

DOING BUSINESS IN ATLANTIC CANADA'S GROWTH INDUSTRIES

By Colm St. Roch Seviour; Stewart McKelvey

Atlantic Canada provides expanding opportunities in oil and gas, shipbuilding, hydroelectric development and mining. Knowledge of the region's relevant legal and regulatory regimes is essential

Canada's four Atlantic provinces, Newfoundland and Labrador (NL), Nova Scotia (NS), Prince Edward Island (PEI) and New Brunswick (NB), have a venerable history and tradition of things related to the sea, including fishing, shipbuilding, and the business of maritime shipping and transport. These traditional areas of enterprise remain strong, and the Atlantic provinces have also become increasingly known for business opportunities associated with the richness of their natural resources.

Notably, the offshore oil and gas industry has matured to become a dominant sector in the regional economy. NS and PEI are presently enjoying a resurgence of their historic shipbuilding industries. NL has become known for its abundant hydroelectric and mineral resources. NB is justly famous for its burgeoning forest resource industry, with wood and wood products

comprising a vital part of its economy. A vibrant tourism industry is shared by all four provinces.

For businesses interested in participating in the Atlantic provinces' growing oil and gas, shipbuilding, hydroelectric development, mining industries and NS Renewable Energy initiatives, a good knowledge of the applicable legal and regulatory regimes will be essential. This article outlines some of the principal legal regimes of relevance.

Offshore Oil and Gas Regimes in NL and NS

Foremost among the Atlantic Canadian resource industries that have developed in recent years is the offshore oil and gas sector,

which is focused principally in NL and NS. The offshore areas of both provinces have been the subject of significant oil and gas developments.

There are now three oil-producing projects located offshore NL: the Hibernia project (operated by ExxonMobil Canada), the Terra Nova project (operated by Suncor Energy) and the White Rose project (operated by Husky Energy). ExxonMo-

Pursuant to the *Hibernia Development Project Act*, NL laws in relation to security interests, including laws in relation to the enforcement of any rights or obligations thereunder, have application to the NL offshore area. Generally, though, federal laws in relation to banking, bills of exchange, promissory notes, interest, bankruptcy, insolvency or the regulation of trade and commerce will apply in both the NS and the NL offshore areas.

▶ **“Each province has an environmental assessment regime regulated by a modern piece of legislation.”**

bil Canada is presently developing the fourth major offshore project, known as the Hebron project. Nova Scotia’s offshore area is host to two natural gas projects, the significant Sable Offshore Energy Project (operated by ExxonMobil Canada) and Encana Corporation’s Deep Panuke project. The NL and NS offshore areas continue to hold significant oil and gas exploration potential.

There has been an exceptional level of legislative cooperation between the federal government and the NL and NS provincial governments in the regulation of Canada’s Atlantic offshore oil and gas industry. This is reflected in the Atlantic Accord agreements achieved by the federal government of Canada with NL and NS and in the separate but similar implementing legislation, known as the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act* and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* (the *Accord Acts*).

The *Accord Acts* and their accompanying regulations provide for the comprehensive regulation of offshore oil and gas exploration, development and production projects in the NL and NS offshore areas. The legislation regulates rights issuances in the NL and NS offshore areas, ranging from exploration licenses through significant discovery licenses to declarations of commercial discoveries and the issuance of production licenses. The *Accord Acts* also govern the licenses and authorizations that are required to undertake work in the NL and NS offshore areas.

In the implementation of the *Accord Acts* regime, the two levels of government have provided for the application of provincial “social legislation” – which includes labor laws, workers’ compensation legislation and workplace health and safety laws – to offshore installations or structures engaged in drilling or producing activities in the NL and NS offshore areas.

Carrying on business in the Atlantic offshore oil and gas sector will often require substantial interaction with the separate NL and NS regulatory bodies, which have been jointly appointed under the *Accord Acts* by the federal and provincial governments to administer the NL offshore area and the NS offshore area. These are, respectively, the Canada-Newfoundland and Labrador Offshore Petroleum Board (the NL Board) and the Canada-Nova Scotia Offshore Petroleum Board (the NS Board).

