



Compliance and Enforcement

“A prudent Prince neither can nor ought to keep his word when to keep it is hurtful to him and the causes which led him to pledge it are removed.”
Machiavelli (1532: ch. XVIII)

Starting a discussion or a research report with a question is always a good thing. In this case, the question is: What exactly is compliance and enforcement (C&E)? One might think there is an easy answer. But despite the myriad of organizations with C&E policies and staff dedicated to this type of work in a broad range of areas such as taxation, crime, workplace health and safety, and the environment, it was challenging to identify an accessible literature on the theory, evolution and practice of C&E.

C&E is a complex and nuanced topic that, broadly speaking, encompasses behaviour and behavioural motivation. The subject matter of C&E is fundamentally based on:

- rules, which are simply codified norms of behaviour that we agree are “correct” in the context of our collective values and priorities;
- governance structures and institutions that represent how we choose to implement the rules that moderate behaviour at all levels of social and economic activity, including the state, the firm and the individual; and,
- monitoring and information collection which facilitates dialogue and the adjustment of existing rules to accommodate new information and realities.

At a basic level the concepts involved with C&E are fairly straightforward. Society (and our institutions) set rules, and then expect compliance. If the rules are broken, the rule

breaker is punished or sanctioned in some manner. Compliance is the degree to which behavior conforms to what an agreement, usually written as a law, regulation or policy, prescribes, knowing that there are consequences for non-compliance. This can seem black and white. However, new information and technological advances are constantly evolving, as are societal values. In addition, many C&E obligations take time for governments, firms and individuals to understand and respond to in a coherent fashion. Therefore, compliance is not just one event but rather is an unfolding, open-ended social and political process of negotiation and adjustment. In the real world, many regulatory requirements impose ongoing and continuing obligations on parties – none of which are static.

Similarly, enforcement – making sure the rules are followed – doesn’t happen just once but many times at multiple levels, with many different interactions among diverse actors. There are many points of entry/tools/methods for enforcement. Thus, there is and must be a long-term relationship between the regulated entity and the regulator in the context of constrained powers and scarce financial and human resources. Compliance and enforcement are not static or simple; they must be adaptive.

Unfortunately, the public policy-making process devotes insufficient time to understanding and implementing C&E. The scope of the terms and conditions that regulated entities must be compliant with are often vague and/or poorly worded, too numerous, and not necessarily tightly linked to public policy goals; nor are they always practical and realistic.

Failure to properly consider and plan for C&E has led to some spectacular failures, like the 2008/2009 financial crisis. Before that it was the financial crash that led to the Great Depression in the 1930s (and which coincidentally preceded the environmental disaster of the 1930's Dust Bowl). Not paying attention to regulatory and legal design generally sets the stage for future disputes about what was meant and how best to deal with negative outcomes. Poor policy design undermines trust and increases conflict. A well-crafted C&E framework should help, not hinder.

The Models

Let's start with some theory of compliance.¹ There are two generally accepted models that form the bookends. In practice, most OECD countries have mixed C&E frameworks that rely on elements of both models.

The **rationalist** model is utilitarian,² where actors follow the logic of consequences and consider the difference between costs and benefits when deciding on their behaviour. The focus of the model is on deterrence through enforcement. If it is "cheaper" to violate a regulatory or legal requirement than it may be violated. If, on the other hand, there is a high perceived probability of being caught, if the response to a violation is swift and the expected costs outweigh the benefits, then compliance is more likely to occur. Enforcement is used to both prevent misbehavior (e.g., inspections, monitoring requirements, investigations, etc.) and to punish non-compliance by changing the calculation of costs and benefits (e.g., fines, prosecution, changing the rules, etc.) The rationalist model, for thinking about C&E, can be viewed as consistent with a command and control approach.

