

## **Back on the Omnibus with Bill C-45: Another Omnibus Budget Bill Drives More Change to Federal Environmental Law**

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As you may recall, in late April 2012, the federal government introduced [Bill C-38: An Act to Implement Certain Provisions of the Budget tabled in Parliament on March 29, 2012 and Other Measures](#) which received Royal Assent on June 29, 2012<sup>i</sup> and is now known as the *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19. The implementation of *Bill C-38* substantively changed federal environmental law in Canada.<sup>ii</sup> Over ten pieces of federal environmental legislation were amended or repealed by *Bill C-38*. Significant changes were made to federal environmental assessment law, fisheries law, and the operation of the National Energy Board.

On October 18, 2012, the federal government introduced [Bill C-45: A Second Act to Implement Certain Provisions of the Budget tabled in Parliament on March 29, 2012 and Other Measures](#). Again, significant changes will be made to federal environmental law by an omnibus budget bill. The proposed changes include amendments to federal environmental assessment law, fisheries law and the law protecting Canada's navigable waters. As well, *Bill C-45* proposes to enact the *Bridge to Strengthen Trade Act* which exempts the construction of an international bridge between Windsor and Detroit from a host of environmental laws.

### ***Canadian Environmental Assessment Act, 2012***<sup>iii</sup>

Only minor amendments are made to the *Canadian Environmental Assessment Act, 2012* by *Bill C-45*. The amendments appear to correct drafting mistakes that were made in the original version of the Act.

### ***Fisheries Act***<sup>iv</sup>

There are some minor amendments made to the *Fisheries Act* by *Bill C-45*. These changes include:

- a direction that all fines received for offences under the *Act* are to be paid into the Environmental Damages Fund;
- amending the provision relating to obstructing passage of fish or waters<sup>v</sup> by including seines and other fishing appliances as prohibited obstructions; and
- further amending the provision relating to obstructing passage of fish or waters<sup>vi</sup> by prohibiting fishing appliances that obstruct more than two-thirds of the width of any

river or stream or one-third of the width of the main channel at low tide of a tidal stream.

Under *Bill C-38*, there were numerous significant changes to the *Fisheries Act* which are not yet in force. Two of these pending provisions are further amended by *Bill C-45*:

- The definition of an aboriginal fishery will be expanded to include those fisheries which are used for purposes set out in a land claims agreement.
- A pending provision relating to fish-ways<sup>vii</sup> will be further amended. Under *Bill C-38*, the fish-ways provision includes a prohibition against obstructions more than two-thirds of the width of any river or stream or one-third of the width of the main channel at low tide of a tidal stream. This particular prohibition is to be removed by *Bill C-45*. Presumably, this prohibition is being removed from the provision relating to fish-ways because a similar prohibition is to be added into another provision of the *Fisheries Act* as detailed above.

Finally, the provisions in *Bill C-45* dealing with the transition from the old *Fisheries Act* to the version amended by *Bill C-38* will allow authorizations issued under the old *Fisheries Act* to be amended or cancelled. This means that commitments made under existing authorizations, including compensation for lost or damaged fish habitat, may ultimately be amended or cancelled by the Minister.

### ***Hazardous Materials Information Review Act***<sup>viii</sup>

The Hazardous Materials Information Review Commission (HMIRC), which is an arm's length administrative agency established under the *Hazardous Materials Information Review Act*, will be abolished by *Bill C-45*. The HMIRC focuses primarily on worker health and safety in relation to hazardous materials and its powers include:

- registering claims for trade-secret exemptions and issuing registry numbers;
- adjudicating and issuing decisions on the validity of claims for exemption using prescribed regulatory criteria;
- making decisions on the compliance of material safety data sheets and labels within the *Workplace Hazardous Materials Information System* requirements (as set out in the *Hazardous Products Act*, the *Controlled Products Regulations* and various provincial and territorial occupational health and safety acts); and
- convening independent, tripartite boards to hear appeals from claimants or affected parties on decisions and orders issued by the HMIRC.

Pursuant to *Bill C-45*, the powers of the HMIRC will be transferred to the Minister of Health.

### ***Navigable Waters Protection Act***<sup>ix</sup>

The most significant change to federal environmental law proposed by *Bill C-45* is to the law protecting Canada's navigable waters. The *Navigable Waters Protection Act (NWPA)* will be renamed the *Navigation Protection Act (NPA)* which apparently reflects the government's intention to remove the environmental dimension of protecting Canada's navigable waters.

Currently, the *NWPA* protects navigation rights on Canada's waters. Its prohibitions against creating obstructions and against deposition of materials in navigable waters have operated to provide environmental protection of Canadian waters. This environmental aspect of the *NWPA* was recognized by the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*:<sup>x</sup>

[Sections 21 and 22] of the *NWPA* are aimed directly at biophysical environmental concerns that affect navigation ...the [*NWPA*] has a more expansive environmental dimension given the common law context in which it was enacted.

The link between the *NWPA* and environmental protection was further enhanced by requiring federal environmental assessment of projects that required an approval under the *NWPA*. This link has been broken with the repeal of the previous *Canadian Environmental Assessment Act* and the replacement with the *Canadian Environmental Assessment Act, 2012* (which happened with *Bill C-38*).

