



# The Winds of Change

## **The Winds of Change (Part 1) - Newfoundland and Labrador Government signaling major shift in energy policy – Updated July 6, 2022**

[John Samms](#) and [Matthew Craig](#)

Further to our original article published on May 17, 2022 (included below), on the changing energy policy frameworks in Newfoundland and Labrador, the government amended the Order in Council (“OC”) that had previously banned environmental assessment and issuance of Crown titles. The timing of the publication of the Order in Council is not clear. The exact text of the amendment states:

*The Lieutenant-Governor in Council is pleased to amend OC2006-026 to allow industrial customers seeking to self-generate wind energy for their own consumption, and industrial customers or retailers seeking to generate wind energy for export, to apply for Crown leases or grants, under the authority of the Lands Act, and Environmental Assessments, under the authority of the Environmental Protection Act.*

As a result of this amendment, proponents may now apply for Crown titles and environmental assessment approval.

However, it is not expected that any crown land applications will be approved until the provincial government finalizes its policy framework in respect of crown land acquisition from a wind energy perspective. Further, proponents who fall into the category of industrial customers, such as hydrogen producers, will still need to seek an exemption from the *Electrical Power Control Act* prohibition on private generation of supply or electricity in order to develop, own, operate, manage or control a facility for the generation and supply of electrical power of energy either for its own use or for the public.

### **Original Article – Published May 17, 2022**

In uncertain economic times like these, “open for business” is a welcome phrase by leading Ministers in Newfoundland and Labrador.

For years, Newfoundland and Labrador’s wind generation policy was, for better or worse, easy to explain: we have a bountiful wind resource, but now is not the time to use it. Notwithstanding the ideal synergies eminent in the interaction of wind and hydro resources (if it does not blow, we can control the flow – all in a low-carbon manner), recent development of hydro *precluded* the development of wind resources on the island portion of the province through amendments to the *Electrical Power Control Act* (“EPCA”).

Now we feel the winds of change. On April 5, 2022, Minister Andrew Parsons [announced the “end of moratorium on wind development”](#). The announcement was made through a Ministerial Statement in the House of Assembly.

## **Impediments to wind generation exist, with an escape hatch**

Legally speaking, absolutely nothing has changed quite yet. The major impediments to wind generation still technically exist.

### **The Generation Monopoly**

Under Section 14.1(2) of the *EPCA*, no one may “*develop, own, operate, manage or control a facility for the generation and supply of electrical power or energy either for its own use or for supply directly or indirectly to or for the public or an entity on the island portion of the province*”. The main object of this provision was to guarantee Newfoundland and Labrador Hydro’s revenue pipeline intended to pay for the Muskrat Falls project. Any erosion of that has an adverse impact on rate mitigation – a dominant policy imperative for the Province during the last decade.

This provision of the *EPCA* has essentially precluded major industrial users on the island portion of the province (read: customers of Muskrat Falls power) from building their own energy resources.

The escape hatch: subsection 14.1(7) of the Act allows the province to exempt a retailer or an industrial customer from that provision. Despite this legislative contemplation of exceptions to the prohibition, it does not appear any have been granted – there is also no policy framework to grant such an exception.

### **Ban on Environmental Assessment and Issuance of Crown Land**

In addition to the *EPCA*, a 2006 Order in Council (“OC”) outright bans issuance of Crown leases or grants for commercial wind generation projects that propose to produce energy for sale. That same OC bans any environmental assessment for such projects under the *Environmental Protection Act*.

This OC has been long rumoured to be on the chopping block, but the question remains: what is going to replace it? That remains to be seen.

### **Contenders vs pretenders**

We are at the precipice of a paradigmatic shift in Newfoundland and Labrador energy policy and there are many players seeking to capitalize on it – we know there are over 8000 MW of requests for energy sitting on desks at Newfoundland and Labrador Hydro, which is four times the current capacity in the provincial system.

The contenders will need to separate themselves from the pack and they will need expert advice to do it. Not only expert advice on the legal dynamics at play, but also the advice necessary to foresee how the legal and policy imperatives facing the province will impact on a

new regulatory framework. Minister Parsons effectively said the province is open for business. Not only that, the policy shift remains in transition. Now is the time to answer the government's call, and take steps to prepare for what's to come.

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## **The Winds of Change (Part 2): Crown Land – July 21, 2022**

By: [John Samms](#), [Sadira Jan](#), [Paul Kiley](#), [Dave Randell](#), [Alanna Waberski](#), and Jayna Green

Now that the Government of Newfoundland and Labrador (“GNL”) has amended the Order in Council that had banned Crown titles and environmental assessment in respect of commercial wind generation projects, industry players are now looking forward to GNL’s policy in how it will decide who gets access or rights to Crown land that might be necessary or desirable for the construction of wind energy projects.

GNL has indicated that the policy is coming very soon - the exact date, however, is unknown. There are, in Canada, generally two ways in which the award of access to Crown lands for wind energy projects is accomplished – through a non-competitive process or through competitive bidding.

Where a jurisdiction indicates that it will use a non-competitive process to award access to Crown lands for wind energy projects, applications are submitted for a wind power lease and assessed on a first-come-first-served basis.

Where competitive bidding is used, the Crown Corporation or other entity in charge of energy/electricity distribution issues a Request for Qualifications (“RFQ”) and/or a Request for Proposals (“RFP”), and successful proponents then apply for a Crown land lease for their project, if necessary.

This article provides a review of such schemes across the other Provinces that make up Atlantic Canada, which we hope provides some insight on what may come.

### **Nova Scotia**

#### *Overview of Policy*

Nova Scotia’s 2013 policy for leasing Crown lands explains that leasing generally is initiated through an application or in response to a public tendering process.<sup>1</sup> Applications for a Crown lands lease must align with the best interests of the Province, and are assessed on a first-come-first-served basis.

