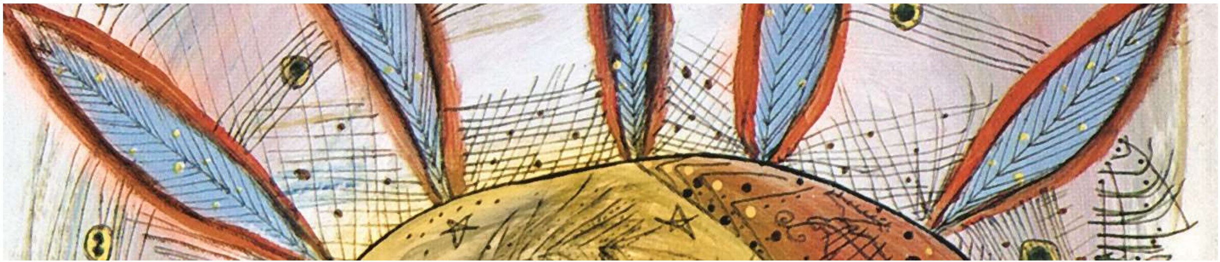
Assembly of Nova Scotia Mi'kmaw Chiefs



Brief to the Standing Senate Committee on Energy, the Environment and Natural Resources
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

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Please accept this submission on behalf of the Assembly of Nova Scotia Mi'kmaw Chiefs ("Assembly") and Kwilmu'kw Maw-klusuaqn ("KMK").

The Assembly and KMK have established a working relationship with the provincial and federal governments through the *Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process*, developed through the Made-in-Nova Scotia Process. Under this process, KMK has coordinated, facilitated and participated in consultations on hundreds of projects and initiatives that may impact Mi'kmaw rights, including fishing rights, as protected under section 35 of the *Constitution Act, 1982*.

The activities to be authorized under Bill C-49 have the potential to adversely impact the Mi'kmaq's section 35 rights. Two letters from Natural Resources Canada (dated September 7, 2022, and May 26, 2023) were the only efforts made by the federal government to "engage" with the Mi'kmaq prior to this Bill. Both letters were classified as "engagement" and did not follow the previously mentioned Made-in-Nova Scotia Process, with no consultation being initiated.

The provincial and federal governments have had ample opportunities to raise Bill C-49 in discussions with the Mi'kmaq but have failed to do so. There have been meetings specifically dedicated to emerging developments in the energy sector, such as Natural Resources Canada's Regional Energy and Resource Table, in which this Bill was never put on the agenda nor raised by the Crown. These included bi-monthly meetings held between the Nova Scotia Office of L'nu Affairs ("OLA") and KMK's Consultation Team; a meeting between the Nova Scotia Department of Natural Resources and Renewables ("NRR") and the Assembly's Energy & Mining Portfolio Lead Chiefs held in Fall of 2023; and various other regular check-in meetings with both OLA and NRR. While the Nova Scotia offshore wind "roadmap" highlights the importance of working closely with the Mi'kmaq of Nova Scotia, we have seen no such efforts leading up to the introduction of this Bill.

Similarly, last week we were "informed" that the Province had already introduced Bill 471 to amend its mirror legislation, the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, in advance of the Senate deliberations on, and passage of, Bill C-49. Bill 471 also contains amendments to Nova Scotia's *Marine Renewable-energy Act*, which would allow the province to proceed with a call for bids for offshore wind licences in 2025, even without C-49 receiving Royal Assent. This was the first we had heard of such developments, and we were notified after Bill 471 already had been introduced.

Additionally, KMK has been heavily involved with the Regional Assessments of Offshore Wind in Nova Scotia and Newfoundland since April 2022, and despite covering topics which overlap significantly with Bill C-49, to our knowledge the Bill has not been raised during, or incorporated into, the work on the Regional Assessments over the past two years.

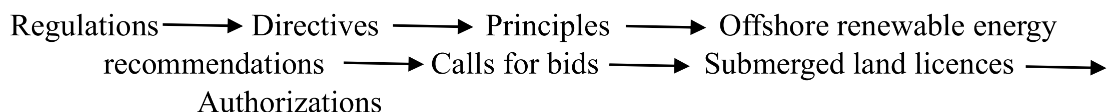
In June of this year, when we were first invited to speak with the Standing Senate Committee on Energy, the Environment and Natural Resources on this Bill, we received less than three days notice. In light of the lack of consultation by the Crown leading up to that point, as well as the

lengthy and highly technical nature of this Bill, it was impossible to complete our review of the Bill within that short timeframe. Accordingly, we appreciate being given the opportunity to raise our concerns with you at this juncture.