The prohibitions against deposition of materials in navigable waters (sections 21 and 22) remain in the *NPA*:

- depositing sawdust, edgings, slabs, bark or like rubbish is prohibited, and
- throwing or depositing stone, gravel, earth, cinders, ashes or other material or rubbish that is liable to sink to the bottom of any water where there is not a minimum depth of 36 metres of water is prohibited.

As well, there is a new prohibition against dewatering (dewatering is not defined in the *NPA*). These prohibitions apply to any navigable water in Canada. However, the federal cabinet may choose to exempt any rivers, streams or waters from these prohibitions if such an exemption is in the public interest. As well, the Minister may designate dumping places for depositing stone, gravel, earth, cinders, ashes or other material even where there is not a minimum depth of 36 metres of water.

The main role of the *NWPA* has been to regulate the construction of works in, on, over, under, through or across any navigable waters. However, this role will be seriously curtailed by *Bill C-45* because the prohibition against constructing works in, on, over, under, through or across navigable waters will be limited to only those navigable waters included in the schedule to the *NPA*. The schedule includes 3 oceans, 97 lakes and portions of 62 rivers. This represents a very small portion of the total lakes and rivers in Canada.<sup>xi</sup>

This means that, unless the works will impact listed navigable waters, there will be no need to obtain an approval under the *NPA* to construct that works. Further, if the works falls into the definition of a “minor works” under regulations, there will be no need to obtain an approval under the *NPA* to construct that works. An approval to construct works under the *NPA* will be required only if:

- the works will be in, on, over, under, through or across a listed navigable water; and
- the works will substantially interfere with navigation.<sup>xii</sup>

It should be noted that the proponent of works on non-listed navigable waters may request that the *NPA* apply to its works.

The amendments to the *NWPA* raise an interesting legal situation. At common law, there is a right to navigate Canada’s waterways. This common law right is modified by the *NWPA* (and will be modified by the *NPA*) by allowing interference to navigation in accordance with approvals issued by the federal government. Given the restricted application of the *NPA*, this means all other navigable waters in Canada revert to the common law position that there cannot be interference with navigable waters. This position cannot be modified by the implementation of provincial or territorial laws because s.91 of the *Constitution Act* grants exclusive jurisdiction to the federal government over navigation and shipping.

### ***Bridge to Strengthen Trade Act***

Pursuant to *Bill C-45*, the *Bridge to Strengthen Trade Act* will be enacted. This *Act* applies to a proposed bridge connecting Windsor, Ontario to Detroit, Michigan. The *Act* declares that the construction of the bridge, parkway and related works is exempt from numerous pieces of environmental legislation.

The bridge will be exempt from the *Fisheries Act*, the *Navigable Waters Protection Act*, the *Species at Risk Act*, section 6 of the *International Bridges and Tunnels Act* and the *Port Authorities Operations Regulations*. The *Canadian Environmental Assessment Act, 2012*, with

the exception of sections 67 to 72, will not apply to this project. As well, the federal cabinet may exempt any person from any requirement under any other federal Act to obtain a permit, licence, approval or other authorization in relation to construction of the bridge, parkway or any related work.

In effect, there will be very little consideration of environmental concerns associated with construction of the bridge, parkway or any related work. The only potential for consideration of environmental concerns comes with the requirement on the project proponent to file a variety of plans with the Minister outlining measures to mitigate impacts on navigation, to offset loss of fish habitat, to mitigate impacts on listed species and to mitigate adverse environmental effects.

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<sup>i</sup> Many, but not all, provisions of *Bill C-38* came into force on the date of Royal Assent (i.e. June 29, 2012). Two notable exceptions are the provisions regarding *CEAA 2012* which came into force on July 6, 2012 by Order-in-Council, and the provisions amending section 35 of the *Fisheries Act* are being implemented in a two-step process.

<sup>ii</sup> See the [Environmental Law Centre's Analysis of Bill C-38](#).

<sup>iii</sup> *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52

<sup>iv</sup> *Fisheries Act*, R.S.C. 1985, c. F-14.

<sup>v</sup> *Supra*. note iv, s. 29.

<sup>vi</sup> *Supra*. note iv, s. 29.

<sup>vii</sup> This will be the new section 20 of the *Fisheries Act*, *supra* note iv, when proclaimed in force.

<sup>viii</sup> *Hazardous Materials Information Review Act*, R.S.C. 1985, c. 24 (3<sup>rd</sup> Supp), Part III.

<sup>ix</sup> *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22.

<sup>x</sup> [1992] 1 S.C.R. 3 at paras. 88 to 89.

<sup>xi</sup> The exact number of Canadian lakes and rivers is unknown. By some estimates, there are 2 million lakes and 2 million rivers located in Canada. In 1973, Environment Canada published the *Inventory of Freshwater Lakes* (Ottawa: Environment Canada, Inland Waters Branch) which counted 31,752 lakes of a size more than 400 km<sup>2</sup>. Even by this very conservative estimate, only about 3% of Canada's lakes will fall into the purview of the *NPA*.

<sup>xii</sup> In making this determination, the Minister must take into consideration several factors which are listed in section 5(4). None of these factors includes environmental concerns.