For wind projects specifically, the Department of Natural Resources (“DNR”) may identify public lands for development and make them available to interested proponents through a public tendering process. The DNR may issue an RFP for specific uses of public lands, such as wind

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<sup>1</sup> “Guidelines for the Preparation of Crown Land Lease Applications” *Nova Scotia Department of Natural Resources*, (21 September 2015) online (PDF): <[https://novascotia.ca/natr/land/pdf/Guidelines\\_Applicants\\_Crown\\_Land\\_Leasing.pdf](https://novascotia.ca/natr/land/pdf/Guidelines_Applicants_Crown_Land_Leasing.pdf)>

energy conversion. If an area is in particularly high demand (e.g. multiple applications for leases are received by the DNR), a public tendering process may also be initiated.

### *Overview of Process*

In the private land context as it relates to renewable energy projects, we would often see a fee simple owner of land grant an option to lease to a developer or applicant. During the option period, the lands are subject to exclusivity and the applicant can run its testing, investigations, etc. as may be required in connection with the proposed project. If all is in order, the applicant would then exercise its option to lease and move forward on a timeline of its own choosing, which can co-align with the financing and construction of the project in question. Typically, there would be certain outs drafted into the lease, allowing the applicant to terminate if it ultimately decides not to complete the project. With the lands locked up either by option or a full lease, the applicant can then focus on the other pieces of the project.

In the Crown land context, there are certain steps in the Crown leasing guidelines which fundamentally change the path to lease. The Crown process may be considered more cumbersome; the applicant is expected to do more of the work on the front end and absorb more risk without any guarantee that the lands will ultimately be leased to the applicant. In this process, perhaps not surprisingly, the decision to lease is more in the hands of the Crown than the applicant.

The applicant initiates the process by making an application to lease. Once the application is received and the initial Crown review is complete, the applicant requests a Letter of Authority from the Crown which will provide the applicant with interim rights to do its investigations, etc. The applicant then has to prepare a Development Plan (“DP”) in accordance with the Crown Lease guidelines. In the Crown’s review of the DP, they’ll consider land use optimization and assess whether any Indigenous interests are engaged that would require consultation. When they’re satisfied with the DP, the Crown will issue a Letter of Offer which will include any additional conditions to be met prior to approving the lease (which may require an environmental assessment or an Indigenous consultation process). For wind farm leases specifically, the following are additional requirements:

1. When describing production method processes, applicants must specify the types of towers to be installed and how many megawatts of energy they will produce.
2. Applicants must adhere to municipal by-laws for specific setbacks and management of sound requirements.
3. Wind-energy development will not be considered within 10 rotor diameters of any existing wind turbines owned by third parties. The rotor diameter used to calculate this distance will be the larger of the diameter(s) of the existing turbine(s) and any turbines proposed for the requested lease.

4. Applicants must show how their projects will connect to the power grid.
5. When summarizing the physical and biological components in the area likely to be affected by the project, include expected effects on migratory birds and bats.

Perhaps most importantly, the Crown will not issue an approval of a lease until they have proof that both a Power Purchase Agreement (“PPA”) and a Generator Interconnection Agreement (“GIA”) with Nova Scotia Power Inc. have been executed. This may cause concern to the applicant who will not have assurance on the lease until they’ve already obliged themselves to sell power via these agreements. While it would be unusual for the Crown to deny a lease once a project has advanced to this stage, it certainly has the right to do so. In order to hedge this risk, the Crown has indicated that an applicant may request a Comfort Letter from DNR confirming that their application is currently under review. A Comfort Letter can also be requested for security of tenure during a period when wind testing activities are being conducted under a Letter of Authority.

## **New Brunswick**

### *Overview of Policy*

New Brunswick’s “Allocation of Crown Lands for Wind Power Projects Policy” initially published in 2012 outlines the approach for the utilization of Crown lands for wind exploration and wind farm development and recognizes the economic and environmental benefits of generating electricity from wind energy.<sup>2</sup> The Policy was developed to establish a fair, balanced and consistent approach for allocating Crown lands for wind power.

### *Overview of Process*

Since 2012, the Province of New Brunswick established a “single-entry point” for all wind generation projects on Crown lands.<sup>3</sup> Pursuant to the Policy, grants for wind power projects over Crown lands are typically issued through a two-staged, integrated process facilitated by the Department of Natural Resources and Energy Development (“DNRED”).

At stage one, the DNRED grants a License of Occupation for Wind Exploration and an Option Agreement providing the first right to apply for a wind farm lease over the same exploration area.<sup>4</sup> In the Province, wind exploration activities are comparable to mineral, oil and natural gas

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<sup>2</sup> Government of New Brunswick, “Allocation of Crown Lands for Wind Power Projects,” (7 February 2012), online (PDF) at 3: <https://www2.gnb.ca/content/dam/gnb/Departments/nr-m/pdf/en/Publications/CLM0172005.pdf>

<sup>3</sup> *Ibid.*

<sup>4</sup> Government of New Brunswick, “Crown Lands – Wind Farm Lease: Natural Resources and Energy Department,” online: [https://www2.gnb.ca/content/gnb/en/services/services\\_renderer.200867.Crown\\_Lands\\_-\\_Wind\\_Farm\\_Lease.html](https://www2.gnb.ca/content/gnb/en/services/services_renderer.200867.Crown_Lands_-_Wind_Farm_Lease.html). Further, Applicants who can provide wind exploration data in the proposed area may be exempt from the two-stage process and could proceed directly to the application for a Wind Farm Lease.

exploration where developers may stake “wind claims” onto large areas of Crown land for possible future development, and thereafter, based on the data collected during exploration, proponents may move to the second stage and apply to develop a wind farm within the exploration area.

