



200 - 2006 West 10<sup>th</sup> Avenue  
Vancouver, BC V6J 2B3  
www.wcel.org

tel: 604.684.7378  
fax: 604.684.1312  
toll free: 1.800.330.WCEL (in BC)  
email: admin@wcel.org

## **LEGAL BACKGROUNDER – BILL C-43**

### ***A threat to environmental safety and democracy***

On October 23, 2014, the federal government introduced Bill C-43, *A second Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures* (also called the “Economic Action Plan 2014 Act, No. 2”). An omnibus bill over 475 pages long, Bill C-43 makes changes to over 50 laws and regulations. Buried in Division 16 of the Bill are proposed changes to the *Canada Marine Act* that, if adopted, would pose a serious threat to legal protection from and public oversight of environmental threats from activities that occur in ports, like coal storage and LNG facilities.

#### **Overview of the *Canada Marine Act***

The *Canada Marine Act* governs Canadian ports. Pursuant to it, a number of medium-sized ports are designated as public ports that are administered by Transport Canada. Larger ports, such as Vancouver Fraser, Prince Rupert and Port Alberni, are administered by port authorities that govern the shipping, navigation, transportation of goods and passengers, and handling and storage of goods in those ports as agents of the Crown. The Minister is responsible for administering federal port property, but may entrust port authorities to manage that property.<sup>1</sup>

The *Canada Marine Act* requires port authorities to develop land use plans to regulate the type and use of structures in ports. They are also responsible for conducting environmental assessments of activities related to ports, such as the storage and shipping of coal.

#### **Proposed changes**

If passed, the bill would make a number of changes to the *Canada Marine Act* that would significantly increase the powers of port authorities, allow the federal government to offload its responsibility over shipping in federal ports, broaden the Governor-in-Council (Cabinet’s) powers to reduce federal oversight and the transparency of shipping activities in Canada, and limit the application of federal environmental laws on port lands. For example, the changes:

- 1. Authorize Canada to sell its lands and infrastructure to a port authority, and port authorities to then lease that property to industry.** The changes allow port authorities to buy federal lands and infrastructure (e.g., ports) from the government, and then lease those lands to companies, or authorize companies to use them for as long as the port authority has control over them.<sup>2</sup> Once sold, those lands would no longer be federal property, meaning they would not be subject to terrestrial species protections

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<sup>1</sup> *Canada Marine Act*, SC 1998, c 10, s 44(1)-(2).

<sup>2</sup> Bill C-43, *Economic Action Plan 2014 Act, No. 2*, 1<sup>st</sup> reading, 41<sup>st</sup> Parl, 2<sup>nd</sup> Sess, s. 228, p 371 ln 21. For ease of reference, specific provisions cited in the main text refer to the proposed new section as it would occur in the *Canada Marine Act*.

under the *Species at Risk Act* or automatically trigger federal environmental assessments of certain projects that occur on them. .

2. **Give Cabinet broad power to make regulations respecting industrial use of Canada's ports**,<sup>3</sup> including regulations that would:
  - a. Hand over regulatory, administrative or even judicial control of industrial activities in ports to any person, including a province, port authority or even industry itself (s 64(2b));
  - b. Give to any person or body the power to make rules of procedure for such hearings (s 64(2)(m));
  - c. Limit the liability of and establish defences and immunities for the person or body in charge of port activities (s 64(2)(h));
  - d. Make rules allowing information regarding activities in ports to be kept confidential (s 64(2)(k));
  - e. Authorize the destruction of documents created or submitted in respect of activities in ports (s 64(2)(l));
3. Authorize Cabinet to incorporate by reference into regulations a provincial statute or any document (including corporate documents), meaning that industries, port authorities and provinces could write federal laws without those laws being subject to customary public scrutiny at the federal level (s 64.2).
4. Shield the federal government and port authorities from civil lawsuits and fines for matters relating to specified industrial activities in ports (s 64.93).

### **Potential threats to environmental health and safety**

The proposed amendments raise a number of concerns. Chief among them is the broad power the new provisions would give Cabinet to give away control of port lands, activities and administration to any person without ensuring that environmental, health and safety are protected, or that citizens are able to have a say in where, when and how potentially risky shipping activities occur on BC's coast. They would enable port lands to no longer be subject to federal terrestrial species-at-risk protection or environmental assessments, and call into question the government's offloading of its legal responsibility for protecting the environment, health and safety.

### ***Reducing federal environmental legal protection***

The amendments include an express grant of power to port authorities to buy federal lands and lease them to any person. Once purchased, the lands would no longer be federal property, and as a result key provisions of federal environmental laws like the *Species at Risk Act* (SARA) and the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) would no longer apply.

