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LEGISLATIVE SUMMARY



Bill C-46: An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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Legislative Summary of Bill C-46
(Legislative Summary)

Publication No. 41-2-C46-E

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LEGISLATIVE SUMMARY OF BILL C-46: AN ACT TO AMEND THE NATIONAL ENERGY BOARD ACT AND THE CANADA OIL AND GAS OPERATIONS ACT

1 BACKGROUND

Bill C-46, An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act¹ (short title: Pipeline Safety Act) was introduced and received first reading in the House of Commons on 8 December 2014.

The bill makes numerous amendments to the *National Energy Board Act* and the *Canada Oil and Gas Operations Act*² with a stated goal to “strengthen the safety and security of pipelines regulated by those Acts.”³ Notably, it establishes a statutory liability regime for pipeline spills, including a minimum \$1 billion liability limit for the biggest pipeline companies for incidents in which fault or negligence has not been proven. Also noteworthy is the bill’s provision for a pipeline claims tribunal to be established, in certain circumstances, to adjudicate compensation claims for damage caused by a pipeline spill.

The government has recently introduced other legislation dealing with liability regimes for oil and gas activities under federal jurisdiction. For instance, Bill C-22: Energy Safety and Security Act (short title), which is currently before the Senate, “modifies Canada’s civil liability regimes both for the offshore oil and gas industry and for the nuclear energy industry. Notably, it increases the absolute liability threshold to \$1 billion for operators of offshore oil and gas and nuclear facilities.”⁴ Bill C-22 also provides for the establishment, in certain circumstances, of a nuclear claims tribunal to adjudicate claims for compensation caused by a nuclear incident.

A third piece of recent liability-related legislation is the *Safeguarding Canada’s Seas and Skies Act*,⁵ (formerly Bill C-3), which amended the *Marine Liability Act* to implement the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010*. In certain circumstances, this convention provides for compensation for damage resulting from oil spills related to shipping. Bill C-3 received Royal Assent on 9 December 2014.

By addressing the liability regimes for federal pipelines, Bill C-46 adds a new element to a larger initiative to amend liability regimes for oil and gas activities under federal jurisdiction.

Canada has in place an estimated 825,000 kilometres of transmission, gathering and distribution pipelines, approximately 73,000 kilometres of which are federally regulated by the National Energy Board (NEB). Federally regulated pipelines primarily include transmission lines, which move approximately 1.3 billion barrels of oil annually across provincial and international borders.⁶

Pipelines are thought to be a relatively safe method of transporting liquids.⁷ Federally regulated pipelines have not caused any major spills recently, although it should be noted that most pipelines in Canada are not federally regulated. Any incidents related to federally regulated pipelines that do occur must be reported immediately to the NEB, which compiles the information and releases it to the public. The NEB reports that from January 2008 to September 2014 a total of 619 incidents occurred in relation to federally regulated pipelines. These incidents included 20 serious injuries, 6 fatalities, 64 incidents related to operation beyond design limits, 126 fires, 8 explosions, 46 liquid releases (totalling about 1.5 million litres) and 361 natural gas and other high vapour pressure releases.⁸ The largest quantity of liquid releases from federal pipelines took place in 2009 with 495,050 litres released in 7 incidents, and in 2013, which saw 42,780 litres spilled in 9 releases.⁹

The impact and costs of a pipeline spill vary, depending on the vulnerability of the site where the spill occurred and the volume and type of liquid released. The largest recent pipeline incident in Canada was the Plains Midstream Canada ULC Rainbow Pipeline failure in northern Alberta, which released 4.5 million litres of crude oil into an area of muskeg in 2011.¹⁰ “The aggregate total estimated cost to clean-up and remediate the site, before insurance recoveries, was approximately [US]\$70 million.”¹¹ By way of comparison, the “single most expensive on-shore spill in US history”¹² was the 2010 Enbridge spill in Michigan, which released 20,000 barrels (approximately 3.2 million litres) of crude oil. About 8,000 barrels of this oil entered the Kalamazoo River system.¹³ As of September 2014, Enbridge Energy Partners estimated the costs of this oil release at US\$1.2 billion, including US\$48 million in fines and penalties.¹⁴

2 DESCRIPTION AND ANALYSIS

In this description and analysis, the *National Energy Board Act* is referred to as the NEB Act, and the *Canada Oil and Gas Operations Act* is referred to as the COGO Act.

2.1 LIABILITY AND FINANCIAL REQUIREMENTS RELATING TO AN UNINTENDED OR UNCONTROLLED RELEASE FROM A PIPELINE (CLAUSE 16)

2.1.1 PURPOSE (SECTION 48.11)

To reinforce the “polluter pays” principle (section 48.11), Bill C-46 adds new sections to the NEB Act relating to liability for an unintended or uncontrolled release from a pipeline carrying oil, gas or any other commodity (a “release”) and imposes financial requirements on any company authorized under the NEB Act to construct or operate a pipeline. These new provisions relating to liability and financial responsibility are summarized below.

2.1.2 LIABILITY (SECTION 48.12)

If a release occurs, the liability of all persons responsible varies depending on whether it is proven that the release is attributable to their fault or negligence.

2.1.2.1 LIABILITY WITH PROOF OF FAULT OR NEGLIGENCE (SECTIONS 48.12(1) TO 48.12(3), 48.12(8) AND 48.12(9))

All persons to whose fault or negligence a release is attributable – or who are by law responsible for others to whose fault or negligence the release is attributable – are jointly and severally, or solidarily,¹⁵ liable for:

- all actual loss or damage incurred by any person as a result of the release or as a result of any action or measure taken in relation to the release;
- the costs and expenses reasonably incurred by a government¹⁶ or any other person in taking any action or measure in relation to the release; and
- all loss of non-use value¹⁷ relating to a public resource that is affected by the release or by any action or measure taken in relation to the release (section 48.12(1)).¹⁸

If a release is attributable to the fault or negligence of a contractor, the company authorized under the NEB Act to construct or operate a pipeline (“pipeline company”) is jointly and severally, or solidarily, liable with its contractor (section 48.12(3)).

2.1.2.2 LIABILITY WITHOUT PROOF OF FAULT OR NEGLIGENCE (SECTIONS 48.12(4) TO 48.12(7))

Without proof of fault or negligence, the pipeline company from whose pipeline a release occurs is liable for the items listed in the three bullets above up to the following limits (section 48.12(4)):

- \$1 billion (or a greater amount, if prescribed by regulations) for a company that is authorized under the NEB Act to construct or operate one or more pipelines that individually or together can transport at least 250,000 barrels of oil per day; or
- the amount prescribed by the regulations for a company authorized to construct or operate any other pipeline (sections 48.12(5) and 48.12(6)).

However, if the company is also liable for the release, without proof of fault or negligence, under any other Act, the liability limit is the greater of the two limits set out in the two Acts. If the other Act does not prescribe a limit, then the limit under the NEB Act does not apply (section 48.12(7)).

Despite the liability limits described in the two bullet points above (\$1 billion or greater, or a prescribed amount), a company may be required to pay amounts exceeding its liability limit. See sections 2.1.3.5 and 2.2.2.8.3 of this Legislative Summary for details.

