OSLER

Bill C-49: proposed changes to energy regulation for the Atlantic offshore

AUGUST 3, 2023 12 MIN READ

Related Expertise

- Corporate and Commercial Disputes
- Energy
- Environmental
- Regulatory, Indigenous and Environmental
- Renewable Energy

Authors: Simon C. Baines, Sander Duncanson, Joey Chan, Logan Aitken, Logan Aitken, Jesse Baker

On May 30, 2023, the House of Commons completed the first reading of Bill C-49.[1] If enacted, Bill C-49 will amend the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*[2] and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*[3] (collectively, the Accord Acts). Currently, the Accord Acts govern joint offshore petroleum resource management and revenue sharing between the federal government and the governments of Newfoundland and Labrador and Nova Scotia, respectively.

Bill C-49 seeks to establish a new regulatory regime for renewable energy projects offshore Newfoundland and Labrador and Nova Scotia. These offshore renewable energy projects would include the exploitation, storage, transmission and related research and assessment of renewable resources, with Bill C-49 focusing on offshore wind, hydrogen and green ammonia.[4]

Changes to offshore regulators

Bill C-49 would rename the two regulators established under the Accord Acts; the Canada-Newfoundland and Labrador Offshore Petroleum Board would be renamed as the Canada-Newfoundland and Labrador Offshore Energy Regulator, and the Canada-Nova Scotia Offshore Petroleum Board would be renamed as the Canada-Nova Scotia Offshore Energy Regulator (collectively, the Regulators). These name changes would be consistent with other energy regulators in Canada (notably, the Canada Energy Regulator, Alberta Energy Regulator and British Columbia Energy Regulator).

Proposed amendments would enable the Regulators to regulate offshore renewable energy projects in a similar manner to how they currently regulate offshore petroleum development projects. This would include control over impact assessments and any required hearings, licensing, environment, health and safety matters, and decommissioning.

Changes to offshore licences

Bill C-49 would introduce a new submerged land licence to carry out offshore renewable energy projects. This single-licence tenure regime for offshore renewable energy projects would differ from the system of issuing multiple licences through the life-cycle of an offshore petroleum development project (including exploration, significant discovery and production

licences). However, a submerged land licence would not be required for offshore renewable energy projects that do not require attaching a facility or structure to the seabed.[5]

In areas of the offshore where no submerged land licence is in force respecting a particular renewable energy resource, the Regulators could make a call for bids. A call for bids would specify certain details, such as licence parameters, types of technology, important dates, and other terms. The Regulators would then select and publish the successful bids.[6]

The responsible Regulator would notify the federal Minister of Natural Resources and designated provincial minister (collectively, the Designated Ministers) of its offshore renewable energy recommendation for or against the issuance of a submerged land licence. The Designated Ministers would then approve (with or without variations) or reject the recommendation. A ministerial decision-making process outlining the Regulators' exercise of powers would also be established.[7]

In addition to the introduction of submerged land licences for offshore renewable energy projects, Bill C-49 would also change the term of significant discovery licences (SDLs) for offshore petroleum discoveries. Historically, an SDL has remained in force for a portion of the offshore area until either: (i) a production licence has been issued for that portion; or (ii) the declaration of significant discovery that was the basis for the SDL is no longer in force in relation to that portion.[8] If Bill C-49 is passed, new SDLs would remain in force for that portion of the offshore area until either: (i) a production licence has been issued for that portion (same as before); or (ii) 25 years after the SDL is issued.[9] However, for exploration licences issued for a portion of the offshore area before 2017, an SDL issued to the holder of that licence for the same portion would remain in force for as long as it would have before Bill C-49 was passed (i.e., until the occurrence of either of the above-noted events that have historically terminated an SDL).[10]

Reservation of revenue from offshore renewable energy projects

Similar to the fiscal regime that is in place for offshore petroleum development projects, Bill C-49 would reserve to Canada any revenues from an offshore renewable energy project requiring a submerged land licence that would be payable under provincial legislation to Newfoundland and Labrador or Nova Scotia, as applicable, as if that project were carried out within the applicable province.[11] Bill C-49 also contemplates Canada and Newfoundland and Labrador and Nova Scotia, as applicable, entering into agreements in respect of the collection and administration of revenue from offshore renewable energy projects.[12]

Newfoundland and Labrador recently released a Wind-Hydrogen Fiscal Framework that sets out revenues that will be payable in respect of wind-hydrogen projects carried out in the province. If they become payable under provincial legislation, and Bill C-49 is passed, the following revenues set out in that framework will be reserved to Canada in respect of wind-hydrogen projects that require a submerged land licence under the *Canada-Newfoundland and Labrador Act*:

- Crown land reserve fees of 3.5% of the market value of Crown lands held in reserve during the site and wind resource assessment period.
- Crown land lease lees of 7% of the market value of Crown lands upon issuance of tenure.
- For projects producing five megawatts or more of electricity for hydrogen production, an annual wind electricity tax of $4,000 per megawatt on installed capacity once turbines are

in-service.