In the **normative** model, the actors are more focused on the appropriateness of their behaviour (e.g., acting in good faith), the obligations they have to others, and the influence of shared discourse and acquisition of knowledge for problem-solving (e.g., the power of ideas). The use of cooperation and assistance (e.g., incentives, education, and moral suasion) as a means of preventing non-compliance is central. Compliance occurs or does not occur largely because the actors (both the regulated and the regulator) have the capacity (e.g., knowledge of the rules, and financial and technological ability to comply) and the commitment (e.g., perception that the rules are fair) to meet the rules. This can be considered a management approach. It is also the foundation of voluntary compliance, self-reporting and – in recent years – the growing roles of citizens/communities in enforcement.

Sanctions are integral to both models. They arise in the context of the rationalist approach because they are priced (e.g., fines and administrative penalties). In the normative model, sanctions take the form of a loss of reputation, respect and "social license," and the risk that tougher regulatory obligations may make it more difficult to complete an activity. We tend to think that, if priced, the sanction will have higher value as a deterrent. But, oddly, when harmful practices are only priced, it takes away the normative sense of obligation. We also know that if sanctions are not enforced, they lose their moral force, which may invite an opportunistic response to rules that can multiply. Practically speaking, because development of rules lag changes in norms, we perceive the normative model to be weaker than the rational model in influencing behaviour. But this is not true. States, companies and individuals work hard to maintain reputation and respect, which in part relies on doing the right thing regardless of the legal rules. This helps explain

¹ Making the Law Work: Environmental Compliance and Sustainable Development, edited by Durwood Zaelke, Donald Kanariu, and Eva Kružíková (2005). Chapter 2, pp 55-58, "An International Network for Environmental Compliance and Enforcement compilation of compliance and enforcement topics."

² Guide to Ethics and Moral Philosophy, John Stuart Mills 1863, <http://caae.phil.cmu.edu/Cavalier/80130/part2/sect9.html>, Carnegie Mellon University online resources.

why many firms comply with standards even though the expected penalties for non-compliance may be small in terms of the calculus of financial costs/benefits.³ Furthermore, some research shows that in the normative model there is limited correlation between the level of financial sanction and the level of compliance.⁴ Often, it is more important for regulated entities to be seen to be doing the right thing.

Trust is also a salient element of C&E. We are all involved in a constant process of exchange, from business transactions to social interactions. The willingness to defer to another (e.g., government as the decision maker and regulator) depends on beliefs that the other party will fulfill their commitments. When trust is low or declining, there is likely to be more conflict, and a push for more rules and stepped up enforcement. Arguably, Canada and BC are currently in this place today in many fields of regulation. There are loud voices that would prefer the command and control model despite the evidence, presented below, that it doesn't always produce good results.

What Constitutes a Good Environmental Compliance and Enforcement Regime?

The International Network for Environmental Compliance and Enforcement,⁵ the only international organization of its kind, has compiled a set of principles describing what it considers to be the elements that support an effective C&E program.

- Demonstrated commitment to the environment by developing and implementing environmental laws.
- Enabling a governance framework that

- o clearly identifies the jurisdictions of various orders of government/regulatory authority;
 - o maintains the independence of regulators who have the necessary capacity to interpret and apply the law/rules in an impartial and transparent manner;
 - o is integrated;
 - o facilitates problem solving through laws that are clear and sufficiently stringent to meet environmental goals, and policies and procedures that are transparent and unambiguous;
 - o ensures coordination and a steady flow of information/evidence, particularly where this process is likely to be flexible or discretionary.
- Creating the opportunity for collective effort where:
 - o government officials can exercise their authority according to the standards chosen and have sufficient resources to deliver them (i.e., adequate resources and training, proper remuneration, motivation, and professional development opportunities);
 - o the regulated have the proper incentives to comply with both the letter and the spirit of a law;
 - o non-governmental groups and the media play an unbiased education role and present objective information and analysis, not fear;
 - o there are opportunities for public participation and information exchange that builds capacity.
 - Establishing a set of meaningful targets that:
 - o are clearly articulated and measurable;
 - o have related performance indicators that are useful and improve decision

³ [Implementing Environmental Regulation: Enforcement and Compliance](#), Anthony Heyes, University of London, Department of Economics, 2000, pp.11.

