

## EXPLANATORY NOTES

### BILL

### No. 44

## An Act to amend *The Water Security Agency Act*

### **Clause Of Bill**

1 *The Water Security Agency Amendment Act, 2016.*

2 *The Water Security Agency Act S.S., 2005 c. W-8.1.*

### **3 Existing Provision**

None

### **Explanation**

Between 1981 and mid-2015 drainage works constructed prior to January 1, 1981 were exempted from the requirement to obtain an approval. That exemption was removed by new drainage regulations that are part of *The Water Security Agency Regulations* which came into force on August 21, 2015.

This new clause reinforces that change by clearly stating the Water Security Agency's ability to make orders requiring closure or alteration of pre 1981 drainage works without compensation to the owner of the drainage works. The amendment also extinguishes any cause of action arising from this section, thus reducing the risk of litigation. Litigation could disrupt implementation of the province-wide initiative to bring drainage into compliance.

### **4 Existing Provision**

#### **Interpretation of Division**

**79** In this Division:

- (a) “**drainage works**” do not include drainage works that are designated, or are within a class of drainage works that are designated as exempted by the regulations from the application of sections 80 and 81;
- (b) “**formal complaint**” means a complaint filed pursuant to section 81.

2005, c.S-35.03, s.79.

**Request for corporation's assistance to resolve complaint**

**80(1)** Before filing a formal complaint pursuant to section 81, a person who claims to have suffered, or anticipates that he or she may suffer injury, loss or damage by reason of the construction, extension, alteration or operation of any drainage works, must submit a written request to the corporation for assistance in resolving the complaint.

(2) Subject to subsection (3), a written request submitted pursuant to subsection (1) must include the following information:

- (a) the name of the person or authority that the complainant considers to be responsible for the cause of the complaint;
- (b) the complainant's efforts to resolve the complaint through contact with the person or authority that the complainant considers to be responsible for the cause of the complaint;
- (c) the location of drainage works the construction, extension, alteration or operation of which the complainant claims has caused or will cause injury, loss or damage;
- (d) the injury, loss or damage suffered or anticipated.

(3) If the corporation considers it appropriate, the corporation may waive the requirement set out in clause (2)(b).

(4) On receipt of a written request pursuant to this section, the corporation shall conduct a preliminary investigation of the complaint and shall:

- (a) issue a written recommendation for resolving the complaint, which may include recommending mediation or arbitration; or
- (b) dismiss the complaint, with written reasons.

(5) The corporation shall provide a copy of any recommendation or decision made by it pursuant to subsection (4) to:

- (a) the complainant; and
- (b) if the corporation considers it appropriate, the person or authority that the complainant considers to be responsible for the cause of the complaint.

2005, c.S-35.03, s.80.

**Filing of formal complaint**

**81(1)** The complainant mentioned in section 80 may file a formal complaint with the corporation with respect to the construction, extension, alteration or operation of any drainage works by reason of which the complainant claims to have suffered or anticipates that he or she will suffer injury, loss or damage if:

- (a) the complainant is not satisfied with a recommendation of the corporation made pursuant to clause 80(4)(a); or

- (b) the person or authority that the complainant considers to be responsible for the cause of the complaint does not implement the corporation's recommendations.

(2) A formal complaint filed pursuant to subsection (1) must be:

- (a) in writing and in a form acceptable to the corporation; and
- (b) accompanied by the prescribed fee for filing the complaint.

2005, c.S-35.03, s.81.

**Notice of formal complaint and investigation**

**82(1)** On receipt of a formal complaint filed pursuant to section 81, the corporation shall:

- (a) immediately serve notice of the filing, stating the basis of the complaint, on:
  - (i) the persons indicated in the complaint as being responsible for the cause of the complaint; and;
  - (ii) any other persons that the corporation considers it appropriate to notify;
- (b) inquire into and investigate the complaint; and
- (c) subject to subsection (2), render a written decision, with reasons, with respect to the complaint not later than 18 months after the day on which it receives the complaint.

(2) If the corporation considers it appropriate, it may extend the period mentioned in clause (1)(c) by not more than six months.