At stage two, proponents typically apply for an exclusive wind farm lease (for the wind turbine and substation footprints) and an associated non-exclusive license of occupation for access and distribution (for associated access and distribution corridors) for the area of the proposed project. In certain circumstances, a wind farm lease can be for a larger footprint on the Crown lands which would encompass all elements of the proposed wind farm, but that approach would be atypical.

A wind farm lease application and associated license of occupation for access and distribution must be submitted with a number of supporting documents, approvals and registrations. One such prerequisite for the grant of such a lease is the confirmation that the applicant has been either awarded an RFP for the purchase of the power, or has submitted an approved business plan which provides for the proposed utilization of the power in the absence of an RFP award.

In New Brunswick, pursuant to the *Electricity Act*<sup>5</sup> only New Brunswick Power Corporation is permitted to sell or supply electricity to a consumer or a municipal distribution utility within the Province and thus, is responsible for the majority of all RFPs issued for the purchase of power in the Province. Notwithstanding the foregoing, municipal distribution utilities can also generate or purchase power, and can sell power to a consumer provided it does so within its own territorial limits. There are three municipal distribution utilities in the Province<sup>6</sup> and accordingly, each could issue an RFP for the production of wind power within its territorial limits, including the possibility that Crown lands could be used in such projects.<sup>7</sup>

Upon submission of a completed application, the DNRED will conduct a comprehensive review and send an offer letter to the proponent informing of any additional requirements that may be required following approval.

## **Prince Edward Island**

### *Overview of Process*

The majority of wind farm development in Prince Edward Island is on private lands and there is no provincial policy regarding the use of Crown lands for wind farm development. The present wind capacity in Prince Edward Island is 104 MW, of which nearly 74 MW is owned and operated by the Prince Edward Island Energy Corporation (“PEIEC”), a provincial Crown corporation. Two

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<sup>5</sup> *Electricity Act*, SNB 2013, c 7, s 72.

<sup>6</sup> These include: The Power Commission of The City of Saint John; the City of Edmundston, and the Perth-Andover Electric Light Commission.

<sup>7</sup> Burchill Wind Farm, which is currently under construction is located on Crown lands and consists of 10 turbines with an installed capacity of 45MW and was in response to the award of an RFP by The Power Commission of The City of Saint John.



wind farms located in western Prince Edward Island are operated by a private developer and supply the balance of wind capacity in the Province. PEI's commitment to wind farm development has resulted in wind energy supplying approximately 24% of PEI's electricity needs.<sup>8</sup>

In 2017, the PEIEC was assigned responsibility to construct two additional wind farms within the Province, with 30 MW of wind capacity to be operational by 2020 and an additional 40 MW by 2025. In 2019, the PEIEC issued a request for proposals inviting prospective proponents to submit proposals for the supply of wind turbines for the proposed 30 MW wind project. A site near the PEIEC's existing wind farm in East Point has since been identified as the preferred location for the development of first 30 MW wind project. It is expected that both projects will be located on privately held lands subject to land-owner lease agreements.<sup>9</sup>

## **Conclusion**

Like many parties in the renewable energy space we eagerly wait for an announcement from GNL with respect to access or rights to Crown land that might be necessary or desirable for the construction of wind energy projects. How GNL proceeds will have a direct impact on proponents looking to develop such projects, in the context of creating green hydrogen for export or otherwise.

This update is intended for general information only. If you have any questions on the above we would invite you to contact the authors or any other member of our [Energy Group](#).

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<sup>8</sup> PEI Energy Corporation, "Island Wind Energy Securing Our Future: The 10 Point Plan," *PEI Environment and Energy Policy Series* (2009), online (PDF): [http://www.gov.pe.ca/photos/original/wind\\_energy.pdf](http://www.gov.pe.ca/photos/original/wind_energy.pdf)

<sup>9</sup> PEI Energy Corporation, "Request for Proposals for Wind Turbine Procurement for a Proposed 30 Megawatt Wind Project for the PEI Energy Corporation," (12 December 2018), online (PDF) at 24: <<https://www.princeedwardisland.ca/en/tender/peiec-5172>>

## **The Winds of Change (Part 3): Newfoundland and Labrador releases wind energy guidelines - July 27, 2022**

By: [John Samms](#), [Matthew Craig](#), [Dave Randell](#), and Jayna Green

On July 26, 2022 the Province of Newfoundland and Labrador (the “Province”) released [“Guidelines: Nominating Crown Lands for Wind Energy Projects”](#) (the “Guidelines”). Described as “the first step of certainty,” by Minister Andrew Parsons, this announcement and release of the Guidelines marks a substantial development in renewable energy in the Province. This article provides a brief overview of the Guidelines and details the future path ahead for entities looking to invest in wind farm projects in the Province.

### **Stated Purposes of the Guidelines**

The Guidelines explain the evolution of the Province’s wind power policies, mentioning the establishment of the 2007 wind moratorium and the subsequent changes announced on April 5, 2022. For a more detailed description of those rules please see [here](#).

The Guidelines suggest that renewable energy in the Province is abundant, with opportunities to develop green hydrogen and ammonia resources in addition to wind generation. The Guidelines are cited as an initiative to move the Province’s 2021 “Renewable Energy Plan” forward while ensuring long-term benefit to the people of the Province.

While the underlying goals of the Guidelines are important, the Province’s announcement is clear: the time for change has come and those looking to capitalize on the Province’s abundance of renewable resources must act quickly and effectively.

### **The Nomination and Bid Process Starts Now**

Proponent’s intending to capitalize on wind generation opportunities must hit the ground running. The Province has introduced a two-phased approach to wind generation on Crown Lands and the clock has started ticking.

