

March 11, 2014

Bill C-22 and the Proposed Regime for the Development of Transboundary Oil and Gas Pools and Fields

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Proposed legislation commented on: Bill C-22, *An Act respecting Canada's offshore oil and gas operations, enacting the Nuclear Liability and Compensation Act, repealing the Nuclear Liability Act and making consequential amendments to other Acts* ([Energy Safety and Security Act](#)), Second Session, Forty-first Parliament, 62 Elizabeth II, 2013-2014

Bill C-15, *An Act to replace the Northwest Territories Act to implement certain provisions of the Northwest Territories Lands and Resources Devolution Agreement and to repeal or make amendments to the Territorial Lands Act, the Northwest Territories Waters Act, the Mackenzie Valley Resource Management Act, other Acts and certain orders and regulations*, ([Northwest Territories Act](#)), Second Session, Forty-first Parliament, 62 Elizabeth II, 2013-2014. And see the coordination provision in s 118 of Bill C-22 coordinating the entry into force of the two statutes. My colleague Martin Olszynski has commented on one aspect of Bill C-22 [here](#). This post analyses the provisions of Bill C-22 which aim to establish a regime for the development of transboundary oil and gas pools and fields. It refers more cursorily to the “straddling resource” provisions of Bill C-15. The relevant provisions in both Bills take the form of amendments to the *Canada Oil and Gas Operations Act*, RSC 1985, c. O-7 ([COGOA](#)). This post begins by describing the problem that Bill C-22 seeks to address and then examines the proposed regime. But first, two preliminary comments.

The proposed regime is very complex, especially when read together with the existing compulsory unitization provisions of *COGOA*. Much of the complexity results from the fact that in the future we will have two distinct unitization regimes for the federal lands covered by Bill C-22: one regime will apply to pools that are transboundary, the other, the existing regime, will apply to all other pools found entirely on the federal lands covered by this legislation. As if this were not enough, a third regime for the compulsory unitization of “straddling deposits” will apply within the Inuvialuit Settlement Region once the Northwest Territories devolution legislation, Bill 15, enters into force. The Bill 15 regime is a considerable improvement on the regime proposed by Bill C-22 and one wonders why greater efforts were not made to harmonize these different regimes.

Many of the concepts in the legislation (both Bill C-22 and even more clearly the case for Bill C-15) are drawn from the Agreement between Canada and the French Republic Relating to the Exploration and Exploitation of Transboundary Hydrocarbon Fields (2005). This Agreement, which has yet to enter into force, is designed to deal with the problem of transboundary fields that may be created as a result of the extraordinary delimitation created by the 1992 Award of the Court of Arbitration for the Delimitation of Maritime Areas between Canada and France delimiting the maritime areas pertaining to each state in the area around the French Islands of St. Pierre and Miquelon in that part of the Atlantic Ocean lying due south of Newfoundland. However, the provisions in this Bill do not apply to these particular federal lands. That is because the federal lands subject to the Canada/France treaty are subject to the Newfoundland (and perhaps the Nova Scotia) offshore accord legislation rather than *COGOA*. The transboundary provisions of Bill C-22 discussed here do not amend the parallel provisions in the Accord statutes: the *Canada-Newfoundland Atlantic Accord Implementation Act*, SC 1987, c 3 and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c 28. Further amendments to these two statutes would be required in order to allow Canada to properly meet its obligations under the Canada/France treaty when it enters into force.

A. The problem

The problem of oil and gas deposits that straddle political boundaries is well understood in both national law and international law. In addition, there is extensive treaty practice on the subject. The general consensus seems to be that the rule of capture does not apply as between states and thus that states should seek to reach agreement on apportionment and unitization before allowing production to commence from a transboundary field. There is very little practice within Canada across jurisdictional boundaries in relation to these issues and it is thus perhaps more difficult to assess whether the rule of capture (which certainly applies as between adjoining owners of private land in Canada) also applies across jurisdictional boundaries within Canada.

B. The proposed regime

The proposed regime is introduced by way of amendments to Part II, Production Arrangements, of *COGOA* under the heading in Bill C-22 of “Modernizing Canada’s Offshore Oil and Gas Operations Regime.”