- For all hydrogen facilities, a water use fee of $500 per 1000 m^3 of water licensed and used, and $50 per 1000 m^3 of water licensed but not used, both adjusted annually according to the Canadian consumer price index, and
- A water royalty that will apply once the proponent has recovered its investment in the project (at a rate of 10% of the calculated residual value of the water) and will increase once it has recovered two and three times its investment in the project (at a rate of 20% and 25% of the calculated residual value of the water, respectively).[13]

Meanwhile, Nova Scotia's *Marine Renewable-energy General Regulations* set out revenues payable in respect of renewable energy projects carried out in areas designated under the *Marine Renewable-energy Act* (MRA). If Bill C-49 is passed, the following revenues set out in that regulation will be reserved to Canada in respect of renewable energy projects that require a submerged land licence under the *Canada-Nova Scotia Act* and are carried out in an area designated under the MRA:

- If a licence would be required under the MRA, an annual rent equal to the greater of $2,500 per megawatt of licensed and installed capacity or $20 per hectare of licensed area, and
- If a permit would be required under the MRA, an annual rent that would vary depending upon the type of permit that would be required.[14]

While many jurisdictions are offering financial incentive programs to help support the development of renewable energy projects (including the U.S. *Inflation Reduction Act* and federal investment tax credits in Canada[15]), rents and royalties payable in respect of renewable energy projects offshore Newfoundland and Labrador or Nova Scotia may be an important factor in prospective project proponents' decisions regarding whether to proceed with the development of a project.

Impact assessment and consultation

If Bill C-49 is passed, environmental assessments of designated offshore projects will be completed pursuant to the *Impact Assessment Act* (IAA).[16] Bill C-49 would clarify the role of the Regulators with respect to impact assessments (IAs) of such projects, as well as regional and strategic assessments.

If an application for an authorization is made under an Accord Act in respect of a designated project under the IAA, the Regulators would not be able to make a determination respecting that application until either: (i) the Impact Assessment Agency of Canada (IAAC) decides that an assessment is not required; or (ii) the federal Minister of Environment and Climate Change (the Environment Minister) has issued a decision statement under the IAA.

Bill C-49 would also require the chairperson of the responsible Regulator to provide comments (i) if the Environment Minister is considering designating an offshore petroleum or renewable energy project for purposes of the IAA, and (ii) to the IAAC to help decide whether an IA is required for such a project. If an IA is required, then the chairperson would also be required to provide comments to the IACC relating to: (i) the time limits for public comments on a draft IA report; and (ii) the information or studies that are necessary for conducting the IA or preparation of the IA report, as applicable.[17]

Bill C-49 would not change any of the provisions in the IAA relating to the role of the Regulators in IAs of designated offshore projects. For example, the IAAC (or the Environment Minister, if the IA is referred to a review panel) would still need to offer to consult and cooperate with the respective Regulator with respect to such an IA and, if the IA is referred to a review panel, the Environment Minister and the respective Regulator could still establish a joint review panel to conduct the IA.[18]

Bill C-49 would also permit the Regulators to conduct the following assessments, either alone or under an agreement with any jurisdiction authorized under other legislation to conduct such an assessment (e.g., IAAC):

- A regional assessment of the effects of any offshore petroleum or renewable energy project; and
- A strategic assessment any proposed or existing policy, plan or program relating to the respective offshore area or of any issue that is relevant to any offshore petroleum or renewable energy project.[19]

Bill C-49 would further allow the Regulators to establish participant funding programs to facilitate consultation with Indigenous communities, or the general public. Currently, the Accord Acts allow the Regulators to establish participant funding programs to facilitate the participation of "the public" in the environmental assessment of an offshore project.[20] By contrast, Bill C-49 would more broadly allow the Regulators to establish programs to facilitate the participation of the public and Indigenous peoples in consultations concerning any matter regarding the respective offshore area.[21] It would also add a provision that the federal and provincial Crowns may rely on the Regulators for the purposes of consulting with Indigenous peoples respecting any potential adverse impacts on existing Aboriginal and treaty rights, and that the Regulators may accommodate any such impacts, if appropriate.[22]

Environment, health and safety

Bill C-49 would expand the safety and environmental protection regime and enforcement powers under the Accord Acts to encompass offshore renewable energy projects.

In offshore areas that may be identified as areas for environmental or wildlife conservation or protection, the federal Governor in Council would be able to prohibit the commencement or continuation of petroleum resource or renewable energy activities, or the issuance of interests.[23]

Bill C-49 would also seek to establish a regulatory and liability regime for abandoned petroleum-related or offshore renewable energy project facilities. The existing federal occupational health and safety regime would be expanded to encompass offshore renewable energy projects. Bill C-49 would also expand enforcement and compliance tools to encompass offshore renewable energy projects.[24]

Joint exploitation agreements for transboundary pools

Bill C-49 would establish a hydrocarbon management regime to regulate pools straddling domestic and international boundaries. This would allow for joint exploitation agreements between the Regulators and the other appropriate authorities having jurisdiction to provide for the exploitation of a transboundary pool (i.e., a pool extending beyond the Regulators'

jurisdiction), as though it were a single pool.[25]

