA* has been successful in instituting a rights issuance system that is market-driven, is responsive to industry interest and provides security of tenure, while at the same time retaining for the Crown full control over whether to initiate the process. It was not suggested during this Review that any element of the Act has presented a barrier to entry.

6.2 Today's Policy Context

The 1985 policy statement *Canada's Energy Frontiers* included the following statement:

> The prudent management of Canada's endowment of oil and natural gas is an important economic, **social and environmental** responsibility of governments.[144]

Notwithstanding this passing reference to social and environmental responsibility, the focus of the policy statement was almost exclusively on economic considerations, as reflected in the statement's subtitle: *A Framework for Investment and Jobs*.

As discussed earlier,[145] the legal and policy context for resource management in northern Canada today is significantly different from the context of 1986, particularly having regard to the intervening evolution of land claims agreements, devolution agreements, constitutional responsibilities to Indigenous peoples and current government policies, including emerging policy with respect to climate change.

An overview of today's policy context, specifically as it relates to the management of northern oil and gas resources, is found in the Minister's Message in the *Northern Oil and Gas Annual Report 2015* to Parliament:

> The Government of Canada has pledged to continue promoting a modern, effective and safe oil and gas regulatory regime that upholds world-class environmental standards in the North. We are committed to working with Indigenous Peoples when considering the development of natural resources and will do so in a responsible and environmentally sound manner. Work will continue with both our domestic and international partners to promote a sustainable Arctic economy, where resource development decisions are based on science, facts, and evidence, and serve the public's interest.[146]

Considering the permissive or enabling framework of the rights issuance process under the *CPRA*,[147] there does not appear to be any element of the Act that would inhibit its application in

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[144] *Supra* note 72, at p. 8. Emphasis added.

[145] *Supra* Section 2.8.

[146] *Supra* note 130, at p. 3.

[147] As discussed above in Section 5.1.

support of each component of the Minister's statement. Whether the Act might be amended to include explicit obligations reflecting today's policy context is another discussion.

6.3 Purpose Statement

Based on comments received during the Review, there appears to be some misapprehension of the role of the *CPRA*, particularly when it is suggested that the Act is linked to the 1985 policy statement *Canada's Energy Frontiers: A Framework for Investment and Jobs*.[148] While that statement explained the policy context and purpose of the Act as presented by the government of the day, the Act is not formally tied to the 1985 statement; on the contrary, it has proven flexible enough to accommodate evolving national priorities and policies, such as those reflected in the Minister's statement quoted above. As also noted above, the Act is in fact administered to reflect other priorities in addition to those that were the focus of the 1985 policy statement, including environmental concerns and the involvement of Indigenous communities. Indeed, one of the strengths of the Act is its flexibility to be administered having regard to evolving national priorities as they may change over time.

Having said that, the MSR has concluded that the Act would be improved by the addition of a statement of purpose. Such a statement should explicitly reflect the responsibility of government to consider – and balance – economic, social and environmental responsibilities (including the obligation to work with Indigenous Peoples), generally capturing, in abbreviated form, the key elements of the Minister's Message quoted above. Reference should also be made in such a statement to the incorporation of Indigenous knowledge into the administration of the Act.

The inclusion of a statement of purpose in legislation of this kind, it is suggested, is good legislative practice. Such statements can improve general understanding of legislation and provide valuable guidance for its administration. It is noted that the companion legislation to the *CPRA*, the *COGOA*, includes such a statement.[149]

RECOMMENDATION 1

It is recommended that the *CPRA* be amended to include a Statement of Purpose that would be broad and enduring, to accommodate national priorities as they may evolve.

[148] *Supra* note 72.

[149] *COGOA supra* note 15, section 2.1.

6.4 Strategic Environmental Assessments

Several submissions received during the Review pointed to the absence from the *CPRA* of any requirement for an environmental assessment to be undertaken before initiation of the call for bids process. The submission of Ecojustice Canada stated that "[t]his gap places Canada out of step with international best practices that every other Comparator Jurisdiction has adopted."[150]

Environmental assessments of specified works and activities are required under the *Canadian Environmental Assessment Act, 2012* and, in the Inuvialuit Settlement Region, under the *Inuvialuit Final Agreement*. There is, however, no direct statutory requirement for an environmental assessment to be undertaken before initiating a call for bids or the issuance of any licence under the *CPRA*.

Although it is not required by the Act, the potential environmental consequences of issuing licences are considered under existing policies and processes. As noted, it is the practice of INAC, prior to initiating a call for bids, to consult Indigenous communities and organizations, territorial governments and other federal departments with environmental and scientific information relevant to oil and gas exploration and development.[151]

Further, as discussed above, INAC is subject to the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*,[152] under which a strategic environmental assessment of a policy, plan or program proposal is expected to be conducted when the proposal is submitted to an individual minister or Cabinet and implementation of the proposal may result in "important environmental effects." Under the *Directive*, departments and agencies are also "encouraged to conduct strategic environmental assessments for other policy, plan or program proposals when circumstances warrant."[153]

There has been a long history of environmental studies and assessments in the North.[154] The most recent of these, the Beaufort Regional Environmental Assessment (BREA),[155] has

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[150] Ecojustice Canada submission (April 11, 2016), at p. 3. The "Comparator Jurisdictions" adopted by Ecojustice were Norway, Greenland and the U.S.

[151] *Northern Oil and Gas Report Annual Report 2015*, *supra* note 130, at p. 10.

[152] http://www.ceaa.gc.ca/default.asp?lang=En&n=b3186435-1.

[153] In its submission (April 11, 2016), at p. 7, Ecojustice Canada asserted that INAC has not complied with the Directive.

[154] https://www.aadnc-aandc.gc.ca/eng/1310570943643/1310572541138.

[155] http://www.beaufortrea.ca/.

supported the government's "continued pledge towards responsible, sustainable resource development…"[156] The BREA concluded in March, 2015.

Recently, the Inuvialuit Regional Corporation and the Inuvialuit Game Council have jointly proposed a Regional Strategic Environmental Assessment (RSEA) in the Inuvialuit Settlement Region.[157] In its written submission to the MSR, Imperial stated:

> Imperial believes that the time is right for a Beaufort RSEA and fully supports the March 8, 2016, letter from the Inuvialuit Regional Corporation and the Inuvialuit Game Council…[158]

BP Canada ('BP') commented:

> [A Beaufort Sea wide RSEA] could provide valuable insights for addressing environmental impacts at a cumulative, regional level as well as providing insights for preserving local cultural identity and values. Importantly, individual project environmental assessments would benefit from a more efficient process that draws on the findings and conclusions from the RSEA…[159]

The value of strategic environmental assessments is widely accepted. The Arctic Council recommends their use "on a regional basis to determine the potential environmental impacts of human activity, including opening areas for oil and gas."[160]

Nevertheless, as noted, the *CPRA* does not require that a strategic environmental assessment be undertaken prior to initiating a call for bids. At the same time, it is noted that the Act does not contain any provision limiting the ability of the Minister to require – and to determine the scope of – such assessments as a matter of administrative practice, given the wide discretion under the *CPRA* to initiate the call for bids process.

It would be preferable, however, to elevate a requirement for strategic environmental assessments to a statutory obligation, as a prerequisite to the initiation of the rights issuance process. As submitted by Greenpeace, "entrenching the requirement in legislation would provide greater assurance that the government will actually adhere to this best practice, both now and

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[156] Minister's Message, *Northern Oil and Gas Report Annual Report 2015*, *supra* note 130.