(3) On receipt of a formal complaint, the corporation may register or file an interest based on the notice of the complaint against the title to or abstract record for the land on which the drainage works complained of are located, and any application to register or file the interest must be accompanied by a copy of the notice of complaint.

(4) On the registration of an interest in accordance with subsection (3):

- (a) the rights and obligations arising out of this Division apply to and enure to the benefit of, and are binding on, any person who, at any time subsequent to the registration of the notice pursuant to this section, is the registered owner of the land with respect to which the notice is registered; and
- (b) this Act applies to any person mentioned in clause (a) in the same manner as if that person was the registered owner of the land at the time the notice was registered.

(5) The corporation shall cause a copy of its decision pursuant to this section, together with reasons, to be served on:

- (a) the complainant; and

- (b) each person on whom notice has been served pursuant to clause (1)(a).
- (6) The corporation shall register a discharge of any notice registered or filed by the corporation pursuant to subsection (3) if:
  - (a) the corporation subsequently registers an interest based on an order of the corporation pursuant to subsection 83(6);
  - (b) the corporation dismisses the complaint and no appeal is taken pursuant to section 84;
  - (c) following an appeal taken pursuant to section 84, the Water Appeal Board or the Court of Queen's Bench, as the case may be, dismisses the complaint; or
  - (d) the complaint is otherwise resolved.

2005, c.S-35.03, s.82.

### **Explanation**

The amendments will eliminate the existing complaint process which focusses on neighbour to neighbour disputes over damage alleged to be caused by drainage, and replace it with a much simpler request for assistance. Under the proposed new request for assistance process, the focus of an investigation will be to determine if the drainage is approved. If works are present and not approved Water Security Agency would issue a written recommendation that the owner of the works obtain an approval or close the works. Because an approval will only be granted if the drainage works do not cause damage, the process will resolve the damage issue.

On rare occasions approved works may be causing damage due to changed or unforeseen circumstances. An investigation may therefore consider whether approved works are impacting the petitioner's land and how those impacts could be mitigated.

## **5 Existing Provision**

### **Order relating to decisions**

**83(1)** If the corporation makes a decision pursuant to section 82 with respect to a formal complaint, it may make any order that it considers appropriate:

- (a) requiring the closure or alteration of, or changes or additions to, the drainage works with respect to which the complaint was filed; or
  - (b) directing or discontinuing any operation, construction, extension, alteration, use or repair of the drainage works with respect to which the complaint was filed, either permanently or for a specified period, by the person to whom the order is directed.
- (2) In an order made pursuant to subsection (1), the corporation may fix the period within which the order is to be complied with.
- (3) The corporation shall cause a copy of any order made by it pursuant to this section to be served on the person to whom it is directed.

- (4) An order made pursuant to this section is effective with respect to the whole of the drainage works with respect to which the complaint was filed, and on the making of the order, any approvals relating to the drainage works and affected by the order are deemed to be amended insofar as is necessary to be consistent with the provisions of the order.
- (5) If the corporation considers it appropriate, the corporation may:
- (a) extend the period in which any order made pursuant to this section is to be complied with; or
  - (b) amend the terms and conditions of any order made pursuant to this section.
- (6) In accordance with subsection (8), the corporation may register or file an interest based on an order made pursuant to subsection (1) against the title to or abstract record for the land on which the drainage works complained of are located, and any application to register or file the interest must be accompanied by a copy of the order.
- (7) On the registration of an interest in accordance with subsection (6):
- (a) the terms and conditions of and the rights and obligations under the order that is the subject of the notice are binding on any person who, at any time subsequent to the registration of the notice pursuant to this section, is the registered owner of the land with respect to which the notice is registered; and
  - (b) this Act applies to any person mentioned in clause (a) in the same manner as if that person were the person to whom the order was originally directed.
- (8) The corporation may register or file the interest mentioned in subsection (6):
- (a) if no appeal is taken pursuant to section 84, after the 30-day appeal period mentioned in section 12 of The Water Appeal Board Act has expired;
  - (b) if an appeal is taken pursuant to section 84, and the Water Appeal Board confirms, in whole or in part, the order made by the corporation pursuant to this section and the period for appeal to the Court of Queen's Bench mentioned in section 26 of The Water Appeal Board Act has expired; or
  - (c) if an appeal is taken from the decision of the Water Appeal Board and the Court of Queen's Bench confirms the order of the corporation, in whole or in part.
- (9) In the event that the decision of the Water Appeal Board in the circumstances described in clause (8)(b) or the order of the Court of Queen's Bench in the circumstances described in clause (8)(c) amends the corporation's order, the corporation shall register the amended order in the manner described in subsection (6).