⁴ [Compliance Theory: A Goal Framing Approach](#), Julien Etienne, Postdoctoral Fellow, Centre for Analysis of Risk and Regulation,

London School of Economics and Political Science, June 2010, pp. 23.

⁵ [Principles of Environmental Compliance and Enforcement Handbook](#) (<http://inece.org/>), pp 11 – 14.

making (i.e., right information for the right problem).

- Enabling timely, predictable, and appropriate enforcement actions that cause potential violators to determine that the risk of detection and punishment outweighs the potential benefits of non-compliance.
- Incorporating continuous improvement through evaluation to ensure that conditions in permits and authorizations are enforceable, consistent with current priorities, and identify areas of underachievement.
- Ensuring consistent, visible, and transparent efforts against corruption.

How Does BC Measure Up?

We can check off most of the points above. BC has a strong commitment to environmental goals and a plethora of environmental statutes, from the *Agricultural Land Commission Act* to the *Oil and Gas Activities Act* and the *Water Sustainability Act*, plus a host of federal laws that any project proponent must consider and/or obtain approvals under before development activities can begin. For the most part these have clear lines of authority and responsibility, although there is still work to be done on eliminating overlap and duplication. The province has a set of independent, sector-specific regulators who are charged with impartially reviewing the activities of those they regulate. There are also overarching regulators (e.g., environmental assessment). Some argue that the transparency of parts of the environmental regulatory processes is inadequate. We require industry, in particular, to monitor and report on its activities. This is an area that needs more work to ensure relevance and a direct relationship to achieving environmental goals, rather than

reporting for reporting's sake. We also provide substantial opportunities for public participation.

Some areas to work on:

- Developing targets and indicators.⁶ Overall these are weak in BC, partly because this is an emerging area of academic thinking and practice rather than a mature body of knowledge.
- Ensuring a process for continuous improvement and capacity development. Often financial and human resource constraints make it hard to achieve this.
- Enabling appropriate and efficient monitoring, data collection and reporting. When we are unsure about something, we usually ask for more information without necessarily scoping the requirements tightly enough, which results in mountains of largely useless data.
- Pursuing creative problem solving and being open to new ideas.
- Better integration. The complexity and silo'd nature of our environmental regulatory system creates problems instead of facilitating solutions.
- Transforming the roles of NGOs/ENGOs/media to educators rather than vehicles of fear by partnering with them, where appropriate, so that we can understand, evaluate and accept different points of view.

BC Statistics

Now let's look at some statistics. Using Ministry of Environment data,⁷ there has been an average of ~2,300 violations each year. Of these, about 17% are issued under acts that are not necessarily environmental in nature and include responsibilities of Conservation Officers for

⁶ <http://www.bcbc.com/content/1144/EEBv6n1.pdf>.

⁷ Environmental Violations Database, BC Ministry of Environment, <https://a100.gov.bc.ca/pub/ocers/searchApproved.do?submitType=menu>.