[157] Joint letter addressed to six federal Ministers, dated March 8, 2016.

[158] Imperial submission (April 12, 2016), at p. 42.

[159] BP Canada submission (April 12, 2016), at pp. 4-5.

[160] *Arctic Offshore Oil and Gas Guidelines 2009*, https://oaarchive.arctic-council.org/bitstream/handle/11374/63/Arctic-Guidelines-2009-13th-Mar2009.pdf?sequence=1&isAllowed=y, at p. 17.

into the future."[161] Ecojustice Canada submitted that "[p]olicy statements alone do not provide sufficient certainty and accountability to ensure that SEA requirements are implemented fairly and effectively."[162]

RECOMMENDATION 2

It is recommended that the *CPRA* be amended to require that a strategic environmental assessment, encompassing the area in which it is proposed to initiate a call for bids, has been completed and considered by the Minister before the call for bids is issued.

6.5 Overall Assessment

While some participants in this Review submitted that there are significant omissions from the *CPRA*, it was not suggested that the overall framework of the *CPRA* is no longer appropriate for the management of rights to explore for, develop and produce petroleum in the areas under the authority of the Minister of Indigenous and Northern Affairs. The Act has enabled the Minister to manage the rights issuance process in a way that supports evolving national priorities and accommodates changing governance arrangements in the North, while providing industry with confidence in the integrity of the scheme and with security of tenure to rights issued under the Act. There has been no suggestion that, to this point, the Act has been a barrier to entry for companies interested in acquiring rights. While the Act is market-responsive, the Minister nevertheless retains unilateral control over where, when and on what terms and conditions to release areas for licensing through the call for bids process.

Overall, industry supports the Act. Many of the submissions of governments and agencies, in addition to raising issues with specific provisions of the Act, were directed at perceived shortcomings or omissions in the current Act, rather than the Act's overall framework. Similarly, many of the submissions of non-governmental organizations ('NGOs') urged that the Act should expressly require that certain matters be addressed before the rights issuance process is initiated.

The MSR has concluded that a comprehensive legislative restructuring of the *CPRA* is not needed. The Act would, however, be improved by the addition of certain provisions, as discussed in this and following sections of this Report. A number of specific issues might also be addressed if a Bill to amend the Act is presented to Parliament, although most of these are not essential to the continued functioning of the Act.[163]

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[161] Greenpeace Canada submission (April 13, 2016), at p.10.

[162] Ecojustice Canada submission (April 11, 2016), at p. 8.

[163] The specific issue of potentially increasing the maximum term of exploration licences would require legislative amendment, as discussed in the next Section 7.2 below.

Many of the matters raised by industry, by governments and agencies, and by NGOs could be addressed by the adoption of new or revised policies and procedures within the framework of the existing Act. This is particularly true of steps that it has been urged should be required before initiating a call for bids. Understanding of the Act and confidence in its administration would be improved by adopting formal statements of policy, process and guidance.

RECOMMENDATION 3

Should it be decided not to proceed with proposed legislative amendments to the *CPRA*, it is recommended that appropriate formal statement of policy and guidance be adopted, to be applied within the framework of the current Act.

7.0 SPECIFIC ISSUES

7.1 Introduction

This section of the Report addresses specific issues raised during the Review. The most significant of these relate to the maximum term of exploration licences and the indefinite tenure of significant discovery licences. These two matters are addressed first.

7.2 Length of Exploration Licence Term

7.2.1 Current Provisions

Subsection 26(2) of the *CPRA* provides:

> Subject to subsection (3) and section 27, the term of an exploration licence shall not exceed nine years from the effective date of the licence and shall not be extended or renewed.

The subsection has two key elements: firstly, subject to limited exceptions, it prescribes an absolute maximum term of nine years; secondly, it expressly prohibits extensions or renewals.

Subsection 26(3) provides a limited exception for the transition of exploration licences that had been negotiated prior to December 20, 1985.[164] A further exception is enacted by section 27, which provides that, where the drilling of a well on any lands subject to an exploration licence has been commenced prior to the expiration date of the licence, the licence continues in force while the drilling of that well is being pursued diligently and for so long thereafter as may be necessary to determine the existence of a significant discovery based on that well.

A further limited exception to the express prohibition against the extension or renewal of exploration licences is enacted by subsection 12(3). Under subsection 12(1),[165] the Governor in Council may issue an order prohibiting activities in certain circumstances. Subsection 12(3) provides that, notwithstanding any other provision in the Act, the term of an "interest" (which, by definition, includes exploration licences[166]), and the period provided for compliance with any requirement in relation to the interest, are extended for a period equal to the period that the order is in force.

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[164] This is a transitional provision, the date being that on which the Act was tabled in the House of Commons. The provision is spent.

[165] Discussed above at notes 119 and 120.

[166] Section 2.

Any proposed extension or renewal of the term of an exploration licence not coming within these limited exceptions could not be implemented without amending subsection 26(2) of the Act.

By letter dated December 17, 2014 Imperial Oil Limited and BP Canada, on behalf of the Beaufort Sea Exploration Joint Venture ('BSEJV'), made a request to the then Minister of Aboriginal Affairs and Northern Development Canada that the terms of EL476 and EL477, covering areas in the Beaufort Sea, be extended to 16 years, "with Ministerial discretion for extensions beyond 16 years."[167] The current expiry date for EL476 is July 31, 2019 and for EL477 is September 30, 2020. The letter acknowledged that subsection 26(2) of the *CPRA* would have to be amended for the request to be granted.

In a letter dated November 21, 2014 to the then Minister of Aboriginal Affairs and Northern Development, the Inuvialuit Regional Corporation (IRC) advised that the IRC would support an amendment of the *CPRA* that would retain the maximum term of exploration licences at nine years while authorizing the Minister to extend the term up to a maximum of 16 years in total where it was demonstrated that "the location or other characteristics of the EL presented technical, environmental or logistical issues that could not be reasonably addressed during the nine year term of the EL."[168] The IRC letter noted that, should the proposed amendment to the *CPRA* be made, it would need to be applied to EL 476 and EL 477.[169]

In its submission to the MSR, Imperial recommended the introduction of a zone system in the area of the Beaufort Sea, with maximum EL terms ranging from nine to 16 years and with the revised maximum terms applied to existing EL.[170]

BP requested in its submission that the term of future ELs in the Arctic offshore be increased and that the term of existing ELs in the Arctic offshore be extended "to at least sixteen years."[171]

The submissions of Canadian Association of Petroleum Producers ('CAPP')[172] and the Yukon government[173] supported increasing the maximum term of ELs. The Nunavut government

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[167] Joint letter dated December 17, 2014 from Imperial Oil Limited and BP Canada.

[168] Letter dated November 21, 2014 from the Chair and Chief Executive Officer of Inuvialuit Regional Corporation.

[169] The IRC's written submission to the MSR in this review (April 11, 2016) did not address the matter of potentially amending section 26 of the Act.

[170] Imperial submission (April 12, 2016), Section 3.

[171] BP submission (April 12, 2016), at pp. 6-9.

[172] CAPP submission dated (April 4, 2016).