Theme #1: Duty to Consult

The Supreme Court of Canada has told us that the Crown has a duty to consult on decisions that reflect the "strategic planning for utilization of the resource" since such decisions "may have potentially serious impacts on Aboriginal right and title."[1] For the first time, the Bill amends the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* (the "Act") to provide that the federal or provincial Crown may rely on the Regulator for the purposes of consulting with Indigenous peoples under s. 35 of the *Constitution Act, 1982*.[2]

The Bill is structured as a long series of strategic planning decisions, culminating in authorizations to carry out work on an offshore renewable energy project. As is explained below, the Bill provides either no consultation, or inadequate consultation, at every one of these decision points:



Regulations

There are new offshore renewable energy regulation-making powers set out throughout the Bill, including at new sections 98.2 and 98.3(2),[3] section 2.1,[4] section 59.1,[5]and subsection 188.25(1).[6] Among other things, these sections allow the Governor in Council to make regulations in relation to the offshore area for the purpose of calls for bids, and *prescribing specific terms and conditions* for calls for bids and for submerged land licences.

Lack of Consultation: Despite the fact that these regulations apply to and constrain important decision points, including the terms and conditions for calls for bids and submerged land licences, there is no requirement to post the proposed regulations to the *Canada Gazette*.

Additionally, the Bill repeals three sections of the Act which previously required proposed regulations to be published in the *Canada Gazette*, with opportunities to comment.[7]

[1] *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, para. 76.
[2] Clause 117, adding s. 18.1.
[3] Clause 147, adding ss. 98.2 and 98.3(2).
[4] Clause 110, adding s. 2.1.
[5] Clause 137, adding s. 59.1.
[6] Clause 185, adding s. 188.25(1).
[7] Clause 159, repealing s. 128(2)—regulations for carrying out the purposes and provisions of Part II; clause 180, repealing s. 154(1)—regulations to amend Schedule V or VI to add or remove references to federal Acts or

Directives

Subsection 41(1) of the Act provides the federal and provincial Ministers with the option to issue Directives on a number of topics. The Bill amends this subsection to add "offshore renewable energy recommendations" and "the principles referred to in section 98.7"[8] to the list of topics which may comprise Directives. Additionally, the Directives may specify those portions of the offshore area in a call for bids.[9] These Directives are binding upon the Regulator.[10]

Lack of Consultation: If these Directives are issued or jointly issued by the Federal Minister, the Bill requires that notice of the Minister's action to be published in the *Canada Gazette*.[11] This would occur after the fact. The text of the Bill does not include notice of *proposed* Directives in advance of the Directives being made.

Principles referred to in section 98.7

Section 98.7 of the Bill adds new high-level Principles that apply to offshore renewable energy projects.[12] As noted above, these Principles are subject to the Directives by the Ministers.

Lack of Consultation: The Principles are set out in the Bill and have not been consulted on with the Mi'kmaq of Nova Scotia. While it is unclear what a Directive regarding the Principles might seek to achieve, presumably it would direct the incorporation of the Principles into the decision-making processes. Thus, the subsequent decisions would be guided and influenced by these Principles, absent consultation.

Offshore Renewable Energy Recommendations

The "offshore renewable energy recommendations" are addressed in the new sections 38.1-38.3.[13] In these sections, the Regulator makes a renewable energy recommendation, which would have to comply with the relevant Directive if any had been issued. The recommendation could relate to a variety of decision points, such as the issuance of a call for bids or a submerged land licence.[14]

The Regulator notifies the federal and provincial Ministers of its recommendation, and the Ministers may decide to approve, vary or reject it. The Regulator is required to publish in the *Canada Gazette* any decision on a renewable energy recommendation, except a decision to reject

regulations; and clause 202, repealing s. 210.127 (1)—regulations for carrying out the purposes and provisions of Part III.1.
[8] Bill clause 126, amending s. 41(1).
[9] *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, s. 41(3).
[10] *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, s. 41(5).
[11] Clause 127, replacing s. 42(1).
[12] Clause 147, adding section 98.7.
[13] Clause 125, adding ss. 38.1-38.3.
[14] Clause 147, adding s. 94(3).

a call for bids. If both Ministers approve the recommendation with the same variations, if any, the Regulator shall proceed to exercise the power or perform the duty.

