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Public Interest Standing for NGOs to Test Whether CNLOPB can Effect an End-Run Around Maximum Term Provisions

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Case Commented On: *David Suzuki Foundation v Canada-Newfoundland Offshore Petroleum Board*, 2018 NLSC 146

Corridor Resources Inc. (Corridor) received a nine year exploration licence (EL 1105) from the Canada-Newfoundland Offshore Petroleum Board (CNLOPB or Board) on January 15, 2008 under the terms of the federal and provincial legislation implementing the terms of the Atlantic Accord: *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, S.C.1987, Ch. 3 (*Federal Act*), and *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, R.S.N.L. 1990, c. C-2 (*Newfoundland Act*). As is customary, the EL was divided into two periods: Period I, five years and Period II, 4 years. In order to validate the licence for Period 2 Corridor had to commence the drilling of a well within the Period I and diligently drill through to completion. Corridor's proposal to drill proved controversial and triggered a time-consuming environmental assessment procedure. In response to this Corridor applied for and was granted an extension to Period I but in the end it was not able to drill a well as required by the EL.

The Board had earlier decided (February 27, 2012) that it would not issue a prohibition order under s. 55 of the *Newfoundland Act* (slightly different from the equivalent provision in s.56 of the *Federal Act*). Such an order would have stopped the clock on the running of time under the EL.

> **55. (1)** The board may, in the case of
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> **(a)** an environmental or social problem of a serious nature; or
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> **(b)** dangerous or extreme weather conditions affecting the health or safety of people or the safety of equipment,
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> by order, prohibit an interest owner specified in the order from beginning or continuing work or activity on the portions of the offshore area or a part of the offshore area that are subject to the interest of that interest owner.
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> **(4)** Where, because of an order made under subsection (1) or (3), a requirement in relation to an interest cannot be complied with while the order is in force, compliance with the requirement is suspended until the order is revoked.

> **(5)** The term of an interest that is subject to an order under subsection (1) or (3) and the period provided for compliance with a requirement in relation to the interest are extended for a period equal to the period that the order is in force.

In the end, however, the Board resolved to exercise its apparent statutory authority under s.61(1)(b) of the *Federal Act* to request Corridor Resources to surrender EL 1005 in return for a new EL (EL 1153, available here) covering exactly the same lands. The new licence, with an effective date of January 15, 2017, has a four-year term: Period I is for three years and period II for one year. Section 61(1)(b) of the Federal Act provides as follows:

> **61 (1)** Subject to sections 31 to 40, the Board may issue an interest, in relation to any Crown reserve area, *without making a call for bids* where
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> **(a)** the portion of the offshore area to which the interest is to apply has, through error or inadvertence, become a Crown reserve area and the interest owner who last held an interest in relation to such portion of the offshore area has, within one year after the time they so became a Crown reserve area, requested the Board to issue an interest; or
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> **(b)** the Board is issuing the interest to an interest owner in exchange for the surrender by the interest owner, at the request of the Board, of any other interest or a share in any other interest, in relation to all or any portion of the offshore area subject to that other interest.
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> (emphasis added)

Section 69 of the *Federal Act* is also relevant.

> **69 (1)** The effective date of an exploration licence is the date specified in the licence as the effective date thereof.
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> **(2)** Subject to subsection (3) and section 70, 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.
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> **(3)** Subject to section 70, [drilling of a well commenced, or need to commence the drilling of a second well for technical or similar reasons] the term of an exploration licence entered into or in respect of which negotiations have been completed before December 20, 1985 may be renegotiated once only for a further term not exceeding four years and thereafter the term thereof shall not be renegotiated, extended or renewed.
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> **(4)** On the expiration of an exploration licence, the portions of the offshore area to which the exploration licence related and that are not subject to a production licence or a significant discovery licence become Crown reserve areas.

There are similar provisions in both the *Canada Petroleum Resources Act*, RSC 1985, c. 35 (2nd Supp.) (ss. 12, 14, 17 & 26) and in the legislation establishing the offshore regime for Nova Scotia.

The applicants in this case, five environmental non-governmental organizations (ENGOs), sought to question the validity of the Board's decision to use its exchange power, particularly

when the practical effect of exercising the power was to avoid the hard nine-year ceiling of s.69(2) in the *Federal Act*.

