

## THE LAW APPLICABLE TO THE CANADIAN EAST-COAST OFFSHORE

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*This article examines the current uncertainty as to jurisdiction over offshore oil and gas explorations in Canada and canvasses the solutions other countries have formulated. The author then suggests that the Federal law of Canada should be extended to the offshore with the law of the province adjacent the area incorporated by reference to supplement the Federal law where necessary.*

### I. INTRODUCTION

It is the thesis of this paper that considerable uncertainty exists as to the law applicable to the Canadian continental margin and activities conducted there. This uncertainty flows both from the unresolved constitutional dispute between Canada and the Maritime provinces as to ownership and jurisdiction over the offshore and also from the failure of Parliament to adopt appropriate legislation to resolve such doubts. This paper examines the principal areas of difficulty: the extension of certain federal and provincial laws; the absence of a rule as to applicable law in the absence of statute, particularly law governing property and civil rights; the constitutional dispute; jurisdiction of Canadian courts; and the application of maritime law, labour law, workmen's compensation, taxation and customs, law governing security in property, criminal law and police powers, and oil and gas law.

The purpose of this paper is to raise and examine a range of questions rather than attempt to give any definitive answers. The paper examines several methods of resolving present and future uncertainties and proposes the adoption of a federal statute extending all Canadian Law to the offshore.

### II. STATEMENT OF THE PROBLEM

Where there is the will and where there is money to be made, uncertainties of the law seldom prevent industrial and technological development. Industrial and technological change usually precede the law, as was certainly the case with offshore oil and gas drilling in the Gulf of Mexico in the late 1930's. However, while most comparable countries have now adopted comprehensive measures to extend their laws to offshore oil and gas exploration and other activities on the continental margin, Canada has been content to extend only some of its laws and these in a piecemeal fashion.

Some Federal laws dealing with oil and gas exploitation, taxation, criminal law, fisheries and marine pollution have been extended in a limited fashion but no comprehensive effort has been made to extend all relevant Canadian statutes and still less has any effort been made to determine the residual law governing property and civil rights in the absence of or to complete an applicable statute. Certain laws of Newfoundland and Nova Scotia dealing with oil and gas exploitation also purport to

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apply to the continental shelf.

The constitutional dispute between the government of Canada and the governments of the Maritime provinces may be the reason for the failure of Parliament to take appropriate remedial measures, but given that all federal legislation and regulations in the field of oil and gas are premised upon exclusive federal jurisdiction in the offshore is this any longer a valid excuse for inaction? In the view of the author, it is not. Furthermore, the accelerating pace of offshore oil and gas exploration and the imminence of offshore production in the Sable Island and Hibernia fields within the decade, leads the author to conclude that much greater certainty in the law will be required than is presently the case.

If any doubt ever existed as to the authority of Canada to extend its laws to the full extent of the continental margin, this doubt has now been removed by the adoption of the Convention on the Law of the Sea, article 76 by the Third United Nations Conference on the Law of the Sea on April 30, 1982.<sup>1</sup> The removal of any conceivable international impediment provides further justification for Canadian action on this matter.

### III. DIMENSIONS OF THE PROBLEM

#### A. *What Canadian statutes now apply to the offshore?*

The basic rule of public law governing the application of Canadian law to the offshore is that no law, whether statute or common law, extends beyond the low water-mark unless specifically extended by Parliament<sup>2</sup> or a Provincial Legislature.<sup>3</sup> The exception to this rule would be waters *inter fauces terrae* or waters otherwise included in the body of a Province by custom or historic title.<sup>4</sup> Since there is no general statute extending Canadian law to the offshore it is necessary to begin this inquiry by examining what statutes have been extended to the offshore.

To ask this question is to begin a lengthy search. Some statutes apply to the offshore because they are stated to apply there in whole or in part by their own terms; others apply there because they are extended by virtue of other statutes. It is also conceivable that some statutes apply to the offshore because they are laws of general application.

a) The laws in the first category include the following:

- Aeronautics Act,<sup>5</sup>
- Arctic Waters Pollution Prevention Act,<sup>6</sup>
- Broadcasting Act,<sup>7</sup>
- Canada Shipping Act,<sup>8</sup>

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1. U.N. Doc. A/CONF/62/122, 7 October 1982.

2. *The Queen v. Keyn* (1876) 2 Ex. D. 63 as interpreted in *Reference Re Ownership of Offshore Mineral Rights* [1967] S.C.R. 792.

3. On the hypothesis that the Provincial Legislature has jurisdiction over a particular body of water or can in some other way escape the prohibition on the extra-territorial application of provincial law.

4. *Direct U.S. Cable Co. v. Anglo-American Telegraph Co.* (1877) 2 A.C. 394 (P.C.); *affg.* (1875) 6 N.L.R. 28, or *The "Fagernes"* [1927] P. 311.

5. R.S.C. 1970 c. A-3, s. 6 as am.

6. R.S.C. 1970 (1st Supp.) c. 2, s. 3 as am.

7. R.S.C. 1970 c. B-11, s. 2 as am.

8. R.S.C. 1970 c. S-9 as am.

Canada Oil and Gas Act,<sup>9</sup>  
 Criminal Code,<sup>10</sup>  
 Fisheries Act,<sup>11</sup>  
 Income Tax Act,<sup>12</sup>  
 Maritime Code Act,<sup>13</sup>  
 National Defence Act,<sup>14</sup>  
 Ocean Dumping Control Act,<sup>15</sup>  
 Oil & Gas Production and Conservation Act,<sup>16</sup>  
 Territorial Sea and Fishing Zones Act,<sup>17</sup> and the  
 Customs Act.<sup>18</sup>

These acts have recently been joined by the following:

An Act to amend the Petroleum Administration Act,<sup>19</sup>  
 An Act to amend the National Energy Board Act,<sup>20</sup>  
 Act to amend the statute law relating to certain taxes,<sup>21</sup>  
 Energy Monitoring Act,<sup>22</sup> and  
 The Petroleum Incentives Programme Act.<sup>23</sup>

Certain provincial acts also apply to the offshore such as the following:

Petroleum Resources Act,<sup>24</sup> and  
 The Petroleum and Natural Gas Act.<sup>25</sup>

b) Acts which apply by virtue of their extension by other acts of Parliament are as follows:

Coastal Fisheries Protection Act,<sup>26</sup> and the  
 Canada Shipping Act, Part XX.<sup>27</sup>

c) Some statutes of general application would seem to apply implicitly to the offshore. They include the Constitution Acts, 1867-1982 and the Public Lands Grants Act,<sup>28</sup> as well as a number of other quasi-constitutional acts such as the Canadian Bill of Rights,<sup>29</sup> the Official Languages Act,<sup>30</sup> and the Canada Evidence Act.<sup>31</sup>

9. S.C. 1980-81-82, c. 81, s. 5.

10. R.S.C. 1970, c. C-34, s. 433.

11. R.S.C. 1970 c. F-14, s. 101.

12. R.S.C. 1970-71-72 c. 63, s. 255.

13. S.C. 1977-8 c. 41 (not yet fully in force).

14. R.S.C. 1970 c. N-4, as am. ss. 31, 120, 121, 231, *inter alia*

15. S.C. 1974-5-6, c. 55, s. 2.

16. R.S.C. 1970 c. O-4, s. 3, as am.

17. R.S.C. 1970, c. T-7, as am.

18. R.S.C. 1970 c. C-40, as am.

19. S.C. 1980-81-82, c. 114 (see s. 4 *et al.*).

20. S.C. 1980-81-82, c. 116 (see s. 2 *et al.*).

21. S.C. 1980-81-82, c. 104 (see s. 3 *et al.*).

22. S.C. 1980-81-82, c. 112 (see s. 2).

23. S.C. 1980-81-82, c. 107 (see s. 2 *et al.*).

24. S.N.S. 1980, c. 12.

25. R.S.N. 1970 c. 294, s. 2 as am.

26. R.S.C. 1970, c. C-21, s. 3 as am.

27. *Supra* n. 8, Part XX.