As you move through the sequence of regulatory steps, many key decision points are subject to the recommendations made in sections 38.1-38.3, including: the making of a call for bids,[15] the issuance of a submerged land licence,[16] setting out licence terms and conditions,[17] amending licences,[18] and prohibition orders for environmental or social reasons.[19]

Lack of Consultation: The Bill only requires that the Ministers be provided with the renewable energy recommendations, and not Indigenous communities or the public. The Ministers would then make their decision, and notice is only published in the *Canada Gazette* after the fact. There is no requirement for notice of *proposed* recommendations to be published in advance of the recommendations being sent to the Ministers, or in advance of the Ministers making their decisions.

Calls for bids

In most cases, the Regulator cannot issue a submerged land licence within a Crown reserve area without a call for bids.[20] The call for bids sets out the portions of the offshore area to which the licence is to apply, the technologies to which the licence is to apply, the terms and conditions subject to which the licence is to be issued, and other criteria.[21] As noted above, the call for bids is subject to the renewable energy recommendations.[22]

Lack of consultation: The call for bids is made by publishing a notice,[23] however, this notice is provided *after the call for bids is made.* The Regulator is not required to provide *advance* notice, prior to the call for bids, of the *proposed* areas, *proposed* technologies and *proposed* terms and conditions to be included in the call for bids. Further, the terms and conditions of an eventual licence must be "substantially consistent" with the call for bids, so there appears to be minimal leeway to incorporate changes after a call for bids is made.

Submerged Land Licences

A submerged land licence confers the right to carry on an offshore renewable energy project.[24]

[15] Clause 147, adding s. 93(2).
[16] Clause 147, adding s. 91(2).
[17] Clause 147, adding s. 98.3(1).
[18] Clause 147, adding s. 98.4(1).
[19] Clause 136(1), replacing s. 59(2.1).
[20] Clause 147, adding s. 93(1).
[21] Clause 147, adding s. 93(3).
[22] Clause 147, adding s. 93(2).
[23] Clause 147, adding s. 93(1)(a).
[24] Clause 147, adding s. 92.

The terms and conditions of a submerged land licence must be "substantially consistent" with the terms and conditions set out in the call for bids.[25] However, in addition to the terms and conditions prescribed by regulation, the Regulator and the licensee may privately agree to other terms and conditions, subject to the renewable energy recommendations.[26] Further, the Regulator and the licensee may privately agree to amend any provision of the licence, subject to the regulations.

Lack of consultation: This illustrates how one decision builds upon another within the approval process. The regulations, renewable energy recommendations, and call for bids all inform the contents of submerged land licences. Even so, there are provisions allowing terms and conditions to be added or amended through negotiated deals between the Regulator and the licence holder. There are no requirements for consultation or advance notice to be given of any of these key decision points.

If a bid is selected following a call for bids, the Regulator is required to publish a notice *after its selection*.[27] If a submerged land licence is issued following a call for bids, the Regulator is only required to publish a notice of the licence's terms and conditions *after its issuance.*[28] If a licence is being amended, the only time that *advance notice* is provided is when the amendment adds a new portion of the Crown reserve area to the licence.[29]

Authorizations

An authorization is required for a person to carry on any work or activity related to an offshore renewable energy project, in those portions of the offshore area not within the Province.[30] The Regulator may issue an authorization, subject to terms and conditions which include conditions established under the *Impact Assessment Act*.[31] If the application is in respect of a "designated project", the Regulator cannot issue the authorization until the Impact Assessment Agency of Canada decides that an impact assessment is not required, or the Minister has issued a decision statement under the *Impact Assessment Act*. In addition to the regional assessments and strategic assessments that are possible under the *Impact Assessment Act*,[32] the Bill provides the Regulator with the discretion to conduct its own regional assessments and/or strategic assessments.[33]