2.1.2.3 GENERAL RULES RELATING TO LIABILITY (SECTIONS 48.12(10) TO 48.12(12))

Claims relating to a release may be pursued in any court of competent jurisdiction¹⁹ in Canada. The order of ranking for recovering claims is as follows: first, claims for actual loss or damage; second, claims for costs and expenses in taking an action or measure; and third, claims for loss of non-use value (section 48.12(10)).

The fact that an act or omission is an offence under the NEB Act does not mean that no other legal liability or remedy may apply for that act or omission. A person who is liable under the NEB Act for a release may seek a legal remedy against another person. Applicable laws and rules of law that are consistent with the new liability provisions continue to operate (section 48.12(11)).

Legal proceedings for a claim relating to a release from a pipeline may be instituted within three years from the day on which the loss, damage or costs and expenses were incurred, but proceedings may not be instituted after six years from the day on which the release occurred (section 48.12(12)).

2.1.3 FINANCIAL REQUIREMENTS (SECTIONS 48.13 TO 48.15)

2.1.3.1 AMOUNT OF FINANCIAL RESOURCES (SECTIONS 48.13(1), 48.13(4) AND 48.13(5))

A pipeline company must maintain sufficient financial resources to pay the amount of the company's liability limit (\$1 billion or greater, or a prescribed amount; see section 48.13(1)). However, the NEB may, by order, specify a greater amount of financial resources that a pipeline company must maintain (sections 48.13(1) and 48.13(4)). When the NEB specifies a greater amount, it is not required to consider any potential loss of non-use value relating to a public resource that is affected by a release or by any action or measure taken in relation to the release (section 48.13(5)).

2.1.3.2 TYPES OF FINANCIAL RESOURCES (SECTIONS 48.13(2) AND 48.13(7))

The NEB may order a pipeline company or a class of pipeline companies to maintain the necessary financial resources in the types that the NEB specifies, including types that are readily accessible to the company. The NEB may also specify the amount of financial resources required under each type (section 48.13(2)). The Governor in Council may, on the recommendation of the Minister of Natural Resources, make regulations with regard to the types of financial resources from which the NEB may choose in making an order and the amount of financial resources that must be readily accessible (section 48.13(7)).

2.1.3.3 DUTY TO PROVIDE EVIDENCE OF FINANCIAL RESOURCES AND TO MAINTAIN FINANCIAL RESOURCES (SECTIONS 48.13(3) AND 48.13(6))

If requested to do so, a pipeline company must satisfy the NEB that it meets the requirements relating to the amount and types of financial resources it must maintain. The board may consider, among other things, the company's financial statements, letters of credit, guarantees, bonds or suretyships and insurance (section 48.13(3)).

A pipeline company must maintain the required amount and types of financial resources until it obtains leave from the NEB to abandon the operation of its pipeline (section 48.13(6)).

2.1.3.4 POOLED FUND (SECTION 48.14)

A pipeline company may meet all or a portion of its requirements to maintain financial resources by participating in a pooled fund established by pipeline companies (section 48.14(1)). A pipeline company that meets only a portion of its financial requirements by participating in a pooled fund must maintain sufficient financial resources to make up the difference between the amount of funds in the pooled fund to which it has access and the amount of financial resources it is required to maintain (section 48.14(2)).

Regulations respecting a pooled fund may specify:

- the minimum and maximum amount of the pooled fund that shall be readily accessible;
- any condition that a pipeline company must meet in order to participate in the pooled fund, including the minimum amount that a company must contribute;
- the maximum amount a pipeline company may withdraw; and
- the maximum portion of a pipeline company's financial requirements that may be met by participating in the pooled fund.

Such regulations may be made by the Governor in Council on the recommendation of the Minister of Natural Resources (section 48.14(3)).

2.1.3.5 REIMBURSEMENT BY COMPANY (SECTION 48.15)

If a release occurs, the NEB may order the relevant pipeline company to reimburse any government or person reasonable costs and expenses incurred in taking any reasonable action or measure in relation to the release, even if the costs and expenses exceed the liability limit of \$1 billion or greater, or a prescribed amount, set under section 48.12(4) (as described in section 2.1.2.2 of this Legislative Summary).

2.2 DESIGNATION OF COMPANY AND PIPELINE CLAIMS TRIBUNAL (CLAUSE 16)

If a release occurs and the pipeline company does not have sufficient financial resources or is otherwise non-compliant, the bill allows for certain actions to be taken, including the establishment of a claims tribunal to adjudicate claims for compensation. These actions may only be taken if a company is first “designated.”

2.2.1 DESIGNATION OF COMPANY AFTER A RELEASE OCCURS (SECTION 48.16)

If a release occurs and the relevant pipeline company either

- does not have or is not likely to have the financial resources necessary to pay the compensation that might be awarded for damage caused by the release as well as the costs and expenses of responding to the release; or
- does not comply with an NEB order with respect to any action or measure to be taken in relation to the release;

then the Governor in Council may “designate” the company, on the recommendation of the Minister of Natural Resources (section 48.16(1)).

Designation of a pipeline company means that:

- The NEB, any of its authorized officers or employees or a third party authorized by the NEB may take any necessary action or measure in relation to the release (section 48.16(2)). No legal action may be taken against the NEB and its officers and employees or the federal government and its employees for anything done or not done in taking any such action or measure (section 48.16(3)). An authorized third party that takes any action or measure in response to a release is not liable for any related act or omission unless it is shown that the third party did not act reasonably in the circumstances (section 48.16(4)).
- The NEB may reimburse any person for costs and expenses that the person reasonably incurred in taking any reasonable action or measure in relation to the release (section 48.16(5)).
- If the pipeline company participates in a pooled fund, the NEB may withdraw from that fund any amount necessary to pay or reimburse costs and expenses associated with actions referred to in first bullet point in this list and costs and expenses referred to in the second bullet point (section 48.16(6)).

2.2.2 PIPELINE CLAIMS TRIBUNAL (SECTIONS 48.18 TO 48.48)

2.2.2.1 OVERVIEW AND PURPOSE (SECTIONS 48.18(1) AND 48.47(g))

Bill C-46 adds 31 sections to the NEB Act relating to a pipeline claims tribunal, which the Governor in Council may establish by order after a pipeline company is designated. The purpose of a tribunal is to quickly and fairly examine and adjudicate claims for compensation made in relation to the release from the designated company's pipeline (section 48.18(1)). The Governor in Council may make regulations generally to enable the tribunal to exercise its powers and perform its duties and functions (section 48.47(g)).

2.2.2.2 LIMIT AND PRELIMINARY MATTERS (SECTIONS 48.18 TO 48.2)

The Governor in Council may establish a tribunal only if it is of the opinion that it is in the public interest to do so, having regard to the extent of the compensable damage caused by the release, the estimated cost of paying compensation and the advantages of having claims dealt with by a tribunal (section 48.18(2)).

When the Governor in Council establishes a tribunal, it must specify the location of its head office (section 48.18(1)).

