

October 11, 2011

**The Participant Canada's Cross-Examination Questions of
Otto Langer on his Revised Affidavit
Sworn September 22, 2011**

In these questions:

- DFO refers to the federal government department now known as the Department of Fisheries and Oceans by whatever name it was known from time to time; and
- EC refers to the federal government department now known as the Department of Environment or Environment Canada by whatever name it was known from time to time.
- A reference to s.36 also means the former s.33; and reference to s.35 also means the former s.32.

Please answer the following questions factually based on your personal knowledge from the period of years you were employed in DFO or EC.

We may object to the admissibility of answers that are not factual and based on your personal knowledge from the period of years you were employed in DFO or EC.

Please be concise in your answers.

In answering these questions, bear in mind the Commissioner's Ruling of October 7, 2011 as to the limited scope of factual information you are permitted to testify to based on your personal knowledge and drawing on your time as a federal employee.

Questions re Langer Affidavit Paragraphs 1 and 2

1. You swear that you have personal knowledge of the facts and matters set out in your affidavit, except where they are stated to be on information and belief.
2. Is every statement in the admissible portions of your Affidavit, as ruled on by the Commissioner on October 7, 2011, based on personal knowledge? The admissible paragraphs are paragraphs 1-7, 8, 9-13, 14 except the last sentence, 16, 17, 26, 33, 35-37.
3. If not, what facts or matters are not based on personal knowledge?
4. Explain why you have included statements that are not based on personal knowledge when the Commissioner expressly limited your evidence to your personal and direct knowledge based on your former employment with the Government of Canada.
5. Is every statement in your Affidavit true based on your personal knowledge?
6. If not, what statements are not true?
7. Do you agree that since it has been 30 years since you worked in EC that your knowledge of the following is extremely limited and dated:
 - a. EC programs,
 - b. resources assigned to programs,
 - c. the potential or actual impacts of organizational change scenarios related to the *Fisheries Act*, including s. 36?

Questions re Langer Affidavit Paragraph 3

1. Trace, with more particularity than what is in paragraph 3 of your Affidavit, what were your positions or job titles, level or seniority, and duties from when you started with DFO through to your retirement in 2002, noting in each case whether you were employed in DFO or EC.
2. What were your duties as physical habitat protection biologist from 1969 to 1972?
3. In that capacity what work, if any, did you do relative to ss. 35 and 36, formerly ss. 32 and 33, of the *Fisheries Act*?
4. What were your duties in overseeing a water quality group in DFO from 1972 to 1976?
5. How many employees were in this group, what were their positions, and what were their duties?
6. In your oversight capacity, did you have responsibility relative to ss. 35 or 36, formerly ss. 32 and 33 of the *Fisheries Act*?
7. For what period of time did that group continue to exist after you left DFO in 1976?

Questions re Langer Affidavit Paragraph 4

1. Referencing your use of 'jurisdiction' in paragraph 4 and elsewhere, do you agree that administration of s. 36 was given to EC, but that jurisdiction over s. 36 and all other sections of the *Fisheries Act* remained with the Minister of Fisheries and Oceans, who remained accountable to Cabinet and Parliament for s. 36 throughout?
2. When, by whom and how were you informed that administration over s. 36 was being transferred from DFO to EC?
3. Did this coincide with government changes to the make up and names for government departments?
4. Was it part of a broader realignment of responsibilities amongst government departments?
5. Do you agree that you do not know the reasons that the government of the day or senior managers had for putting responsibility for s. 36 in EC?
6. As DFO liaison officer for s. 36 from 1972-76, did you make best efforts to facilitate the effective transference of water quality and pollution matters, including s. 36, from DFO to EC?
7. Explain what best efforts you made.