28. R.S.C. 1970, c. P-29, s. 2.

29. R.S.C. 1970, as am.

30. R.S.C. 1970, c. O-2, as am.

31. R.S.C. 1970, c. E-10, as am.

It is to be noted that while some of these statutes are stated to apply in their entirety, others apply only partially and for limited specific purposes. Numerous regulations have been adopted pursuant to these statutes.

The significance of the remainder of this paper turns upon the assumption that these laws, which explicitly or implicitly apply to the offshore, do not provide a fully adequate basis for the regulation of activities in offshore areas, or the satisfactory resolution of the legal problems that are likely to arise there in the future.

### B. *Applicable common law or residual law*

In the absence of a specific statute, is there any other law of a residual character applicable to the offshore? In all Canadian provinces but Québec, this law would be the common law as received from England. In Québec it would be the rules of the Civil Code. Other countries with similar legal systems have dealt with the problem in various ways. With the Outer Continental Shelf Lands Act,<sup>32</sup> the U.S.A. has extended all federal law and the law of the adjacent state as federal law to complete any gaps that may exist. In Australia, the Petroleum (Submerged Lands) Act 1967<sup>33</sup> extended all commonwealth and state laws to the continental shelf, with the exception of certain categories of state laws which deal with oil and gas, taxation or jurisdiction of courts. The Seas and Submerged Lands Act 1973<sup>34</sup> is also relevant. These acts are now consolidated and slightly amended by the Minerals (Submerged Lands) Act 1981.<sup>35</sup> In the United Kingdom there is a general extension of criminal and civil law to any place on the shelf within 500 meters of an offshore "installation", by virtue of the Continental Shelf Act 1964.<sup>36</sup> Provision is also made to delineate areas where the civil law of Scotland is the residual law.<sup>37</sup> The law of New Zealand<sup>38</sup> with regard to the continental shelf is very similar to that of the United Kingdom.

In Canada no attempt has yet been made by Parliament to clarify the situation by declaring what residual laws, whether federal or provincial, apply to the offshore. No attempt has been made by the provinces either, although it must be implicit in Newfoundland's claim that all provincial

32. 67 Stat. 462; 43 U.S.C. § 1331-1343 (1953) as am. 88 Stat. 2146 (1975). There has been extensive judicial application of this rule by the U.S. courts. The rule does not seem to have given great difficulty; see *inter alia*, *Rodriguez v. Aetna Casualty* 395 U.S. 352 (1968), *Longmire v. Sea Drilling Corp.* 610 F. 2d 1342 (1980), *Ramos v. Liberty Mutual Ins. Co.* 615 F. 2d 334 (1980), *Gulf Offshore Co. v. Mobil Oil Corp.*, Tex. Civ. App., 594 S.W. 2d 496 (1980).

33. No. 118, of 1967 (Aust.), s. 9.

34. No. 161, of 1973 (Aust.), s. 16.

35. No. 81, of 1981 (Aust.). Not proclaimed in force as of August 1, 1982.

36. Chapter 29 (U.K.), s. 3. See also Outer Continental Shelf Act, *supra* n. 32 (U.S.A.); Minerals (Submerged Lands) Act, 1981 no. 81 (Australia); Continental Shelf Act, 1964, no. 28 of 1964 (New Zealand). The U.K. courts have applied this Act; see *Clark (Inspector of Taxes) v. Oceanic Transport* [1981] 1 W.L.R. 59. For a critique of the legislation and the difficulty encountered in the application of subordinate legislation extended to the continental shelf, see W.G. Carson, *The Other Price of Britain's Oil* (1982) 139-150, 267-280.

37. *Id.*, s. 3(2); see also Continental Shelf (Jurisdiction) Order 1980, s. 1, 1980 No. 184 (U.K.) and No. 559 (Scotland).

38. Continental Shelf Act 1964, No. 28 of 1964 (N.Z.), s. 7.

laws apply to the Newfoundland offshore, however it may be delimited.<sup>39</sup>

The one provision, albeit limited in scope, which extends certain laws to the offshore, is the Territorial Sea & Fishing Zones Act<sup>40</sup>, which extends all "laws of Canada respecting fishing and the exploitation of living resources of the sea" to Canada's fishing zones. A more comprehensive extension of civil and criminal laws is contained in the Canada Shipping Act<sup>41</sup>; section 274, in particular, is an important measure and potentially of great importance to drilling rigs but hardly a comprehensive resolution of the problem.

As a result of the inactivity of Parliament or the provincial legislatures and in the absence of a statute specifically extending Canadian law to the offshore in respect of a particular matter, there may be considerable doubt as to the law applicable, particularly with respect to contract, tort (delict) and criminal law. Public international law is applicable but of little immediate relevance to the problem at hand, since public international law speaks principally to the rights and duties of states and much less to the rights and duties of private persons. Thus international law authorizes Canada to extend its laws to oil and gas extraction on the offshore, but does not compel Canada to do so nor does it in any way automatically extend Canadian law and maritime law. While it is possible to argue the existence of some "federal common law", its ambit is a matter of great difficulty, and, however broad or narrow, it is subject to the same rules of extension beyond the law water-mark as other Canadian laws. Furthermore, it is very hard to argue that there is a body of general "federal common law" unrelated to specific heads of federal jurisdiction such as navigation and shipping. It can be argued that Parliament could itself adopt laws governing property and civil rights. On the hypothesis that there is exclusive federal jurisdiction over the offshore, there would be no legal bar to this; however there would be serious objections on grounds of policy and effectiveness, and the necessity of choosing either common or civil law.

Thus it is submitted that by any test, whether by specific extension of a statute, by more general extension of a category of laws, or by the potential application of a complete body of pre-existing law, there appear to be serious *lacunae* in the law and grave doubts as to what Canadian law applies to activities on the East Coast continental margin below the low water-mark.<sup>42</sup>

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39. An indirect attempt is made in the Newfoundland and Labrador Petroleum Regulations, Nfld. Regs. 139/78, s. 132:

It is deemed to be a term of every license, permit or lease that the petroleum operations carried out pursuant to such license, permit or lease shall be subject to the laws of the provinces as they shall be from time to time.

40. *Supra* n. 17, s. 444(2).

41. *Supra* n. 8, s. 274.

Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Part any provision on the subject that is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

42. Other writers have already noted the absence of residual law, see Beauchamp, Crommelin & Thompson, "Jurisdictional Problems in Canada's Offshore" (1973) 11 *Alta. L. Rev.* 431 at 464-6; Herman, "The Need for a Canadian Submerged Lands Act: Some Further Thoughts on Canada's Offshore Mineral Rights Problems" (1980) 58 *Can. Bar Rev.* 518.

