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And Now Some Good News for a Change: The Energy Safety and Security Act

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

At the end of last month, while all eyes were fixed on the U.S. State Department's release of the Final Supplemental Environmental Impact Statement (EIS) for TransCanada's Keystone XL pipeline (discussed by my colleague Professor James Coleman here), the federal government quietly introduced Bill C-22, the *Energy Safety and Security Act* (*ESSA*), for first reading in the House of Commons. Bill C-22 has two parts, the first dealing with offshore oil and gas operations, the second with the liability regime applicable to nuclear incidents. This post focuses on the changes to the offshore liability regime and then briefly considers what *ESSA* tells us about the development of effective environmental laws and policies in Canada.

The *Energy Safety and Security Act*: From Laggard to Leapfrog?

It is sometimes suggested in certain matters of national policy, including energy and the environment, that Canada is of necessity a follower, not a leader. Certainly, this is the view of the current federal government with respect to climate change (for a contrary view, see here). But Canada's record as a taker – if not a laggard – in the environmental context goes back at least forty years. It was just over forty years ago that the United States enacted their endangered species legislation, while Canada's *Species At Risk Act*, SC 2002, c 29 (*SARA*) is barely a decade old. Similarly, the U.S. environmental assessment (EA) legislation, the *National Environmental Policy Act*, 42 USC 4321 et seq. (pursuant to which Keystone XL was assessed) is widely regarded as the progenitor of *all* EA laws, including Canada's. In the offshore oil and gas liability context, the minutiae of the regimes make generalizations difficult but overall Canada appears late to the game here too; the U.S. *Oil Pollution Act (OPA)*, 33 USC 40, which contains many of the provisions discussed below, was passed over two decades ago (in 1990 following the *Exxon Valdez* oil spill). As discussed below, however, *ESSA* represents a rare opportunity for Canada to leap ahead of the U.S. in this context.

Assuming it is passed without major amendment, Part I of *ESSA* will amend the *Canada Oil and Gas Operations Act*, RSC 1985, c O-7 *(COGOA)*, the *Canada Petroleum Resources Act*, RSC

1985, c 36, the *Canada-Newfoundland Atlantic Accord Implementation Act*, SC 1987, c 3 (*CNAAIA*), and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c 28 (*CNSOPRIA*). As described in a backgrounder prepared by Natural Resources Canada, "[t]he proposed changes focus on four main areas — prevention, response, accountability and transparency — and they help to further strengthen safety and security to prevent incidents and ensure swift response in the unlikely event of a spill."

This post focuses on accountability, with respect to which *ESSA* does five principle things:

1. References the "polluter pays" principle explicitly in legislation;
2. Maintains and reinforces that liability is unlimited where fault or negligence is proven;
3. Raises the absolute liability (*i.e.* where there has been no fault or negligence) to $1 billion from $30 million (Atlantic offshore areas) or $40 million (Arctic);
4. Establishes a basis for governments to seek environmental damages;
5. Establishes that authorization holders are liable for the actions of their contractors.

ESSA accomplishes this by amending the relevant liability provisions of the above-noted Acts. Thus, paragraphs 26(1)(a) and (b) of *COGOA* will be amended as set out **here** (underlining is from text of Bill C-22 as found on the Parliament of Canada's website; see also new paras. 167(1)(*a*) and (*b*) of the *CNSOPRAIA* and new paras. 162(1)(*a*) and (*b*) of the *CNAAIA*).

Thus, point 2 (unlimited liability in the case of negligence or fault) is maintained through new para. 26(1)(a). Point 3 (increased absolute liability) is achieved through the combined operation of new para. 26(1)(b) and new subs. 26(2.2) (in contrast to the current regime, whereby limits are contained in regulations, subs. 26(2.2) sets out statutory limits (e.g. $1 billion) although a new subs. 26(2.3) will allow these to be amended by regulations). Point 4 (environmental damages) is achieved through new subpara. 26(1)(a)(iii), which refers to the loss of "non-use value relating to a public resource that is affected by a spill." (See the new section 26(2) for similar changes with respect to losses caused by debris). Of all these changes, it is arguably the increases in absolute liability that put *ESSA* ahead of the U.S. *OPA* (see §2704).