Questions re Langer Affidavit Paragraph 5

1. Do you agree that beginning in the 1970s and continuing through to the present and onwards in time, EC had to develop and maintain proficiency in water quality and pollution in order to do work assigned to EC under statutes and regulations other than s. 36 of the *Fisheries Act*?
2. Name as many statutes and regulations as you know where EC had responsibility for water quality and pollution affecting water quality from about 1970 through to the present?
3. Do you agree that DFO would have had to develop and maintain this proficiency in water quality and pollution regardless of whether they administered s. 36 of the *Fisheries Act*?
4. Do you agree that EC achieved efficiencies in developing and maintaining proficiency in water quality and pollution by reason of doing a lot of work in these areas relative to multiple statutes and regulations?
5. Do you agree that by reason of this work, both s. 36 and other statutes and regulations, EC developed considerable expertise in water quality and pollution matters?
6. Do you agree that EC is a centre of considerable knowledge and expertise on water quality and pollution in the present day?
7. How many staff did EC have assigned to do water quality and pollution work in the early to mid-1970s:
 - a. Nationally
 - b. Pacific Region
8. How many staff did EC have assigned to do water quality and pollution work when you retired from DFO in 2002:
 - a. Nationally
 - b. Pacific Region

Questions re Langer Affidavit Paragraph 6

1. In paragraph 6 of your Affidavit you swear that you “oversaw the Environment Canada – Environmental Protection Service (hereinafter DOE-EPS) Freshwater Studies and Contaminants Control Program” and that “approximately 60% of your time was spent on ‘water quality and habitat compliance matters’ respecting enforcement and compliance of section 36.
2. What was the other 40% of your time spent on?
3. Did it include oversight of the Contaminants Control Program?
4. Further, were you responsible for doing work also under the *Environmental Contaminants Act* (ECA)?
5. Was ECA a significant part of EC work that created a need for water quality and pollution knowledge and expertise within EC?

Questions re Langer Affidavit Paragraphs 10 and 11

1. You note in paragraph 10 that EC was established as a new department in about 1971. The Fisheries Service was incorporated into EC. Later, the two were split with each becoming its own department.
2. Do you agree that when this split occurred, it was reasonable to have EC retain a mandate over water quality and pollution control?
3. In fact, do you agree that water quality and pollution control were and are two core elements of what a Department of Environment should be responsible for?
4. With respect to your second to last sentence in paragraph 11, is it correct that throughout the period under consideration – the 1970s to the present – the Minister of Fisheries and Oceans is the minister responsible for s. 36 of the *Fisheries Act*?
5. I ask you to look at exh 689; a Memorandum of Understanding between EC and DFO dated 1985.
6. Are you familiar with this document?
7. Were you familiar with it in 1985?
8. When did you become familiar with it, and how did that occur?
9. Do you agree that the 1985 MoU is the overall governing document on the administration of s. 36 of the *Fisheries Act*?
10. Are you aware that the 1985 MoU followed on a Prime Ministerial directive dated 1978, which I am now producing and showing to you?
11. Do you recognize this document?
12. This document should be marked as an EXHIBIT.
13. Are you aware that in 1987-88 a Regional Director General level agreement was signed on the administration of the pollution provisions in the *Fisheries Act* in Pacific Region?

14. Are you aware that is the current operational document under which EC and DFO staff work on water quality and pollution issues, including such matters as provision of scientific and technical information on the impacts of pollutants and toxic substances, inspections, investigations of alleged offences?
15. If you are not aware of this, as a long time DFO and EC manager, why are you not aware of it?
16. Do you agree that you should have been aware of it when employed in DFO and EC?
17. Do you agree that it is a type of document that would be readily available to managers and staff?

Questions re Langer Affidavit Paragraph 13

1. Is it correct that the EC Environmental Protection Service (EPS) had other responsibilities besides s. 36?
2. What were they?
3. Do these other statutes include the *Environmental Contaminants Act* (1975)?
4. What other statutes and regulations did the EPS work with or have administration of?
5. We have other questions on this later in this series of questions.
6. In about 1976 did EC undertake a major mandate to address toxic chemicals such as polychlorinated biphenyls (PCBs), chlorofluorocarbons (CFCs), chlorophenates, phosphorus and more?