### C. *The Constitutional Problem*

Conflicting federal and provincial claims to jurisdiction over a matter are nothing new in Canadian history. However, the present dispute between the governments of Canada and Newfoundland and potentially also Nova Scotia, New Brunswick, Prince Edward Island and Québec, is of a more radical order. This dispute goes to the basis of the legality of virtually all federal regulation of oil and gas exploitation and ownership of the resource as well as to legislative jurisdiction to determine generally what laws are applicable to the offshore.

Until 1982 neither the Government of Canada nor the Government of Newfoundland had shown much real eagerness to go to the courts, despite occasional statements by the Prime Minister and the Premier of Newfoundland during constitutional negotiations. The recent agreement between the Government of Nova Scotia and the Government of Canada skirts the constitutional issue by setting up a single administrative body which will be authorized by both levels of government to regulate oil and gas exploitation on the basis of broadly compatible federal and provincial legislation.<sup>43</sup>

However unpalatable it may be to go to the courts it is submitted that federal legislation, existing and proposed, can only be justified if there is exclusive federal ownership and jurisdiction over offshore resources. In any case as a result of the decision of the Federal Court of Appeal *S.I.U. Canada v. Crosbie Offshore Services Ltd.*,<sup>44</sup> Newfoundland did refer the whole question to its Court of Appeal in January, 1982,<sup>45</sup> and the Federal Government responded by referring a narrower question to the Supreme Court of Canada in March 1982.<sup>46</sup>

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43. See Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing, March 2, 1982, especially at 15-16.

44. (1982) 135 D.L.R. (3d) 485 (F.C.A.) see section F, *infra*.

45. "Do the lands, mines, minerals, royalties or other rights, including the right to explore and exploit and the right to legislate, with respect to the mineral and other natural resources of the sea bed and sub-soil from the ordinary low-water mark of the Province of Newfoundland to the seaward limit of the continental shelf or any part thereof belong or otherwise appertain to the Province of Newfoundland?"

46. "In respect of the mineral and other natural resources of the seabed and subsoil of the continental shelf, in the area offshore Newfoundland approximately 320 kilometres (170 nautical miles) east south east of St. John's, Newfoundland, bounded by 46 30' north latitude and 47 00' north latitude and by 48 30' west longitude and 49 west longitude, where resource exploration is being conducted and more particularly delimited on the map attached hereto as the Appendix to this Order, as between Canada and Newfoundland, pursuant to The Newfoundland Act, 1949 or otherwise, has Canada or Newfoundland:

(1) the right to explore and exploit the said mineral and other natural resources, and  
(2) legislative jurisdiction to make laws in relation to the exploration and exploitation of the said mineral and other natural resources?"

Much has been written on the Constitutional question and the issues to be determined are fairly clear.<sup>47</sup> A number of Canadian decisions can be cited which deal with provincial jurisdiction beyond the low water mark<sup>48</sup> which may assist the Supreme Court. It is submitted that the issues will be settled on the basis of the Supreme Court's opinion in 1967 that at common law, as received from England: a) the realm ends at low water-mark, except for historic waters *inter fauces terrae*; b) positive legislative action is needed to extend the realm or the application of any law; and c) the limits of a province are those it possessed on entry into Confederation. While the common law basis for this rule is not as strong as the Supreme Court of 1967 opinion might have us believe, this is the rule which Canadian, Australian and British Courts are following. On the basis of this rule it is the author's view that Newfoundland, New Brunswick and Nova Scotia may be able to prove title to certain historic bays and possibly a three mile territorial sea but to no more. Newfoundland's arguments based on its special constitutional status and the continental shelf doctrine in international law in 1949 are unlikely to succeed.

Final determination of exclusive ownership and jurisdiction over offshore minerals will still leave open the issue of the applicable residual law. Parliament will still have to act.

#### D. Jurisdiction of Courts

Closely linked to the constitutional law issue is that of the jurisdiction of Canadian Courts over disputes arising on or in respect of offshore oil and gas exploitation. It should be noted that the general statutes of the U.S.A.,

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47. See Beauchamp *supra* n. 42; G.V. LaForest, "Canadian Inland Waters of the Atlantic and the Bay of Fundy Incident" (1963) 1 *C.Y.I.L.* 149; C. Martin, "Newfoundland's Case on Offshore Minerals: A Brief Outline" (1975) 7 *Ottawa L. Rev.* 34; I. Head, "The Legal Clamor over Offshore Minerals (1967) 5 *Alta. L. Rev.* 312; I. Head, "The Canadian Offshore Mineral Reference" (1968) 18 *U. of T.L.J.* 131; A.J. Kovach, "An Assessment of the Merits of Newfoundland's Claim to Offshore Mineral Resources" (1975) 23 *Chitty's L.J.* 18; Ippolito, "Newfoundland and the Continental Shelf" (1976) 15 *Col. J. of Trans. L.* 138; S. Swan, "The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law" (1976) 22 *McGill L.J.* 541; R.J. Harrison, "The Offshore Mineral Resources Agreement in the Maritime Provinces" (1978) 4 *Dal. L.J.* 245; J. Ballem, "Oil and Gas and the Canadian Constitution, On Land and Under the Sea" *L.S.U.C., Special Lectures on the Constitution* (1978) 251; R.J. Harrison, "Jurisdiction over the Canadian Offshore: A Sea of Confusion" (1979) 17 *Osgoode H.L.J.* 469; C. Douglas, "Conflicting Claims to Oil and Natural Gas Resources off the Eastern Coast of Canada" (1980) 18 *Alta L. Rev.* 54; R.J. Harrison, "Natural Resources and the Constitution: Some Recent Developments and their Implications for Future Regulation of the Resource Industries" (1980) 18 *Alta. L. Rev.* 1; L.L. Herman, *supra* n. 44; N. Inions, "Newfoundland Offshore Claims" (1981) 19 *Alta L. Rev.* 461; See also G.V. LaForest, *Natural Resources and Public Property Under the Constitution* (1969); J. Brossard *et al.*, *Le Territoire Québécois* (1970); F. Lorient, *Le Statut Juridique du Golfe St-Laurent* (Unpublished Doctoral Thesis presented to the Université Laval, copy available in McGill Faculty of Law Library).
48. See *Anglo-American Telegraph Co. v. Direct U.S. Cable Co.* (1875) 6 N.L.R. 28 at 53; *affd. supra* n. 4; *Mowat v. McPhee* (1880) 5 S.C.R. 66; *Rhodes v. Fairweather* (1888) 7 N.L.R. 321; *The Queen v. Delepine* (1889) 7 N.L.R. 378; *Re Prov. Fisheries* (1895) 26 S.C.R. 444; *A.-G. Can. v. A.-G. Ont.* [1898] A.C. 700; *Capital City Canning and Packing Co. v. Anglo-British Packing Co.* (1905) 11 B.C.R. 333; *Schooner "John J. Fallon" v. The King* (1917) 55 S.C.R. 348; *Re Quebec Fisheries* (1917) 35 D.L.R. 1, [1921] 1 A.C. 413 (Que. K.B.); *R. v. Burt* (1932) 5 M.P.R. 112; *Filion v. N.B. Int'l Paper Co.* (1934) 8 M.P.R. 89 at 118; *Gavin v. The Queen* (1956) 3 D.L.R. (2d) 547; *Re Dominion Coal Company Ltd. and County of Cape Breton* (1963) 40 D.L.R. (2d) 593 at 620; *Re Offshore Mineral Rights of B.C.* [1967] S.C.R. 792; *Re Strait of Georgia* (1976) 1 B.C.L.R. 97 (C.A.).