Phase 1, Calls for Land Nominations, begins immediately and will run until October 1, 2022. Government is asking that interested parties provide nominations for areas within which they wish to develop wind energy projects. At this stage, all Crown lands are available for submission subject to specific exemptions. While respondents are encouraged to be strategic with their nominations, it is evident that the Province is seeking to incentivize proponents and gauge the competition for particular parcels of land. The

Government has not limited the amount of land a proponent may show interest in nor are proponents limited to one specific geographic location.

Once Land Nominations are received, they will inform the subsequent decisions made by the Department of Industry, Energy and Technology (“IET”) in selecting land area(s) to be included in future bidding processes. While the Call for Nominations is a non-competitive process, Phase 2, Call for Land Bids, is a competitive process. Details on the evaluation process will be announced in mid-December.

### **Newfoundland and Labrador Hydro Interfacing**

Newfoundland and Labrador Hydro (“NL Hydro”) will be involved in the review of Land Nomination and bid submissions. NL Hydro will be responsible for reviewing the technical viability, and potential rate impacts of assessments. In doing this, NL Hydro may provide insights into the cost of interconnection and supply of energy to respondents where applicable, and will be responsible for providing technical parameters to support respondents as they develop land nominations. In a press conference, the Minister of IET explained that technical viability will be assessed prior to the commencement of the Phase 2 competitive process.

Currently, NL Hydro is conducting wind integration studies to assess the amount of wind generation that can be supported by the grid. The results will be made public, with the goal of ensuring transparency regarding project viability.

NL Hydro will also support project proposals throughout the bidding process by providing reasonable preliminary consultation to proponents and relevant information regarding systems. NL Hydro will not be performing individual system studies for proponents, rather it will initiate detailed system studies for successful bidders through its Interconnection Process.<sup>1</sup>

NL Hydro’s involvement will not stop here, as it’s currently involved in a “Reliability and Resource Adequacy Review” to “ensure sufficient and reliable long-term supply of energy and capacity for customers.” The results of the review will influence the number and

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<sup>1</sup> The policy states that the Interconnection Process will begin by proponents submitting a formal interconnection request. Hydro will conduct system impact and facilities studies to confirm costs for proponents and previous preliminary system upgrade requirements. NL Hydro’s interconnection process will be executed in an effort to provide proponents with accurate cost estimates and schedules sufficient to support interconnection and power purchase agreement negotiation and regulatory approval.

location of new wind resources, with the final report submitted to the Public Utilities Board on September 30, 2022.

## **Conclusion**

The Province is no stranger to natural resource development. [A recent feasibility study](#) of hydrogen production, storage, distribution, and use in the Province estimated that development of hydrogen production in the Province and attraction in new industry could result in new green jobs and a hydrogen sector valued at more than \$11 billion per year by 2050. That same study found that if Atlantic Canada captured 5% of the European market for hydrogen, the export opportunity could be \$9 billion annually in the Province. While questions remain, a new industry is upon us.

Now publicly described as being a global “best in class resource,” with respect to wind energy, the Province’s opportunity to demonstrate leadership in the global transition to green energy is upon us and navigating a new industry means having the knowledge and support to foster success. Lawyers within Stewart McKelvey’s Energy Group have the expertise to provide this support, and to help clients navigate this novel process, as well as the policy changes to come.

This update is intended for general information only. If you have any questions on the above we would invite you to contact the authors or any other member of our [Energy Group](#).

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## **The Winds of Change (Part 4): A Review of Rental and Royalty Regimes for Wind Development on Crown Lands: Options for Newfoundland and Labrador’s Economic Wind Policy - August 8, 2022**

By: [John Samms](#), [Sadira Jan](#), [Dave Randell](#), [Alanna Waberski](#), and Jayna Green

As we explained in our July 6, 2022 “[Winds of Change](#)” article, [the announcement](#) made by Minister Andrew Parsons on April 5, 2022 declaring the end of Newfoundland and Labrador’s moratorium on wind development signals a paradigmatic shift in Newfoundland and Labrador energy policy.<sup>1</sup>

The downstream impact of that shift remains to be seen, but optimism abounds. [A recent feasibility study](#) of hydrogen production, storage, distribution, and use in Newfoundland and Labrador estimated that development of hydrogen production in NL, and attraction in new industry, could result in new green jobs and a hydrogen sector in NL valued at more than \$11 billion per year by 2050. That same study found that if Atlantic Canada captured 5% of the European market for hydrogen, the export opportunity could be \$9 billion annually in Newfoundland and Labrador. While questions remain, a new industry is upon us.

This gives rise to legal considerations of how new policy frameworks are structured and, particularly for the purposes of this article, whether the Province will adopt a rental or royalty regime specific to wind generation on Crown lands that will produce fair returns and incentivize development.

This article analyzes renewable Crown land rental and royalty regimes in other jurisdictions, from which we may glean some insight into how such policies could be implemented in Newfoundland and Labrador. The following sections provide brief observations as to how other jurisdictions across the country are capitalizing on wind generation on Crown lands.

### **British Columbia Has an Established Royalty Regime**

In 2019, British Columbia’s Ministry of Forests, Lands, Natural Resource Operations and Rural Development (“the Ministry”) updated their “Wind Power Projects Policy” to provide information on the disposition of Crown land for components of a wind power project, including turbines, maintenance buildings, plant facilities, roads, and transmission lines.