Questions re Langer Affidavit Paragraph 26

1. Do you have knowledge of DFO scientists and biologists doing research and study of matters that relate to water quality and pollution, albeit not for administration of s. 36 *per se*, over the past several decades?
2. What research and study in the foregoing area(s) do you know of?
3. With reference to the last sentence in paragraph 26 of your Affidavit, I suggest that it was in 1999 when EC hired uniformed enforcement officers. Does that refresh your memory as to the year?
4. Do you agree that the EC enforcement officers received formal training and designation as CEPA 1999 enforcement officers, Fisheries Officers and Inspectors?
5. Do you also agree that prior to 1999 EC hired additional staff under the Fraser River Action Plan (FRAP) where a majority of the inspections work was conducted under the *Fisheries Act* and associated regulations.

Questions re Langer Affidavit Paragraph 35

1. Do you agree that in order to successfully implement any transfer of administration of s. 36 from EC to DFO it would be important to maintain appropriate resource levels in EC to allow it to properly do its remaining work?
2. Do you agree that in order to successfully implement any transfer of administration of s. 36 from EC to DFO that appropriate resource levels and training would need to be added to DFO to permit it to do this new work?
3. Do you also agree that DFO would have to establish or buy access to suitable testing facilities for water and habitat samples to do this new work?
4. Are you aware of the following actions undertaken by EC, many in collaboration with DFO, in the past several years in relation to s. 36:
 - EC develops (based on risk assessment, scientific methods), administers (including compliance promotion) and enforces several regulations pursuant to the *Fisheries Act* s. 36.
 - Several regulations were developed, starting in the 1970s, the most recent one being currently developed are the proposed National Wastewater Systems Effluent Regulations under the Fisheries Act. Key elements of regulations are agreed to with provinces. Putting in place administrative mechanisms to implement WSER with ongoing co-operation with provinces is also agreed to.
 - EC develops and carries out a regulatory science program, the Environmental Effects Monitoring program pursuant to the Pulp and Paper Effluents Regulations (PPER) and Metal Mining Effluents Regulations (MMER).
 - EC developed and now implements the Compliance and Enforcement Policy for Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act*.
 - EC officers follow the EC-DFO Compliance and Enforcement Policy for the enforcement of the *Fisheries Act* and follow up on complaints brought to their attention, as required by this policy.
 - Responding to complaints and implementing other sector specific enforcement strategies actually represents 40% or more of EC inspection efforts and this percentage is quite stable from year to year.
 - EC officers have also taken enforcement actions, including prosecutions, on several s.36 (3) violations, and these are all reported annually in the Fisheries Act Annual Report.

- EC, in collaboration with DFO, is working towards the implementation of recommendations made in the 2009 Spring Report of the Commissioner of the Environment and Sustainable Development related to the Fisheries Act. As a result, and for example, EC is putting place an EC Fisheries Act Pollution Prevention Plan Risk Management Accountability Framework and is renewing the 1985 Administration of Section 36 of the Fisheries Act MoU with DFO.
5. Do you agree that all of the foregoing are important steps and actions undertaken by EC, many in collaboration with DFO, relative to s. 36 of the *Fisheries Act*?
 6. Do you agree that if administration of s. 36 were transferred to DFO, the scope of DOE enforcement and administration (operation and program) activities in fish bearing waters would not change significantly as those major industrial sectors currently covered under s.36(3) or its regulations would still be largely covered by CEPA instruments?
 7. Do you agree, for instance, that the dioxin and furans regulations made pursuant to CEPA 1999 would still apply to the pulp and paper sector regulated under the FA?
 8. As such, do you agree that EC would still need to maintain its field presence and expertise in those sectors given the applicable CEPA regulations and other instruments (P2 plans, notices, etc)?
 9. Do you further agree that under this scenario, the enforcement activities would be duplicative as both DFO and EC would be present to undertake enforcement activities under different mandates?