In this case the Board sought a preliminary determination as to the standing of the applicants to bring this application. The applicant relied on the doctrine of public interest standing as developed in cases including *Borowski v. Canada (Minister of Justice)*, 1981 CanLII 34 (SCC), [1981] 2 S.C.R. 575, (S.C.C.) and again in *Canadian Council of Churches v. R.*, 1992 CanLII 116 (SCC), [1992] 1 S.C.R. 236, and *Downtown Eastside Sex Workers United Against Violent Society v. Canada (AG)*, 2012 SCC 45 (CanLII), 2012 S.C.C. 45.

The Court concluded that the applicants had met the test for public interest standing and that therefore this was an appropriate case to grant standing to the ENGOs notwithstanding that they are not directly affected by the Board's decision.

First, the applicants raised a serious justiciable issue relating to a statutory regime with constitutional overtones (at para 24) and dealing with publicly owned resources:

> … the manner in which the Board interprets its governing legislation in the context of its role to manage offshore resources is an issue that could have broad ramifications and impact on the citizens of this province, and potentially beyond. The interpretation of the statutory provisions in question has not previously been adjudicated and the outcome of this issue is not unique to the issuance of this specific licence. Rather it could affect how the Board deals with its exchange and surrender powers under subsection 61(1) of the *Act* in the future. Therefore, I find the issue raised reaches the level of seriousness contemplated by this branch of the test (at para 29).

Second, the applicants had a real stake or genuine interest in the issue. Here the Court held that the ENGOs had demonstrated a sustained and genuine interest in the issue. The Court rejected the Board's claim that the ENGOs' interest was in preventing oil and gas activities in the Gulf of St. Lawrence rather than the proper administration of the statute and that therefore the applicants could not achieve their real interest since the Board always had authority to issue new rights on the basis of a call for bids. The Court characterizes the applicants' interest as follows:

> The Applicants' concern is that if this is permitted, or left unchecked, the Board could issue licences other than pursuant to its statutorily prescribed limits. This would be contrary to the Applicants' interest in protecting and preserving the Gulf. In this respect, they have a genuine interest in ensuring that the Board does not overstep its authority by issuing licences other than in accordance with its enabling legislation. As such, the Applicants have a greater interest in the Board's compliance with the licensing provisions of its legislation than most members of the public (at para 31).

Third, the application offered a reasonable and effective way to bring the issue before the Court. In particular, the Court was not convinced by the arguments of the Board that the application should not be allowed to proceed since there were other parties (e.g. other industry players) who had a more direct interest in this issue than the ENGOs. The Court surmised that "the lack of interest on the part of these potential litigants combined with the possibility that they could stand to benefit from the precedential value of the Decision, makes the likelihood of their putting the issue before the Court remote" (at para 44). Furthermore:

> Insofar as this Originating Application seeks a determination as to the Board's statutory authority pursuant to subsection 61(1) of the *Act*, this would clarify, once and for all, the Board's authority with respect to this aspect of its surrender and exchange powers and, as such, would be an efficient expenditure of judicial resources (at para 46).

Finally, while the litigation might have an impact on industry interests, those interests would be represented by Corridor in these proceedings.

Justice Chaytor also dealt with a second issue which was an application by Innue and Mi'gmaq communities from Quebec. Justice Chaytor denied these applications largely on the basis that the intended intervenors seemed to be more interested in questioning the merits of the Board's decision to exercise its discretion and because there was some risk that by referencing the duty to consult that the intended intervenors might impermissibly expand the issues and unduly lengthen and delay the proceedings.

Next Steps

It will be interesting to follow this case on the merits. The first question the Court will have to address is the standard of review. I think that there will be a strong case for correctness. The case involves publicly owned resources, it raises a true threshold question as to the authority of the Board to use the exchange power to effectively extend the original tenure, it deals with a complex federal\provincial statutory scheme, and crucially, these same provisions occur in at least two other federal statutes. This is not the first time that questions have been raised as to the possibility of extending a federal resource tenure but in those cases it seems to have been understood that it would be necessary to amend the relevant statutes to achieve that result. See, Rowland Harrison, *Review of the Canada Petroleum Resources Act by The Minister's Special Representative*, May 2016, especially at 36 – 47.

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