The Ministry uses a first-come-first-served approach to process applications for wind development. Upon successful application, the Ministry will charge a rent of \$500/year to issue an investigative license of occupation.<sup>2</sup>

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<sup>1</sup> <https://www.stewartmckelvey.com/thought-leadership/the-winds-of-change-newfoundland-and-labrador-government-signaling-major-shift-in-energy-policy/>

<sup>2</sup> Government of British Columbia, “Land use – wind power” online: <<https://www2.gov.bc.ca/gov/content/industry/crown-land-water/crown-land/crown-land-uses/clean-energy/wind-power#Type%20of%20tenure>>

During operations, in addition to an annual rental fee charged in association with the granting of a Multi-Tenure Instrument (“MTI”),<sup>3</sup> the Ministry will apply a “Participation Rent” after a wind power project’s first ten years of production. Starting in year eleven, developers are charged this participation rent based on their annual production factor (“APF”). Developers are charged a minimum of 1% and a maximum of 3% of their gross revenue depending on their APF. British Columbia’s policy ensures that the Province gains a return while promoting wind energy development, since rates are sensitive to individual projects.

### **Saskatchewan Engages a Royalty & Rental Fee Regime For Development on Agricultural Crown Lands**

Saskatchewan’s 2018 “Wind Power Policy: Agricultural Crown Land,” outlines the government’s support for renewable energy development on agricultural Crown land through a co-operative procedural framework.<sup>4</sup> Corporations, partnerships, or individuals involved in exploration, development, production, or transmission of wind generated power are eligible to apply for a wind power lease on agricultural Crown lands.

The Government of Saskatchewan charges a rate for both revenue sharing and rental of agricultural Crown lands, both of which are negotiated at levels received by other land owners within the wind project and are subject to approval by the Minister. As a minimum flat rate, the Ministry can charge up to \$2,500 per wind tower. Other charges associated with the ongoing operation of a wind power lease are calculated according to *The Provincial Lands (Agriculture) Regulations*.<sup>5</sup>

### **Ontario’s Regime Includes Multiple Rental Charges**

In Ontario, developers can apply and pay the provincial government a \$20,000 application fee in a non-competitive process to confirm the economic viability of wind energy resources. Competitive bidding procedures are used in areas where several companies are interested in developing wind energy on provincial Crown land.<sup>6</sup>

Similar to British Columbia’s regime, Ontario will charge different rental rates based on the wind power project’s development stage. First, an annual base land rent will be applied to the area under the land use permit (if applicable). When a project becomes operational, this rental payment changes and is replaced by an “Annual Wind Land Rental Charge” and “Administrative Land

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<sup>3</sup> The MTI is initially issued with rights equivalent to a general license of occupation and subsequent Crown land rights may be added or reduced as necessary to meet the needs of the individual development plan; Ministry of Forests, Lands, Natural Resource Operations and Rural Development, “Land Use Operational Policy: Wind Power Projects,” 21 January 2019, Government of BC, at 4, online (PDF): <<https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/windpower.pdf>>

<sup>4</sup> Government of Saskatchewan, “Wind Power Policy Agricultural Crown Land,” February 2018, online (PDF): <<https://publications.saskatchewan.ca/api/v1/products/76951/formats/86252/download>>

<sup>5</sup> *The Provincial Lands (Agriculture) Regulations* RRS c P-31.1 Reg 1.

<sup>6</sup> Renewable Energy Program (Ontario), “Onshore wind power development on Crown land procedure,” 9 May 2013, online: <<https://www.ontario.ca/page/onshore-wind-power-development-crown-land-procedure#section-9>>

Rent.” The “Annual Wind Land Rental Charge” is paid in quarterly installments and is based on the total installed kilowatt capacity of all turbines in an operational project.<sup>7</sup> The Administrative Land Rent, also applied in replacement of the annual base land rent, is charged at a fixed rate of \$1,000 per turbine and paid quarterly.<sup>8</sup>

### **Quebec Charges Annual Rent for Wind Farms on Crown Lands**

In 2017, an order-in-council adopted the “Program for the awarding of lands in the domain of the state for the installation of wind turbines” (“the Program”).<sup>9</sup> The Program provides a framework for granting Crown land rights for the development of wind energy, with its goal being to reserve public land for wind farm construction.<sup>10</sup>

The Program adopted a specific scheme for wind power facilities on Crown lands, ensuring that from April 1, 2021 to March 31, 2022, an annual rent for the leasing of land in the domain of the State for the installation of a wind turbine is calculated based on the production capacity of the wind turbine, at a taxable rate of \$6,107 per megawatt.<sup>11</sup> The rate is adjusted and rounded to the nearest dollar on April 1<sup>st</sup> of each year, based on the change in the average consumer price index for the preceding year and using the Statistics Canada index for Quebec.<sup>12</sup>

### **Prince Edward Island’s Regime Includes Land Lease Payment Agreements**

Prince Edward Island does not have a specific royalty scheme for wind farms on public lands. Many of Prince Edward Island’s large wind farms were developed by PEI Energy Corporation (“PEIEC”), which has devoted a significant amount of time to developing strong local partnerships with private landowners.

PEI Energy Corporation’s 2020-2021 annual report indicated that land lease payment agreements were entered into for the use of, or option to use, land in perpetuity in connection with the operation of its wind farms. The report explains that the rate charged under these agreements would be dependent on the power generated from wind farms.<sup>13</sup>

The Province’s 10-Point Plan for wind energy development, released in 2009, explains that “fairness in local land leases and creative models for revenue sharing” are a major consideration

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Ministère de l’Énergie et des Ressources naturelles, “Program for the awarding of lands in the domain of the state for the installation of wind turbines,” (10 May 2017), online (pdf): <[https://mern.gouv.qc.ca/wp-content/uploads/GM\\_programme\\_eolien\\_ang.pdf](https://mern.gouv.qc.ca/wp-content/uploads/GM_programme_eolien_ang.pdf)>

<sup>10</sup> Ministère de l’Énergie et des Ressources naturelles, “Wind Farm Construction on Public Land,” online: <<https://mern.gouv.qc.ca/en/energy/wind-energy/wind-farm-public/>>

<sup>11</sup> Ministère de l’Énergie et des Ressources naturelles, *supra* note 9.