Questions re Langer Affidavit Paragraph 36

1. Do you agree that over the past decades EC has built up knowledge and expertise in water quality and pollution matters?
2. Do you agree that knowledge and expertise is necessary to carry out the responsibilities EC has and the work it does under the several statutes and regulations it administers other than s. 36 of the *Fisheries Act*?
3. Do you agree that EC will have to retain and maintain that knowledge and expertise to do its assigned work no matter where responsibility for s. 36 is placed?
4. Do you agree that EC will have to retain all or most of its staff with this knowledge and expertise to do that work?
5. Do you agree that if administration of s. 36 were transferred to DFO, then DFO would have to recruit and train staff and develop systems and infrastructure to properly administer s. 36?
6. Do you agree that you have no personal knowledge of the administration, operations, and operational requirements of either EC or DFO after you retired in 2002?
7. Do you have knowledge of EC activities outside of the Pacific Yukon region with respect to s. 36?
8. If not, do you agree that you are not well positioned or knowledgeable to speak to resource implications of a transfer of administration of s. 36 throughout the country?
9. Will you agree that your stated opinion in the first sentence of paragraph 36 that consolidation could occur and savings would result is made without knowing present day operations or operational needs in EC and DFO in Pacific Region or nationally?
10. Will you agree that the above referenced statement is a hope and objective on your part, but you do not know whether it is feasible?
11. Will you agree that the amalgamation of habitat and water quality enforcement staff of EC and DFO could easily lead to individual staff having multiple supervisors and managers, and lead to confusing and contradictory mandates and work priorities?

12. Will you accept that EC's science expertise on aquatic contaminant chemistry and toxicology has evolved significantly over the past 25 years?
13. Is it correct that during the 1990s, former DFO scientists in the areas of fish toxicology transferred to EC and, at the same time, EC hired many toxicologists and scientists who could link chemistry (EC's traditional area of expertise) to both lab and field ecotoxicology?
14. Do you agree that EC's scientists currently have significant science expertise on the impacts of pollution as demonstrated by EC's assessment of complex effluents, individual chemicals, and historical contaminants?
15. Are you aware that EC is actively involved in providing scientific expertise under the *Fisheries Act*?
16. For instance, are you aware that in 2010, many EC scientists were expert witnesses at the Total Joslyn Mine Hearings?
17. Given that you agree that the situation may not apply in National Headquarters or in other regions of Canada, are you suggesting that this change only be applied in the PYR? Are you aware of the situation in the NHQ and other regions?

Questions re Langer Affidavit Paragraph 37

1. With reference to the last sentence of paragraph 37 of your Affidavit, do you agree that is your opinion on the matter?
2. Do you agree that other people have different and sometimes a contrary opinion from you on this matter, that is, administration of s. 36 by EC can work for the administering agencies, fish, and habitat?
3. Do you agree that clear roles and responsibilities, good coordination, and well trained, knowledgeable staff are key to the proper administration of s. 36 for the benefit of fish and habitat, no matter where administration of s. 36 is placed?
4. Will you agree that the foregoing can be accomplished with EC as the lead federal agency for water quality and pollution control, so long as clear roles and responsibilities, leadership and appropriate staff levels and expertise are in place?
5. If you won't agree with the foregoing, is it because you have a pre-disposed view to how s. 36 should be administered - that is, to have s. 36 under DFO administration - and won't agree with other options that could be applied?
6. Do you agree that if administration of s. 36 were transferred to DFO, the net effect would be that DFO would administer the effects of water quality on fish and fish habitat, but EC would continue to have responsibility for the environmental effects of activities relative to water and pollution?
7. Do you agree that could lead to overlapping approaches, confusion and inefficiencies?