Australia, U.K. and New Zealand have all resolved this issue.<sup>49</sup> In Canada it is submitted that considerable doubt remains as to jurisdiction to hear such questions, both as between the Federal and Provincial courts and more generally as to the extent of Provincial court jurisdiction. A choice of forum clause in a contract, personal service, or seizure of assets within the province upon the ordinary rules of jurisdiction under the rules of practice and the principles of private international law are sufficient to found jurisdiction. But is a provincial court competent to order the seizure of documents or the presence of witnesses from a rig working below the low water-mark? Can a provincial court order the seizure of such a rig, or would it have jurisdiction over the rig in a contractual dispute by the mere presence of the rig offshore, if neither the owners nor their assets could be found in the province? Is a provincial legislature competent to grant original jurisdiction over rigs or other offshore installations situated on the continental margin outside the limits of the province?

The Federal Court clearly has jurisdiction in respect of the application of 'Canadian maritime law' and over "ships" as defined by the Federal

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49. See Outer Continental Shelf Act, 43 U.S.C. 1332-1333 (U.S.A.); Minerals (Submerged Lands) Act 1981, no. 81 (Australia); Continental Shelf Act, no. 28 of 1964 (New Zealand).



Court Act.<sup>50</sup> This would appear to grant jurisdiction over oil and gas rigs, if they are ships<sup>51</sup> operating on the continental margin. However, would the statutory definition cover installations such as reception facilities and pipelines which are not ships, or would there be jurisdiction to hear disputes relating to a drilling or insurance contract under the Act? A further question is whether Parliament has authority to grant the Federal Court jurisdiction over all disputes in contract and in tort arising out of oil and gas exploitation on the offshore. In the author's view, such an outcome

50. R.S.C. 1970 (2nd Supp.), c. 10, ss. 2, 3, 22(1), and 55(1). Section 2: "Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the Admiralty Act or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this or any other Act of the Parliament of Canada." See *The Robert Simpson Ltd. v. Hamburg-Amerika Linie Norddeutscher* [1973] F.C. 1356, 1 N.R. 158, 43 D.L.R. (3d) 267 (F.C.A.); *Benson Bros. Shipbuilding Co. (1960) Ltd. v. Mark Fishing Co. Ltd.* (1978) 21 N.R. 260, 89 D.L.R. (3d) 527 (F.C.A.); *Intermunicipal Realty & Development Corporation v. Gore Mutual Insurance Co.* [1978] 2 F.C. 691, 108 D.L.R. (3d) 494 (F.C.T.D.); *Hawker Industries Ltd. v. Santa Shipowning and Trading Co., S.A.* [1979] 1 F.C. 183, 89 D.L.R. (3d) 699 (C.A.); *Davie Shipbuilding Ltd. v. The Queen* [1979] 2 F.C. 235, 90 D.L.R. (3d) 661, 9 C.P.C. 128 (T.D.); *Antares Shipping Corporation v. The Ship "Capricorn"* [1980] 1 S.C.R. 553, 30 N.R. 104 (S.C.C.); *Skaarup Shipping Corp. v. Hawker Industries Ltd.* [1980] 2 F.C. 746, 32 N.R. 622, 111 D.L.R. (3d) 343 (C.A.); s. 22(1): "The Trial Division has concurrent original jurisdiction as well between subject and subject as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned." See *The Robert Simpson Montreal Ltd. v. Hamburg-Amerika Linie Norddeutscher* [1973] F.C. 1356, 1 N.R. 158, 43 D.L.R. (3d) 267 (C.A.); *Anglophoto Limited v. The Ship "Ikaros"* [1976] 1 F.C. 393, 66 D.L.R. (3d) 227 (T.D.); *K.J. Preiswerck Limited v. The Ship "Allunga"* [1977] 1 F.C. 259 (T.D.); *Skaarup Shipping Corp. v. Hawker Industries Ltd.* [1980] 2 F.C. 746, 32 N.R. 622, 111 D.L.R. (3d) 343 (F.C.A.); s. 22(2)(a): "any claim, as to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein." See *Heater v. Anderson et al.* (1910) 13 Ex. C.R. 417; *Brunswick of Canada Ltd. v. "The Bounty III"* [1970] Ex. C.R. 934; *Vemb v. "The Samuel T."* [1971] Ex. C.R. 1036; *Sumitomo Shoji Canada Ltd. v. The Ship "Juzan Maru"* [1974] 2 F.C. 488, 49 D.L.R. (3d) 277 (T.D.); s. 22(3)(a): "in relation to all ships whether Canadian or not and wherever the residence or domicile of the owners may be; s. 22(3)(c) in relation to all claims whether arising on the high seas or within the limits of the territorial, internal or other waters of Canada or elsewhere such waters are naturally navigable or artificially made so, including, without restricting of the foregoing, in the case of cargo or wreck found on the shore of such waters." See *Swiss Bank Corporation v. Air Canada* [1976] 1 F.C. 30 (T.D.); *Sivaco Wire & Nail Company et al. v. Tropwood A.G. et al.* (1979) 26 N.R. 313 (S.C.C.); *Orient Leasing Co. Ltd. v. The Ship "Kosei Maru"* (1978) 94 D.L.R. (3d) 658 (F.C. T.D.); s. 55(1) "The process of the Court shall run throughout Canada, including its territorial waters, and any other place to which legislation enacted by the Parliament of Canada has been made applicable." See *"The Grace"* (1894) 4 Ex. C.R. 283; *The Ship "North" v. The King* (1906) 37 S.C.R. 385; *The Ship "D.C. Whitney" v. The St. Clair Navigation Company* (1906) 38 S.C.R. 303; *The Dunbar and Sullivan Dredging Company v. The Ships "Amazonas" and "Montezuma"* (1911) 13 Ex. C.R. 472; *The Schooner "John J. Fallon" v. The King* (1917), 55 S.C.R. 348; *Commercial Pacific Cable Co. v. The "Prince Albert"* [1927] Ex. C.R. 44; *Canadian Imperial Bank of Commerce v. Mackenzie* (1969) 4 D.L.R. (3d) 405 (P.E.I.S.C.); *Beukenkamp v. Secretary of State* [1970] Ex. C.R. 158; *B.P. Exploration Company (Libya) Limited v. Hunt* (1980) 114 D.L.R. (3d) 35, 23 A.R. 271, 16 C.P.C. 168 (N.W.T.S.C.).