<sup>12</sup> *Ibid.*

<sup>13</sup> Prince Edward Island Energy Corporation, “Annual Report 2020-21,” (21 June 2021), online (PDF): <[https://www.princeedwardisland.ca/sites/default/files/publications/peiec\\_annual\\_report\\_2021\\_final\\_21jun2021.pdf](https://www.princeedwardisland.ca/sites/default/files/publications/peiec_annual_report_2021_final_21jun2021.pdf)> at 27. [PEI Energy Corporation Annual Report 2020-21]

in evaluating new wind farm proposals. Wind farm leases provide alternative revenue streams for private land owners, and provide financial benefits to the Island's farming community.<sup>14</sup> For example, PEIEC's most recent annual report indicates that all turbines at the East Point Wind Farm are located on private lands, and a three-tier compensation system is used to allocate a portion of gross revenue from the wind farm to private land owners. Land owners with turbines directly on their property or those in close proximity to turbines are eligible for compensation. The report states that in 2020-21, land owners received approximately \$179,000 as a result of the compensation system.<sup>15</sup>

### **New Brunswick & Nova Scotia Use a Wind Farm Lease Regime**

Both Nova Scotia and New Brunswick use a wind farm lease regime. In New Brunswick, the Minister may issue a Wind Farm Lease for no more than a 20-year term. To issue a Wind Farm Lease beyond a 20-year term, the Minister is required to receive the Lieutenant-Governor's in-council approval.<sup>16</sup> An individual, exclusive use Wind Farm Lease will be issued for turbines and electrical substation sites, whereas a License of Occupation for non-exclusive use will be issued to authorize connecting access roads and distribution lines within a wind farm.<sup>17</sup> Successful lease applicants are required to pay Annual Rent on their lease, invoiced on April 1<sup>st</sup> of every year and established in accordance with the Lands Administration Regulation, as per the *Crown Lands and Forests Act*.<sup>18</sup> Annual rent is paid in addition to property taxes on leased properties. New Brunswick also charges an Associated License to Occupy Fee and an annual rental fee for any Licence of Occupation issued for the construction and operation of access and transmission lines between individual turbine sites.<sup>19</sup>

Lists of fees for activities on Crown Lands in Nova Scotia are found in the "Fees for Activities on Crown Land" policy ("the Policy"), which came into effect in April, 2015.<sup>20</sup> The Policy indicates that Crown land leases issued through a public tendering process will be subject to fees and ongoing rents, however this information is provided in the applicable tender documents. For Wind Energy Generation Leases, the Policy states that to lease a new site or renew a lease, required fees include administrative fees of \$747.83 and minimum ongoing annual rental fees per tower. For the first lease issued on a ten-year term per megawatt of capacity, lessees are required to pay approximately \$4,364.43. For a subsequent ten-year term, a lessee is required to pay either the greater of 2% of their gross revenue or the minimum ongoing annual rental fee. Additionally, fees

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<sup>14</sup> PEI Energy Corporation, "Island Wind Energy – Securing Our Future: The 10 Point Plan," (2009), online (pdf) at 20: [http://www.gov.pe.ca/photos/original/wind\\_energy.pdf](http://www.gov.pe.ca/photos/original/wind_energy.pdf)

<sup>15</sup> PEI Energy Corporation Annual Report 2020-21, *supra* note 13 at 15.

<sup>16</sup> Government of New Brunswick, "Allocation of Crown Lands for Wind Power Projects Policy," (7 February 2012), online (pdf): <https://www2.gnb.ca/content/dam/gnb/Departments/nr-rn/pdf/en/Publications/CLM0172005.pdf>

<sup>17</sup> *Ibid.*

<sup>18</sup> *Crown Lands and Forests Act*, SNB 1980 c C-38.1.

<sup>19</sup> Government of New Brunswick, "Using New Brunswick Crown Lands," (21 July 2021), online (PDF): [https://www.pxw1.snb.ca/snb7001/e/1000/CSS-FOL-SNB-60-0045\\_E.pdf](https://www.pxw1.snb.ca/snb7001/e/1000/CSS-FOL-SNB-60-0045_E.pdf)

<sup>20</sup> Government of Nova Scotia, "Fees for Activities on Crown Land" (1 April 2015) *Department of Natural Resources*, online (pdf): <https://novascotia.ca/natr/land/pdf/Fees-Activities-on-crownland.pdf>



must be paid for third party use or sublease, and administration fees must be paid for the assignment, transfer, or amendment of a Wind Energy Generation Lease. Rental rates can be revised at specified times as per a lease agreement.<sup>21</sup>

### **Alberta Lacks a Renewable Energy Royalty Regime**

Alberta does not currently have a royalty regime governing wind energy development on public lands, despite having a significant amount of wind energy capacity and being well-versed in wind development on private lands. As of 2021, practitioners have suggested that Alberta must adopt a renewable conservation regime, complete with a renewable royalty model, to ensure the market in Alberta is “in line with existing practices in Canada and around the world.”<sup>22</sup>

### **Manitoba is Developing a Wind Energy Royalty Regime**

In 2019, the Government of Manitoba produced a question and answer sheet on Manitoba’s Crown Land Policies for wind farms, which indicated that the Province was developing a system of rent and royalties for the use of Crown land similar to the regime used for wind development on private lands. The most favorable option includes a land rent, which will be dependent on the intensity of wind farm use, in addition to charging a royalty based on revenues.<sup>23</sup>

### **Conclusion**

It’s unclear which structure the Provincial Government of Newfoundland and Labrador will choose. However, it’s apparent that options are available based on existing regimes in other jurisdictions, and this Province must choose a policy that promotes development. Current literature in this space indicates that jurisdictions without a royalty regime for wind energy development on Crown lands are missing out on lucrative opportunities to capitalize on the extractive steps involved in renewable energy production, in addition to tax revenues gained on generation.<sup>24</sup>

This update is intended for general information only. If you have any questions on the above we would invite you to contact the authors or any other member of our [Energy Group](#).