[173] Yukon Energy, Mines and Resources submission (April 15, 2016).

stated that it "does not have any objection to this potential change, and recognizes the difficult conditions experienced by industry in the Arctic."[174]

All of the submissions of the non-governmental organizations opposed increasing the maximum EL term.

Considering an increase in the statutory limit to the term of exploration licences presents two distinct questions:

- **Should the *CPRA* be amended to increase the maximum term for exploration licences?**
- **Should any increase in the maximum term for exploration licences be applied retrospectively to licences currently in force?**

7.2.2 Should the Maximum EL Term Be Increased?

Subsection 26(2) of the *CPRA* has two elements – it first prescribes an absolute maximum term of nine years and then expressly prohibits any extension or renewal of that term.

The maximum term of exploration rights should balance, on the one hand, industry's interest in securing tenure for as long a period as possible with, on the other hand, the Crown's interest in ensuring that exploration activity is in fact undertaken within a reasonable period, that exploration prospects are not taken out of circulation and held in inventory, and that rights are not used merely as a vehicle for speculation. At the same time, from the Crown's perspective, the term of exploration rights should allow a reasonable period for undertaking a rigorously-designed, methodical exploration program that fully meets all regulatory requirements with respect to safety, environmental protection and resource conservation, as well as satisfying expectations with respect to consultations with Indigenous Peoples and affected communities.

Exploration in the Beaufort Sea has presented unique technological and logistical challenges ever since the drilling of the first offshore well in 1972.[175] Under the relevant regulations at that time, the term of an exploration permit for areas such as the Beaufort Sea was six years plus six automatic annual renewals for a total term of 12 years.[176] A permittee was entitled to a 21 year lease for half of the permit area,[177] subject to increased rentals, but without having to demonstrate that a commercial discovery had been made, for a total term of 33 years.

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[174] Government of Nunavut submission (April 11, 2016).

[175] Imperial submission (April 12, 2016), at p. 2. Onshore drilling in the Mackenzie Delta began in 1961: Imperial submission, at p.1.

[176] *Canada Oil and Gas Land Regulations*, C.R.C., c. 1518, section 36 and 38.

[177] *Ibid* section 55(2).

A lease was itself renewable for successive terms of 21 years where the Minister was satisfied that the area was "capable of producing oil or gas."[178]

Under the *COGA, 1982*, which succeeded the former regulations in 1982 and which applied until the enactment of the *CPRA* in 1986, the term of an exploration agreement could not exceed five years or, "where the Minister considers it necessary," eight years.[179] However, exploration agreements issued under the *COGA, 1982* could be renegotiated "for successive terms not exceeding five years each…"[180] without limit on the number of successive terms and without having to establish the existence of either a significant or commercial discovery.

Until 1990, all rights issued in the Beaufort Sea under either the *COGA, 1982* or the *CPRA* were successor rights to rights that had been issued originally under the *Canada Oil and Gas Land Regulations*[181] as far back as the 1960s. The first call for bids for new exploration licences in the area under the *CPRA* was not issued until 1989, with a closing date in March, 1990.[182] The 1989 Annual Report of the Canada Oil and Gas Lands Administration noted that "previous exploration rights in the area were awarded 20 years ago."[183] All wells drilled in the Beaufort Sea prior to 2005 (the last such well having been spudded in 1989[184]) were drilled under rights that had originally been issued in the 1960s and 1970s, under the *Canada Oil and Gas Land Regulations*, with terms that, in one form or another, had run for at least 20 years. These rights had been carried forward as exploration agreements under the transition provisions of the *COGOA, 1982*[185] and, subsequently, as exploration licences under the *CPRA*,[186] with an effective term in some cases of 20 or more years from their original date of issue.

The non-renewable nine-year limit on EL terms introduced by the *CPRA* significantly reduced the length of the term that had previously been available to holders of exploration rights in Canada's frontier areas. The limit was nevertheless accepted by industry in 1985. In keeping

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[178] *Ibid* section 62.

[179] S.C. 1980-81-82-83, c. 81, subsection 16(1).

[180] *Ibid*.

[181] *Supra* note 176.

[182] Canada Oil and Gas Lands Administration 1989 Annual Report, at p. 9.

[183] *Ibid*.

[184] Esso Chevron et al Isserk I-15, spudded in November, 1989.

[185] S.C. 1980-81-82-83, c. 81, sections 62-72.

[186] *CPRA* Part X.

with the general approach of limiting Ministerial discretion under the new regime,[187] it was also accepted that the *CPRA* should not include any general discretionary authority to extend or renew exploration licences. To make the matter abundantly clear, subsection 26(2) expressly prohibits extensions or renewals.

Since the enactment of the *CPRA* in 1986, only one well has been drilled in areas within the authority of the Minister of Indigenous and Northern Affairs under exploration licences subject to the maximum non-renewable term of nine years.[188]

It is not apparent that the limited, non-renewable term of exploration licences has been the cause of, or even a significant factor in, this decline in activity. No doubt many factors have been at play.[189] At the same time, the low level of activity since the first issuance of new exploration licences under the *CPRA* in 1990 provides little empirical evidence that nine years has proven to be an appropriate balance between the interests of the Crown and the interests of industry in the Beaufort Sea. The willingness of parties to bid on licences that have a maximum term of nine years might provide some evidence that the term was believed by bidders to be sufficient at the time of their bids, but the record shows that in only one case has that belief been carried through to the drilling of a well in the Beaufort Sea.[190]

It should also be noted that, notwithstanding the 44-year history of drilling in the Beaufort Sea, no commercial discovery has been declared and no development project for any offshore area has been proposed.[191]

The request of the BSEJV co-venturers to increase the maximum term of exploration licences under the *CPRA* directly presents the question of whether an absolute maximum EL term of nine years continues to be appropriate – having regard to the state of today's knowledge on prospectivity, drilling technology and logistics, and other considerations such as evolving regulatory requirements, and obligations and expectations with respect to consultation of affected communities.

As noted, the unique environment of the Beaufort Sea has always presented particular technical and logistical challenges. These challenges have been met by continual learning, the development of new technologies, and adaptability on the part of both industry and government.

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[187] As discussed in Section 3 above.

[188] Devon Paktoa C-60, spudded December 5, 2005.

[189] See, for example, the discussion in the CAPP submission (April 4, 2016), at p. 20.

[190] Devon Paktoa C-60.

[191] The three anchor fields for the proposed Mackenzie Gas Project and the Bent Horn project on Cameron Island are all located onshore.

As exploration interest moves to deeper waters, further technological innovation – and regulatory responses – will be needed. Licensing and regulatory requirements should not present an impediment to this evolutionary process. Certainly a need to meet licence requirements by a deadline should not serve as an inducement to proceed in any way other than the safest, the most environmentally responsible and the most technologically sound.

To date, the wells drilled in the Beaufort Sea have been located on the continental shelf in relatively shallow water depths, many in areas where conditions allowed for year-round drilling using bottom-founded platforms or structures. Most of the wells drilled in the area from drillships were located in water depths of 50-60 meters.

EL 476 and EL 477 include areas where the seabed transitions from the continental shelf to the continental slope, with water depths that are generally greater than 100 meters and that can reach over 1000 meters. Apart from the greater water depth itself, drilling on the continental slope can present additional technical challenges.

