

BILL C-45 COMPLIANCE PROVISIONS

**By
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In the February issue of *Fisherman Life*, Christopher Harvey reviewed the Management Agreement provisions of Bill C-45. In March, Richard Keevil reviewed many of the provisions dealing with licensing and allocations. In this month's legal desk column, I will provide an overview of the new enforcement provisions proposed in Bill C-45.

Starting on a positive note, Department of Fisheries and Oceans ("DFO") deserves an "A" grade for modernizing a number of provisions including:

1. The Creation of a specialized independent tribunal to replace the courts over time with powers to impose fines up to \$30,000 and permanently revoke or partially suspend licenses as well as vary the conditions of licenses regarding the amount of fish caught or gear used;
2. Changing the provisions for having seized fishing vessel's released pending trial to allow the form and amount of security for release to be determined by the court or tribunal rather than the Minister;
3. Improving the relief from forfeiture provisions of the act respecting third parties who have legal interest in vessels being forfeited;
4. Creating an alternative measures program to deal with offences where at an early stage, the accused is prepared to accept responsibility for his or her offence;
5. Updating search and seizure powers; and
6. Modernizing a ticketing procedure for minor offences.

While giving D.F.O. qualified support for its efforts to modernize its enforcement provision, the "devil is in the details", and I would be remiss if I did not point out some of the problem areas that could use improvement.

One area where D.F.O. deserves a failing grade is in the creation of a 5 year limitation period for commencing legal proceedings for fisheries violations. This is particularly problematic in the fisheries context because the most common fisheries defence is a defence of due diligence. For example, if one failed to fill out one's log books by midnight of the day the fish were caught or failed to hail out because one was dealing with an onboard emergency such as an injured crew member, one would likely have a due diligence defence. However, 5 years after the fact it would be very difficult to remember what was happening on the night that a logbook did not get filled out or a hail out was not made. Under the *Criminal Code*, the limitation period for summary conviction offences

is 6 months. I would suggest that the limitation period under the *Fisheries Act* should be the same.

Another area that could be improved is dealing with the release of seized goods when a fish harvester is acquitted of an offence. Using the failing to hail out example once again, suppose DFO seized your fish boat and catch as a result of your failure to hail out. After waiting approximately one year to go to trial, you appear at trial, explain that you could not hail out because you were assisting an injured crewmember and are acquitted. Upon being acquitted, the court would order your boat returned to you and the proceeds from the sale of your catch returned to you. However, under s. 129(1) of the Bill C-45, the Crown would be allowed to charge you all of the costs of storing and maintaining your boat for a year. In addition, even though the proceeds of sale of your catch were used by the government, it would not be required to pay you interest. If the Crown were negligent, in selling your catch at less than market value, under s. 107 of the Bill, it would also be immune from any civil liability.

Although the provisions of the *Fisheries Act* dealing with the posting of security for the release of seized fish boats pending trial have been vastly improved, there is still room for improvement. For example, the wording of s. 88 could be interpreted to mean that one cannot bring an application to post security to release a boat until a “proceeding” has been commenced. Since s. 89(1) gives the Crown 90 days after seizing goods to decide whether or not to commence a proceeding, one may have to wait 90 days to bring an application to obtain release of a vessel. Ninety days may have been reasonable 138 years ago when the *Fisheries Act* was first proclaimed, but most of today’s fisheries do not even last 90 for days. I would suggest that the 90 period in s. 89(1) be reduced to 7 days and the word “proceeding” be removed from s. 88.

Another area of concern is the burden of proof. Under the *Criminal Code*, the Crown must prove “beyond a reasonable doubt” that both the offence occurred and that the accused intended to commit the offence. Since fisheries offences involve voluntary participation in a regulated fishery, under the current *Fisheries Act* the need to prove criminal intent has been removed and the Crown only needs to prove that the offence occurred. However, the burden of proof upon the Crown remains the *Criminal Code* burden of “beyond a reasonable doubt”. Once the Crown has proved the offence has occurred, the onus then shifts to the accused to prove he or she exercised due diligence on a “balance of probabilities”. This has been interpreted by some courts to mean if the alleged facts “might reasonably be true”. Under the proposal contained in Bill C-45, it has become even easier to convict an accused because the burden of proof to be applied by the tribunal has been reduced from proof “beyond a reasonable doubt” to proof “on a balance of probabilities”. For minor offences, this may not be problematic. However, given the fact that the tribunal will have the power to permanently revoke licences, it is troubling to think that a person’s fishing licence could be permanently revoked simply because the alleged offence “might reasonably be true”. Given the aging nature of our fishing fleet, many fish harvesters are too old to retrain for any occupation other than fishing. If they lose their ability to fish, they may end up on social assistance. In addition, as a result of area licensing introduced by the Mifflin Plan, some fish harvesters

have paid large sums of money for the additional licenses that were required to stay in the fishery.

When tabling Bill C-45 for second reading on February 23, 2007, an opposition M.P. proposed an amendment requiring that second reading of the Bill be delayed for a period of 6 months in order to provide time for further consultation. Although the status of this proposed amendment is not entirely clear, it is hoped that in the interim, DFO will take the time to fix the above-described deficiencies in the proposed legislation.

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