With respect to point 4, some readers might reasonably be wondering what exactly "non-use value" is, and how those words translate into "a basis for governments to seek environmental damages." "Non-use value" is a term borrowed from environmental economics to describe environmental values that are derived not from the environment's actual use (these are unimaginatively referred to as "use value") but rather from its mere existence. The Supreme Court of Canada actually discussed both of these kinds of value in *Canadian Forest Products v. British Columbia*, [2004] 2 SCR 74 (at para. 138), widely regarded by both academics (see *e.g.* Jerry V. DeMarco et al., *Opening the Door for Common Law Environmental Protection in Canada: The Decision in [Canfor]*" (2005) 15(2) J Env L & Prac 233) and the private bar as having "opened the door" to common law liability for environmental damages in Canada:

> "Use value" includes the services provided by the ecosystem to human beings, including food sources, water quality and recreational opportunities. Even if the public are not charged for these services, it may be possible to quantify them economically by observing what the public pays for comparable services on the market.
>
> "Passive use" or "existence" [non-use] value recognizes that a member of the public may be prepared to pay something for the protection of a natural resource,

> even if he or she never directly uses it. It includes both the psychological benefit to the public of knowing that the resource is protected, and the option value of being able to use it in the future.

Although the wording could be clearer, it is arguable that *COGOA* already establishes liability for lost "use values" through its definition of "actual loss or damage," which subsection 24(3) currently defines as "include[ing] loss of income, including future income, and, with respect to any Aboriginal peoples of Canada, includes loss of hunting, fishing and gathering opportunities." Thus, *ESSA*'s primary contribution here is to explicitly expand the scope of environmental liability to include non-use values, the significance of which can be gauged relatively simply by considering that the *minimum* estimated value of lost non-use values following the *Valdez* oil spill was $2.8 billion (US) (see Richard T Carson et al, "Contingent Valuation and Lost Passive Use: Damages from the Exxon Valdez Oil Spill" (2003) 25:3 Envtl & Resource Econ 257 at 278; there do not appear to be any publicly available estimates of lost non-use values associated with BP's Deepwater Horizon spill in the Gulf of Mexico, although these too will undoubtedly be substantial).

There are other aspects of the *ESSA* that are noteworthy, and still others that could be improved. For example, the U.S. *OPA* authorizes not only federal and state governments to recover what are referred to there as "natural resources damages", but also Indian tribes (see §2706(a)(3)). *ESSA* limits the right to recover non-use values to the federal, provincial and (through operation of s 35 of the *Interpretation Act*, RSC 1985, c I-21) territorial governments (see new section 26(2.6)), which seems strange in light of the focus, with respect to "actual loss or damage," on what are essentially Aboriginal use-values, and in light of the fact that several First Nations have Aboriginal title claims in coastal waters (see *e.g. Ahousaht Indian Band v. AG of Canada*, 2007 BCSC 1162 (CanLII)). The *OPA* also authorizes the promulgation of regulations with respect to the assessment of damages, compliance with which creates a rebuttable presumption of accuracy in the event of litigation (see § 2707), but no such regulations are contemplated by *ESSA*. *ESSA* also raises the financial capacity requirements of operators, which is to say proof of sufficient financial resources now to pay for any future liability (new subsections 26.1(1) and (2)), but these are limited by the absolute liability caps (new section 26(2.2)) and the National Energy Board "is not required to consider any potential loss of non-use value relating to a public resource that is affected by a spill" when determining those amounts (new subsection 26.1(3)).

Finally, *ESSA* continues the trend set by the federal government's 2009 *Environmental Enforcement Act*, SC 2009, c 14 (*EEA*), which is to incorporate environmental damages assessment (through the inclusion of the terms "use and non-use value") into the regulatory offences context, authorizing judges to consider the loss of such values when determining the sentence to be imposed where an offence has been committed (for *COGOA*, see new subsections 60(3) to (7)). On this front, however, it should be pointed out that five years on and notwithstanding the fact that the *EEA* amended several of Canada's more prominent environmental laws, including the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, there is still not a single reported decision where environmental damages have been assessed and quantified for the purposes of sentencing (University of Alberta professor and environmental economist Peter Boxall and I have recently prepared a paper on this state of affairs that we will be presenting at the Canadian Institute for Resources Law's Environmental Law Symposium in Halifax, N.S. next week).