Technical and logistical challenges also increase with distance from shore, as the number of open-water days decreases.[192] Imperial submitted that two or more years might be required to drill a single well and that "[a]dditional time is necessary to develop suitable, fit-for-purpose technology, equipment and operating practices to execute drilling operations in this environment."[193]

BP submitted that the pace of work had been affected by, *inter alia*:

- Learning in respect of the operational challenges of working in the Beaufort Sea (e.g., difficult ice conditions, a short open-water period in which to conduct operations, and the need to establish support infrastructure and systems for such a remote area). Environmental baseline work has provided additional insights into these operational challenges;
- The complexity of the geology and subsurface pressure within the licence areas, which has been highlighted by the acquisition and analysis of seismic data;
- The requirement to either upgrade existing drilling systems or develop new-build drilling systems and support vessels…[194]

The MSR notes that these factors appear to be based on learnings from work undertaken to date by the BSEJV, since the issuance of EL 476 and EL 477.

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[192] The correlation between the number of open-water days and distance from shore is illustrated in Imperial's submission (April 12, 2016), at pp. 9-13.

[193] *Ibid* at p. 15.

[194] BP submission (April 12, 2016), at p. 8.

A persuasive case has been made to the MSR that the nine-year maximum term for exploration licences is not – in the context of today's understanding of the technological, regulatory and consultation requirements – sufficient for the execution of a sound exploration program for areas in the deep waters of the Beaufort Sea.

Industry participants and others pointed to the regimes of other nations with Arctic exploration activities as precedents. The same precedents were argued, by different parties, to support both the view that the existing nine-year maximum term is appropriate and, on the other hand, that the term should be increased for areas such as the Beaufort Sea. The precedents, and the views of different parties on what they should mean for this Review, are discussed in detail in the various submissions. The MSR notes that the Greenland regime allows for terms up to 16 years. None of the precedents cited appears to limit an initial term to nine years with no possibility of extension or renewal.

In the MSR's view, however, the international precedents are of limited value. The licensing regimes of the jurisdictions cited are different from the Canadian regime, which, as noted, has evolved over decades to meet the unique circumstances of Canada's Arctic and, later, offshore areas. What is an appropriate maximum term for future exploration rights under the *CPRA* should be determined in the context of Canada's unique circumstances.

In its 2014 report for the Wilson Center, *Opportunities and Challenges for Arctic Oil and Gas Development*, the Eurasia Group states:

> Longer lease terms are particularly important in the North American Arctic, where severe conditions limit the window for exploration and production activity to just three to four months of the year.[195]

Imperial claimed in its submission that there is "a general trend toward longer exploration licence terms."[196] CAPP reported that the U.S. and Russian governments have each received industry requests for longer lease terms in the Arctic.[197]

The MSR notes that Yukon recently amended its *Oil and Gas Act* to allow for discretionary extensions (in defined circumstances) of the initial maximum term of 10 years for an oil and gas permit.[198] Areas within the Yukon do not appear to present technical and logistical challenges of the same magnitude as those encountered in the deep water of the Beaufort Sea.

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[195] https://www.wilsoncenter.org/sites/default/files/Artic%20Report_F2.pdf, at p.24.

[196] Imperial submission (April 12, 2016), at p. 48.

[197] CAPP submission (April 4, 2016), at p. 11.

[198] R.S.Y. 2002, c. 162, as amended by S.Y. 2015, c. 13, section 8.

As discussed, the maximum term of nine years does not appear to have been a significant factor in limiting the level of interest in acquiring exploration licences in the past. Looking at the question for the future, however, is a different matter. The submissions made by the BSEJV co-venturers have cast doubt on the feasibility of executing a responsible drilling program for deep water areas of the Beaufort Sea within the current limit of nine years. Other industry members may well come to the same conclusion (particularly when they review the experience of the BSEJV co-venturers); they may, therefore, be reluctant to bid on nine-year exploration licences in any future calls for bids for these areas. Retaining the current nine-year limit could in the future present a barrier to entry and result in exploration of deep water areas of the Beaufort Sea (and potentially other frontier areas) being deferred for the foreseeable future.[199]

The MSR notes in this context that, on June 26, 2015, Imperial notified the National Energy Board and the Environmental Impact Review Board that it was suspending all regulatory work and planned submissions with respect to the BSEJV project. Imperial's letter to the NEB stated:

> [U]nder the current licence term, there is insufficient time to conduct the necessary technical work and complete the regulatory process. Consequently, on behalf of the joint venture partners, Imperial is undertaking discussions with the federal government to have the current licence term retroactively extended to 16 years.[200]

Increasing the maximum term of exploration licences for the future would not compromise the integrity of the rights issuance scheme under the Act. The underlying principle of an objective bidding process, with only minimal provision for the exercise of Ministerial discretion with respect to rights once issued, would be maintained.

As noted earlier, fixing the appropriate maximum term for exploration rights is a matter of balancing industry's interest in securing tenure for as long a period as possible with, on the other hand, the Crown's interest in ensuring that exploration activity is undertaken within a period that is reasonable, having particular regard for safety, environmental, technological and consultation considerations. In their submissions in this Review, BP,[201] Chevron[202] and Imperial[203] recommended 16 years. Franklin Petroleum Canada Limited recommended 15 years.[204] Each of these parties based their recommended number on suggested schedules for

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[199] Imperial submission (April 12, 2016), at p.15.

[200] Letter from Imperial to the National Energy Board, dated June 26, 2015.

[201] BP submission (April 12, 2016).

[202] Chevron submission (April 11, 2016).

[203] Imperial submission (April 12, 2016), Section 3.

[204] Franklin submission (April 6, 2016).

work programs that appear to be reasonable. Other parties that either recommended or supported an increased maximum term did not specify a number of years.[205]

The MSR has concluded that a revised maximum term of 16 years for exploration licences would be reasonable, having regard to the technological and logistical challenges, and the regulatory and consultation expectations for exploration projects in the deep waters of the Beaufort Sea.

It was suggested during the Review that, rather than imposing a uniform maximum EL term for all areas subject to the Act, consideration might be given to introducing a zone system under which different maximum terms would apply in different zones that would be fixed according to technical and logistical difficulty.[206] It is emphasized that subsection 26(2) prescribes a **maximum** limit. The Act is flexible enough that a zone system could be implemented administratively within a revised limit (or within the current 9-year limit). The current Act is also flexible enough to allow for exploration licence terms to be divided into periods (as is in fact usually done), with progression from one term to the next being contingent upon satisfying conditions specified in the licence. The MSR recommends against incorporating a zone system into the Act.

RECOMMENDATION 4

It is recommended that the *CPRA* be amended to increase the permissible maximum term of exploration licences from nine to 16 years.

In their December 2014 letter to the Minister, the BSEJV co-venturers requested that the current maximum term of nine years be increased to 16 years **AND** that the Act be amended to provide for discretionary extensions beyond 16 years.[207] In its submission in this Review, Imperial recommended that amendment of subsection 26(2) of the Act include "reference to a mechanism for licence extension."[208]

A discretionary authority to extend the term of an exploration licence would introduce a significant departure from the scheme of the Act, which the MSR has concluded would be

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[205] Yukon Energy, Mines and Resources submission (April 15, 2016); CAPP submission (April 4, 2016). The Government of Nunavut submission (April 11, 2016) stated that it did have any objection "to this potential change…"

[206] See particularly the Imperial submission (April 12, 2016), Section 3.