2005, c.S-35.03, s.83.

## **Explanation**

Water Security Agency's ability to make orders with respect to unapproved drainage works is continued. The existing requirement to work through a formal complaint process before making an order is eliminated. The amendments would allow Water Security Agency to make an Order under section 62 after making its written recommendation.

Because an Order would be made under section 62, some of the existing clauses providing detail around an order are not required. The ability to register an interest on land, and that runs with the land, based on the order is continued.

The new section 83.01 provides Water Security Agency with authority to make orders requiring the alteration or temporary closure of approved drainage without compensation if those works are causing loss or damage.

## **6** **Existing Provision**

### **Right of appeal**

**84(1)** The complainant or any person on whom notice has been served pursuant to clause 82(1)(a) may appeal a decision of the corporation made pursuant to section 82 or an order of the corporation made pursuant to section 83 to the Water Appeal Board in accordance with *The Water Appeal Board Act*.

(2) The parties to the appeal are to be the complainant and the person or persons on whom notice has been served pursuant to clause 82(1)(a).

2005, c.S-35.03, s.84.

### **Explanation**

In the existing complaint process, a decision on a formal complaint may be appealed to the Water Appeal Board which considers only the question of damages. This provision would be repealed because the proposed request for assistance process does not include a formal complaint or a formal decision, and focusses on compliance with the approval process. Drainage works that are causing damage will not be approved.

The proposed section 84 creates an ability to appeal Orders made by Water Security Agency under sections 62, 69, 70.1, 83, or 83.01 to Court of Queen's Bench on a point of law. Provisions about the record of appeal and the judge's options are established.

## **7** **Existing Provision**

### **Failure to comply with order**

**85(1)** If a person fails to comply with an order of the corporation made pursuant to section 83 or an order of the Water Appeal Board or the Court of Queen's Bench following an appeal pursuant to section 84, the corporation or any person acting under the corporation's instructions may, without incurring any liability for any action taken that is necessarily incidental to the exercise of its powers pursuant to this section:

- (a) enter on any land with any equipment, machinery or other articles that it considers necessary; and
- (b) do any acts that are necessary to carry out the order.

### **Explanation**

Section 85 empowers Water Security Agency to enforce drainage orders issued under any of the applicable sections by directly closing works. Reference to section 84, Orders from the Water Appeal Board, is removed as there is no provision for appeals to the Water Appeal Board in the proposed amendments. However, application is expanded to include section 62 (orders made for works which have not been approved and where there is no request for assistance), section 69 (orders made when an approval is cancelled for failing to comply with conditions), section 70.1 (pre 1981 works) and sections 83 and 83.01 (unapproved and approved drainage works following a request for assistance).

## **8 Existing Provision**

### **Recovery of corporation's costs**

**86(1)** If the corporation undertakes any work for the purposes of section 85 and incurs any costs as a result, the corporation may file in the office of the local registrar of the Court of Queen's Bench at the judicial centre nearest to the place where the work, or the greatest portion of the work, was done a certificate that is signed by an authorized officer of the corporation and that sets out:

- (a) the amount of the costs incurred by the corporation pursuant to that section; and
- (b) the person from whom the corporation claims the costs are recoverable.

### **Explanation**

The amendments continue the ability for the Water Security Agency to recover costs incurred in closing drainage works from the landowner by filing a certificate at the Court of Queen's Bench.

The existing legislation only addresses work to enforce orders made following complaints. This ability applies to closures that result from failure to comply with an order to close or obtain an approval, and other enforcement actions under section 93. With the commitment to bring all drainage into compliance over the next 10 years, power to enforce orders beyond those made after requests for assistance is essential.