1. The area of application of *COGOA*

COGOA applies to two categories of lands. First, it applies to lands in the northern territories for which there has been no devolution of oil and gas interests. Thus, *COGOA* does not apply to Yukon or the so-called adjacent area since devolution to Yukon has already occurred: see *Yukon Act*, SC 2002, c 7. It does apply to lands within Nunavut and the Northwest Territories although devolution of oil and gas interest to the NWT is in the works and should be effective as soon as April 1, 2014, see [here](#) and Bill 15. The devolution legislation will cause *COGOA* to be inapplicable to the land areas of the NWT. This tells us that the scope of these *COGOA* provisions will be reduced over time although it may be some long time before we see devolution of oil and gas interests to Nunavut. However, it bears emphasising that unlike the federal oil and gas leasing legislation, *Canada Petroleum Resources Act (CPRA)*, RSC 1985, c

36 (2d Supp), *COGOA* is a law of general application and as such applies to all lands in the applicable territories i.e. not just to federal oil and gas interests but also to oil and gas interests in aboriginal lands under the terms of modern land claim agreements (e.g. the Inuvialuit Agreement). Second, *COGOA* applies to offshore areas within the NWT (post-April 1) as well as those submarine areas not within a province or territory and which are not subject to either of the two east coast Accord statutes.

2. Definitions

a. The definition of transboundary pools and fields

Bill C-22 defines this combination of words as follows:

‘transboundary’ means, in relation to a pool, extending beyond the National Energy Board’s jurisdiction under this Act (i.e. *COGOA*) or, in relation to a field underlain only (*sic*) by one or more such pools

b. The definition of regulator

The term “regulator” is defined as meaning a provincial government or regulator or a federal-provincial regulator with administrative responsibility for the exploration or exploitation of oil and gas in an area adjoining the perimeter. It is evident that the regulator (I will generally use the term “relevant regulator” or “adjacent regulator”) is the counter party to the National Energy Board.

3. The identification and delineation of transboundary pools or fields

The legislation (s 48.11) will require the National Energy Board to provide the adjacent regulator with prescribed information relevant to the determination of whether a pool is a transboundary pool whenever an exploratory well (as defined in the *CPRA*) is drilled within the perimeter area and under the jurisdiction of the NEB. The amendments define the perimeter as an area within 20 km of the boundaries of the Northwest Territories or Nunavut or that is within 10 nautical miles of the seaward (*sic*) limit of the submarine areas referred to in paragraph 3(b) of the Act. These submarine areas are described as those areas that are “not within a province” or the adjoining area, as defined in section 2 of the *Yukon Act* but which are within the internal waters of Canada, the territorial sea of Canada or the continental shelf of Canada.

If the NEB reaches the conclusion that a pool exists it must so notify the provincial regulator as soon as possible indicating, in addition, whether it believes the pool to be a transboundary pool (s 48.12(3)). Where the Board is unable to make this determination it must so notify the provincial regulator no later than one year after receiving data from the drilling of a third well on the same geological feature. In both cases the Board must provide the Minister and its provincial counterpart with the reasons for its determination and opinion (s 48.12(4)).

Where the two regulators agree that a pool exists they “shall jointly determine whether that pool is transboundary and, if so, they shall jointly delineate its boundaries” (s 48.14(1)). If they are unable to reach agreement on any of those three matters (whether a pool exists, whether it is

transboundary, or its delineation) then either party (no later than 180 days after the issuance of the notice) may “refer the matter to an expert”.

4. Approval of work and benefits plans in relation to transboundary pools or fields

Under s 5.1 of *COGOA* no development of a field may occur without an approved development plan. The new s 5.1(8) of *COGOA* provides that the NEB shall not approve a development plan for work or activity in respect of a transboundary pool or field that is the subject of a joint exploitation agreement unless the appropriate regulator has agreed to its contents. Any disagreement about the contents of the plan may be referred by either the appropriate regulator or the Minister (on the NEB’s behalf) for expert determination (s 5.1(9)).

There is a parallel procedure prescribing and requiring approvals for benefits plans (s 5.2).