Lack of consultation: For projects which do not receive assessments under the *Impact Assessment Act*, the Bill is silent on if, or what, processes are to be used for their assessment. For instance, if the project is not a wind power generating facility of 10 or more wind turbines, or

[25] Clause 147, adding s. 95(2).
[26] Clause 147, adding s. 98.3(1).
[27] Clause 147, adding s. 94(2).
[28] Clause 147, adding s. 95(3).
[29] Clause 147, adding s. 98.4(2).
[30] Clause 165, replacing s. 139, and clause 166, adding s. 140.2(a).
[31] Clause 142.011(2), amending s. 142.011(3).
[32] *Impact Assessment Act*, ss. 92-95.
[33] Clause 170.2, adding s. 142.018-142.019.

if the project is excluded from receiving an assessment under the *Impact Assessment Act*, there is no information concerning whether the Regulator will conduct its own environmental assessment and if so, what opportunities will be available for Indigenous consultation. There is also no information regarding the processes to be followed for Regulator-led regional or strategic assessments, and if or how Indigenous consultation would be incorporated into those assessments.

Recommendation #1a: The section 35 consultation process should cover off all key decision points within the strategic planning process, and the Bill should be structured so as to support the fulfillment of these consultation obligations prior to final decisions being made. The planning process begins with Regulations, then proceeds through Directives, Principles, Offshore Renewable Energy Recommendations, Calls for Bids, and Submerged Land Licences, culminating in any authorizations that are not otherwise consulted upon through the *Impact Assessment Act* process.

Recommendation #1b: The Bill should address Regulator-led environmental assessments, regional assessments and strategic assessments. There should be clear triggers, factors guiding the exercise of Regulator discretion, and process requirements including consultation at appropriate junctures.

Theme #2: Disclosure

Closely related to the theme of duty to consult, is the question of what information the Regulator is permitted to share in fulfilling its duty. Section 122 of the Act speaks to Disclosure of Information, as does section 19. Subsection 122(2) holds that information provided under Part II (Petroleum and Offshore Renewable Energy Resources) or Part III (Petroleum and Offshore Renewable Energy Operations) is privileged and shall not be disclosed without consent of the person who provided it, except in certain circumstances. The rest of section 122 sets out a myriad of details regarding the types of information covered by this restriction and the exceptions under which such information may nonetheless be disclosed.

Section 19 holds that the federal and provincial Ministers are entitled to access information provided for the purposes of this Act, without first requiring consent from the party who provided it. The Bill amends this section to include information relating to offshore renewable energy activities.[34]

Recommendation #2: Add an exception to section 122 or section 19 providing that, as with other levels of government, Indigenous governments are entitled to access information for the purpose of section 35 consultations, without first requiring consent from the party who provided it. If documentation that informs impacts to s. 35 Aboriginal or Treaty rights is seen by a proponent to contain confidential information, the appropriate response is to negotiate a

[34] Clause 118, replacing s. 19(1).

confidentiality agreement with the Indigenous group being consulted, not to limit the disclosure of such key information.

Theme #3: Regional Assessments

KMK has been heavily involved with the Regional Assessment of Offshore Wind in Nova Scotia and Newfoundland since they were launched in April 2022. This includes providing nominations for the five-person Steering Committee, participating in the three Advisory Groups (Indigenous Knowledge Advisory Group, Scientific Information and Community Knowledge Advisory Group, and Fisheries and Other Ocean Users Advisory Group), providing feedback on various documents such as mitigation measures and environmental studies, and providing a white paper (currently in draft) to outline overall impacts to the Mi'kmaq, in regards to the offshore wind industry (both in Nova Scotia and Newfoundland & Labrador).

The Bill does not accord weight to these Regional Assessments or account for their recommendations within the planning process. This omission undermines and undervalues all the time and resources that have been dedicated towards the Regional Assessments, and it suggests that a compartmentalized approach is being followed by the various federal and provincial government departments working on offshore wind. This siloed approach should be remedied within the Bill.

Recommendation #3: The Bill should be amended to only allow calls for bids to be made, and submerged land licences to be issued, in areas that have been recommended for development within the Regional Assessments.

