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ESSIM Forum Secretary
Oceans and Coastal Management Division
Fisheries and Oceans Canada (Maritime Region)
Dartmouth, Nova Scotia, Canada

North American Submarine Cable Association Submittal

The February 2005 Draft for Discussion entitled “Eastern Scotian Shelf Integrated Ocean management Plan (2006 – 2011)”

The North American Submarine Cable Association (“NASCA”) hereby offers its comments and considerations on the above-entitled document (herein “the ESSIM Initiative”). NASCA is a non-profit trade association whose members own, install or maintain submarine telecommunications cables that land in North America.

Our comments and considerations are expressed, more specifically, from a Canadian legal perspective, restricting the analysis to the use of Canadian coastal seabed for planning, maintaining, repairing and laying submarine telecommunications cables and their continued presence therein (herein the “Cable or Cables”).

The major issues we will discuss focus on Canada’s jurisdiction over Cable routes outside its territorial sea and the possibility, raised by the ESSIM Initiative, of mandatory Cable-routing consultations with fishermen groups.

To do so, we will first list some of the legal considerations underlying these very issues, then, some factual submissions and, lastly, based on said legal and factual aspects, we will conclude by recommending a regime of exception for Cables, or alternatively, a modified consultation process by the federal government with the Cable industry.

Alaska United Fiber
System Partnership

Alcatel Submarine
Networks

Apollo Submarine
Cable System Ltd

AT&T Corp.

Global Crossing Ltd.

Global Marine
Systems Limited

GlobeNet
Communications
Group Limited

Hibernia Atlantic

Level (3)
Communications,
LLC

MCI

New World Network
USA, Inc.

Southern Cross
Cable Network

Sprint
Communications
Corporation

Teleglobe Canada
ULC

Tyco
Telecommunications
(US) Inc.

GENERAL COMMENT

The ESSIM Initiative, on the whole, seems to mainly consider procedures and avoids addressing jurisdictional issues, which, in our opinion, directly underlie the proposed management effort. In fact, the general structure of the ESSIM Initiative seems to take for granted that there are no or very few questions as to the legal qualification of the various parties to be involved in the management plan it proposes.

LEGAL CONSIDERATIONS

Considering the ESSIM Initiative from a Canadian constitutional perspective, while restricting our analysis and considerations to Cable-related activities and space occupation, we wish to focus on the following legal aspects:

We recognize the authority of the Canadian Parliament to promulgate a management plan directed at the protection of the Eastern Scotian Shelf. In two key decisions, the Supreme Court of Canada¹ confirmed federal jurisdiction over the territorial sea and the continental shelf under Section 91 of the Constitution of Canada². The rights pertaining to the law of the sea devolve to the federal government by international law³. The Oceans Act⁴ gives the Canadian federal government authority over “marine installation(s) or structure(s)” attached to or anchored on the continental shelf of Canada. These cover, *inter alia*, “sub-sea installations”. Even though no provision of this Act specifically refers to Cables and no regulations have been adopted to date under Section 26(1)(a) prescribing a work for the purpose of more specifically defining “marine installation(s) or structure(s)”, the applicable interpretation rules referring to the usual meaning of these phrases would lead

¹ In: *Reference: Offshore Mineral Rights of British Columbia*, [1967] S.C.P. 792; and *Reference: Newfoundland Continental Shelf (Hibernia)*, [1984] 1 S.C.R. 86.

² *The British North America Act*, 1867, also known as the *Constitutional Act of 1867*, 30 & 31, Vict. U.K., c. 3. (the “BNA”).

³ Beaudoin, Gérald A., “La Constitution du Canada”, Wilson & Lafleur, 3rd ed., Montreal, 2004, p. 390.

⁴ S.C. 1996, c. 31, Sections 2 and 20(1).

to consider Cables as being comprised within the general class of work or wares covered by “sub-sea installation(s)”. We find this usual meaning first in the Shorter Oxford English Dictionary⁵ which defines “installation” as “a mechanical apparatus set up or put in position for use (machinery, apparatus, etc.)”. The Webster Third New International Dictionary⁶ is even broader in its definition of “installation”: “something that is installed for use”. We can thus conclude that Cables can be considered as “structures”, as defined by Section 2 of the Oceans Act.