To navigate the offshore regulatory structure requires good knowledge of the *Accord Acts* and their extensive implementing regulations. Regulations having application to both the NL and NS offshore areas include, e.g., the *Oil and Gas Spills and Debris Liability Regulations*, the *Canada Oil and Gas Operations Act*, and the *Canada Oil and Gas Land Regulations*. For the NL offshore area, the relevant additional regulations include the *Newfoundland Offshore Petroleum Drilling and Production Regulations*, the *Newfoundland Offshore Area Oil and Gas Operations Regulations*, the *Newfoundland Offshore Petroleum Installations Regulations*, the *Newfoundland Offshore Certificate of Fitness Regulations*, and the *Newfoundland Offshore Area Registration Regulations*. For the NS offshore area, the key additional regulations are the *Nova Scotia Offshore Area Certificate of Fitness Regulations*, the *Nova Scotia Offshore Petroleum Drilling and Production Regulations*, the *Nova Scotia Offshore Area Petroleum Installations Regulations*, the *Nova Scotia Offshore Area Petroleum Geophysical Operations Regulations* and the *Nova Scotia Offshore Area Oil and Gas Spills and Debris Liability Regulations*. The NL Board and the NS Board will each also function as the lead regulator under the *Canadian Environmental Assessment Act* for the purpose of assessing, reviewing and approving the broad range of petroleum exploration work and development activities that may be undertaken in the NL and NS offshore areas.

The *Accord Acts* authorize the NL Board and the NS Board to each issue and publish guidelines with respect to a number of matters governed by the *Accord Acts*, notably including benefits plans, safety matters, and financial assurances that will be required of an offshore operator.

One of the key underlying principles of the accords between the federal government and each of NS and NL is recognition of the right of each of these provinces to be the principal beneficiary of its offshore oil and gas resources. To implement

this principle, each of the *Accord Acts* requires the submission and approval of local benefits plans in connection with any offshore oil and gas undertaking. Known respectively as the Canada-Newfoundland and Labrador Benefits Plan and the Canada-Nova Scotia Benefits Plan, these benefits plans are intended to promote the engagement of provincial labor and commercial resources in offshore exploration and development projects, and are intended to provide a full and fair opportunity for provincial enterprises to compete for the supply of goods and services for such undertakings. The key local preference provisions that must be accommodated in a benefits plan are expressed in section 45 of each of the *Accord Acts* as follows:

(b) consistent with the Canadian Charter of Rights and Freedoms, individuals resident in the province shall be given first consideration for training and employment in the work program for which the plan was submitted and a collective agreement entered into by the corporation or other body submitting the plan and an organization of employees respecting terms and conditions of employment in the offshore area shall contain provisions consistent with this paragraph;

...

(d) first consideration shall be given to services provided from within the province and to goods manufactured in the province, where those services and goods are competitive in terms of fair market price, quality and delivery.

These provisions have provided the impetus for foreign entrants to this sector to structure co-operative business arrangements, sometimes called “alliances,” with local enterprises.

In addition to purely offshore oil and gas undertakings, NL’s oil and gas industry has seen the drilling of onshore-to-offshore exploration wells off the province’s west coast. These technically and legally challenging exploration projects engage the requirement for regulatory compliance with not only the NL *Accord Act* but also the NL *Petroleum and Natural Gas Act*, which regulates onshore oil and gas activities.

Resource Industries’ Regimes in NL

NL is Canada’s easternmost province, comprising the island of Newfoundland (43,010 square miles) and the mainland, Labrador (113,640 square miles). In addition to NL’s offshore oil and gas resources, the province is also notable for its world-class hydroelectric generation and mineral resources.