[207] Joint letter dated December 17, 2014 from Imperial Oil Limited and BP Canada to the then Minister of Aboriginal Affairs and Northern Development.

[208] Imperial submission (April 12, 2016), at p. 21.

inconsistent with the principle of limiting the potential use of discretion. There should continue to be a fixed limit on the term of exploration rights, subject only to the limited exceptions that are currently provided for in the Act, with one possible addition.

The history of the exploration licences that are the subject of the BSEJV (EL476 and EL477) has brought to light circumstances in which the Minister should have the authority to extend the term of an exploration licence, where intervening and unanticipated regulatory developments may affect the ability of licence holders to meet their obligations within the licence term. In 2010, in the wake of the *Deepwater Horizon* disaster in the Gulf of Mexico, the National Energy Board initiated a *Review of Offshore Drilling in the Canadian Arctic*.[209] The predecessor licences to EL476 and EL477 were surrendered and reissued under section 17 of the Act to preserve the rights of the licence owners while this review proceeded. A discretionary authority to extend the licences would have been appropriate in these circumstances.

It would also be appropriate to provide a discretionary authority to extend a licence term in the case of a narrowly-defined *force majeure* event, such as the loss of a drilling unit in transit to a proposed drilling location. However, such an authority should not extend to changes in market conditions.

RECOMMENDATION 5

It is recommended that the *CPRA* be amended to allow the Minister to extend the term of an exploration licence where the Minister is satisfied that intervening and unanticipated regulatory developments, or a *force majeure* event, would restrict the ability of the licence owner to meet the requirements of the licence in the remaining term of the licence.

7.2.3 Should Any Revised EL Term Be Applied Retrospectively?

Should any increase in the maximum term for exploration licences be applied retrospectively to licences currently in force?

As discussed above,[210] an underlying principle of the *CPRA* is to establish a rights issuance process in which all participants compete on equal terms that are known and fixed in advance. As an element of this principle, the Act is also structured to minimize the potential use of discretion.

[209] http://www.neb-one.gc.ca/nrth/rctcffshrdrllngrvw/index-eng.html.

[210] Section 4.1 above.

Applying the recommended increase in the maximum term of exploration licences to existing licences would depart from one of the foundational principles of the Act and would require the exercise of discretion (by Parliament, rather than the Minister) to change the terms of licences retrospectively, on a case-specific base. This would extend to one group of licences, after the fact, terms that were not available to other bidders, actual or potential.

Having said that, the particular circumstances of the BSEJV and the request by its co-venturers raise additional considerations.

The first question is whether the work program to which the BSEJV co-venturers committed under their exploration licences has, to date, been pursued diligently in all the circumstances. If not, there would appear to be no justification for granting any relief. It does not appear to the MSR that the BSEJV co-venturers have been dilatory in pursuing their work program commitments to date.

It should then be asked whether current circumstances raise issues about the reasonableness of completing that work program in the time remaining under the relevant licences. If so, further consideration of the matter is warranted. From one perspective, it can be said that the BSEJV co-venturers apparently believed at the time of bidding for the relevant exploration licences that the work program was feasible and achievable and, therefore, they should be held to their commitments. If, on the other hand, technical understanding, regulatory developments, consultation expectations and other dynamics have evolved since the licences were issued[211] to such an extent that it may no longer be reasonable to complete the original work program in the remaining licence term, then other elements of the public interest should be considered.

Can the committed work program reasonably be completed within the remaining licence term having regard to **current** technical understanding and regulatory requirements, particularly in light of learnings from the National Energy Board's 2011 *Review of Offshore Drilling in the Canadian Arctic*?[212] Have current technical understanding, regulatory requirements and consultation expectations introduced a change of circumstances that would make it unreasonable to demand adherence to work commitments within a time limit that would no longer apply to new licences?

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[211] The predecessor exploration licences to EL 476 and EL 477 were originally issued in 2007 and 2008 respectively. The predecessor licences were exchanged in 2012 for EL 476 and EL 477, pursuant to paragraph 17(1)(*b*) of the *CPRA*, "in order to equitably restore the licence term which was adversely affected due to the National Energy Board's Public Review of Arctic Safety and Environmental Offshore Drilling Requirements and the predecessor, Policy Review on Same Season Relief Well Capabilities during which operations were effectively suspended." See *Northern Oil and Gas Annual Report 2012*: https://www.aadnc-aandc.gc.ca/eng/1367341676920/1367341870731.

[212] *Supra* note 209.

Consideration should also be given to the potential consequences of not applying any increased licence term to the licences held by the BSEJV co-venturers. As noted,[213] the BSEJV co-venturers have suspended all regulatory work pending a decision on the possible extension of the relevant exploration licences. If the current licences are not extended, it is possible that the remaining work program would not be completed and the licences would be forfeited. That outcome would be an immediate setback to exploring the potential of the deep water areas of the Beaufort Sea. In the absence of information from the results of the BSEJV drilling program, there may also be a dampening effect on industry interest in future calls for bids.[214] The overall result might well be that no exploration activity would be undertaken in the area for the foreseeable future.

Non-completion of the BSEJV work program would also result in the loss of associated northern economic benefits, both from the BSEJV program itself, as well as from other programs that could follow if the BSEJV program were successful.

The MSR has concluded that applying an increase in the term of exploration licences retrospectively would depart from one of the principles underlying the *CPRA*. However, the question for the Minister, and ultimately for Parliament, is whether changed circumstances and the potential direct and indirect benefits to be derived from continuation of the BSEJV (and potentially from future exploration) are sufficiently in the public interest as to warrant an exception in this specific case.

RECOMMENDATION 6

It is recommended that, if it is proposed to amend the *CPRA* to increase the maximum allowable term of exploration licences, the Minister consider whether the revised term should be applied to existing exploration licences in the Beaufort Sea, having regard to changed circumstances, the potential benefits of having the Beaufort Sea Exploration Joint Venture work program continue and the implications for future exploration in the Beaufort Sea.

7.3 Tenure under Significant Discovery Licences

As described above, one of the underlying principles of the *CPRA* is that security of tenure extends to the right to continue to hold any discovery area until the discovery is determined to be commercial. The vehicle for granting this security is the significant discovery licence (‘SDL’), which, subject to certain conditions described below, grants exclusive rights to a

[213] *Supra* at note 200.

[214] See Imperial submission (April 12, 2016), at p. 15: “Moreover, the current licence term does not provide industry the incentive to participate in future licensing opportunities and inhibits potential exploration of frontier lands.”

significant discovery area for an indefinite term. This tenure recognizes that, particularly in the Canadian North, there is likely to be a long period of indeterminate duration between making a discovery and being able to develop that discovery for commercial production.