Theme #4: Participant funding

The Bill provides that the Regulator "may establish a participant funding program to facilitate the participation of the public and any Indigenous peoples of Canada in consultations concerning any matter respecting the offshore area."[35] [Emphasis added]

By contrast, under the *Impact Assessment Act*, the Agency "must" establish a participant funding program for impact assessments, regional assessments and strategic assessments.[36]

Recommendation #4: The participant funding program in the Bill should be made mandatory. The reasons for this are threefold: 1) the development of offshore wind is a lengthy, novel and highly technical process which will require communities to have access to significant resources and expertise in order to participate on a level playing field, 2) the s. 35 Indigenous consultations should begin well before the impact assessment phase, and 3) there could be regulator-led environmental assessments, regional assessments and strategic assessments that do not fall under the *Impact Assessment Act*.

[35] Clause 170.2, adding s. 142.022.
[36] *Impact Assessment Act*, s. 85(1).

Theme #5: Service contracts

One of the Principles set out in the Bill speaks to the ability of "Canadian corporations" and "individuals" to compete for contracts to supply goods and services in support of the offshore renewable energy industry.[37] This is a major area of interest and potential economic benefit for Indigenous peoples, and yet the language is not inclusive of the different types of Indigenous entities who might have an interest in bidding on such work.

Recommendation #5: As has been done in other Bills, the language of this provision should be made more inclusive by adding the term "Indigenous organization" to the text of s. 98.7(a), and adding the following two definitions:

Indigenous governing body means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Indigenous organization means an Indigenous governing body or any other entity that represents the interests of an Indigenous group and its members.

Theme #6: Impacts to fishing rights

The totality of the potential impacts of offshore renewable energy on fishing rights is not yet known. These are new and emerging technologies, and their impacts on ocean species are still being studied worldwide. What is known, is that they will have a large-scale footprint within waters that are currently being used for a variety of other purposes, including fishing. The nature of impacts could range from safety and navigation concerns, to areas becoming inaccessible or off-limits to fishers, displacement of ocean species, above-water and below-water disruptions from physical infrastructure and changes to water conditions such as temperature variations and electromagnetic fields, and cumulative effects from multiple developments in a condensed area over time. Additionally, the loss of fishing grounds may lead to overcrowding of available fishing grounds and subsequently a decrease in harvest and revenues. Given all of these uncertainties and given the core importance of subsistence, moderate livelihood and commercial fishing to the Mi'kmaq, it is particularly disappointing that there were not conversations to discuss this key topic prior to the introduction of the Bill.

The participation of Mi'kmaw communities in Nova Scotia is essential for the long-term success of the offshore renewable energy sector. Their involvement is integral to addressing historic issues, managing current resource challenges, and developing co-management structures. Canada's history of development has frequently led to significant economic disparities for Mi'kmaw communities, resulting in rights infringements, power imbalances, and social tensions within regions. These challenges persist in the fisheries sector, where ongoing tensions exist between Mi'kmaw and non-Mi'kmaw fishers, and the Department of Fisheries and Oceans.

[37] Clause 147, adding s. 98.7.

Assessing, addressing, accommodating and compensating impacts to rights-based fisheries requires a multi-pronged approach. Part of this approach must include the Crown fulfilling its duty to consult, beginning with the earliest decision points in the strategic planning process, before decisions are made regarding where to locate calls for bids and where to issue submerged land licences. Giving appropriate weight to the Regional Assessments is another important step, since these assessments have dedicated time and resources to studying overlapping and conflicting ocean uses. As noted above, part of giving appropriate weight to the Regional Assessments is not making calls for bids or issuing submerged land licences outside of the areas that have been identified as appropriate for development.

Recommendation #6a: In addition to the above-noted recommendations, one of the Principles set out in the Bill speaks to giving importance to the "consideration of effects on fishing activities" during the submerged land licence issuance process. While we support the sentiment behind this Principle, its language should be broadened to include other decision points within that Division (such as calls for bids) and outside that Division (such as renewable energy recommendations and authorizations). The language should also explicitly specify that "effects" includes "cumulative effects" so that such considerations are not narrowed to a case-by-case basis.

Recommendation #6b: There is a need to ensure the Bill's compensation scheme addresses all types of losses, not just those occasioned by damages from debris or deleterious substances. These losses could include displacement of fishers or displacement of fish from traditional fishing grounds, as well as yet-unanticipated losses that could result from the use of new technologies with the possibility of unforeseen consequences.