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<sup>21</sup> Government of Nova Scotia, “Guidelines for the Preparation of Crown Land Lease Applications,” (21 September 2015), *Department of Natural Resources*, online (PDF): [https://novascotia.ca/natr/land/pdf/Guidelines\\_Applicants\\_Crown\\_Land\\_Leasing.pdf](https://novascotia.ca/natr/land/pdf/Guidelines_Applicants_Crown_Land_Leasing.pdf)

<sup>22</sup> Daniel BR Johnson, Matthew Schneider & Yi Liu, “Moving Forward by Looking Back: Toward a Renewable Conservation Scheme in Alberta,” (2021) 59:2 *Alta L Rev* at 294.

<sup>23</sup> Government of Manitoba, “Some Questions and Answers Regarding Manitoba’s Crown Land Policies for Wind Farms,” (6 June 2019), online (PDF): [https://www.gov.mb.ca/sd/pdf/question\\_answers\\_wind\\_farms.pdf](https://www.gov.mb.ca/sd/pdf/question_answers_wind_farms.pdf)

<sup>24</sup> Daniel BR Johnson, Matthew Schneider & Yi Liu *supra* note 22 at 294.

## **The Winds of Change (Part 5): Atlantic Canada poised to benefit from clean energy tax credits— November 10, 2022**

By [Jim Cruikshank](#), [Graham Haynes](#), and [Dave Randell](#)

On November 3, 2022, the Honourable Chrystia Freeland delivered the Federal Government's Fall Economic Statement ("FES"). The FES included a number of tax related announcements, including further details on the Clean Technology Investment Tax Credit and the Hydrogen Investment Tax Credit, both of which were originally proposed in the 2022 Federal Budget.

The FES states these tax credits are made in response to similar initiatives in the United States following the passage of the Inflation Reduction Act and are intended to help Canada remain competitive in the North American clean energy and clean technology industries.

### **Clean Technology Investment Tax Credit**

The Clean Technology Investment Tax Credit will be a refundable tax credit equal to either 20% or 30% or of the capital cost of qualifying equipment, which is currently proposed to include:

- Electricity generating systems including solar photovoltaic, concentrated solar, wind, and water energy generating systems;
- small modular nuclear reactors used to generate electricity;
- industrial zero-emission vehicles plus related charging or refueling equipment; and
- stationary non-fossil fuel energy storage equipment including batteries, flywheels, supercapacitors, magnetic energy storage, compressed air energy storage, pumped hydroelectric energy storage, gravity energy storage and thermal energy storage.

The applicable percentage of the investment tax credit will vary based on the ability of claimants to meet certain labour conditions which have not yet been developed but are expected to include wage thresholds and apprenticeship positions. The Department of Finance has stated it will consult stakeholders to determine what the final thresholds will be, and the results of this consultation will be released in the 2023 Federal Budget.

The Clean Technology Investment Tax Credit is proposed to be available in respect of the capital cost of property acquired and that becomes available for use on or after Budget Day 2023 and until 2031, then will gradually be phased out by 2035. Note that this credit is proposed to be available in respect of new property only.

Atlantic Canadian businesses will be able to benefit from both the Clean Technology Investment Tax Credit and the existing Atlantic Investment Tax Credit on certain capital expenditures. The Atlantic Investment Tax Credit, for reference, was established in March, 2012, and provides a refundable credit of up to 10% of the value of new qualified property purchased in the Atlantic

Provinces and the Gaspé Peninsula which includes, among other things, energy generation and conservation property.

### **Clean Hydrogen Investment Tax Credit**

The Clean Hydrogen Investment Tax Credit will be a refundable tax credit of up to 40% of the investment cost in clean hydrogen projects. The credit percentage applicable to the Clean Hydrogen Investment Tax Credit will be based on a combination of the carbon intensity of the project and the satisfaction of certain labour conditions.

In particular, in line with the US tax credits announced under the *Inflation Reduction Act*, the credit will begin to apply when emissions from the production of hydrogen are 4.0kg of CO<sub>2</sub>e per kilogram of hydrogen produced or lower and will be capped at 30% when emissions from the production of hydrogen are 0.45kg of CO<sub>2</sub>e per kilogram of hydrogen produced or lower.

An additional 10% credit rate can also apply if the project satisfies certain labour conditions, yet to be announced. A consultation process regarding the labour conditions and the overall requirements of this credit will be launched in the coming weeks.

The Clean Hydrogen Investment Tax Credit is proposed to be available in respect of eligible investments made on or after Budget Day 2023 and until 2030, at which time it will be gradually phased out.

This new tax credit, combined with the recent signing in Atlantic Canada of the *Joint declaration of intent between the Government of Canada and the Government of the Federal Republic of Germany on establishing a Canada-Germany Hydrogen Alliance* which propositions the creation of a “transatlantic supply chain for hydrogen” with first deliveries aimed for 2025, are positives for the development of a green hydrogen industry in Atlantic Canada.

The furtherance of progress on the above-mentioned tax credits are welcome news in the Canadian market and in Atlantic Canada specifically. Stakeholders should watch for upcoming details on both such items in the 2023 Federal Budget.

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*think: forward*

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This update is intended for general information only. If you have any questions on the above we would invite you to contact the authors.