51. See section E, *infra*.

is possible but by no means certain given the case law on the Constitution Act, 1867, s. 101.<sup>52</sup>

Jurisdiction to settle disputes arising out of oil and gas leases issued under federal legislation seems clear; jurisdiction over agreements between operators, such as farmout and joint operating agreements, made in the enjoyment of rights granted in the leases is not quite the same case, although closely related. Jurisdiction to hear disputes in relation to maritime law contracts such as charters of supply and support vessels is clearly with the Federal Court. A much harder case is that of the drilling contract made between a permit holder, the operator, and a drilling contractor. Is a contract based on the model of the "International Day Work Drilling Contract Offshore"<sup>53</sup> equivalent to the charter of a ship and hence a maritime contract subject to the jurisdiction of the Federal Court? The answer is not an easy one. What of the performance bonds given by contractors or by parent companies which are now very common?<sup>54</sup>

The cases strongly suggest that the primary basis of Federal Court jurisdiction is a federal statute dealing with the matter before the court or a statute to which the contract is closely related.<sup>55</sup> Professor S.A. Scott<sup>56</sup> suggests six other categories of "laws of Canada" which in his view should justify Federal Court jurisdiction. A contract closely related to a federal statute and existing by virtue of the statute would surely qualify as a law of Canada. The Supreme Court has shown a tendency to interpret maritime law more broadly than other fields and there is little doubt that the non-statutory body of "Canadian maritime law" is treated as part of the laws of Canada for purposes of federal jurisdiction. The basis of this would appear to be statutory incorporation by reference.

In *B.P. Exploration (Libya) Co. v. Hunt*<sup>57</sup>, a case involving a successful application for a "Mareva" injunction against removal of assets including Arctic offshore leases, the question of jurisdiction was not raised before the N.W.T. Territorial Court, or the Alberta Court of Appeal.

Current practice and judicial authority strongly support the proposition that a policy of marine insurance is a maritime contract and hence a law of

52. *Québec North Shore Paper Co. v. C.P. Ltd.*, [1977] 2 S.C.R. 1054; *McNamara Construction (Western) Ltd. v. The Queen* [1977] 2 S.C.R. 654; *R. v. Thomas Fuller Construction Co. (1958)* [1980] 1 S.C.R. 695; *Tropwood v. Sivaco Wire & Nail Co. et al.* [1979] 2 S.C.R. 157; *Antares Shipping Co. v. The "Capricorn"* [1980] 1 S.C.R. 553; *Aris Steamship Co. v. Associated Metals & Minerals* [1980] 2 S.C.R. 322; see generally S.A. Scott, "Canadian Federal Courts and the Limits of their Jurisdiction" (1982) 27 McGill L.J. 137.

53. Drawn up by the International Association of Drilling Contractors, see Summerskill, *Oil Rigs, Law & Insurance* (1979) 247.

54. See *Rhine v. The Queen*, *Prytula v. The Queen* (1981) 116 D.L.R. (3d) 385 (S.C.C.).

55. In the words of the Supreme Court of Canada, *Rhine's Case*, *id.*, 388, "... existing and valid federal law to govern the transaction which became the subject of litigation in the Federal Court."

56. Scott in "Canadian Federal Courts and the Limits of their Jurisdiction" (1982) 27 McGill L.J. 137 at 156-7 suggests six other categories of "laws of Canada" which in his view would justify Federal Court jurisdiction: 2) Common law continued under federal legislative authority; 3) Local pre-Confederation enactments continued under federal legislative authority; 4) "Received" "English" statutes continued under federal legislative authority; 5) Imperial statutes subject to federal legislative authority; 6) Provincial enactments applying to matters within federal legislative authority; 7) Imperial statutes and other rules of law subject to neither unilateral federal nor unilateral provincial legislative authority.

57. (1980) 23 A.R. 271.

Canada for purpose of Federal Court jurisdiction.<sup>58</sup> But would this principle be extended to the insurance of oil and gas drilling operations, including insurance of the rig, storage facilities and pipelines? Again the answer is not easy.<sup>59</sup>

In some matters will it be necessary to go to a provincial court for a ruling on the substantive issue and possibly to the Federal Court to effect procedural remedies and execution over a rig outside a province?

Some difficulties are thus of a constitutional order while others flow from the wording of the Federal Court Act; the latter could be removed by amendment of the Act; the former are likely to prove less tractable.

### E. *Application of Canadian Maritime Law*

This body of law now provides most of the solutions as to the law applicable to the offshore. Wylie Spicer has already ably canvassed the issues.<sup>60</sup> The author does not intend to repeat the same issues but rather to set out some of the issues of policy raised by the present uncertainty. Some existing difficulties in this area result from constitutional problems; others from the drafting of existing statutes.

Maritime law has the great advantage of providing a basis for the application of the general law of the port of registry of a Canadian vessel.<sup>61</sup> There are, however, a number of difficulties. What drilling rigs are vessels? The cases show a movement towards a broadening of the category to include floating drilling ships, most submersible and semi-submersible rigs, as well as other craft such as cranes and barges.<sup>62</sup> Despite this tendency the courts in Canada and abroad continue to oscillate between the position reflected in the broad statement of Lord Blackburn that "every vessel that substantially goes to sea is a "ship"<sup>63</sup> to teleological definitions such as that of Mr. Justice Atkinson "[a] ship or vessel must be something which is intended to do its real work upon the waters, and it has got to be capable of free and ordered movement".<sup>64</sup> Two recent Canadian cases have held, by implication in an action on a contract for use and hire, that a drillship<sup>65</sup> and that a barge<sup>66</sup> were not ships. These decisions may well have been wrong and the more recent *St. John Shipping and Dry Dock* decision runs counter to them. But there is always the possibility that some rigs, particularly fixed platforms, or floating platforms while stationary will not be deemed to be vessels. This is especially true in the

58. *Intermunicipal Realty Co. v. Gore Mutual Ins. Co.* (1980) 108 D.L.R. (3rd) 494 (F.C.T.D.).

59. For marine insurance contracts to be laws of Canada they must be incorporated by reference or otherwise independently grounded in Canadian Maritime Law. To enjoy the status of laws of Canada the provincial statutes on the matter, e.g., Marine Insurance Act, R.S.O. 1970 c. 255; Insurance Act, R.S.N.S. 1967, c. 148 and the Quebec Civil Code arts. 2468-2692 must fall within one of the categories proposed by Professor Scott.

60. "Some Admiralty Law Issues in Offshore Oil and Gas Developments" (1982) 20 *Alta L.R.* 153.

61. Canada Shipping Act, R.S.C. 1970, c. S-9, s. 274.

62. *The Queen v. St. John Shipping and Dry Dock Co. Ltd. et al.* (1982) 126 D.L.R. (3d) 353 (F.C.A.); see generally Spicer, *supra* n. 62, at 154-160 and Summerskill, *Oil Rigs: Law & Insurance* (1979) Chs. 1 & 2.

63. *Ex p. Ferguson* (1871) 6 L.R. Q.B. 280.

64. *Polpen Shipping v. Commercial Union Assurance* (1943) 74 LL. L.R. 157 (K.B.).

65. *Dome Petroleum Ltd. v. Hunt International Petroleum* [1978] 1 F.C. 11.

66. *R. v. Gulf Aladdin* (1975) 27 C.C.C. (2d) 562.

U.S.A.<sup>67</sup> These ambiguities could be clarified by legislation and with them much doubt as to the applicability of maritime liens, mortgages and other rules of maritime law.<sup>68</sup>

Another weakness of a system based on maritime law is the assumption that foreign flag vessels will be governed by their own law for all matters except those directly relating to oil and gas exploration and exploitation. Is this the best policy? Should Canadian law respecting working conditions, unionization, health, discipline, criminal law not apply on board foreign rigs working in the Canadian offshore? Should the Government of Canada not be free to set standards for the construction and manning of such vessels? Under international law it will be prohibited from doing so. The flag system has sound policy reasons behind it with respect to ships but it should not be imposed upon drilling rigs by default.