From the above only, one can assert that the Oceans Act confirms the authority of the Government of Canada to legislate and regulate activities pertaining to Cables in Canadian internal and territorial waters, *i.e.*, within the 12 nautical miles of the Canadian territorial sea⁷.

On the other hand, Canadian provinces have been denied constitutional jurisdiction over sea floor activities beyond the low water mark of their seashores, as well as the ownership of the sea floor beyond their actual terrestrial territory.

The maritime frontier of a Canadian province is the low water mark of its seashore. This Canadian common law rule originates in a British case⁸ and it was consistently applied and followed by the Supreme Court of Canada⁹. The Court of Appeal of Newfoundland also followed these decisions¹⁰.

The corollary implication of this rule is that the territorial sea beyond the low water mark is outside the territory of a given province, and the latter has no ownership rights or

⁵ Oxford University Press, London, 1975.

⁶ (Unabridged Edition) G. A. C. Merriam Co, Springfield, MA, 1976.

⁷ Section 4(a) defines the territorial sea of Canada as having an outer limit of twelve nautical miles from its baselines.

⁸ *Q. vs Keyn* (1873), 2 Ex. D.63.

⁹ See note 1 above.

¹⁰ *ACE – Atlantic Container Express Inc. v. Newfoundland (Minister of Finance)* (1992), 92 D.L.R. (4th) 581.

legislative authority thereupon¹¹. Furthermore, in principle, a province may legislate only within its limits¹².

Incidentally, it should be noted that Section 21(1) of the Oceans Act, absent any applicable federal law, allows for the application of a coastal province's statutes over Canadian waters. However, in the presence of the Oceans Act itself, and noting Section 92(10)(a) of the BNAA, which specifically excludes provincial jurisdiction over "telegraph lines" extending beyond the limits of a province¹³, it would be very difficult for a Canadian province to claim jurisdiction over Cables in Canadian waters.

In addition to provincial representatives, the ESSIM Initiative, would also invite urban communities and other local social groups to take an active part in the proposed management plan, with decisional power.

As municipal institutions are provincial creatures under the BNAA¹⁴, entities like urban and local communities would have no more constitutional jurisdiction to take part in the management plan than the provinces themselves. Social groups, such as fishermen associations and First Nations councils, in their capacity as individuals or groups of individuals, have no constitutional jurisdiction in Canada. As per the BNAA, constitutional jurisdictions are distributed to the federal or provincial governments only under Sections 91 and 92 therein. Accordingly, these groups could not share the jurisdiction of the federal government in this matter either.

When the federal government is being entrusted with a jurisdiction under the Constitution or by international law, it cannot delegate same to someone else, but must exercise it itself by virtue of the *Delegatus non potest delegare*¹⁵ rule. The Supreme Court of Canada has

¹¹ Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf edition, Toronto, Thomson Carswell, 1997, p. 13-5.

¹² Hogg, *op. cit.*, pp. 13-5 to 13-12.

¹³ Beaudoin, *op. cit.*, p 535.

¹⁴ BNAA, Section 92(8).

¹⁵ "A delegate cannot delegate."

recognized the application of this Roman law maxim in Canadian law¹⁶. In Canada's constitutional context, this rule, as applied, forbids interparliamentary delegation, *i.e.*, from one level of government to the other, commonly referred to as "legislative" inter-delegation¹⁷. This is what the ESSIM Initiative would be doing if the federal government involves provincial representatives as well as provincial bodies and citizens groups in a decision-making process that should be the federal government's alone.