Immediately after a tribunal is established, the NEB must notify the public of the tribunal's purpose and how to obtain information on making a claim for compensation. The notice must be published in the *Canada Gazette* as well as communicated to the public in a manner that the tribunal considers appropriate (section 48.2).

A tribunal must exercise its powers and perform its duties and functions in an equitable manner, without discrimination on the basis of nationality or residence (section 48.18(3)).

Despite the establishment of a tribunal, courts of competent jurisdiction maintain jurisdiction with respect to a release (section 48.19).

2.2.2.3 MEMBERSHIP (SECTIONS 48.21 TO 48.23, 48.47(a) AND 48.47(b))

A tribunal consists of at least three members, who are appointed by the Governor in Council on the recommendation of the minister (section 48.21(1)). People appointed to be members of the tribunal must be either retired judges of a superior court or lawyers – and in Quebec, notaries – with 10 years' standing in a province (section 48.21(2)). The Governor in Council may make regulations prescribing the terms and conditions of appointment of members and respecting conflict of interest (sections 48.47(a) and 48.47(b)).

The NEB pays members remuneration and expenses fixed by the Governor in Council (section 48.21(4)).

Members hold office for up to five years, but may be removed by the Governor in Council for cause (sections 48.21(1) and 48.22(1)). In the event of the absence, incapacity, resignation or death of a member, the Governor in Council may appoint a replacement for that member (section 48.21(3)). If the tribunal has no work to carry out, the Governor in Council may terminate the appointments of members (section 48.22(2)).

A member cannot be sued for anything he or she does or does not do as a member of the tribunal (section 48.23).

2.2.2.4 CHAIRPERSON AND STAFF (SECTIONS 48.24 TO 48.28, 48.47(c), 48.47(d) AND 48.47(f))

The Governor in Council, on the minister's recommendation, appoints one of the members of the tribunal to be the chairperson. The chairperson is responsible for apportioning work among the members and supervising the tribunal's staff. If the chairperson establishes a panel, the chairperson assigns members to the panel and designates a member to preside over it (section 48.24). The Governor in Council may make regulations with regard to the chairperson's powers, duties and functions and the absence or incapacity of the chairperson or another member (sections 48.47(c) and 48.47(d)).

A tribunal may employ staff and it may temporarily engage lawyers, notaries or other specialists. In relation to both staff and specialists, a tribunal may prescribe duties and terms and conditions of employment (subject to any regulations), and, with the Treasury Board's approval, fix the remuneration that the NEB must pay to them (sections 48.25 to 48.27). The Governor in Council may make regulations respecting the hiring and terms and conditions of employment of staff (section 48.47(f)).

The NEB must provide a tribunal with any assistance, facilities and supplies that, in the NEB's opinion, the tribunal needs (section 48.28).

2.2.2.5 TRIBUNAL'S POWERS, DUTIES AND FUNCTIONS (SECTIONS 48.29 TO 48.34 AND 48.47(e))

A tribunal must conduct its hearings in Canada at the times and locations that it considers appropriate (section 48.29).

A tribunal has all the powers, rights and privileges of a superior court with respect to the attendance, swearing-in and examination of witnesses, the production and examination of documents, the enforcement of its orders and other matters needed to exercise its jurisdiction. A tribunal is not bound by the legal rules of evidence; however, it may not receive any evidence that would be inadmissible in a court by reason of any privilege²⁰ (section 48.3).

In adjudicating a person's claim for compensation or application for reconsideration, a tribunal may:

- require the person to undergo medical or other examinations that are reasonably necessary (section 48.31);
- adjudicate the matter on the basis of written submissions only (section 48.33); and
- refuse to hear a matter it considers frivolous or vexatious (section 48.32).

A tribunal may make rules it needs to adjudicate claims for compensation and applications for reconsideration, including rules respecting:

- procedures for making a claim or application and the information to be included in a claim or application;
- the conduct of its examination of claims and applications, including the conduct of hearings;
- the form and manner for submitting evidence; and
- a quorum (section 48.34).

The Governor in Council may make regulations respecting the effects of replacing a member of the tribunal, including the effects on evidence received and decisions made by the tribunal before the replacement was appointed (section 48.47(e)).

2.2.2.6 CLAIMS FOR COMPENSATION (SECTIONS 48.35 TO 48.38, 48.39(3) AND 48.48)

The Governor in Council may make regulations establishing the costs, losses and damages for which a tribunal may award compensation and regulations respecting that compensation. However, any such regulations may not provide that the tribunal may award compensation for loss of non-use value in relation to damages caused to the environment (section 48.48).

Any person, organization or government may make a claim for compensation to a tribunal for damage caused by a release from a designated company's pipeline (section 48.35(1)). Such a claim must be made within the limitation period prescribed by regulations (section 48.35(1) and 48.48(1)(a)).

As soon as feasible after a claim is made, the chairperson must assign the claim either to the tribunal or to a panel that the chairperson establishes or that already exists. The chairperson must then notify the claimant, the designated company and the NEB that the claim has been assigned. A panel has the same powers, functions and duties as the tribunal – other than the power to make rules – with respect to a claim for compensation (sections 48.35(2) to 48.35(4)).

Tribunal hearings are to be held in public, but may be held in private if, in the tribunal's opinion:

- a public hearing would not be in the public interest;
- a person's privacy interest outweighs the principle that hearings be public; or
- confidential business information may be disclosed (section 48.36).

A tribunal may award interim compensation if the regulations authorize it to do so. It must notify the NEB of any interim amount awarded (sections 48.37 and 48.48(1)(b)).

A tribunal decides whether to award compensation and costs, and what amounts to award, in accordance with and as authorized by the regulations. In determining an amount of compensation, the tribunal must consider any other compensation the claimant has been paid for the damage claimed (section 48.38(1)).

A tribunal must notify a claimant and the designated company of its decision on a claim for compensation, and if it decides to award compensation or costs, it must also notify the NEB. The notice must indicate the amount of compensation and costs awarded, any reduction in the amount of compensation provided for in the regulations and any amounts already paid to the claimant for the relevant damage (sections 48.38(2) and 48.38(3)).

A tribunal may also award fees and travel expenses, if it is authorized to do so by the regulations. The tribunal must notify the NEB of any such awards (sections 48.39(3) and 48.48(1)(c)).

2.2.2.7 RECONSIDERATION AND JUDICIAL REVIEW OF A DECISION (SECTIONS 48.43 TO 48.45)

2.2.2.7.1 RECONSIDERATION OF A DECISION (SECTIONS 48.43 TO 48.44)

A tribunal or a panel of the tribunal may reconsider its decision with respect to a claim if the chairperson is of the opinion that reconsideration is warranted because of extraordinary factors. The tribunal's reconsideration may be on its own motion or on the application of a claimant (section 48.43(1)). The chairperson must notify the applicant, the designated company and the NEB if a decision will be reconsidered (section 48.43(2)).

After its reconsideration, the tribunal or a panel may confirm, amend or rescind the original decision (section 48.43(1)). If the tribunal decides to amend its original decision, it must decide whether to award compensation and costs, and, if so, what amounts to award (section 48.44(1)). The tribunal or panel must then notify the applicant, the designated company and the NEB of its decision on reconsideration (section 48.44(2)). If the tribunal or panel amends the original decision, the notice must indicate the new amount of compensation and costs awarded, any reduction in the amount of compensation provided for in the regulations, and any amounts that have already been paid on the claim (section 48.44(3)).