A broad reading of the Federal Court Act ss. 22(3) and 55 would seem to make "Canadian maritime law" applicable to all "ships Canadian or foreign" whenever they may be — a principle which, if extended for foreign drilling rigs, would go far to give the Federal Court jurisdiction over them and make them subject to Canadian maritime law. However, section 22(3) is somewhat restricted in scope to certain matters, particularly salvage, wreck, mortgages and other security, as well as cargo damage.<sup>69</sup> Section 55 is much less clear. It would seem to give the Federal Court jurisdiction to apply any law made applicable outside Canada by Parliament, but not, it is submitted, to apply all Canadian law wherever any law of Canada has been extended by Parliament.

Are the solutions provided by maritime law always satisfactory? A case in point is the rules as to limitation of liability of the shipowner for damage done by the ship. Rules have been developed for oil pollution damage caused by bulk carriers of oil.<sup>70</sup> In the view of the author these rules are not appropriate.<sup>71</sup> Even greater doubt as to the applicability of maritime law must arise with respect to non-vessels such as storage facilities and pipelines.<sup>72</sup>

67. See *Dresser Industries v. Fidelity and Casualty Co. of N.Y.* [1978] A.M.C. 2588; see generally *Gomez v. Schlumberger* [1980] A.M.C. 1371 (fixed platform not a vessel); *Buna v. Pacific Far East Inc.* [1978] A.M.C. 1878 (to qualify a vessel must engage in transportation of passengers, cargo or equipment across navigable waters). *Nevel v. Todd Shipyards Corporation* [1978] A.M.C. 2230 ("floating dry dock is not vessel under general maritime law unless it is committed to navigation. *Leonard v. Exxon Corp.* [1979] A.M.C. 2011 ("floating constructions platform not a vessel"); *Atkins v. Greenville Shipbuilding Corporation* 411 F.2d 279 (1969).

68. The author has been told that the drafters of the *Maritime Code Books III-V* have considered adopting the position that maritime law should apply to drilling rigs while in motion, but not when stopped and operating. New law may therefore bring more confusion than good sense. See Summerskill's comment on such an eventuality, *supra*, n. 53.

69. *Tropwood A.G. v. Sivaco Wire & Nail Co.* (1980) 99 D.L.R. (3d) 235 at 242. This decision gives a broad reading to the scope of s. 22(3).

70. Canada Shipping Act, *supra* n. 61, Part XX.

71. It should be noted that new rules have been adopted in the Oil and Gas Production and Conservation Act, *supra* n. 16, s. 19, as am., S.C. 1980-81-82, c. 81 *et seq.* and Regulations.

72. *Quaere* is the "captain" really in command of a rig at all times? Similarly anyone arguing for a broad coverage of oil rigs by "Canadian maritime law" must be able to assert successfully that drilling operations are properly classified as maritime operations and that drilling personnel on board rigs are properly designated as mariners.

Maritime law is and will continue to be an important source of law but is unlikely to offer a complete or fully satisfactory solution to the determination of applicable law.

#### F. Labour relations

There would appear to be considerable doubt at the present time concerning jurisdiction over labour relations.<sup>73</sup> There is no bar to choosing the law of a province expressly or because the contract of employment is made there. Such contracts are enforceable within the province despite the fact that they may be largely performed outside.<sup>74</sup> However, serious difficulties may arise concerning the enforcement of provincial labour standards on board rigs outside a province or the issuance of access orders during a union organizing campaign. No case has yet determined whether oil and gas drilling on the continental margin outside a province, and hence labour relations in this field, is inherently within exclusive federal jurisdiction either independently or as an aspect of navigation and shipping. Both outcomes are possible. There have been conflicting decisions concerning labour relations on supply vessels. The most recent Federal Court ruling relating to supply vessels,<sup>75</sup> held in favour of federal jurisdiction as an aspect of navigation and shipping. The situation of supply vessels may be necessarily incidental to the broader activity of oil and gas exploitation or may continue to be held to be simply an aspect of navigation and shipping. To date there has been no litigation concerning the applicability of the employment and discipline provisions of the Canada Shipping Act<sup>76</sup> to navigation or to drilling personnel on board rigs. But the Canada Labour Relations Board has held<sup>77</sup> that the Canada Labour Code must be given extra-territorial application and that the domicile of the workers and company in Canada and the making of the employment contract in Canada justified the exercise of its jurisdiction. As a result the Board made an access order in favour of the S.I.U. in respect of drilling ships working in the Beaufort Sea.<sup>78</sup>

Should the courts decide to follow the logic of the *Western Union Telegraph* decision<sup>79</sup> they may hold labour relations on rigs to be within exclusive federal jurisdiction on the ground that the work or undertaking, in that case submarine cable laying, extends beyond the limits of the province. If drilling rigs are really ships, then their employees may be held to be governed by the Canada Shipping Act and the Canada Labour Code<sup>80</sup> generally, or special legislation governing seamen.

A system of labour relations based upon maritime law gives rise to serious policy questions. Should a worker from Newfoundland not enjoy

73. It appears that some health and safety standards are being applied by the Federal Departments of Transport and Energy in what they regard on their respective fields of "jurisdiction". Information supplied to the author by officials of both Departments.

74. *Workmen's Compensation Board v. C.P.R.* [1920] A.C. 184; *Mark Fishing Co. v. United Fishermen & Allied Workers Union* (1974) 38 D.L.R. (3d) 316 (S.C.C.); *affg* (1972) 24 D.L.R. (3d) 585 (B.C.C.A.).

75. *S.I.U. v. Crosbie Offshore Services Ltd.*, (1982) 135 D.L.R. (3d) 485 (F.C.A.).

76. R.S.C. 1970 c. S-9 s. 143 *et seq.*

77. *S.I.U. v. Dome Petroleum et al.* [1978] 2 Can. L.R.B.R. 518 at 525-26.

78. Following *Canadian Offshore Services v. S.I.U.* [1973] F.C. 1339.

79. 52 C.L.L.C. ¶ 16,609.

80. R.S.C. 1970 c. L-1 *as am.*

the protection of Federal or Provincial labour laws when he signs on a foreign flag rig operating in the Canadian offshore? This is likely to be the outcome at the present time, although the *Western Union Telegraph* decision suggests another result.

Apart from constitutional problems, other difficulties arise from the drafting of the Canada Labour Code itself.<sup>81</sup>

Given the amount of litigation, it is possible that if governments do not seek to resolve the constitutional issues directly, labour relations will force the courts to resolve them.<sup>82</sup>

### G. Workmen's Compensation

The application of the workmen's compensation laws of the province where the contract of employment is made presents no difficulty on the basis of *B.C. Workmen's Compensation Board v. C.P.R.*<sup>83</sup> even if the work is to be performed outside the province. This approach is generally being adopted with respect to employees hired in Canada.<sup>84</sup> Problems probably do exist with respect to enforcement of board orders against foreign flag rigs having no assets in Canada and working outside the province.

There would appear to be strong reasons of law and policy to justify the application of provincial workmen's compensation to persons domiciled or hired in an East coast province. The mandatory extension of provincial workmen's compensation legislation outside the province, especially to foreign registered rigs and foreign workers against their wishes, raises legal difficulties. There would be grave difficulty in a provincial board's attempting to subject foreign rigs to compulsory inspections and otherwise enforcing orders against foreign rigs or companies which do not submit to the jurisdiction of the board. There is also a question as to the constitutional limits of the board to receive jurisdiction of foreign workers and companies by agreement, if the board would not ordinarily have such jurisdiction over them.