There is an exception to that rule but it is not applicable to the topic of our discussion. It is called "administrative" inter-delegation¹⁸ and was found valid by the Supreme Court in the Willis case¹⁹. It pertains to cases where, for example, "the federal Parliament could, if it chose, "adopt as its own" a provincial agency and authorize it to exercise federal powers side by side with its provincial powers. And the provincial Legislature could confer on a provincial agency the capacity to accept a delegation of federal powers"²⁰.

International law has long recognized but has also limited the rights of a coastal state, as they pertain to Cables beyond its territorial seas upon its continental shelf. The law of the sea allows all nations and their nationals to lay, maintain and repair Cables beyond territorial seas upon the continental shelf with regard to the interests of other states. This is even more clearly the case since November 7, 2003, when Canada ratified the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"). Referring to same, upon announcing the Canadian ratification, the Department of Foreign Affairs and International Trade of Canada justly qualified UNCLOS as "the defining document of international oceans law", and the "constitution of the oceans"²¹.

¹⁶ *Comeau's Sea Food Ltd. v. Canada (Ministry of Fisheries and Oceans)*, [1997] 1 S.C.R. 12.

¹⁷ Beaudoin, *op. cit.*, p. 314 (referring to "délégation horizontale"); also, Hogg, *op. cit.*, p 14-18.

¹⁸ Beaudoin, *op. cit.*, p 315 (referring to "délégation oblique").

¹⁹ *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392, at p. 396.

²⁰ Hogg, *op. cit.*, p 14-18.

²¹ News release No. 171 of November 6, 2003,
http://w01.international.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/106595.htm.

In its provisions on submarine cables, UNCLOS codifies one of the freedoms of the seas, *i.e.*, the right to lay and operate Cables. Sections 58 and 79 state:

“Art. 58. Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.”

“Art. 79. (2) Submarine cables and pipelines on the continental shelf

Subject to its rights to take reasonable measure for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.”

“Art. 79 (4) Nothing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.”

When compared to earlier conventions on the law of the sea, unlike in the case of pipelines, UNCLOS does not recognize that Cables may pose an environmental threat to a coastal state, and has not increased its authority on the continental shelf over the location of the Cables or with respect to pollution arising therefrom²².

²² See: “US Department of State Dispatch Supplement” of February 1995. Vol. 6, No. 1, p. 9.

The routing and laying of Cables on the Eastern Scotia Shelf, outside the territorial sea of Canada, are already sufficiently regulated by the Canadian Government. Albeit indirect, this regulation process takes place by the mere application of federal laws and regulations to these activities inside the territorial waters of Canada, since international Cables cross over into Canadian territorial waters from the high seas.

In this regard, one may refer to the following legal requirements now in force:

Firstly, a Cable can be laid and land in Canadian territory only if an “international submarine cable licence” is duly obtained under the provisions of Sections 17 and 18 of the Telecommunications Act²³; and the applicant for such a license must remain eligible under the regulations to hold the license in question (Section 17).

Secondly, there is a Cable laying approval process by Transport Canada, through the Navigable Waters Protection Program, under the applicable provisions of the Navigable Waters Protection Act²⁴. All “works”, including any “telegraph cable” as per the definitions under Section 3 therein, to be built or placed in Canadian navigable waters, must be approved by the Minister of Transport under Section 5.

Furthermore, nothing would prevent the federal government, especially when considering the issue of an international submarine cable licence, from submitting same to environmental considerations. From this perspective, the federal government could well ask for a favourable environmental assessment as a prerequisite to issuing the licence in question. The federal government is also free to consult with any province or with any group of persons prior to issuing such a licence.

FACTUAL SUBMISSIONS

In addition to the above legal aspects, NASCA wishes to put forward the following factual arguments:

²³ S.C. 1993, C. 38.

²⁴ R.S., 1985, C.N-22.

Cables are, by nature, benign structures, passive and chemically neutral, carrying light waves over glass fibres and, when equipped with repeaters, a minimal amount of electrical power to feed the latter only. They do not, *per se*, pose an environmental threat. Furthermore, their installation and an average of maybe 2 or 3 repairs over a 20-25 year expected useful life, cause minimal disturbance to the sea bottom.