2.2.2.7.2 JUDICIAL REVIEW OF A DECISION (SECTION 48.45)

Except that a decision may be reconsidered, as described in section 2.2.2.7.1 of this Legislative Summary, every decision of a tribunal is final and conclusive and is not to be questioned or reviewed in any court except in Federal Court on the grounds that the tribunal:

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- failed to observe a principle of natural justice, procedural fairness or other required legal procedure; or
- acted, or failed to act, by reason of fraud or perjured evidence.

2.2.2.8 PAYMENTS (SECTIONS 48.17, 48.39 TO 48.42 AND 48.46)

2.2.2.8.1 PAYMENTS BY THE NATIONAL ENERGY BOARD (SECTIONS 48.39 TO 48.42, 48.46(2) TO 48.46(3) AND 48.48)

Using money from the Consolidated Revenue Fund²¹ (as described in the next section – 2.2.2.8.2 – of this Legislative Summary), the NEB must pay to a claimant any compensation, including interim compensation, and costs awarded by the tribunal along with any interest payable on compensation (section 48.39(1)). Payments must be made within the period prescribed by regulations (sections 48.39(1), 48.48(1)(g) and 48.48(1)(h)). If regulations provide for interest on compensation, the interest accrues at the same rate as interest paid by the government on refunds for tax overpayments under the *Income Tax Act* (sections 48.39(2) and 48.48(1)(j)). The NEB must also pay any fees and travel expenses awarded by the tribunal (section 48.39(3)).

Of the total amount of money paid out of the Consolidated Revenue Fund in respect of a release, the Minister of Finance may establish a portion to be used solely by the NEB to pay claimants (other than their fees and travel expenses). The Minister of Finance establishes the portion by order after consultation with the Minister of Natural Resources (section 48.46(2)). The establishment of this portion places an upper limit on the total amount of money that the NEB may pay to claimants in respect of a release (section 48.4). If the Minister of Finance establishes a portion, the Minister of Natural Resources must publish a notice in the *Canada Gazette* setting out the portion (section 48.46(3)).

The Governor in Council may make regulations relating to the tribunal, including regulations establishing an order of priority for awarding compensation; fixing the maximum amount of compensation that may be awarded to a claimant, including in respect of a class of compensable damage; providing for the reduction of compensation, including in respect of a class of compensable damage; and providing for the payment to a claimant in a lump sum or in multiple payments over time (sections 48.48(1)(d) to 48.48(1)(f), 48.48(1)(i) and 48.48(1)(k)).

An amount that the NEB overpays to a claimant – including because the tribunal rescinded or amended a payment decision – is a debt due to the federal government. To recover the debt, the government may retain, from any payment it owes to the claimant, the appropriate amount²² (section 48.41).

Every three months, the NEB must submit to the ministers of Finance and Natural Resources a report on the amounts of compensation and costs awarded by the tribunal and paid by the NEB (section 48.42).

2.2.2.8.2 PAYMENTS FROM THE CONSOLIDATED REVENUE FUND (SECTION 48.46(1))

The government may pay for various costs, remunerations and expenses from the Consolidated Revenue Fund. The amount of a payment is established by the Minister of Finance on the recommendation of the Minister of Natural Resources. This amount may be used to pay:

- costs and expenses incurred by the NEB or an authorized third party in taking any necessary action or measure in relation to a release from the pipeline of a designated company;
- costs of a tribunal, including costs of publishing the public notice, remuneration and expense of members and specialists, remuneration of staff and costs for assistance, facilities or supplies; and
- payments the NEB makes to claimants for compensation, costs, interest, fees and travel expenses.

2.2.2.8.3 REGULATIONS TO RECOVER PAYMENTS OUT OF THE CONSOLIDATED REVENUE FUND (SECTIONS 48.17 AND 48.46(4))

To recover amounts paid out of the Consolidated Revenue Fund – even if those amounts exceed a pipeline company's liability limit – the NEB may make regulations:²³

- imposing fees, levies or charges on a designated company and other pipeline companies that construct or operate pipelines similar to that of the designated company; and
- prescribing how fees, levies and charges are to be calculated and paid to the NEB (section 48.17(1)).

Such regulations may specify the interest rate or the manner of calculating the interest rate payable on any overdue fee, levy or charge and the time from which

interest is payable (section 48.17(2)). Fees, levies or charges and any related interest payable on them constitute a debt due to the federal government that may be recovered in any court of competent jurisdiction (section 48.17(3)).

In section 48.46(4), which bears the marginal note “Repayment,” the bill states: “The Board shall deposit the amounts paid out under subsection (1) to the credit of the Receiver General in accordance with the terms and conditions established by the Minister of Finance.” It appears that this section means that, following a payment out of the Consolidated Revenue Fund, any monies the NEB recovers must be deposited to the credit of the Receiver General. Monies may be recovered from pipeline companies under regulations described above (section 48.17(1)).

2.3 SENTENCING PROVISIONS (CLAUSE 37)

2.3.1 PRINCIPLES AND AGGRAVATING FACTORS (SECTION 132)

The NEB Act currently contains no provisions regarding sentencing for offences under the Act. Rather, it relies on principles of general application set out in the *Criminal Code*.²⁴

Bill C-46 adds new sentencing principles and aggravating factors to the NEB Act. A court must consider these principles and factors – in addition to those set out in the *Criminal Code* – when sentencing a person under the NEB Act for an offence related to an actual or potential pipeline release.

The principles are that the amount of the fine should

- be increased to account for each aggravating factor of the offence; and
- reflect the gravity of each aggravating factor (section 132(1)).

The aggravating factors are as follows:

- the offence risked, harmed or damaged²⁵ human health or safety; environmental quality; or any unique, rare, particularly important or vulnerable component of the environment;
- the damage or harm caused is extensive, persistent or irreparable;
- the offender committed the offence intentionally or recklessly; failed to take reasonable steps to prevent the commission of the offence; or was motivated by the prospect of financial gain;
- the offender has a history of non-compliance with safety or environmental legislation; and
- after the offence was committed, the offender tried to conceal its commission or failed to take prompt action to prevent or mitigate its effects or to reduce the risk of committing similar offences (section 132(2)).

The absence of an aggravating factor is not a mitigating factor (section 132(3)). If the court does not increase the amount of a fine despite the existence of one or more aggravating factors, it must give reasons for that decision (section 132(5)).

2.3.2 ORDERS OF COURT (SECTION 132.1)

Bill C-46 adds to the NEB Act a new list of types of orders a court may impose on a person found guilty of an offence related to a pipeline release. A court may impose these types of orders in addition to any other punishment that may be imposed under the NEB Act, such as a fine or imprisonment.