It is to be noted in this context that, notwithstanding that significant discoveries in northern offshore areas and the Arctic Islands date back to the early 1970s, more than 40 years later none has proceeded to commercial development, with only one limited exception.[215] There are 69 significant discovery licences in force for areas under the authority of the Minister of Indigenous and Northern Affairs,[216] none of which is currently proposed for commercial development; nor is development likely to be proposed in the foreseeable future.[217]

The concept of granting indefinite tenure to significant discovery areas on the frontier lands predates the *CPRA*. The predecessor to the *CPRA*, the *COGA, 1982*, provided:

> 16(9) An exploration agreement continues in force in respect of any grid area or portion thereof specified in a declaration of significant discovery **for as long as the declaration is in force**.[218]

Mechanisms under the predecessor *Canada Oil and Gas Land Regulations* also provided for the continuation of tenure.[219]

Several submissions were received by the MSR urging that a fixed term limit should be imposed on significant discovery licences, the underlying argument being that rights should not be held for an indefinite duration without any offsetting obligation. It was submitted that the indefinite tenure of SDLs sequesters these areas from further exploration or development by third parties when, by definition, such areas have been demonstrated to have potential for sustained production.[220]

The assumption underlying the significant discovery licence is that, where a discovery is determined to be commercial, market forces will lead to development. Critics have argued this assumption overlooks the reality that, within multinational corporations, commercial development prospects within Canada must compete with other international opportunities and

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[215] The one exception is the Bent Horn project on Cameron Island. See *supra* note 9.

[216] *Northern Oil and Gas Report Annual Report 2015*: https://www.aadnc-aandc.gc.ca/eng/1462475616893/1462475684959

[217] With the possible exception of the anchor fields for Mackenzie Gas Project. See further discussion below, at notes 224 and 225.

[218] S.C. 1980-81-82-83, c. 81. Emphasis added.

[219] *Canada Oil and Gas Land Regulations*, C.R.C., c. 1518.

[220] See further the discussion of the definition of "significant discovery" below in Section 7.4.

therefore will not necessarily be developed even if determined to be commercial when considered on their own merits.

In fact SDLs do not result in the licence owner having unilateral control over the timing of development. The Act includes two mechanisms by which the Minister has the authority to force development. The first is a drilling order under subsection 33(1) and the second is a development order under subsection 36(1). Explanatory notes prepared at the time of tabling the Act stated that "[t]he drilling order is the *quid pro quo* for the fact that a significant discovery licence grants open-ended tenure." Section 36 empowers the Minister to, in effect, impose a specified term limit on a significant discovery licence (or reduce the term of a production licence) by issuing a development order where a declaration of commercial (as distinct from significant) discovery has been made, which declaration may be made at the initiative of the Minister.

Critics of the indefinite tenure of significant discovery licences also argue that there is no equivalent tenure found in other comparable regimes. The Australian offshore regime includes a "retention" lease, which recognizes that long lead-times may be needed for the commercial development of new discoveries, although it is not granted for an unlimited term. In the U.K., a "fallow field" initiative was introduced in 2002 as a result of government-industry consultation; it was applied on a voluntary basis.[221]

In the MSR's view, however, neither of these schemes is directly comparable to the circumstances of the Canadian North. It is noted again that, notwithstanding that there are many significant discoveries dating back to the early 1970s, none has been developed commercially, with one limited exception,[222] nor does it appear that any could be developed commercially in the reasonably foreseeable future, with the possible exception of the "anchor fields" for the Mackenzie Gas Project (MGP).[223]

The history of proposals to develop the MGP is worth considering in addressing this issue. In its most recent form, that project would depend on the development of three anchor fields that were discovered in 1971, 1972 and 1973.[224] Had the rights to develop those fields been term-limited and lost to the companies that discovered them,[225] it is questionable whether

[221] See Raymond E. Quesnel, "Fallow Field Initiatives and Canada's East Coast Offshore: Policy and Legal Considerations," (2007), 30 Dal. L.J. 457.

[222] Bent Horn, *supra* note 9.

[223] The anchor fields for the Mackenzie Gas Project are all located onshore.

[224] See Imperial submission (April 12, 2016), at p. 2.

[225] Exclusive rights to the fields were carried forward from the prior regulatory regime under the *Canada Oil and Gas Land Regulations* through the *COGA, 1982* and the *CPRA* and are currently held as significant discovery licences.

plans for the MGP (which were developed over several decades, with the continuing security of rights to produce the fields) could have been proposed and the project presented for regulatory approval in the coordinated manner in which it was.

In the MSR's view, the mechanisms provided under the *CPRA* to force development of significant discovery areas are adequate to ensure that developments that are commercial will be developed.

Furthermore, it is not obvious what benefit would be derived by the Crown as resource owner if the rights to significant discovery areas were forced to be surrendered. It does not appear that any of the northern discoveries currently underpinning SDLs would support commercial development at this time, or even further exploration by any party other than the current licence owners. On the other hand, the assurance of continuing tenure for these owners is more likely to support the formulation of development plans, particularly where the commercial viability of projects may depend on the coordinated development of several discoveries, including the potential for the later tie-back of smaller discoveries to an anchor project.

It is not apparent to the MSR that any public purpose would be served by imposing a term limit on current significant discovery licences. The MSR is not aware of any indication that there is a demand by third parties for access to current significant discovery licence areas. Indeed, the evidence is to the contrary – in the one instance where a significant discovery licence was the subject a call for bids (specifying a cash bonus as the bidding criterion), no bids were received.[226] It seems likely that the forced surrender of significant discovery areas would, for the foreseeable future, result in such areas being totally withdrawn from any potential exploration and development activity, admittedly limited as that potential may be in the immediate future.

Furthermore, changing the rights granted by the Act under existing SDLs would require a retroactive change (by amendment of the Act) that would arguably amount to an expropriation of vested rights, potentially precipitating claims for compensation.

RECOMMENDATION 7

It is recommended that the provisions of the *CPRA* relating to the rights granted by significant discovery licences not be changed.

7.4 Definition of 'Significant Discovery'

The precondition to the issuance of a significant discovery licence under the *CPRA* is the making of a declaration of "significant discovery", which is defined by the Act as follows:

2. In this Act,

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[226] See note 100, *supra*.

* * *

> "significant discovery" means a discovery indicated by the first well on a geological feature that demonstrates by flow testing the existence of hydrocarbons in that feature and, having regard to geological and engineering factors, suggests the existence of an accumulation of hydrocarbons that has potential for sustained production;

It was submitted by industry participants during the course of this Review that this definition, at least as it is applied by the responsible regulators,[227] is not compatible with current technology for determining whether a discovery has potential for sustained production.

CAPP submitted:

> Advances in technology since the CPRA was drafted enable testing for the presence of hydrocarbons without having to flow them to the surface. Since the early 1990s, when drill stem testing was the dominant tool, operators have used other methods. Wireline formation tests, closed-chamber tests, and formation testing while tripping can provide reliable assessments of resource and flow. Such tests have advantages over the legacy technology of flow testing, allowing for testing to greater depths, better measurement quality, and more safely by eliminating the potential for flaring. It is significant that other jurisdictions, including Norway, the US, Australia and the United Kingdom, no longer prescribe the use of drill stem testing.
>
> The definition of a significant discovery should be amended to reflect evolving technology and international best practice that no longer requires drill stem testing to confirm producible hydrocarbons.[228]

However, the submission then states that "[t]his does not appear to require a change to the Act, but amendment to the guidelines."[229] Imperial submitted that the "current definition is flexible enough to permit the use of various types of test methods" and should be retained.[230]

It is not clear to the MSR from this submission whether the issue arises from the particular wording of the definition of significant discovery in the Act (which requires "flow testing") or is an issue that could be addressed through a change in application of the current definition and revised guidelines.