One of the fears of the Cable industry is that, with the application of the ESSIM Initiative as it is being proposed, the Canadian east coast could be avoided in the future as a landing option for international Cables, because such landings are submitted to a much too burdensome and potentially lengthy approval process. These can literally slow down the landing process and bring it to lengthy halts if not to a complete stop. If the ESSIM Initiative is found to be too restrictive by the Cable industry, it may thus become self-defeating in that it could discourage the choice of Canadian landings. This, in turn, would have sovereignty and security implications²⁵. A Canadian oceans strategy should, in our opinion, encourage such landings and re-establish Canadian control over the infrastructures carrying its international communications, including the routing of its strategic defence circuits. If these infrastructures landed exclusively on the shores of the U.S.A. or Mexico for instance, this could very well become a serious sovereignty issue for the Government of Canada, irrespective of the friendly relations Canada may otherwise have with these countries. Considered from the point of view of the business efficiency sought by the Cable industry, the ESSIM Initiative does not take into account the certainty and swiftness of the process needed by that industry to plan Cable routes and landings on Canada's east coast. On the contrary, the ESSIM Initiative, as it now stands, could become a major deterrent to such decision-making.

Co-users of Canada's continental shelf should be treated equally and equitably when dealing with sharing the sea bed. The Cable industry and fishermen have achieved peaceful co-existence in the past without coercive legal measures. Submitting the laying of a Cable to a compulsory process involving another industry would simply submit the lawful exercise of the rights of one user to the possible veto of the other. We believe that

²⁵ These are cited at p. 6 of the ESSIM Initiative as "key pillars" of the Oceans Action Plan.

this could be the result of implementing Action Point A5 of the ESSIM Initiative²⁶. Why would authorities favour one user over another or protect one at the expense of the other? From this perspective, NASCA is concerned that the ESSIM Initiative has not considered the special status that UNCLOS confers on Cables by focusing more on the potential damages that may ensue from the activities of other users of the seabed²⁷.

NASCA has insisted before and reiterates that:

- Once installed, a Cable, especially when buried, cannot be considered as a hazard to navigation. The laying and burial of same involves very limited Cable ship time and manoeuvres²⁸.
- The Cable industry has an excellent track record of selecting routes that can be buried to the maximum extent possible and avoiding conflicts with other seabed user groups, as this is to the benefit of all²⁹.
- Traditionally, the Cable industry has consistently informed fishermen and other seabed users as to the exact position of Cables and requested them to use proper caution when working near cables. NASCA and its members will continue to cooperate with other seabed users and consult with them on any future systems³⁰. The Cable industry has also provided Canadian authorities with detailed Cable routes, as laid, so that official maps used by all potential co-users of Canadian coastal shelves show these Cables in a precise manner.
- Even if Cables are at greater risk from commercial trawling than vice versa, Cable owners have long standing programs to communicate with other seabed users.

²⁶ P. 51, "A5 Develop procedures to improve submarine telecommunications cable planning in relation to impacts on commercial fisheries.

²⁷ See footnote 22 above.

²⁸ See NASCA comments of May 30, 2003, on the May 2003 discussion paper entitled " Considerations for Seabed Utility Corridors to Offshore Nova Scotia", p. 3.

²⁹ *Ibidem*, p. 2.

³⁰ *Ibidem*, p. 7.

NASCA members have been doing so for many years in an effort to avoid conflicts, as they believe that cooperation and compromise are more effective than conflict. In fact, commercial fishermen are often consulted before a Cable route is selected to ensure that productive fishing grounds are avoided to the greatest possible extent³¹. The typical Cable route selection process involves finding a route that is the most secure and drops off the continental shelf in the shortest distance. The security issues addressed in the selection process include, but are not limited to, a review of the threat from fishing, and the ability to bury the Cable based on the route's geology. These factors are often balanced against each other to find the optimum route³².