Permissible types of orders are as follows:

- a prohibition against
 - committing an act or engaging in an activity that may result in the continuation or repetition of the offence; or
 - applying for any new authorization under the NEB Act during a specific period;
- a direction to the offender to
 - take appropriate action to remedy or avoid environmental harm;
 - carry out or pay for environmental effects monitoring;
 - make certain changes to the offender's environmental protection program;
 - have an environmental audit conducted and take appropriate measures to remedy deficiencies revealed during the audit;
 - pay money into the Environmental Damages Fund;²⁶ to environmental, health or other groups; or to an educational institution, including for scholarships in environmental studies;
 - notify any aggrieved person of – or publish²⁷ – the facts of the offence, including the punishment and any orders imposed;
 - post a bond or pay money into court to ensure the offender's compliance with any prohibition, direction, requirement or condition;
 - perform community service, subject to any reasonable conditions; and
- a requirement that the offender comply with appropriate conditions to secure the offender's good conduct and prevent recidivism (section 132.1(1)).

An order may come into force when it is made or on a later day, but it may continue in force only for up to three years (section 132.1(2)).

2.3.3 VARIATION OF AN ORDER (SECTIONS 132.2 AND 132.3)

If a court makes an order in relation to a conviction for an offence related to a pipeline release and the offender's circumstances subsequently change, the offender or the NEB may apply to the court for a variation. After hearing from the offender and the NEB, the court may change any prohibition, direction, requirement or condition, or relieve the offender from complying with a condition. Also, the court may extend

the time during which an order remains in force by up to one year, or decrease the time (section 132.2(1)).

Before varying an order, the court may direct that notice be given to interested persons, and the court may hear any of those persons (section 132.2(2)).

Once a court has heard an application for variation of an order in relation to an offender, permission of the court is needed before another such application may be made (section 132.3).

2.3.4 RECOVERY OF FINES AND AMOUNTS (SECTION 132.4)

If an offender fails to pay a fine the court has imposed or an amount the court has ordered the offender to pay, the prosecutor may file²⁸ the conviction or order in a court of competent jurisdiction, which has the effect of entering as a judgment the amount of the fine or the amount ordered to be paid, and costs, if any. The judgment is then enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings.

2.4 PROVISIONS RELATING TO THE ABANDONMENT OF PIPELINES (CLAUSES 5, 12 TO 15(1), 16, 17(1), 17(2), 19, 24 TO 33, 36 AND 39 TO 42)

2.4.1 OVERVIEW OF PROVISIONS RELATING TO THE ABANDONMENT OF PIPELINES (CLAUSES 12 AND 14)

The NEB Act and COGO Act each contain provisions relating to the abandonment of a pipeline. Notably, each Act requires a company to obtain the NEB's permission before abandoning the operation of a pipeline (section 74(1) of the NEB Act and section 4.01(1) of the COGO Act). The Acts also provide for regulations governing the abandonment of a pipeline (section 48(2) of the NEB Act and section 14(1)(c) of the COGO Act).

Bill C-46 adds new provisions relating to abandoned pipelines, and it adjusts relevant subtitles in the NEB Act to reflect the new provisions added (clauses 12 and 14).

2.4.2 MEANING OF THE TERM "COMPANY" IN THE CONTEXT OF AN ABANDONED PIPELINE (CLAUSE 13)

The NEB Act uses the term "company" to refer to a person with authority to construct or operate a pipeline. Bill C-46 specifies that for any matter relating to an abandoned pipeline, "company" refers to a successor or assign of a company (new section 29(4) of the NEB Act).

Similarly for the COGO Act, Bill C-46 adds the concept of a "successor or assign" of a pipeline company or any person who has been granted permission to abandon the operation of a pipeline (for example, see clause 42, which amends section 5.37 of the COGO Act).

2.4.3 POWERS RELATING TO ABANDONED PIPELINES (CLAUSES 5, 15(1), 24, 25, 36 AND 40 TO 42)

The bill expands the NEB's current authority to inquire into accidents involving a pipeline to allow the NEB also to inquire into accidents involving an abandoned pipeline (clause 5 amends section 12(1.1) of the NEB Act). It also gives the NEB new powers to make regulations, with the Governor in Council's approval:

- governing abandoned pipelines (clause 15(1) amends section 48(2) of the NEB Act); and
- requiring companies that have been granted leave to abandon the operation of a pipeline to keep certain records, books of account and other documents and to make them available to the NEB for inspection as may be prescribed by the regulations (clause 36 adds section 129(1)(d)(i.1) to the NEB Act). For the COGO Act, the bill expands an existing requirement to keep documents and make them available to the NEB so that the requirement applies to a company that has been given permission to abandon a pipeline (clause 42 amends section 5.37 of the COGO Act).

In addition, the bill extends provisions in the NEB Act that grant a company powers to construct, maintain and operate its pipeline such that the powers also allow for a company to abandon a pipeline and maintain its abandoned pipeline. Such powers include, for example, the ability to purchase any land from any person and to construct and maintain roads and buildings (clause 24 amends section 73 of the NEB Act).

The bill amends the COGO Act to allow a person – for the purpose of maintaining safety or protecting the environment – to enter on and use the surface of the land in any area in which the Act applies in order to access the person's abandoned pipeline (clause 41 adds section 5.01(1.1), and makes consequential changes to sections 5.01(2) and 5.01(3) of the COGO Act).

The NEB is given the power to impose any terms and conditions it considers proper on granting permission to a company to abandon the operation of a pipeline (clause 25 adds section 74(2.1) to the NEB Act and clause 40 adds section 4.01(2.1) to the COGO Act).

2.4.4 INSPECTION OFFICERS AND ORDERS RELATING TO ABANDONED PIPELINES (CLAUSES 15(1), 17(1), 17(2) AND 19)

Bill C-46 expands an inspection officer's role to include ensuring the safety and security of abandoned pipelines (clause 17(1) amends section 49(1)(b.1) of the NEB Act). The bill also empowers an inspection officer to examine and make copies of any information relating to the maintenance of an abandoned pipeline (clause 17(3) amends section 49(2)(c) of the NEB Act).

Bill C-46 amends two existing types of orders so that they apply in respect of an abandoned pipeline:

- Under section 48(1.1) of the NEB Act, the NEB may order a company to take measures that the NEB considers necessary for the safety and security of a pipeline. Under the bill, such an order may also be made in respect of an abandoned pipeline, and the NEB may make the order for the safety and security of the public, of the company's employees or of the pipeline or abandoned pipeline; or for the protection of property or the environment (clause 15(1) amends section 48(1.1) of the NEB Act).
- Under section 51.1(1) of the NEB Act, an authorized inspection officer may make an order to address a hazard to people or a detriment to property or the environment that is being or will be caused by the construction, operation, maintenance or abandonment of a pipeline, or any part of it; an excavation activity;²⁹ or the construction of a facility across, on, along or under the pipeline. Under the bill, such an order may also be made in respect of an abandoned pipeline (clauses 19(1) and 19(2), respectively, add section 51.1(1)(a.1) and amend section 51.1(2)(a) of the NEB Act). Also, the bill expands the list of persons against whom an order may be made, to include any person taking any action or measure with respect to the pipeline or the abandoned pipeline, any person responsible for a ground disturbance or any person involved in the construction of the facility (clause 19(3) amends section 51.1(2)(b) of the NEB Act).