The National Energy Board stated in its submission:

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[227] The regulators responsible for declaring significant and commercial discoveries are the joint management boards for areas off the east coast and the National Energy Board for other areas in which the *CPRA* applies.

[228] CAPP submission (April 4, 2006), at pp. 19-20.

[229] *Ibid* at p. 20.

[230] Imperial submission (April 12, 2016), at pp. iii and 30.

> Reviewing and amending the CPRA to allow alternative formation flow testing techniques and new technologies to be used for a significant discovery would increase flexibility that may encourage innovation in technology and techniques. Such innovation could result in better safety outcomes.[231]

Certainly the MSR agrees with the CAPP view that "technology will continue to evolve [and that] Operators should be free to use the best available technology and method…"[232] and notes in particular the NEB's view that "innovation could result in **better safety outcomes**."[233]

There does not appear to be disagreement on the core concept of a significant discovery, namely, that it is a discovery that demonstrates "potential for sustained production."

A related issue was raised with respect to subsection 28(4) of the Act, which provides for amendment of declarations of significant discovery "based on the results of further drilling…" BP submitted that this requirement does not take into account "recent advances of subsurface imaging in evaluating an existing discovery's geographic extent."[234] BP recommended that the requirement for further drilling should be removed.

> **RECOMMENDATION 8**
>
> **It is recommended that technical discussions continue between industry and the responsible regulators to determine if the definition of "significant discovery" in section 2 and the requirement for "further drilling" in subsection 28(4) of the Act are consistent with current technology and, if not, that the Act be amended accordingly.**

7.5 Benefits Plans

Section 21 of the *CPRA* prohibits the commencement of any work or activity on lands subject to a licence until the Minister has approved, or waived the requirement for, a benefits plan under subsection 5.2(2) under the *COGOA*. Inclusion of this requirement in the *CPRA* is anomalous in that it addresses matters ("work or activity") that are otherwise the subject-matter of the *COGOA*. As section 21 explicitly acknowledges, the legal requirement for a benefits plan is imposed by the *COGOA*, not the *CPRA*. Benefits arise from the work or activity conducted on areas held under licence, rather than from the licence itself, and are best considered in the context of reviewing activity plans. Explanatory notes prepared at the time of the enactment of the *CPRA* state that, from a strictly legal point of view, section 21 adds nothing to the legal requirements

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[231] NEB submission (April 15, 2016), at p. 2.

[232] CAPP submission (April 4, 2016), at p. 20.

[233] Emphasis added.

[234] BP submission (April 12, 2016), at p. 11.

imposed under the *COGOA*, but the section "does, however, serve to emphasize the existence of the requirements."

In its submission,[235] the Inuvialuit Regional Corporation ('IRC') noted that subsection 16(11) of the Inuvialuit Final Agreement[236] requires government to consider and apply guidelines including employment, education, training and business opportunities to favor Aboriginal people in relation to each application for exploration, development or production rights. The IRC submission notes further that subsection 14(3) of the *CPRA* makes no reference to the matters referred to in subsection 16(11). The IRC submission recommends that the subsection be amended to require that calls for bids address the matter and that the Minister be required "to consider this information in assessing bids submitted in response to the call." The IRC submission acknowledges that the issue could be addressed through "administrative practice" but that it would be more transparent to refer to it expressly in the Act.

The MSR has concluded that introducing a requirement into subsection 14(3) of the *CPRA* as suggested by the IRC would not be appropriate. Firstly, in the MSR's view, the more appropriate vehicle for addressing benefits is the *COGOA*, where benefits can be considered as an integral component of plans for the works and activities that are the source of those benefits.

Secondly, requiring the Minister, in "assessing bids", to consider information on the matters referred to in subsection 16(11) of the IFA would introduce an element of discretion and subjectivity into the bidding process and would run counter to the requirement that bids be assessed on the basis of a "sole criterion."[237]

7.6 Financial Assurances, Bidder Capacity and Approval of Transfers

Some concerns were raised during the Review with respect to the related matters of financial assurances and bidder capacity (including financial and technical capacity to respond to exigencies that might arise during operations and to meet regulatory requirements, such as the National Energy Board's Same Season Relief Well Policy[238]). While compliance with legislated and regulatory requirements with respect to both financial and technical capability is assessed as part of the regulatory approval process for specific operations, it was suggested that these matters should also be considered at the stage of rights issuance, with a view to excluding potential bidders that do not meet a minimum acceptable level of financial and technical capacity.

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[235] IRC submission (April 11, 2016).

[236] http://www.irc.inuvialuit.com/about/Inuvialuit%20Final%20Agreement-Amended%20April%202005.pdf.

[237] *CPRA* paragraph 14(3)(*g*).

[238] https://www.neb-one.gc.ca/nrth/ssrwtchnclprcdngfq-eng.html#q2.

In the MSR's view, threshold requirements for financial assurances and technical capacity could be addressed under the current Act as pre-bid qualification requirements that all bidders would have to satisfy.[239] Anything more would require a comparative assessment of bids, which would introduce an element of subjectivity to the bidding process. The MSR recommends against introducing a requirement to this effect into the Act itself.

The provisions of the Act with respect to transfers should be considered in this context. The Act requires that notice of transfers of interests, or any share therein, be given to the Minister,[240] but approval of transfers is not required. As a result, there is no means under the Act for the Minister to be satisfied that transferees of interests or shares therein satisfy any qualifications that had been specified in the relevant call for bids. Any added requirement that the Minister must approve transfers should, however, be limited to considering whether qualifications that had been required of the original interest owner (rather than individual interest holders) would continue to be satisfied.

RECOMMENDATION 9

It is recommended that the Act be amended to require the Minister's approval of transfers of interests, or any share therein, provided the Minister is satisfied that the transfer would not jeopardize the relevant interest owner's ability to continue to satisfy the qualifications required of the original interest owner.

7.7 Environmental Studies Research Fund (ESRF)

Part VII of the *CPRA* establishes the Environmental Studies Research Fund (ESRF), comprising a Fund under each responsible Minister,[241] for the purpose of funding environmental and social studies pertaining to exploration, development and production on frontier lands.[242] Payments into the ESRF are levied on interest owners as a product of the number of hectares subject to a licence and the rate fixed by the responsible Minister for the prescribed region in which the licence is located.[243] The amount of each Fund is limited to $15 million.[244] The ESRF is managed by an advisory Environmental Studies Management Board (ESMB) appointed by the Ministers.[245]

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[239] Specified in the relevant call for bids, pursuant to paragraph 14(3)(*d*) of the *CPRA*.

[240] *CPRA* section 85.

[241] *CPRA* Part VII.

[242] Subsection 76(2).

[243] Subsections 80(1) and 81(1).

[244] Subsection 77(2).

[245] Sections 78 and 79.

Several of the issues raised in the course of this Review with respect to the ESRF related to the management of the Fund and appear to be matters that could be addressed within the Act as it stands, without requiring amendment.

The Inuvialuit Regional Corporation (IRC) submission[246], however, made three recommendations that would necessitate amendments within Part VII of the *CPRA*. First, IRC recommended that the ESRF cap, which has been fixed at $15 million since the enactment of the Act in 1986, should be increased for inflation and be indexed for the future. The Yukon submission questioned the need to establish "an arbitrary maximum fund amount."[247]

Secondly, IRC submitted that the Act should require that the membership of the Management Board include a nominee of the IRC. The Yukon submission recommended that the ESMB should include representation from each of the three territories.[248]

Thirdly, the IRC recommended that Part VII of the Act should be amended to recognize explicitly the role of Indigenous knowledge.