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## **The Winds of Change (Part 6): Place your bids – Crown lands soon to be available for wind energy projects – December 15, 2022**

By [John Samms](#), [Stuart Wallace](#) and [Dave Randell](#)

On December 14, 2022, the Newfoundland and Labrador Department of Industry, Energy and Technology [announced](#) the launch of a Crown land call for bids for wind energy projects. The document [Guidelines: Crown Land Calls for Bids for Wind Energy Projects](#) outlines the information required for bidders, including evaluation criteria. While the document should be reviewed for complete details of the process, this article is intended to provide a brief overview of the process.

### **Call for Bids**

Bids can now be submitted for wind developments on Crown lands, and will be accepted from December 14, 2022 until midnight on March 3, 2023. Bids must be submitted via [email](#) to the Department of Industry, Energy and Technology. Available Crown lands for these projects can be viewed [here](#).

### Information for Evaluation

Bidders will be expected to provide, among other things, the following information for evaluation:

- Project summary;
- Associated Hydrogen/Ammonia production;
- Water requirements;
- Project risk mitigation;
- Electricity considerations and grid impacts;
- Community and Indigenous engagement;
- Project schedule; and,
- Financing.

### Legislation

It is imperative that bidders review the province's legislative and regulatory frameworks, including, but not limited to, those pertaining to the development and provision of electricity in the province, such as, the *Public Utilities Act* and the *Electrical Power Control Act, 1994*.

### **Evaluation of Bids**

There will be a two-phased evaluation of bids.

### Phase 1 Review – Minimum Criteria

First Stage Review will evaluate whether submissions meet the minimum criteria expected of a bidder to be able to deliver a Wind Energy Project. Emphasis will be placed on the bidder's experience, the project, and their financial capacity to plan, construct, and operate the proposed project.

### Phase 2 Review

Those successful in Phase 1 will automatically proceed to a Phase 2 review. This will begin in April 2023. This will be a more robust evaluation focused on the entirety on the information provided. The second stage review involves a weighted evaluation system, whereby electricity considerations and grid impacts are evaluated as heavily as bidder details, project details, benefits, and financing. The weighting is listed as follows:

- Bidder: 15%
- Project Risk Mitigation: 5%
- Electricity Considerations and Grid: 15%
- Community and Indigenous Engagement: 10%
- Benefits: 15%
- Project Schedule: 10%
- Financing: 10%

### **Successful Bidders**

Successful bidders will not be awarded Crown land at the outset. Instead, the province utilized mechanisms under the *Lands Act* to proactively reserve certain lands to later grant successful proponents the exclusive right to formally apply for an interest in the property. The provincial government will then provide successful proponents a wind application recommendation letter from the Department. This will serve as the instrument that guarantees a proponent an exclusive window to secure relevant Crown land, subject to the various legislation including the *Public Utilities Act* and the *Electrical Power Control Act, 1994*.

This update is intended for general information only. If you have any questions on the above we would invite you to contact the authors or any other member of our [Energy Group](#).

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## **The Winds of Change (Part 7): Paying the Piper – New Newfoundland and Labrador Fiscal Framework expects billions in revenues from wind to hydrogen projects**

By [Dave Randell](#), [G. John Samms](#), and [Stuart Wallace](#)

With the deadline for [bids on crown lands available for wind energy projects](#) extended to noon on March 23<sup>rd</sup>, the latest development in our Winds of Change series looks at the recently announced fiscal framework of Wind-Hydrogen projects in Newfoundland & Labrador

On February 23, 2023, the Newfoundland and Labrador Department of Industry, Energy and Technology announced further information on the fiscal framework of Wind-Hydrogen projects. This article sets out to provide a basic outline the specifics of the framework.

### **Principles**

Predictability and transparency are the intended principles on which the fiscal framework has been developed. This is intended allow investors to make informed decisions. The framework attempts to balance the risk of investment with the use of provincial resources.

### **Payment Components**

For a singular project over a 30-year period, the the government of Newfoundland and Labrador expects \$3.5B in taxes, royalties and fees.<sup>1</sup>

Payments will occur early in the project, and throughout the operation phase. These payments can be broken into three components: Land, Wind, and Water.

#### Land

- **Crown Land Reserve Fee:** Annual charge of 3.5% of the market value of reserved lands. Payments begin upon award of exclusive right to pursue projects on lands.
- **Crown Land Lease Fee:** Annual charge of 7% of market value of land. Payments begin upon issuance of Crown Land lease.

#### Wind

- **Wind Electricity Tax:** Annual charge of \$4,000 per megawatt on installed capacity. Payments begin when the turbines are “in-service”, and applicable to all wind-hydrogen projects (≥ 5 megawatts) producing electricity for the purposes of producing hydrogen.

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<sup>1</sup> Using a base case of a 1000 MW Windfarm and a 500 MW Hydrogen (Ammonia) Facility with capital costs of \$3.5 billion with an annual production of 60k tonnes of hydrogen converted to 344k tonnes of ammonia.

### Water

- **Water Use Fee:** Annual charge of \$500 per 1000m<sup>3</sup> of water licensed and used, and \$50 per 1000m<sup>3</sup> of water licensed but not used. Payments begin when permit is issued, and are applicable to all hydrogen facilities.
- **Water Royalty:** Payable based on the calculated residual value of the water. Rates are tiered and linked to cost recovery. These terms can be modified via agreements with the Province. Further details about calculation in document.
  - Tier 1: Rate of 10% applied after 1x cost recovery.
  - Tier 2: Rate of 20% applied after 2x cost recovery.
  - Tier 3: Rate of 25% applied after 3x cost recovery.

### Taxes

Taxes will be applicable to all wind projects producing electricity for the purposes of producing hydrogen. For more information on how Atlantic Canada is poised to benefit from clean energy tax credits, check out [part 5](#) of this series.

### **Bids**

Deadline for submitting bids has been extended to **March 23, 2023**.

Successful Bidders will be awarded the exclusive right to pursue their project through the Crown Lands and Environmental Assessment processes.