5. Joint Exploitation Agreements

The Minister and the appropriate regulator may enter into “a joint exploitation” agreement (JEA) providing for the development of a transboundary pool or field as a single unit. Once that has happened, the pool or field “may only be developed as a single field” and as such can only be developed under the terms of a unit agreement (UA) and a unit operating agreement (UOA) that has been approved under s 48.2. The terms of such agreements are further prescribed by s 40. In the event of a conflict between the terms of the JEA and the terms of the UA or the UOA the terms of the JEA shall prevail (s 48.17).

6. Where no joint exploitation agreement

Where the Minister and the appropriate regulator have been unable to reach agreement on the terms of a JEA but a federal “interest owner” (i.e. a party with a share in a production licence issued under the CPRA) (note that this would not apply to a party with a production interest on, say, Inuvialuit lands) has indicated that it intends to proceed to production from a transboundary field or pool then the Minister shall notify the appropriate regulator as soon as possible (s 48.18(1)). If the parties are still unable to reach agreement after 180 days (or sooner if both agree) either the Minister or the appropriate regulator may “refer the matter to an expert to determine the particulars of the agreement” (s 48.18(3)).

7. Unit and Unit Operating Agreements and Compulsory Unitization

The general *COGOA* regime (s 37) contemplates: (1) voluntary unitization, (2) unitization upon the order of the Oil and Gas Committee on the recommendation of the Chief Conservation Officer (CCO) of the NEB, and (3) unitization by order of the Committee on the basis of an application by working interest owners representing 65% of the tract interests within the area of the proposed unitization.

As to the first, voluntary unitization under the general *COGOA* regime requires only that a copy of any unit agreement be filed with the CCO of the NEB (s 37(1)). In addition, the Minister may enter into such an agreement (as the holder of a relevant royalty interest) (s 37(2)).

As to the second, s 38 provides that the CCO may seek an order requiring the relevant working interest owners (no mention of royalty owners) to enter into a unit agreement and unit operating agreement where necessary to prevent waste. The application is to be made to “the Committee” which, following a hearing, may make the order sought provided that it is of the opinion that unitized operation would prevent waste (s.38(3)).

Provision is made for the Committee in ss 6 - 13 of *COGOA*. The Committee is an expert committee with broad powers to conduct inquiries and appeals as provided for under the Act. Its orders may be made an order of the Federal Court.

And finally, as to the third, s 39 anticipates the working interest holders making an application to the Minister who refers the matter to the Committee (s 39(2)). The Committee, following a hearing, may make an order giving binding effect to the proposed unit agreement and unit operating agreement provided that it is satisfied *inter alia* that the proposed arrangement (s 41(2)(b)) “would accomplish the more efficient or more economical production of oil or gas or both from the unitized zone”.

The proposed amendments change this regime with respect to transboundary pools and fields in a number of ways. First, with respect to voluntary unitization arrangements, the proposed regime is not simply a notification and filing regime, it is an approval regime which extends to both the unitization agreement and the operating agreement: both must be “jointly approved” by the Minister and the appropriate regulator (s 48.2). Second, in the event that the working interest owners cannot reach agreement on the term of unitization 65% of the working interest owners may apply for a unitization order, but in this case the matter is to be referred to expert determination rather than to the Committee. And finally it is unclear whether the CCO – driven unitization on the basis of waste is available at all; although perhaps the better view is that this aspect of the general regime is inconsistent with the overall transboundary regime and would certainly present a problem of conflicting forums – i.e. the Committee or the expert procedure.

The main difference between the Committee procedure and the expert procedure is that the Committee is a standing Committee appointed by the federal ministers while the expert procedure is an ad hoc arrangement with the responsibility for appointments, the appointments being shared between the Minister and the relevant regulator. Both procedures allow for the resulting unitization order to be revisited but both provide that the original tract participations factors will not be subject to change (s 45 and s 48.25).

8. The expert procedure

a. Triggering the expert procedure

It is clear from the above that there may be resort to the expert procedure in a number of different circumstances. In the order prescribed by the Act these circumstances are as follows:

1. Referral by either the federal minister (on behalf of the NEB) or the appropriate regulator in the event that the parties cannot agree on the terms of a development plan in relation to any proposed work or activity in a transboundary pool or field that is the subject of a joint exploitation agreement (s 5.1(8) & (9)).