RECOMMENDATION 10

It is recommended that Part VII of the *CPRA* be amended to:

- **Increase the limit on the maximum amount of the ESRF to account for inflation from 1986 to date and to provide for indexing for the future;[249]**
- **Require appointment to the Environmental Studies Management Board of a nominee of the IRC and representation for the territories;**
- **Require the incorporation of Indigenous knowledge into environmental and social studies financed by the Fund.**

7.8 Other Issues

Other recommendations with respect to specific sections of the *CPRA* were raised during the Review. These do not present issues that go to the underlying policy or overall structure of the Act and are not commented on in this report. Should it be decided to proceed with a Bill for amendments to the Act, however, due consideration should be given to each.

7.9 Issues Not Requiring Amendment of the Act

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[246] IRC submission (April 11, 2016).

[247] Yukon submission (April 15, 2016), at p. 4.

[248] The number of members of the ESMB is not fixed directly by the Act, but is to be fixed by the Governor in Council. See subsection 78(1).

[249] It is the MSR's understanding, however, that the Fund has never been subscribed to the full authorized amount.

As noted throughout this Report, many of the issues raised in the course of the Review could be addressed within the framework of the *CPRA* as currently written, through the adoption of administrative policies or guidelines (including in some instances revisions to policies or guidelines that are already in place) or through terms and conditions imposed as part of the call for bids process. In some instances, it has been recommended that appropriate amendments to the Act should be made even if the particular issue could be addressed satisfactorily under the current Act.

Two specific issues that were raised repeatedly in consultations with industry were the calculation of allowable expenditures (as credits against work commitment deposits under exploration licences) and the practice of dividing exploration licence terms into periods. Neither of these matters is addressed in the Act; each relates to the terms and conditions of exploration licences. Any change in current policies would not require amendment of the Act and, therefore, the MSR makes no recommendation thereon.

8.0 CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

The political, policy and legal framework for petroleum exploration and development in Canada's North has changed significantly over the three decades that the *Canada Petroleum Resources Act* has been in force. Overall, the rights issuance and management scheme established by the Act has proven to be sufficiently flexible to adapt as this broader framework has developed. The Act does not appear to have constrained the federal government's ability to meet its commitments and responsibilities with respect to the management of northern petroleum resources, particularly in the context of evolving governance arrangements and current national priorities.

To this point, the Act has also provided industry with the security of tenure that is required for large capital investments in Arctic exploration, while retaining the Crown's ability to determine when, where, and on what terms and conditions, rights will be issued.

The MSR has concluded that the scheme of the *CPRA* is robust and should be maintained. However, the role of the Act should be clarified by introducing an explicit statement of purpose and by requiring that a strategic environmental assessment be completed before rights are issued in any particular area. Other changes to the Act are recommended to reflect today's understanding of technical and regulatory challenges in northern offshore areas.

A specific recommendation is made (Recommendation 4) that the Act be amended to increase the maximum permissible term of an exploration licence from nine to 16 years. It is also recommended (Recommendation 6) that consideration be given to applying any increase in the maximum exploration licence term retrospectively to current exploration licences in the Beaufort Sea.

Circumstances have changed since the predecessor rights to EL 476 and EL 477 were first issued, in 2007 and 2008 respectively.[250] Based on current understanding of the technological and logistical challenges of drilling in the deep water areas of the Beaufort Sea, the feasibility of completing the required work programs in the remaining term of the current exploration licences now appears to be in doubt. If the Beaufort Sea Exploration Joint Venture is discontinued, the potential benefits of that program, both direct and indirect, would not be realized. There would also likely be a dampening effect on industry interest in acquiring new rights. Exploration activity in the Beaufort Sea may be deferred for the foreseeable future.

Under the scheme of the *CPRA*, the Minister is under no obligation to initiate the rights issuance process and has a broad discretion to set the terms and conditions of licences. As a

[250] See note 211, *supra*.

result of this permissive or enabling character of the Act, many of the issues raised in this Review could be addressed within the scheme of the Act as currently written. It is recommended (Recommendation 3) that, if it is decided not to proceed with amendments to the Act at this time, formal statements of policy and guidance should be adopted (or, where they are already in place, be modified, as appropriate) within the framework of the current Act, to clarify the role of the Act in the broader political, policy and legal framework for petroleum exploration and development in Canada's North.

RECOMMENDATION 1

It is recommended that the *CPRA* be amended to include a Statement of Purpose that would be broad and enduring, to accommodate national priorities as they may evolve.

RECOMMENDATION 2

It is recommended that the *CPRA* be amended to require that a strategic environmental assessment, encompassing the area in which it is proposed to initiate a call for bids, has been completed and considered by the Minister before the call for bids is issued.

RECOMMENDATION 3

Should it be decided not to proceed with proposed legislative amendments to the *CPRA*, it is recommended that appropriate formal statements of policy and guidance be adopted, to be applied within the framework of the current Act.

RECOMMENDATION 4

It is recommended that the *CPRA* be amended to increase the permissible maximum term of exploration licences from nine to 16 years.

RECOMMENDATION 5

It is recommended that the *CPRA* be amended to allow the Minister to extend the term of an exploration licence where the Minister is satisfied that intervening and unanticipated regulatory developments would restrict the ability of the licence owner to meet the requirements of the licence in the remaining term of the licence.

RECOMMENDATION 6

It is recommended that, if it is proposed to amend the *CPRA* to increase the maximum allowable term of exploration licences, the Minister consider whether the

revised term should be applied to existing exploration licences in the Beaufort Sea, having regard to changed circumstances, the potential benefits of having the Beaufort Sea Exploration Joint Venture work program continue and the implications for future exploration in the Beaufort Sea.

RECOMMENDATION 7

It is recommended that the provisions of the *CPRA* relating to the rights granted by significant discovery licences not be changed.

RECOMMENDATION 8

It is recommended that technical discussions continue between industry and the responsible regulators to determine if the definition of "significant discovery" in section 2 and the requirement for "further drilling" in subsection 28(4) of the Act are consistent with current technology and, if not, that the Act be amended accordingly.

RECOMMENDATION 9

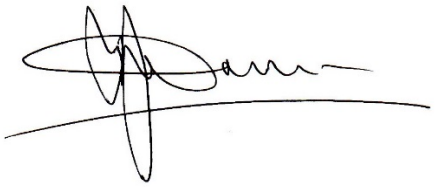
It is recommended that the Act be amended to require the Minister's approval of transfers of interests, or any share therein, provided the Minister is satisfied that the transfer would not jeopardize the relevant interest owner's ability to continue to satisfy the qualifications required of the original interest owner.

RECOMMENDATION 10

It is recommended that Part VII of the *CPRA* be amended to:

- **Increase the limit on the maximum amount of the ESRF to account for inflation from 1986 to date and to provide for indexing for the future;**
- **Require appointment to the Environmental Studies Management Board of a nominee of the IRC and representation for the territories;**
- **Require the incorporation of Indigenous knowledge into environmental and social studies financed by the Fund.**

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Rowland J. Harrison, Q.C.

Minister's Special Representative

***Canada Petroleum Resources Act* Review**

May 30, 2016