As yet no attempt has been made to submit workers on drilling rigs to federal seamen's compensation law.<sup>85</sup>

81. See *S.I.U. v. Dome Petroleum*, [1978] 1 Can. L.R.B.R. 393.

82. See generally *S.I.U. v. Zapata Offshore & Crosbie Offshore Services Ltd.* [1980] 2 Can. L.R.B.R. 7, *rev'd* Fed. Court of Appeal; *S.I.U. v. Crosbie Offshore Services Ltd.* *supra* n. 77, *S.I.U. v. Canadian Offshore Marine Ltd.* 74 C.L.L.C. § 16, 287; *Canadian Offshore Marine v. S.I.U.* [1973] F.C. 1339; *S.I.U. v. Dome Petroleum* [1978] 1 Can. L.R.B.R. 393; *S.I.U. v. Dome Petroleum et al.* [1978] 2 Can. L.R.B.R. 518; *Merchant Service Guild v. Dome Petroleum* [1980] 2 Can. L.R.B.R. 533; *Western Union Telegraph v. Canadian Seamen's Union* 52 C.L.L.C. § 16,609; *S.I.U. v. Commercial Cable* (1957) 57 C.L.L.C. § 18,095; *S.I.U. v. Iron Ore Co.* 57 C.L.L.C. § 18,075.

83. [1920] A.C. 184.

84. The author is informed that it is the practice of Canadian and foreign drilling companies to make payments to the Newfoundland or Nova Scotia Workmen's Compensation Boards respectively for all employees on board their rigs. However this appears to be done to ensure that workers enjoy the benefit of health services in the Province. It is not clear that it is done in respect of workers hired out of Canada from any sense of legal obligation. As to employees on board U.S. registered rigs it would not appear that the statutory bar to suit against the employer is valid in the U.S.A. In April, 1982, after the Ocean Ranger disaster, the Newfoundland Legislature removed the bar against such action against the employer in the province by the heirs of employees killed in the accident.

85. *Merchant Seamen's Compensation Act*, R.S.C. 1970, c. M-11; see generally T. Hayashi, "Offshore Casualties in Canadian Waters" (1983) 21 *Alta. L. Rev.* pp.?

## H. *Taxation and Customs*

The Income Tax Act was extended to the offshore with a minimum of delay. The ambit of s. 255 of the Income Tax Act was expanded in 1980<sup>86</sup> and now covers a broader range of activities than before. However, certain new activities will not necessarily fall within the section and will have to be dealt with specifically. Given the general policy of tax law to subject persons to taxation only by specific wording, *ad hoc* extension would seem to be the proper approach.

The officers of the Customs and Excise Branch of National Revenue Canada have not shown the same alacrity to promote new legislation as have their colleagues in the Taxation Branch. For this reason the Customs Act<sup>87</sup> and Customs Tariff Act<sup>88</sup> do not apply to rigs outside "Canadian waters". Similarly a rig, Canadian or foreign, is not a port or place in Canada for the purposes of the coasting trade when outside "Canadian waters".<sup>89</sup>

## I. *Criminal Law and Police Powers*

The Criminal Code applies within the 12-mile territorial sea by virtue of s. 433. It also applies on board all Canadian flag vessels by virtue of the Canada Shipping Act, s. 274. As yet there has been no test as to whether a Canadian registered rig is a vessel for the purposes of the Criminal Code and the discipline provisions of the Canada Shipping Act.<sup>90</sup> What is clear is that Canada's criminal law does not apply generally to activities on the continental margin.<sup>91</sup> The authority of Canadian police or coroners over events on board non-Canadian drilling rigs, and possibly even on board Canadian rigs if they are not ships for the purposes of the Criminal law, is a matter of grave doubt and uncertainty.<sup>92</sup> The same can be said of Canadian military officers' rights and duties in respect of foreign registered rigs.<sup>93</sup>

## J. *Security in Property*

If a drilling rig is a ship then the provisions of the Canada Shipping Act concerning liens, mortgages, sales, etc., will apply as seems to be the practice at present.<sup>94</sup> But will these remedies under Canadian maritime law be available with respect to pipelines or storage facilities or non-ships such as jack-up rigs? What form of security will be available to the banker, the building contractor, the maintenance contractor in such "non-ships" in the absence of satisfactory prior private arrangement? Will the Federal

86. S.C. 1980-81 c. 47 s. 111.

87. R.S.C. 1970, c. C-49 as am. S.C. 1974-5-6 c. 5.

88. R.S.C. 1970, c. C-41.

89. The author is informed that amendments to this end are under new consideration in the federal department responsible.

90. *Supra* n. 8, s. 211 *et seq.* *Quaere* do the captain's disciplinary powers extend to all persons on a rig or only to the "seamen".

91. The author is informed by officials of the federal department responsible that changes are now under consideration.

92. *Quaere* can a rig in tow through the territorial sea be deemed to exercise the right of innocent passage and hence be exempt from the enforcement of Canadian criminal law?

93. Powers of boarding and inspection of oil rigs exist under oil and gas legislation and regulations, *see* Oil and Gas Production and Conservation Act, *supra* n. 76, ss. 8, 11, 12 and regulations made thereunder.

94. *See* Spicer, *supra* n. 60 at 168.

Court be able to rule upon such suits when there is no specific "law of Canada"?

A particularly interesting issue is that of the applicability of the new provisions of the Bank Act<sup>95</sup> dealing with loans made by banks on the security of hydrocarbons and minerals. The Bank Act itself is not specifically extended to the offshore. Does this fact preclude banks from making loans on the security of hydrocarbon deposits and extraction equipment in the Canadian offshore or would such security be justifiable under the principles of private international law on the grounds that the permit holder had valid title from the Government of Canada and the Bank Act does not expressly preclude loans on security of immovable property abroad?<sup>96</sup>

### K. Oil and Gas Law

As set out in Section A oil and gas exploitation is extensively regulated by specific statutes. These statutes could be amended to clarify many of the doubts raised in this paper. Already the statutes contain a number of provisions on private law matters such as civil liability.<sup>97</sup> The legality of such measures can be justified as being ancillary to the principal matter, so long as the Courts are prepared to hold the principal matter within the jurisdiction of Parliament. However, the new provisions on pollution<sup>98</sup> skirt the broader question of the law applicable to determine pollution liability.<sup>99</sup> Such law is unlikely to be found in the Canada Shipping Act in the view of the author. What law would be applicable to determine liability for pollution damage?

An extensive body of contract law now exists governing relationships between operators, drilling companies and subcontractors, and insurers, as well as oil and gas leases generally. The law of the place of contracting, or the law chosen by the parties can govern. Some aspects of the law have a statutory basis, especially the provisions dealing with leases, but others are derived from land-based contract practice or have been developed to deal with the offshore oil and gas industry.<sup>100</sup>

In the absence of a choice of law clause is it clear what law will govern the execution of these contracts in respect of matters not covered by

95. S.C. 1980-81-82, c. 40, s. 177.

96. In the North Sea area pipelines are generally financed by a floating charge on assets of the owner of the pipeline including the offshore installations. No problem would arise with respect to assets on shore, in Canada, if this technique were employed, but there might well be problems of enforcement of security against physical assets offshore, outside the province.