2. Referral by either the federal minister or the appropriate regulator in the event that the parties cannot agree on the terms of a benefits plan in relation to any proposed work or activity in a transboundary pool or field that is the subject of a joint exploitation agreement (s 5.2(8) & (9)).
3. Referral by either the NEB or the appropriate regulator in the event that the parties cannot agree whether a pool exists, whether the pool is transboundary or its delimitation (s 48.14(2)).
4. Referral by either the Minister or the appropriate regulator in the event that the parties cannot agree on the terms of joint exploitation agreement in relation to a transboundary pool (s 48.18(2)).
5. Referral by the Minister and the appropriate regulator on the application of working interest owners owning at least 65% of the interests in a unitization agreement for a unitization order (s 48.21).
6. Referral by the Minister and the appropriate regulator on the application any working interest owner subject to a unitization order (s 48.24) for an amendment to the order.

It will be observed that on the federal side in some cases referral is by the NEB, in other cases by the Minister, and in still other cases by both the Minister and the appropriate regulator.

b. The appointment of an expert

Where the parties (and note that the parties will vary based upon who may be entitled to make the referral) cannot agree on the appointment of a single expert each shall appoint one member. Those members so appointed shall agree upon the appointment of a chairperson in default of which the Chief Justice of the Federal Court is to make the appointment (s 48.27(3)). The statute is silent as to what happens in the event that one party fails to appoint its expert. Regardless of the appointing party, the expert is to be “impartial and independent, and have knowledge or experience relative to the subject of disagreement between the parties” (s 48.27(4)). The expert’s decision is “final and binding on all parties specified in the decision” from the date specified in the decision, subject to any opportunity for judicial review (s 48.27(7)).

c. The procedure to be followed by the expert

As noted above there are several distinct triggers for the expert procedure. The statute is not equally prescriptive as to the procedures to be followed for the different subject matters covered by the expert procedure. The statute is prescriptive with respect to the compulsory unitization procedure where this occurs before the expert. In this case the proposed provisions require the expert to “hold a hearing at which all interested persons shall be given the opportunity to be heard” (s 48.22(1)), much like the procedure prescribed for the Committee under s 41(1)). The subsequent language of s 48.22 does not track the language of s 41(1) and seems unnecessarily

convoluted.

C. Some observations

The Bill C-22 amendments are tremendously complex and need to be read together with the Bill C-15 amendments that result from the devolution of resources to the Northwest Territories. Together these amendments create no less than three regimes that address the problem of compulsory unitization on federal lands in the north. It is a challenging task to establish the precise area of application for each of the different regimes even if we assume that devolution to the NWT will go ahead and that both Bill C-22 and Bill C-15 will enter into force at approximately the same time. Take for example, a discovery of a straddling deposit in the Beaufort Sea. If the deposit straddles the Inuvialuit Settlement Region (ISR) and an offshore area in the Northwest Territories the straddling deposit and unitization rules of Bill C-15 will apply. If the deposit straddles the ISR and the Yukon adjoining area it would appear as if the transboundary pool provisions and unitization provisions of Bill C-22 apply. And if the pool simply straddles different federal production licences in the Beaufort Sea offshore, then it would seem that the current *COGOA* unitization rules apply.

Of the three regimes the Bill C-15 regime seems the most modern and the most in line with modern unitization practices which assume that governments should be able to require unitization where deposits straddle either political boundaries or licence boundaries. It seems odd to me that the federal officials who have drafted these complex arrangements did not take this opportunity to establish a uniform regime and in particular to modernize the current *COGOA* provisions on compulsory unitization which can only be triggered if the proposal is supported by two-thirds of the relevant interest owners.

The Bill C-22 regime is strangely unilateral and non-reciprocal. One of the interesting features of the legislative scheme is that it confers powers on adjacent regulators without imposing a requirement of reciprocity on them. Thus Yukon is entitled to notice and to trigger the expert determination procedure in one of the examples noted above but there is no reciprocal obligation imposed on Yukon. While there may be both political and legal constraints on the federal government in legislating for reciprocity it is clear that the obligations assumed by the NEB for example might be made conditional on the adjacent jurisdiction adopting similar measures. After all reciprocity is the basis of all international straddling deposit agreements.

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