	2013	2012	2011	2010	2009	2008	2007	2006	Avg	
Total	2659	2261	1693	2004	2266	2365	2351	2580	2272	
Drinking Water Act	2	1	0	0	0	0	0	0	0	0.0%
Environmental Management Act	141	146	95	117	153	154	149	144	137	6.0%
Fisheries Act	395	291	225	287	360	398	400	546	363	16.0%
Forest Act	2	0	0	0	0	0	0	3	1	0.0%
Forest and Range Act	57	62	23	26	36	54	27	9	37	1.6%
Integrated Pest Management Act	17	14	4	8	4	19	8	0	9	0.4%
Migratory Birds Act	1	4	3	1	1	1	0	0	1	0.1%
Park Act	44	39	37	41	126	3	2	8	38	1.7%
Shipping Act	83	65	67	33	20	34	20	0	40	1.8%
Waste Management Act	0	0	0	0	0	0	1	9	1	0.1%
Water Act	28	47	42	47	71	39	39	29	43	1.9%
Wildlife Act	1387	1133	869	1080	1083	1260	1289	1506	1201	52.8%
Motor Vehicle Act (terrain)	31	4	7	6	14	17	15	18	14	0.6%
Other			1	1		1	1	2	1	0.0%
	2188	1806	1373	1647	1868	1980	1951	2274	1886	
Percent of Total	82%	80%	81%	82%	82%	84%	83%	88%	83%	
Other non-environmental										
	468	453	320	367	398	385	399	306	387	
Percent of Total	18%	20%	19%	18%	18%	16%	17%	12%	17%	
Violations by:										
Individual	2597	2190	1636	1965	2190	2286	2247	2496	2201	
Corporate/Local Government	62	71	57	39	76	79	104	84	72	
Percent of Total Corporate/Local Government	2%	3%	3%	2%	3%	3%	5%	3%	3%	

things like firearms. Of the remaining 83%, a majority of the violations (53%) are by individuals under the *Wildlife Act*. The next largest set of violations are under the federal *Fisheries Act* (about 16% to the total). The more interesting number is the percentage of violations attributed to industry: this has remained at about 3% of the total for the past eight years. So despite the impression in some quarters that the conduct of industry is bad and getting worse, the data show that this is not the case.

That said, it is true that compliance with any regulatory regime is hard to know with certainty because the rules are not always understood, and enforcement may be constrained by available resources. However, it is encouraging to see data indicating that industry is generally doing a solid job, perhaps in part because BC has a strong self-reporting and monitoring culture along with a balanced use of tools and practices drawn from each of the two models.

Recommendations

In thinking about the directions in which the statistics are pointing, taking the following steps would help BC do even better:

- Encourage greater enforcement using normative tools that incent correct behavior. For example, enable faster permit processing for good actors. Be transparent and public about why (i.e., acknowledging good behavior), which then sets the bar for others to follow (carrot versus stick.)
- Ensure better training of officials in enforcement roles, in particular about how to collect evidence correctly. The benefits include enabling a greater focus on the important non-compliance issues, which in turn should increase confidence and trust in the system, as well as save money.
- Resist the temptation to raise penalty amounts as the default and broadly applied solution to high profile events. This response has now made the maximum fines/jail terms for regulatory offences substantially higher

than for Criminal Code offences in some cases.

- Stop further expansion of Administrative Monetary Penalty (AMP) regimes. They are inherently unfair because, with few exceptions, they eliminate a due diligence defense. There is no credible evidence to support a conclusion that a due diligence defense weakens enforcement. On a larger scale, precluding a due diligence defense undermines confidence in the regulatory framework and trust overall (right to a fair hearing).

Conclusion

The goal of any environment-specific law is to balance environmental protection with socio-economic benefits of industrial, commercial and technological development. A well designed and implemented compliance and enforcement framework creates value. Conversely, poor design and implementation foster conflict.

Compliance creates “public value” when it promotes the rule of law and good governance; ensures fairness and strengthens the credibility of environmental requirements; protects the goods and services provided to a society by a well-functioning ecosystem; and protects public health. Compliance creates “private value” when it increases investor confidence by reducing business risks; stimulates innovation and increased competitiveness; and creates new jobs and markets.⁸

Comparatively speaking, BC has done a solid job in this domain. We face some challenges going forward, given the global demand for our natural resources and the expansion of urban areas which both rely in some way on the development of our endowed natural heritage. But if we are committed to improvement through an ongoing dialogue and avoid a heavy-handed approach where none is warranted, the province can continue to make progress toward effective C&E.

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⁸ Principles of Environmental Compliance and Enforcement Handbook, INECE, pp. 5.