March 1, 2018

A Missed Opportunity to Strengthen Compliance and Enforcement under the Federal *Fisheries, Environmental Assessment* and *Canadian Energy Regulator Acts*

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Bills Commented On: Bill C-68, *An Act to Amend the Fisheries Act*, and Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and make consequential amendments to other Acts*

Many expected changes and even new approaches to compliance and enforcement under Bills C-68 and C-69. Unfortunately, this is not the case.

Bill C-68, amendments to the *Fisheries Act*, RSC 1985, c F-14, retains nearly intact the s 38(3) authority of designated fisheries officers to enter any place (other than a private dwelling house) to verify compliance with the *Act*. There is an important distinction between compliance – verifying that requirements are met, and enforcement – developing the file to support a charge, for example, deposit of a deleterious substance in waters frequented by fish contrary to s 36(3).

The existing *Act* provides that for a purpose related to verifying compliance, inspectors may enter any place other than a private dwelling house. They must believe on reasonable grounds that:

> (a) there is anything detrimental to fish habitat; or
>
> (b) there has been carried on … any work undertaking or activity resulting or likely to result in
>
> > (i) *serious harm to fish that are part of a commercial, recreational or Aboriginal fishery … ,* [or]
> >
> > (ii) the deposit of a deleterious substance in water frequented by fish…. (s 38(3), emphasis added)

The only change Bill C-68 makes is to replace para (i) above which includes "the serious harm to fish" with, "the death of fish" and to add, as subsection (i1), "the harmful alteration, disruption or destruction of fish habitat [HADD]…". These changes are necessary to accommodate the key s 35 reintroduction of the HADD provision and removal of the "commercial, recreational, Aboriginal fishery" restriction. The same changes are made in s 37, the Ministerial power to require information that will permit the Minister to determine whether a facility's operations are likely to result in the death of fish or will otherwise constitute an offence; and if so how this can be mitigated.

This means that the confusing "reasonable grounds" standard is retained for compliance activity even though case law, particularly *R v Jarvis*, 2002 SCC 73 (CanLII) has essentially limited this standard to investigative activity that engages s 8 of the *Charter*. The difficult issue is when an inspector, as the *Jarvis* court put it (at para 88), "cross[es] the Rubicon" from compliance assurance to investigation in which the dominant purpose is determination of penal liability. The risk in retaining the reasonable grounds standard for compliance activity is that Department of Fisheries and Oceans Canada (DFO) will be timid, thinking that reasonable grounds to believe an offence has been committed are necessary before any compliance or enforcement actions can be undertaken.

Under Bill C-69**,** the new *Impact Assessment Act* provides for designation of inspection officers by the Chief Executive Officer. Inspectors have powers authorizing entry to verify compliance or prevent noncompliance that are very similar to those under the *Fisheries Act* (Authority to Enter, *IAA* s 122). Authority to issue notices of noncompliance (*IAA* s 126) takes these powers a step further than *Fisheries Act* provisions. However, they include the "reasonable grounds" standard with the potential enforcement dampening effect discussed under Bill C-68 above.

The next step is at the level of investigation: authorized inspection officers who have reasonable grounds to believe that there is or is likely to be a contravention of core provisions of the *IAA* may issue an order requiring that activity stop or that compliance or mitigation measures be taken (s 127). These stop order provisions, which have no *Fisheries Act* equivalent, provide an expeditious and flexible enforcement alternative to offence provisions. Review of an order by an Impact Assessment Agency review officer may be requested (s 130), with a potential appeal to the Federal Court. The minister may apply for an injunction to prevent commission of an offence (s 140). Offences are essentially limited to failure to assist and obstruction of officers.

In the case of the new *Canadian Energy Regulator Act (CERA)*, another enforcement tool is administrative monetary penalties (AMPs), provided for in ss 115-135. AMPs already exist under Part X of the *National Energy Board Act*, RSC 1985, c N-7, which Bill C-69 will repeal. A person served with a notice of violation leading to an administrative monetary penalty may request a review by the Commission established under the *CERA*.

Otherwise, for compliance verification, *CERA* has authority to enter provisions similar to those in the *Impact Assessment Act*. There are also offences concerning obstruction of and failure to assist officers. In the case of offences in relation to actual or potential unintended or uncontrolled release of oil, gas or any other commodity from a pipeline, there are sentencing principles that list aggravating factors (s 174).

This post may be cited as: Alastair Lucas "A Missed Opportunity to Strengthen Compliance and Enforcement under the Federal *Fisheries*, *Environmental Assessment* and *Canadian Energy Regulator Acts*" (1 March, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/03/Blog_AL_BillC68_BillC69.pdf