SARA, a law to protect Canada's species at risk, does not apply to terrestrial species (other than migratory birds) that are not on "federal lands" except if Cabinet makes a special order.<sup>4</sup>

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<sup>3</sup> *Ibid*, s 231 at 372-74.

<sup>4</sup> *Species at Risk Act*, SC 2002, c 29, s 24(1), (2).

Because federal port lands would become private if sold to a port authority, SARA's protections for terrestrial species at risk would no longer apply.

Similarly, for projects that are not specifically listed in regulations, CEAA 2012 only requires an environmental review for activities that take place on federal lands and involves a federal decision, such as an approval.<sup>5</sup> Under the proposed changes, if a port authority were to buy federal lands, a federal review of potentially harmful activities on those lands would no longer be automatically required under CEAA 2012.<sup>6</sup>

For example, Fraser Surrey Docks LP's proposed Direct Transfer Coal Facility in Surrey, BC was required to undergo a federal environmental assessment by the Vancouver Fraser Port Authority because the project occurs on federal lands under Port Authority supervision.<sup>7</sup> The Port Authority's approval of the facility has been challenged in court by a group of citizen and non-profit applicants represented by Ecojustice and Beverly Hobby (with funding from West Coast) for failing to follow the requirements of CEAA 2012.<sup>8</sup> If the Bill C-43 changes to the *Canada Marine Act* come into effect and the federal government were to sell the property on which it is located to the Port Authority, it would be possible for controversial projects like this one to bypass reviews under CEAA 2012 altogether.

### ***Divesting federal responsibility***

The changes would authorize Cabinet to offload responsibility to port authorities, provinces or private parties. Some delegation of powers to port authorities might sound like administrative efficiency, but Cabinet would have broad authority to give just about anyone law-making and other broad powers. The Bill provides no real limits on how these powers need to be exercised.

At this stage, we have no information on how the federal government actually intends to use its powers, whether the changes need to be made or are in the public interest, but such broad law-making powers is extremely unusual, and is itself cause for concern, particularly in the absence of limits on how the powers are to be used. Also, proposed changes of this nature and scope should be subject to rigorous public consultation in advance, not rammed through in an omnibus bill.

Powers that can be delegated include responsibility for making laws and policies regarding specified industrial activities in ports, administering activities under those instruments, and hearing disputes that occur regarding port activities. For example, Cabinet could in principle allow an industry association to write the rules regarding the assessment and permitting processes for LNG facilities and coal storage, and the shipping of both. It could then incorporate those rules into federal law without public notice or opportunity to comment.

The Bill even purports to allow Cabinet to take oversight of the new rules away from the courts by creating a tribunal to hear any disputes regarding those activities in ports, including challenges by the public. It could appoint industry representatives as the tribunal's members and authorize port authorities to write the rules governing port activities and for hearing disputes (including who would have standing to bring a challenge).

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<sup>5</sup> *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 67.

<sup>6</sup> Large scale projects that are defined in CEAA's Reviewable Projects Regulation would continue to be subject to an assessment, but not by virtue of being located on port lands or involving a Port Authority approval.

<sup>7</sup> Port Metro Vancouver, *Fraser Surrey Docks Direct Transfer Coal Facility Project Review Report PP 2012-072*, s 4.2: [http://www.portmetrovancover.com/docs/default-source/PROJECTS-FSD/2014-08-15\\_project\\_review\\_report\\_-\\_fsd\\_direct\\_transfer\\_coal\\_facility\\_-\\_pp\\_2012-07208c7bbb1cbf6049a5bdf00004cf7b9.pdf?sfvrsn=0](http://www.portmetrovancover.com/docs/default-source/PROJECTS-FSD/2014-08-15_project_review_report_-_fsd_direct_transfer_coal_facility_-_pp_2012-07208c7bbb1cbf6049a5bdf00004cf7b9.pdf?sfvrsn=0).

<sup>8</sup> *Communities and Coal Society et al v Attorney General of Canada et al*, Notice of Application (19 September 2014), T-1972-14.

The *Canada Marine Act* has a number of purposes. While one purpose is the “provide for the disposition, by transfer or otherwise, of certain ports and port facilities” (ss 4(g), others include to “provide for a high level of safety and environmental protection (ss 4(d)) and “manage the marine infrastructure and services in a commercial manner that encourages, and takes into account, input from users and the community in which a port or harbour is located” (ss 4(f)).<sup>9</sup> Selling ports to port authorities and leasing them to industry may achieve the former purpose. However, failing to set clear limits and requirements to ensure health, safety, and environmental concerns are addressed and that the public is able to participate in project reviews opens the door for the latter purposes to be ignored. It puts environmental health and safety, as well as communities’ ability to have a say about activities that occur in their waters, at risk.

Canadians understand the value of checks and balances and transparency in laws. These amendments do away with both.

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<sup>9</sup> *Supra* note 1, s 4(d).