NL Hydroelectric Resource Development

Labrador is home to one of the largest hydroelectric generation projects in North America, the Upper Churchill Project, having a capacity of 5,428 megawatts. NL’s Crown corporation, Nalcor Energy, is the owner of the hydroelectric generation franchise under provincial law. Nalcor is presently in the course of developing the Lower Churchill Development project, with an anticipated total capacity of 6,300 megawatts. On March 15, 2012, the Muskrat Falls component of the Lower Churchill Project was released from environmental assessment

by the joint federal-provincial environmental assessment review panel appointed to review the project, and a review before the province’s Public Utilities Board is ongoing.

Participation in the Lower Churchill Project will require a good working knowledge of provincial labor laws (such as the *Labour Standards Act*) and occupational health and safety laws (the *Workplace Health, Safety and Compensation Act*). Those who propose to deal with the province’s Crown corporation, Nalcor Energy, will also need to become acquainted with the *Energy Corporation Act*.

Labrador Aboriginal Rights and Title Claims

Businesses operating in Labrador will also require knowledge and respect for a broad range of Aboriginal title and rights claims. In addition to the rights of the Labrador Inuit, which are now formalized in the *Labrador Inuit Land Claims Agreement Act*, the province has recognized the rights of the Innu Nation to extensive areas of central and southwestern Labrador. These are formalized in the *New Dawn Agreement*, an agreement dated September 26, 2008 made among the Innu Nation, Nalcor Energy and the Province of NL. The *New Dawn Agreement* addresses and accommodates the rights and claims of the Innu Nation in relation to the Lower Churchill Project.

There exist additional Aboriginal title and rights claims that have been asserted by other Aboriginal groups that claim portions of Labrador as their ancestral lands. These claimants include a number of Québec Innu groups and the NunatuKavut (formerly known as the Labrador Métis).

Enterprises that carry on business in those areas of Labrador subject to Aboriginal title or rights claims should consult with, and in certain cases accommodate and achieve impact and benefit agreements with, Aboriginal groups with meritorious claims to such areas.

NL Mining and Mineral Rights Regime

NL, and in particular Labrador, is also notable for its extensive mineral resources. Significant iron ore mines have operated for many years in Labrador City and Wabush, Labrador. The Carol and Wabush Mines exploit significant iron ore deposits in the geological formation known as the Labrador Trough. With the surge in iron ore demand and prices in recent years, operators in the Labrador Trough are presently in various stages of exploration and development of new iron ore deposits.

Labrador is also the home of the Voisey’s Bay mine, the world-class nickel-copper-cobalt mine owned and operated by Vale. Labrador is also currently the subject of extensive exploration for rare earth minerals, uranium, gold and base metals.

The mineral resources of NL are regulated under the province’s *Mineral Act* and *Mining Act*. The *Mineral Act* deals with mineral exploration and mining rights issuances, and prescribes the principal rights and obligations of mineral exploration license and mining lease holders. The *Mining Act* regulates

the permitting of mines and mills in the province. It prescribes mines plan and reclamation requirements and regulates financial assurances requirements for mine operators.

Both the *Mineral Act* and *Mining Act* are expressed to be subject to the *Labrador Inuit Land Claims Agreement Act*. The *Labrador Inuit Land Claims Agreement Act* confers jurisdiction and certain resource project participation rights upon the Labrador Inuit. The more recent New Dawn Agreement, which is an agreement in principle with the Labrador Innu, contemplates that similar jurisdiction and rights will be conferred upon

the process for an environmental assessment and approval of any undertaking that impacts the environment. In cases in which federal jurisdictional matters (e.g., fisheries matters) are engaged, there will be a federal dimension to the environmental assessment and approval process, and in particular cases (e.g., inter-provincial projects), a joint federal-provincial environmental assessment process will be required.

NL has a history of accommodating significant resource projects by enacting project-specific legislation.

▶ There has been an exceptional level of legislative cooperation between the federal government and the NL and NS provincial governments in the regulation of Canada's Atlantic offshore oil and gas industry.

the Labrador Innu in relation to their traditional territory.