- One can fish safely even around an unburied Cable, and a buried Cable has essentially no effect on fishing. There is no evidence to suggest that the presence of Cables has created significant negative external effects for commercial fishing³³.
- The environmental effects of a Cable are minimal, short-lived and easily and quickly mitigated. Furthermore, NASCA has access to numerous Environment Impact Statements that can be provided to Canadian authorities if required to support this statement³⁴;

Bearing the above factual statements in mind and referring to the Ecosystem Objectives stated at p. 27 of the ESSIM Initiative, namely the conservation of sediment quality and critical benthic habitats, we are of opinion that Cable laying cannot be seriously compared to the activities of trawlers and dredgers.

Similarly, referring to the Plan-Level Objectives stated and described at length at pp. 29 to 31, such as identify and protect important benthic and, pelagic communities, etc., none of

³¹ *Ibidem*, p. 2.

³² *Ibidem*, p. 2.

³³ *Ibidem*, p. 5.

³⁴ *Ibidem*, p. 3.

these, in our opinion, addresses the real or potential perils that would likely result from Cable-related activities.

Finally, referring to the Human Use Objectives listed at p. 40, it can be said, *a contrario*, that Cables do not harvest living resources, do not extract non-living resources, do not contaminate or constitute a potential for contamination and, lastly, do not threaten ecosystems in any material way.

The ESSIM Initiative proposes that one of its Plan-Level Objectives is the social, cultural and economic well-being of communities in Nova Scotia³⁵. In this regard, one must not forget the very important cultural, social and economic well-being component of the activities of the Cable industry, as prime information carriers not only for Nova Scotian communities, but for all communities, including Canadian and worldwide communities.

One of the strategies expressed by the proposed management plan is to identify, manage and avoid conflicts involving multiple users³⁶. Presumably, this is what all users want. NASCA believes that this will be achieved only if all co-users are treated on the same footing, without any partiality, and that no user of the shelf can validly claim “a sense of ownership and priority of use³⁷”. Even if a sea area is of importance and special significance to a specific user group, impartiality and equality of use and treatment should prevail in any management plan such as the one proposed or in any alternative thereto. Any other approach would not be in the best public interest.

CONCLUSION

NASCA believes the Cable industry should, at the very least, be given the same right as other users in any discussions or management plan related to sharing the seabed on the Eastern Scotian Shelf. NASCA also believes that the Cable industry has consistently demonstrated a responsible use of ocean space and marine resources, that it has not

³⁵ The ESSIM Initiative, p. 32.

³⁶ *Ibidem*, p. 2.

³⁷ The ESSIM Initiative, p. 11.

hampered navigation or caused any serious or irreversible harm to the environment or living species. On the contrary, it is essentially an industry whose activities carry a very low risk of resulting impacts and these would be of very low magnitude at most.

It is also NASCA's conclusion that Cables, by their very nature, should not be subject to the complex, burdensome and consensus-based management plan proposed by the ESSIM Initiative as they are sufficiently regulated as is.

Moreover, the jurisdictional problems raised in this paper indicate that it might be prudent to consider an alternative action plan to ensure, to the satisfaction of all users, that the otherwise legitimate concerns of the federal government are legally addressed and to ensure that the laying and routing of Cables outside the territorial sea of Canada can be continued and achieved with due regard to a coordinated approach and a harmonious solution.

To this end, NASCA promotes alternate approaches, such as protocols and codes of best practice, as are briefly described in the ESSIM Initiative³⁸. These approaches must be practical and offer an effective, even indirect, way to include Cables in Canada's continental shelf management.

NASCA would be amenable to working towards a formal protocol with the federal government or to adopting an eventual code of best practice so as to alleviate concerns about Cables or the practices of the Cable industry. To this end, NASCA is more than open to further dialogue with Canada's federal authorities.

It is, however, NASCA's firm position that, in so doing, no other co-users should have any kind of direct or indirect veto right or mandatory legally conditioned prior consultation right, with regard to routing and laying Cables outside Canadian territorial waters.

The whole respectfully submitted.

³⁸ The ESSIM Initiative, pp. 47 and 67.