While there are still more aspects of *ESSA* worth considering (some are discussed here), it seems clear that overall, and in contrast to almost every other piece of federal environmental legislation

in the last couple of years, *ESSA* is a good news story. Below I briefly offer one possible explanation for this outcome, which is also relevant to another recent development in the Canadian environmental law and policy landscape.

The Commissioner of the Environment and Sustainable Development (CESD): Objective Research and Analysis

What does the CESD have to do with *ESSA*? As it turns out, *a lot*. As noted in the NRCan backgrounder cited above, the *ESSA*'s provisions are intended to "address recommendations from the [CESD] in his fall 2012 report" (Exhibit 2.4 of that report, Canada's offshore oil and gas absolute liability regime as compared with other countries, is particularly relevant to the discussion above).

The CESD is an environmental watchdog position within the Office of the Auditor General of Canada whose job is to provide parliamentarians with "objective, independent analysis and recommendations on the federal government's efforts to protect the environment and foster sustainable development." This is accomplished by conducting performance audits and overseeing an environmental petitions process (for more information on the CESD's mandate, see here), something that the previous Commissioner, Scott Vaughn, did with exceptional rigour and professionalism for five years until moving on to the International Institute for Sustainable Development last year. If you want to debate Canada's environmental record, whether in the classroom or at the pub, then you need to read the CESD's Reports to Parliament, which include chapters on:

- Conservation of Migratory Birds;
- Funding Programs for Species at Risk;
- Ecological Integrity in National Parks;
- Atlantic Offshore Oil and Gas Activities;
- Financial Assurances for Environmental Risks;
- Marine Protected Areas;
- Federal Support to the Fossil Fuel Sector;
- Meeting Canada's 2020 Climate Change Commitments [non-Kyoto];
- Federal Contaminated Sites and Their Impacts;
- Environmental Science;
- Assessing Cumulative Environmental Effects of Oil Sands Projects;
- Enforcing the Canadian Environmental Protection Act, 1999;
- Oil Spills from Ships;
- National Pollutant Release Inventory;
- Protecting Fish Habitat;

For those readers still not inclined to use these easy-to-follow links but willing to take my word for it (spoiler alert), I am being generous when I say that in most of these areas the federal government's performance has been less than stellar. But while such news may not be welcome

to the government of the day (you can get a flavor for that here and here), the fact that parliamentarians – and Canadians generally – have access to this kind of information should be. Just like the Auditor General's more conventional (and similarly unpopular with sitting governments) financial audits, there can be no accountability and no improvement without such information.

This is not to suggest that the mere existence of such reports automatically leads to better policies and legislation. Such information is merely enabling; it must be acted upon. Herein, then, lies one explanation as to why *ESSA* is a good news story; unlike the environmental legislation contained in the omnibus budget bills of 2012 (see *e.g.* this post by Professor Arlene Kwasniak regarding the changes to the *Fisheries Act*, RSC 1985, c F-14), its provisions *are* based on objective research and analysis (honorable mentions should also go to the Eighth report of the Standing Senate Committee on Energy, the Environment and Natural Resources, 2010, released shortly after the *Deepwater Horizon* spill). *ESSA* is, in other words, an example of evidence-based policy.

It is for this reason – the invaluable service provided by the CESD – that I couldn't help notice last week's announcement regarding the appointment of a new Commissioner. According to that announcement, Ms. Julie Gelfand will bring a diversity of experience to the position, having served for over fifteen years as president of Nature Canada but also as Chief Advisor at Rio Tinto Canada and Vice-President of Sustainable Development at the Mining Association of Canada (MAC). When asked about how she might approach her new position in a recent interview with soon-to-be-former Postmedia News energy and environment reporter Mike De Souza, Ms. Gelfand talked about bringing different perspectives on environmental sustainability and "as much balance as possible." I don't know how "different perspectives" and "balance" fit within a mandate to provide objective and independent analysis and advice, but I do know that Canadians would not be well-served by a "kinder, gentler" CESD. I can think of countless positive words to describe former Auditor General Sheila Fraser, for example, but those two are not among them.