If a company does not comply with either type of order, the bill provides that the NEB or its staff is authorized to take any action or measure it considers necessary – or it may authorize a third party to take such action or measure – in relation to the company's abandonment of a pipeline or to the abandoned pipeline (clause 15(1) adds section 48(1.2) to the NEB Act). No legal action may be taken against the NEB, its staff, the federal government or a federal employee for anything done or not done in taking any such action or measure (clause 15(1) adds section 48(1.3) to the NEB Act). Similarly, an authorized third party that takes the action or measure is not liable in respect of any related act or omission, unless the third party did not act reasonably in the circumstances (clause 15(1) adds section 48(1.4) to the NEB Act).

2.4.5 PROHIBITION AGAINST CONTACTING, ALTERING OR REMOVING AN ABANDONED PIPELINE (CLAUSE 16)

The bill adds a new section 48.1 to the NEB Act prohibiting any person from making contact with, altering or removing an abandoned pipeline without the NEB's permission. In giving permission, the NEB may impose any terms that it considers proper. The NEB may make orders or regulations governing when this permission is not necessary.

2.4.6 ENSURING THE ABILITY OF A COMPANY TO PAY FOR THE ABANDONMENT OF ITS PIPELINES (CLAUSES 16 AND 40)

New sections added to each of the NEB Act and the COGO Act empower the NEB to order a company to take any necessary measure to ensure the company is able to pay for the abandonment of its pipelines, including related costs and expenses (clause 16 adds section 48.49(1) to the NEB Act and clause 40 adds section 4.01(2.2) to the

COGO Act). If the NEB orders a company to maintain funds or security for this purpose, the NEB may require that the funds or security be used for this purpose (clause 16 adds section 48.49(2) to the NEB Act).

2.4.7 NEGOTIATION AND ARBITRATION PROCEDURES, INCLUDING TO DETERMINE COMPENSATION FOR DAMAGE CAUSED BY AN ABANDONED PIPELINE (CLAUSES 26 TO 33)

The NEB Act sets out negotiation and arbitration procedures to be used in determining compensation for damage caused by a pipeline, including certain types of claims against the company such as claims arising out of acquisition of lands for a pipeline or out of the inspection, maintenance or repair of a pipeline (section 84). Bill C-46 extends the application of these procedures to the determination of compensation for damage caused by an abandoned pipeline and claims against the company that are directly related to an abandoned pipeline (clause 26 amends section 84 of the NEB Act).

For situations in which a company acquires lands for a pipeline under an agreement with the landowner, the NEB Act lists provisions that must be included in the land acquisition agreement. Bill C-46 adds to the list, such that a land acquisition agreement must also provide for:

- compensation for damages caused by the company's operations, pipelines or abandoned pipelines; and
- indemnification from all liabilities resulting from the company's operations, pipelines or abandoned pipelines, other than liabilities caused by the fault, gross negligence or wilful misconduct of the landowner (clause 27 amends section 86(2) of the NEB Act).

If a company and a landowner do not agree on the amount of compensation for the acquisition of lands or for damages caused by the company's operations, the matter may be negotiated or arbitrated under procedures set out in the NEB Act (sections 88 and 90). Under Bill C-46, these procedures are also available if there is no agreement on compensation for damages caused by the company's pipelines or abandoned pipelines (clauses 28 and 29, respectively, amend sections 88(1) and 90(2) of the NEB Act).

The bill imposes a new, six-month deadline on the Minister of Natural Resources to establish an arbitration committee, if necessary, and serve notice on the committee after the company or the landowner serves the minister with a notice of arbitration (clause 30 amends section 91 of the NEB Act).

In a new section added to the NEB Act, the minister is empowered to appoint a replacement member of an arbitration committee if the incapacitation, resignation or death of a member results in the loss of quorum. If a replacement is appointed, evidence received before the replacement member was appointed is considered to have been received after the replacement. The committee remains bound by its decisions made before the replacement, unless it elects to review, vary or rescind a decision (clause 31 adds section 91.1 to the NEB Act).

Bill C-46 adds new time limits relating to the work of an arbitration committee:

- it must conclude a hearing within 18 months of being served with a complete notice of arbitration; and
- it must render a decision within 6 months of after concluding a hearing.

However, a committee's failure to conclude a hearing within 18 months does not affect its jurisdiction to deal with the matter, and its failure to render a decision within 6 months does not affect its obligation to render a decision (clauses 32 and 33 amend section 93(5) and add sections 93(6) and 95.1 to the NEB Act).

2.5 PROVISIONS REGULATING FACILITIES NEAR POWER LINES AND PIPELINES (CLAUSES 2, 18, 19, 23 AND 34)

2.5.1 PROVISIONS REGULATING FACILITIES NEAR POWER LINES (CLAUSE 23)

The NEB Act contains a provision empowering the NEB to make orders or regulations governing facilities constructed near power lines; power lines constructed near facilities (other than railways); and excavations within 30 metres of power lines (section 58.33). Bill C-46 adds a new section to the NEB Act empowering the NEB, by order, to exempt any person from the application of such an order or regulation (section 58.331(2)).

The NEB Act already empowers the NEB to make orders or regulations related to the need for a person to obtain permission from the board before excavating using power-operated equipment or explosives within 30 metres of an international or interprovincial power line (section 58.33(c)). Bill C-46 adds a new section specifying that any such orders or regulations may prohibit – for three working days – excavations beyond 30 metres of such a power line. The three-working-day period starts on the day a request to locate the line is made, and it may be extended if the person responsible for the line and the person making the request agree (section 58.331(1)).

The bill empowers inspection officers to ensure compliance with:

- an order or regulations governing facilities near power lines and power lines near facilities, including excavations within 30 metres of power lines;
- a requirement to obtain permission from the NEB before constructing a facility near an international or interprovincial power line or before excavating within 30 metres of such a power line;
- a requirement to obtain permission from the person responsible for an international or interprovincial power line before operating a vehicle or mobile equipment across the power line (unless the vehicle or equipment is operated on a highway or public road); or
- a direction of the NEB to the owner of an unauthorized facility that is near a power line (sections 58.331(3) and 58.331(4)).

The bill makes it an offence for a person to contravene any of these compliance measures. The possible punishments on conviction for this offence is, on conviction on indictment, a fine of up to \$1 million and/or imprisonment for up to 5 years and, on summary conviction, a fine of up to \$100,000 and/or imprisonment for up to one year (section 58.331(5)). Certain general enforcement provisions regarding officers of a corporation, proof of offence, continuing offence and limitation period apply to the offence (section 58.331(6)).

2.5.2 PROVISIONS REGULATING FACILITIES NEAR PIPELINES (CLAUSES 2, 18, 19 AND 34)

In addition to existing provisions governing facilities near power lines, the NEB Act contains a provision regulating facilities near a pipeline as well as excavations within 30 metres of a pipeline (section 112).

Bill C-46 amends this provision to eliminate the need to obtain permission from the NEB to construct a facility near a pipeline and the need to obtain permission from the company to operate a vehicle or mobile equipment across a pipeline. Under the bill, these activities are allowed if authorized by orders or regulations made by the NEB and done in accordance with them. The bill adds related regulatory powers (clauses 34(1) and 34(2), respectively, amend sections 112(1) and 112(2) and add sections 112(5)(a.2) and 112(5)(c) to the NEB Act).