97. Oil and Gas Production and Conservation Act *Supra* n. 6, s. 19.1(9).

98. *Id.* at ss. 19, 19.1, 19.2, 19.3, 19.4.

99. Prior to the adoption of this legislation in 1982 operators holding federal permits were required to sign an "East Coast Liability Agreement" and to post a bond for \$30 million to cover potential liability. Unlike similar agreements in the Beaufort Sea area, the East Coast agreements have no provision on applicable law and refer disputes generally to the Federal Court "or any other Provincial Court of competent jurisdiction".

100. See generally Summerskill, *supra* n. 53; MacWilliams and Muir, "Offshore Operating Agreements" (1973) 11 *Alta. L. Rev.* 503; "Indemnity and Insurance Clauses in Joint Ventures, Farmout, and Joint Operating Agreements" (1970) 8 *Alta. L. Rev.* 210; Holt, "Problems Relating to Arctic Farmout and Joint Operating Agreements" (1972) 10 *Alta. L. Rev.* 450; Killely, "Drilling and Service Contracts in Offshore Oil and Gas Operations" (1973) 11 *Alta. L. Rev.* 480 and Kovach, "Some Standard Clauses in Petroleum Industry Agreements - An Inquiry" (1979) 17 *Alta. L. Rev.* 108.



statutes specifically extended to the offshore?

#### IV. SOLUTIONS

What solutions can be proposed to solve the problems raised in this paper? What follows is a range of options, the last of which is proposed by the author.

A) Do nothing. This is a surprisingly popular approach to complex technical legal problems, but it poses obvious disadvantages.

B) Rely upon the rules of private international law as applied by the courts to provide solutions where no statute has been specifically extended. Private international lawyers deny the possibility of a legal vacuum, but most would admit the difficulty of convincing investors of the advantages of this approach.

C) Continue with *ad hoc* extensions of federal laws where these are felt necessary. In the near future action will be needed on criminal law, customs, coasting trade, jurisdiction of courts and some maritime law issues. The piecemeal solution has been criticized in Part I, and may be hard to sustain with ever-increasing offshore activity.

D) Amend the constitution giving jurisdiction to the provinces and clarifying any legal questions. The federal government is unlikely to agree and an extension of provincial territorial boundaries to include the offshore might violate international law.

E) Make the laws of the Northwest Territories applicable to the East Coast offshore. This solution would give rise to political and legal objections as would any other attempt to create a body of "federal common law" governing tort and contract, although Parliament has jurisdiction to do so.

F) Direct a reference question to the courts. This has been done but will not resolve all legal issues as to applicable law.

G) Apply all relevant federal laws listed in a schedule to the offshore and amend from time to time by the Governor in Council. This would go some way towards solving the problem although it continues to be a piecemeal and perhaps arbitrary solution.

H) Extend generally all relevant federal law existing and as adopted from time to time. This would certainly resolve more than half the problem; however it does not deal with areas of law outside federal legislative jurisdiction, since there is no federal common law relating to property and civil rights and it would not seem practical or appropriate for Parliament to adopt such law.

I) Extend generally all relevant federal and provincial laws listed in a schedule to be amended from time to time by the Governor in Council. This would have the advantage of extending certain provincial laws but would suffer from the disadvantages noted under "G".

J) Extend generally all relevant federal laws to the offshore and extend those provincial laws listed in a schedule. This would appear to be the solution preferred by Herman<sup>101</sup> and the solution adopted by the Governments of Canada and Nova Scotia for the Nova Scotia offshore.<sup>102</sup> It has much to commend it, in that provincial laws play only a subordinate role

101. *Supra* n. 42 at 512.

102. Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing, March 2, 1982, especially pp. 15-16.

and there is no doubt as to which are applicable. However there is real danger that the list will be outdated or will be maintained in an arbitrary fashion.

The author would propose the following solution:

1) *Internal and territorial waters*

There should be a general extension of all federal and provincial laws existing from time to time, to all internal and territorial waters as part of the territory of Canada. In principle there is no reason why provincial borders should not be extended to the 12 mile limit but this would require joint legislative action. It would be preferable to clarify the status of the Gulf of St. Lawrence and the Bay of Fundy as internal waters at the same time.

2) *Continental margin*

a) There should be a general extension of all federal law, existing from time to time, to all activities on the continental margin over which Canada enjoys sovereign rights and jurisdiction under international law.

b) The law, both statutory and unwritten, existing from time to time, of the adjacent province should be incorporated by reference as federal law to supplement federal law in those areas where it does not exist.

*Qualifications to principles 2(a) and (b)*

i) It may be necessary to restrict specifically the extension of federal and provincial law to those matters over which Canada exercises sovereign rights and jurisdiction in accordance with international law.<sup>103</sup> Canada should not give the impression of seeking to usurp rights or to turn the Economic Zone and the Continental Shelf into national territory. However, coastal state jurisdiction over economic activities is so broadly phrased,<sup>104</sup> and the rights of the international community in respect of navigation so carefully defined that conflict with the international community is unlikely to arise from a broad extension of laws.<sup>105</sup> Furthermore domestic law is applied in a manner compatible with international law unless the law does not admit of such an interpretation.

ii) For greater certainty it might be wise to allow for the exclusion of the application of certain specified provincial laws, as in the U.S.A. with respect to State taxes. The author considers such caution unnecessary, given federal jurisdiction in the offshore and the rule of paramouncy, but finds positive exclusion much preferable to *ad hoc* listing.

iii) It might be wise to qualify provincial laws extended as those "not repugnant to or inconsistent with applicable federal law", as suggested by Herman.<sup>106</sup> It is suggested that this would be understood, given the role of provincial law and given the rule of paramouncy, but the proposal would do no harm.

103. It should be noted that the U.K. Act, Continental Shelf Act, 1964, c. 29, is framed in terms of offshore installations. This would seem somewhat narrow. See also 43 U.S.C. 1332-1333 (U.S.A.); Mineral (Submerged Lands) Act, 1981, no. 81 (Australia); Continental Shelf Act, no. 28 of 1964 (New Zealand).

104. Convention on the Law of the Sea, UN Doc. A.Conf. 62/122, 7 October 1982, arts. 55-59, 76-85.

105. See the U.S. Outer Continental Shelf Lands Act, *supra* n. 32, § 1331.

106. *Supra* n. 42 at 512.

*Courts*

3) Provision should be made for exclusive jurisdiction of the Federal Court in its areas of specialised jurisdiction,<sup>107</sup> and for concurrent original jurisdiction of provincial courts of the adjacent province over all other matters.

4) It would seem advisable to vest ownership in all mineral resources in the continental margin in the Crown in right of Canada, as this has not yet been done by statute.

5) It would be necessary to delimit the geographic application of provincial laws.

6) Special provisions should be made to clarify the status of Sable Island as part of Nova Scotia.

This proposal is designed to leave the courts considerable latitude in determining which laws, federal and provincial are applicable. The proposal leaves full scope for joint federal-provincial management and revenue sharing agreements, but should remove doubts as to their effective operation.

Ideally, it is submitted that this proposal should be part of a broader act dealing with internal and territorial waters, the continental margin, and the exclusive economic zone.

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107. This would include the application of all federal oil and gas legislation, and on the hypothesis of exclusive federal legislation over the offshore, over all related matters.