When a joint exploitation agreement is entered into, the Regulators would order the working interest owners in the Regulators' jurisdiction to enter into a unit agreement, and a unit operating agreement, with any other working interest owners. This process may involve a hearing to validate the agreement and any variations made to the agreement.[26]

As an example of the opportunity Bill C-49 presents for transboundary pools, Canada and France signed the Canada-France Agreement on Transboundary Hydrocarbon Fields (the Canada-France Agreement) on May 17, 2005. The Canada-France Agreement sought to provide a management regime for hydrocarbon exploration and exploitation off the coasts of Newfoundland and Labrador, Nova Scotia, and Saint-Pierre and Miquelon (a territory of France). The Canada-France Agreement further included mechanisms for identifying and exploiting transboundary fields.[27] If Bill C-49 passes, these parts of the Canada-France Agreement can finally be implemented, almost 20 years after it was signed.

Conclusion

Bill C-49 seeks to modernize Canada's energy regulatory framework for the Atlantic offshore to foster investment in low-carbon energy projects, improve the utilization of Canada's Atlantic offshore resources and support Canada's transition to a lower carbon economy. These proposed changes are timely, as the Atlantic provinces are seeking significant interest in offshore renewable energy. For example, in April 2022, Newfoundland and Labrador lifted a 15-year moratorium on the development of wind power and, by October 2022, 73 wind energy projects had been proposed to power electrolyzers for hydrogen production in the province. Further, Nova Scotia has created an Offshore Wind Roadmap and plans to offer leases for five gigawatts of offshore wind energy by 2025. Updating the Accord Acts would help to clarify some important elements of the regulatory processes applicable to such projects, and thereby hopefully facilitate development. However, in an increasingly strong (and international) competition for private investment dollars for energy transition related projects, the economic competitiveness of Canada's Atlantic offshore will be in the spotlight.

---

[1] Bill C-49, *An Act to amend the Canada–Newfoundland and Labrador Atlantic Accord Implementation Act and the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and to make consequential amendments to other Acts*, 1st Sess, 44th Parl, 2023 (first reading 30 May 2023) [Bill C-49].

[2] SC 1987, c 3 ["*Canada-Newfoundland and Labrador Act*"].

[3] SC 1988, c 28 ["*Canada-Nova Scotia Act*"].

[4] Canada, Parliament, *House of Commons Debates,* 44th Parl, 1st Sess, Vol 151, No 202 (30 May 2023).

[5] Bill C-49, cls 38 & 147.

[6] Bill C-49, cls 38 & 147.

[7] Bill C-49, cls 19, 38, 125 & 147.

[8] *Canada-Newfoundland and Labrador Act,* ss 75(3) & 85(1); *Canada-Nova Scotia Act*, ss 78(3) & 88(1).

[9] Bill C-49, cls 36 & 145.

[10] Bill C-49, cls 53 & 161.

[11] Bill C-49, cls 41 & 150.

[12] Bill C-49, cls 42(1) & 151(1).

[13] Government of Newfoundland and Labrador, "Wind-Hydrogen Fiscal Framework" (February 23, 2023), online: https://www.gov.nl.ca/iet/files/Wind-Hydrogen-Fiscal-Framework-Technical-Deck-1.pdf.

[14] *Marine Renewable-energy General Regulations,* NS Reg 8/2018, s 23(3).

[15] See our discussion of the U.S. *Inflation Reduction Act* and federal investment tax credits in our Fall Economic Statement 2022 and our Federal Budget Briefing 2023.

[16] SC 2019, c 28, s 1 [IAA].

[17] Bill C-49, cls 62 & 170. Bill C-49 would also permit the chairperson of the responsible Regulator to consult with the Designated Ministers before providing comments to the Environment Minister or IAAC.

[18] *IAA*, ss 21 & 39(1).

[19] Bill C-49, cls 62 & 170.

[20] *Canada-Newfoundland and Labrador Act,* s 138.02. See also *Canada Nova-Scotia Act,* s 142.03.

[21] Bill C-49, cls 62 & 170.

[22] Bill C-49, cls 12 & 117. This role of the Regulators is consistent with decisions by the Supreme Court of Canada, which have held that regulators can play such a role if they are expressly or impliedly authorized to do so: see *Clyde River (Hamlet) v Petroleum Geo-Services Inc.,* 2017 SCC 40 at para 30.

[23] Bill C-49, cls 28 & 137. These clauses would also authorize negotiations and compensation to an owner for the surrender or cancellation of an interest.

[24] Bill C-49, cls 76 & 185.

[25] Bill C-49, cls 75-76 & 185.

[26] Bill C-49, cls 76 & 185.

[27] Government of Canada, "Canada and France to Work Together in Atlantic Waters" (May 17, 2005), online: https://www.canada.ca/en/news/archive/2005/05/canada-france-work-together-atlantic-wate

OSLER

rs.html.