Bill C-46 introduces a new term, “ground disturbance,” to replace the existing, undefined term, “excavation” in the context of pipelines.³⁰ A ground disturbance, as defined in a new section of the NEB Act, does not include a ground disturbance caused by cultivation within 45 centimetres of the surface of the ground or any other activity to a depth of less than 30 centimetres that does not reduce earth cover over a pipeline. However, a ground disturbance does include an activity specified in orders or regulations made under a new regulatory power, which the bill adds to the NEB Act (clauses 2 and 34(2), respectively, add a new definition in section 2 and a new regulatory power in section 112(5)(d) of the NEB Act). The bill further amends the NEB Act to regulate activities that cause a ground disturbance within an area that is to be prescribed by regulations (clauses 34(1) and 34(2), respectively, amend section 112(1) and add sections 112(5)(a.1) and 112(5)(a.3) to the NEB Act). A consequential amendment is made to a section providing for orders or regulations imposing a temporary prohibition on ground disturbances in an area that extends beyond the prescribed area (clause 34(3) amends section 112(5.1) of the NEB Act).

2.6 MISCELLANEOUS AMENDMENTS RELATED TO SAFETY (CLAUSES 8 TO 11, 15(2), 17, 20, 21, 41 AND 43 TO 46)

2.6.1 REGULATORY POWER (CLAUSE 15(2))

Bill C-46 gives the Governor in Council new powers to make regulations, on the recommendation of the Minister of Natural Resources, specifying requirements for monitoring pipelines and respecting actions or measures to be taken in case of an oil, gas or other type of spill from a pipeline (clause 15(2) adds section 48(2.3) to the NEB Act).

2.6.2 POWER OF THE NATIONAL ENERGY BOARD TO PROHIBIT ACTIVITIES (CLAUSES 8 TO 11, 43 AND 46)

Bill C-46 adds a new section to the COGO Act empowering the NEB to make orders or regulations prohibiting activities – and providing for exceptions to any such prohibitions – within a specified area around a pipeline, an abandoned pipeline or other work (clause 43 adds section 15.1 to the COGO Act).

The bill makes a related amendment to provide for enforcement of such an order or regulation. Currently, under the COGO Act, both a safety officer and the Chief Safety Officer have the power to order that an oil or gas operation cease, or be continued only in accordance with the terms of the order, if the officer is of the opinion that continuing the operation is likely to result in serious bodily injury (section 58 of the COGO Act). Bill C-46 expands this power such that:

- a conservation officer or the Chief Conservation Officer may also make such an order;
- an order may be made if the officer is of the opinion that continuing the operation or activity could result in harm to a person, damage to the environment or property or a breach of security, or is not in compliance with the COGO Act or its regulations; and
- the order may require the cessation of an activity that the NEB has prohibited around a pipeline, an abandoned pipeline or other work, or allow for its continuation only in accordance with specified terms (clause 46(1) amends section 58(1) of the COGO Act).

The bill makes related and consequential amendments to both the NEB Act and the COGO Act to recognize the new power and related responsibilities of a conservation officer and the Chief Conservation Officer. This new power and responsibilities are analogous to the existing power and responsibilities of a safety officer and the Chief Safety Officer with respect to an order (clauses 8 to 11 amend sections 28.4 and 28.6 and related headings in the NEB Act; clauses 46(2) to 46(4) amend sections 58(2) to 58(5) of the COGO Act).

2.6.3 EXPANSION OF ROLE OF INSPECTION OFFICERS (CLAUSES 17, 20, 21, 44 AND 45)

The bill expands an inspection officer's role beyond ensuring compliance with Part III of the NEB Act, which covers the construction and operation of pipelines, to include ensuring compliance with Part III.1 of the Act, which covers the construction and operation of power lines (clause 17(1) amends sections 49(1)(c) and 49(1)(d) of the NEB Act and clauses 20 and 21, respectively, amend sections 58.27(1) and 58.271 of the NEB Act).

Also relating to the powers of an inspection officer, the bill adds a new section clarifying that the existing section 49(2) of the Act empowers an inspection officer to conduct a compliance audit (clause 17(4) adds section 49(3) to the NEB Act). Similarly in the COGO Act, the bill clarifies that the existing powers given to officers include the power to conduct a compliance audit (clauses 44 and 45, respectively, add section 54(2) and make a consequential amendment to section 56 of the COGO Act).

The bill gives an inspection officer access to, and the power to inspect, any ground disturbance within a prescribed area around a pipeline (clause 17(2) amends section 49(2)(a)(ii) of the NEB Act). It also empowers an inspection officer to direct a person whose activity causes a ground disturbance or who is constructing a facility near a pipeline to provide information orally or in writing (clause 17(3) adds section 49(2)(b)(ii) to the NEB Act).

2.6.4 PURPOSE FOR ENTERING LAND (CLAUSE 41)

Section 5.01(1) of the COGO Act allows any person to enter on and use the surface of the land in any area in which the Act applies for the purpose of exploring for or exploiting oil or gas. Bill C-46 expands this section by adding two new purposes that entitle any person to enter on and use land: maintaining safety or protecting the environment.

2.7 CHANGES RELATING TO THE NATIONAL ENERGY BOARD (CLAUSES 3, 4, 6, 7 AND 38)

2.7.1 GOVERNANCE STRUCTURE (CLAUSES 3 AND 4)

Bill C-46 amends the NEB Act to make two changes to the governance structure of the NEB. Specifically, the bill:

- repeals a provision under which NEB members cease to hold office when they turn 70 years old (clause 3 amends section 3(3) of the NEB Act); and
- specifies that the Chairperson of the NEB decides whether the board sits in a panel (clause 4 amends section 6(2) of the NEB Act).

2.7.2 REQUIREMENTS TO TRANSFER OR VARY AN AUTHORIZATION (CLAUSES 6 AND 7)

The bill amends provisions that require the Governor in Council's approval before the NEB's variance or transfer of a certificate or licence, or variance of a permit, becomes effective. New exceptions are provided so that the Governor in Council's approval is not needed if a variance is simply a change in the name of the holder of a pipeline certificate or of a licence (clause 6 amends section 21(2) of the NEB Act). Similarly, under Bill C-46, the Governor in Council's approval is no longer needed for the NEB to transfer a certificate or a licence unless the board also proposes to impose new terms and conditions of the certificate or licence (clause 7 amends section 21.1 of the NEB Act).

2.7.3 REPORT TO PARLIAMENT (CLAUSE 38)

Bill C-46 extends the time limit – from three months to four months after the end of each fiscal year – for the NEB to submit its annual report to Parliament (clause 38 amends section 133 of the NEB Act).

2.8 TIME LIMITS RELATED TO LICENCES TO EXPORT OIL OR GAS (CLAUSE 35)

Bill C-46 adds new time limits to the existing procedure for obtaining a licence to export oil or gas.