General Provincial Requirements

In addition to requiring knowledge of the industry-specific legal regimes noted above, entrants to the resource industries in NL and NS will need to be mindful of the following important legal considerations:

There are registration requirements under provincial legislation that will have application to any corporations incorporated outside the respective province carrying on an undertaking in the respective province.

Registration will also be required under the provincial workers' health and compensation legislation.

Each province has an environmental assessment regime regulated by a modern piece of legislation, which prescribes

NS Renewable Energy Regime

NS is seeking a sustainable energy future and is turning to renewable energy sources to fulfil one of the province's key policy objectives — a move away from a dependence on coal for electricity. In order to promote this vision, the Government of Nova Scotia has recently released amendments to the *Electricity Act* and introduced the *Renewable Electricity Regulations* with the aim of having 25 percent of the province's electricity come from renewable energy sources by 2015. To date, this policy objective has seen independent power producers and the provincial electricity utility provider, Nova Scotia Power Inc., develop medium- to large-scale wind farm projects across the province. With the recent appointment of the Renewable Electricity Administrator, the province has fulfilled another of its objectives with the competitive process established to foster development now being overseen by an independent administrator.

In addition to promoting medium- to large-scale projects, the Nova Scotia Department of Energy has also brought forward a number of initiatives to foster smaller renewable energy projects, one of which is the Community Feed-in-Tariff (COMFIT) program.

Following the path of a similar program implemented elsewhere in Canada, the COMFIT program in Nova Scotia will provide proponents with the opportunity to receive an established price per kilowatt hour (kWh), set by the Nova Scotia Utility and Review Board, for electricity produced by an approved renewable energy project connected to the province's grid at the distribution level. The legislation provides that a number of community-based entities may be able to partake in this program: municipalities or wholly owned subsidiaries of municipalities; First Nations; co-operatives; not-for-profits; community economic development corporations; universities; and entities that operate combined heat and power biomass

facilities. While in its infancy, the province expects about 100 MW of distribution capacity will be used by these community-based participants.

Atlantic Canada's Growth Industries Attractive and Secure

Atlantic Canada's growth industries provide exciting investment and involvement opportunities. The region's positive features include low costs, advanced technological and transportation infrastructures, a highly educated workforce, competitive and reliable energy supplies, geographical location and an excellent quality of life for people who live and work here.

The Atlantic provinces are open for business and provide

many incentives for entrepreneurs or businesses to locate in the region. The federal government also provides support through the Atlantic Canada Opportunities Agency (www.acoa.ca).

Many of the incentives available in Atlantic Canada take the form of forgivable loans, interest-free repayable loans, equity participation or combinations thereof. Training-related incentives, such as in the form of subsidized wages, are also commonly offered in the region.

Additionally, US investment in Atlantic Canada is safe and secure. Together with Mexico, the US is party with Canada to the North American Free Trade Agreement, which offers a full range of treaty protections and remedies to American enterprises carrying on business in Canada.

Colm St. Roch Seviour

Stewart McKelvey

Tel: (709) 570-8847

Fax: (709) 722-4565



cseviour@stewartmckelvey.com

► With almost 30 years of practice and experience litigating natural resources, commercial, products liability and environmental cases, Colm brings veteran analysis and counsel to the management of disputes for his clients, with an emphasis on practical legal, business and “real-world” solutions. Working with a diverse group of client companies that include mining and other natural resources enterprises, product manufacturers and insurers, he helps protect interests and maximize returns. Colm has litigated cases at all levels of the courts of Newfoundland and Labrador and in the Supreme Court of Canada. He received his LLB from Osgoode Hall Law School, York University, and is an undergraduate of Memorial University of Newfoundland. He is a respected practitioner, both regionally and nationally, and particularly in the areas of natural resources and offshore oil and energy. Colm has been recognized by Lexpert® for excellence for his work in mining, energy and electricity regulatory.