Wording is simplified by referring to a debt due to the corporation pursuant to sections 85 and 93 rather than referring to work and costs.

## **9 Existing Provision**

### **Appeal to Court of Queen's Bench**

**87(1)** A person with respect to whom a certificate has been entered as a judgment

pursuant to section 86 may appeal against the amount of the costs set out in the certificate to a judge of the Court of Queen's Bench:

- (a) within 30 days after the date on which the certificate was filed; or
- (b) if the person made representations to the corporation pursuant to section 86, within 30 days after the date on which the corporation notified the person of its decision pursuant to subsection 86(7).

(2) On hearing an appeal pursuant to this section, the judge of the Court of Queen's Bench may issue an order:

- (a) confirming the amount of costs set out in the certificate;
- (b) amending or varying the amount of costs set out in the certificate;
- (c) quashing the certificate; or
- (d) doing any other thing that the judge considers appropriate.

2005, c.S-35.03, s.87.

#### **Mediation of damage claim**

**88** The corporation has no power to determine liability or award damages or other compensation with respect to a complaint, but the corporation may act as mediator between the parties to a complaint in an attempt to bring about a settlement of claims for damages or compensation.

2005, c.S-35.03, s.88.

#### **Explanation**

Section 87 continues the ability for a person to appeal costs to a judge of the Court of Queen's Bench. The only change is to the title, which is changed to separate the appeals from a certificate in this section from appeals from orders made under section 84.

Amendments to Section 88 remove Water Security Agency's power to act as a mediator between parties in a dispute about damages arising from drainage works. This change is consistent with the move away from assessing damage in the complaint process and allows Water Security Agency staff to focus on bringing drainage into compliance so it will not cause damage.

## **10 Existing Provision**

(2) Every person who contravenes any provision of subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than \$10,000 and not more than \$1,000 for each day or part of a day during which the offence continues.

#### **Explanation**

The amendment would increase the maximum fine on summary conviction for offenses under any part of *The Water Security Agency Act* from "not more than \$10,000 and not more than \$1,000 for each day or part of a day" to "not exceeding \$1,000,000 for each day or part of a



day". The fines are applicable to all matters handled by the Water Security Agency, not just drainage. The maximum fines would then be identical to those under The Environmental Management and Protection Act, 2010, which governs water quality, wastewater and aquatic habitat aspects of water management.

## **11 Existing Provision**

### **Powers of entry re removal of illegal dam or works**

**93(1)** The corporation, or any person acting under the corporation's instructions, may enter on any land with any equipment, machinery or other articles that it considers necessary for the purpose of opening up, taking down, removing or destroying:

- (a) any illegal works; or
- (b) any dam constructed by a beaver or any natural obstruction whether formed by blown dirt, debris or otherwise, in any lake, river, stream or other water body.

(2) The corporation and any persons acting under the corporation's instructions are not liable for any damage done to the land that is necessarily incidental to the exercise of the powers granted by subsection (1).

(3) The amount expended by the corporation and any person acting under its instructions in opening up, taking down, removing or destroying illegal works pursuant to clause (1)(a) may be recovered as a debt due to the corporation from the person who constructed the works in the same manner as that mentioned in section 86 and, for that purpose section 86 applies, with any necessary modification, to that recovery.

2005, c.S-35.03, s.93.

### **Explanation**

The word "illegal" is replaced with the word "unapproved" in the title, in subsection (1)(a) and in subsection (3) to be consistent with wording in other clauses.

## **12 Existing Provision**

None

### **Explanation**

Provides transitional provisions on dealing with complaints in progress when the new legislation comes into force. This amendment specifies that all requests for assistance and formal complaints filed under the existing legislation and still in progress when this act comes into force are deemed to be requests under the new process, as defined in section 79(d) of the proposed amendments. Water Security Agency may then deal with these existing requests for assistance and formal complaints as though they were requests under the new process.

**13**    **Existing Provision**

None

**Explanation**

Provides that this Act will come into force on receiving assent.