The bill gives the NEB six months from the day it receives a complete application to decide whether to issue an export licence. The NEB must make that day public. The time an applicant takes to comply with any requirement of the NEB to provide more information or undertake a study is not included in the calculation of the time elapsed, as long as the NEB indicates that this is the case. The NEB must make public the day on which such a time begins and ends. A failure on the NEB's part to make a decision within the six-month time limit does not affect the NEB's jurisdiction to issue the licence. The Minister of Natural Resources may extend the NEB's time limit by up to three months. The Governor in Council, on the recommendation of the minister, may extend the time limit further (section 118.1 of the NEB Act).

The bill gives the Governor in Council three months to grant its approval of the NEB's decision to issue an oil or gas export licence in a situation where such approval is required by regulation. However, if the Governor in Council grants approval outside the three-month time limit, the NEB's jurisdiction to issue the licence is not affected (sections 118.2(1) and 118.2(2) of the NEB Act).

Bill C-46 gives the NEB seven days from the day on which the Governor in Council grants approval to issue an oil or gas export licence (section 118.2(3) of the NEB Act).

2.9 COMING INTO FORCE (CLAUSE 47)

The provisions of Bill C-46 come into force 12 months after the Royal Assent or on any earlier day(s) to be fixed by order of the Governor in Council.

NOTES

1. [Bill C-46: An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act](#), 2nd Session, 41st Parliament.
2. [National Energy Board Act](#), R.S.C. 1985, c. N-7 and [Canada Oil and Gas Operations Act](#), R.S.C. 1985, c. O-7.
3. Bill C-46, summary.
4. Penny Becklumb and Marc LeBlanc, [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](#), Publication no. 41-2-C22-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 13 June 2014.
5. [An Act to enact the Aviation Industry Indemnity Act, to amend the Aeronautics Act, the Canada Marine Act, the Marine Liability Act and the Canada Shipping Act, 2001 and to make consequential amendments to other Acts](#), S.C. 2014, c. 29.

6. Natural Resources Canada, [*Frequently Asked Questions \(FAQs\) Concerning Federally-Regulated Petroleum Pipelines in Canada*](#).
7. Ibid.
8. Because some events involved multiple reportable incidents, numbers for these categories do not sum exactly to the total number of incidents. See National Energy Board, [*Safety and Environmental Performance Dashboard*](#).
9. Ibid.
10. Alberta Resources Conservation Board, *ERCB Investigation Report: Plains Midstream Canada ULC, NPS 20 Rainbow Pipeline Failure, Licence No. 5592, Line No. 1, April 28, 2011*, 26 February 2013.
11. Plains All American Pipeline, "[Part I](#)," *Form 10-K for the fiscal year ended December 31, 2011*, p. 54.
12. National Transportation Safety Board, "[Pipeline Rupture and Oil Spill Accident Caused by Organizational Failures and Weak Regulations](#)," News release, 7 October 2012.
13. Enbridge, [*Overview of Marshall Spill*](#).
14. Enbridge Inc., [*Third Quarter Interim Report to Shareholders For the nine months ended September 30, 2014*](#).
15. Joint and several liability is a common law concept. When two or more persons are liable for losses, damages and costs resulting from a release, joint and several liability allows a claimant to exact the full amount of compensation due from any of the persons. The persons may seek reimbursement from one another according to the degree to which each person is at fault or negligent (section 48.12(2)). Solidary liability is the corresponding civil law (Quebec) term for joint and several liability.
16. Under Bill C-46 (section 48.12(8)), costs and expenses recoverable by a government are not recoverable under section 42(1) of the [*Fisheries Act*](#), R.S.C. 1985, c. F-14. That section of the *Fisheries Act* imposes liability for costs and expenses incurred by the federal or a provincial government in relation to the unauthorized deposit of a deleterious substance into waters frequented by fish.
17. *Use values* and *non-use values* are defined in Environment Canada, [*Measuring Economic Values for the Environment*](#) as follows:

Use values are associated with direct use of the environment such as fishing and swimming in a lake, hiking in a forest – or commercial uses such as logging or farming. Non-use values are related to the knowledge of the continued existence of the environment (*existence values*), or the need to leave environmental resources to future generations (*bequest values*).
18. Only the federal or a provincial government may initiate proceedings to recover a loss of non-use value (section 48.12(9)).
19. A court of competent jurisdiction is a court that has jurisdiction over the person and the subject matter and that has the power to award the remedy sought ([*R. v. 974649 Ontario Inc.*](#), [2001] 3 S.C.R. 575, 2001 SCC 81). The jurisdiction of certain courts, such as the Federal Court, is set out in legislation such as the [*Federal Courts Act*](#), R.S.C. 1985, c. F-7. Provincial and territorial superior courts, which are known by various names depending on the province or territory, "have 'inherent jurisdiction,' which means that they can hear cases in any area except those that are specifically limited to another level of court" (Department of Justice, [*Canada's Court System*](#)).

20. “[P]rivilege is, primarily, a rule of evidence that prevents admission into evidence of certain types of ‘special’ information. The law of privilege recognizes that there are certain types of communications and relationships that are integral to the just operation of society, and the law of privilege is designed to foster those communications and relationships by assuring people that the resulting evidence will not be admissible in court” (John S. Logan and Michael Dew, [“Overview of Privilege and Confidentiality,”](#) Prepared for the Continuing Legal Education Society of British Columbia, June 2011, p. 2).
21. The Consolidated Revenue Fund is “the account into which the government deposits taxes, tariffs, excises and other revenues, once collected, and from which it withdraws the money it requires to cover its expenditures” (Audrey O’Brien and Marc Bosc, eds., [“Basic Components of Financial Operations,”](#) *House of Commons Procedure and Practice*, 2nd ed., House of Commons, Ottawa, 2009).
22. This means of the government satisfying a debt is set out in section 155 of the [Financial Administration Act](#), R.S.C. 1985, c. F-11.
23. Any such regulations are subject to the Treasury Board’s approval (clause 16 adds section 48.17(1)).
24. See [Criminal Code](#), R.S.C. 1985, c. C-46, ss. 718.1–718.2.
25. Damage includes loss of use value and non-use value (section 132(4)).
26. The Environmental Damages Fund, held is an account in the accounts of Canada, that is “administered by Environment Canada, to provide a mechanism for directing funds received as a result of fines, court orders, and voluntary payments to priority projects that will benefit our natural environment” (Environment Canada, [Environmental Damages Fund](#)).
27. If an offender does not comply with a publication order, the NEB may carry out that order. The NEB may recover publication costs from the offender, including as a debt to the federal government that is recoverable in court (sections 132.1(3) and 132.1(4)).
28. To “file” a document with a court is to formally submit it to the court.
29. Note that Bill C-46 replaces the term “excavation activity” with “ground disturbance” in the NEB Act and in the context of a pipeline. See section 2.5.2 of this Legislative Summary for more information.
30. Clauses 18 and 19, respectively, amend sections 51 and 51.1 of the NEB Act to replace the term *excavation* with *ground disturbance*. The context of these two amendments is that of an inspection officer being given reasonable assistance from a person whose activity causes a ground disturbance, and of an inspection officer making an order in relation to a hazard caused by a ground disturbance.