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Changes to the Fisheries Act – The Sky is (Not) Falling[1]

Upcoming changes to the *Fisheries Act* (the *Act*) had been the subject of considerable speculation until Bill C-38, the Harper government's 2012 Omnibus Budget Bill, was tabled earlier this year. The debate in the media which both pre-dated and followed that in Parliament resembled an odd and rather one-sided story of doom that was about to be unleashed on Canadians.

There are many folktales of paranoia and mass hysteria. Chicken Little is one such example. Readers will recall that Chicken Little, after being hit in the head with an acorn, spread a rumor that the sky was falling, and the end result was a tale of mass hysteria leading to the deaths of Chicken Little and those who had believed her.

The moral of the story is "don't follow blindly" and "don't believe everything you hear". Yet that is exactly what has happened in response to the recent *Fisheries Act* changes, some of which became law on June 29, 2012. Someone claimed that the sky is falling, and soon there was a mass following of people who, like Chicken Little's friends, hadn't actually seen, heard or felt the sky falling, but took her at her word.

In the case of the *Fisheries Act* reforms, this fear was nurtured at a time when the words that actually articulated the changes were not even available. There was just a hint that the coming changes might be big and significant. Some took the opportunity to conjure a picture of impending doom. By the time the words embodying the legislative reforms were actually available for review in Bill C-38, the folktale had taken on a life of its own and eventually the tale became "truth". Once repeated over and over and over again, few bothered to question the validity of the original arguments or, it seems, to examine the actual words relative to the original assumptions. There was a need in some quarters to hold fast to the initial assumptions, and perhaps an unwillingness to admit that the story being told didn't actually match the meaning of the words.

A sampling of "sky is falling" commentary concerning the *Fisheries Act* changes that appeared in various media since March 2012 includes:

The Fisheries Act amendments will undermine a stable, predictable regulatory regime, one that for more than 35 years balanced economic and

[1] The Business Council thanks Paul Cassidy and Janice Walton of Blake, Cassels and Graydon LLP for valuable comments on an earlier draft of this article. Responsibility for the contents rests with the author alone.

environmental objectives and was based on sound science.[2]

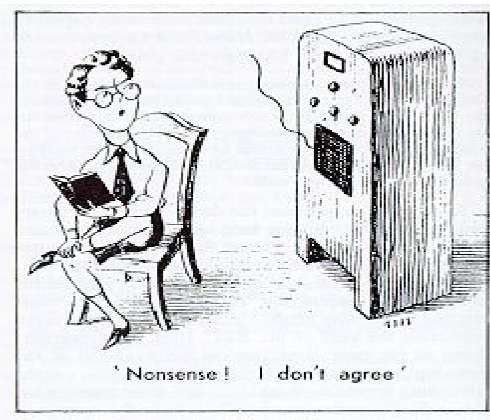
The Fisheries Act currently prohibits activities that harm the habitat of any fish species in any Canadian waters, either fresh or marine, but the new wording would limit protection only to those fishes involved in fisheries. This opens the door to unrestricted development on any water body as long as it does not contain federally listed endangered species or fish targeted by a fishery.[3]

It's going to remove freshwater protection for most fishes in Canada, which can't be a good thing.[4]

The Government proposed to significantly weaken s. 35 of the Fisheries Act and to delegate fish habitat protection, pollution prevention and fisheries management to the provinces and territories.[5]

Our experience convinces us that their continued survival would be endangered without adequate federal regulation and enforcement, particularly in the area of habitat protection.[6]

Government has shown little regard for the protection of the environment and over the past few years has supervised the almost total elimination of enforcement of the habitat protection and the pollution provisions of the Canada Fisheries Act (Sections 35 and 36 respectively).[7]


'Nonsense! I don't agree'

"All of this is nonsense, utter nonsense," says prominent environmental lawyer Paul Cassidy of Blake, Cassels and Graydon LLP in a discussion about why myths have grown around the recent changes to the *Act*. "If anything the 2012 changes to the *Fisheries Act* are at a minimum neutral, and the constraints put on business activities are more stringent than what existed under the 'old' *Fisheries Act*. What the changes do is modernize this 100-year-old legislation, make it consistent with other existing environmental legislation, codify what decision-makers have been doing in practice, and draw stronger lines around what they can and cannot do," he concludes. Has the *Act* been gutted? No. Does industry get a free ride? No. Will there be fish and important fish habitat left unprotected? No. Have Ottawa's powers been diminished? No. Is there still the opportunity to punish, or incent different behaviour from, those who may violate the provisions of the *Act*? Yes.

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[2] Douglas Macdonald, School of the Environment, University of Toronto; David McRobert, environmental lawyer, Peterborough, Ont.; and Miriam Diamond, Department of Geography, University of Toronto. Globe and Mail, July 6, 2012.

[3] Brett Favaro, John D. Reynolds, Isabelle M. Côté, University of Victoria. Sciencexpress, June 16, 2012.

[4] Eric Taylor, University of B.C. Zoology Department.

[5] EcoJustice. UBC Blog, July 16, 2012.

[6] Tom Siddon, David Anderson, John Fraser, Herb Dhaliwal. June 2, 2012. Open Letter.

[7] Otto Langer. March 13, 2012. The Common Sense Canadian.

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Not the Only Legislation Protecting Fish

Let's begin with a basic question: is the *Fisheries Act* the only legislation that protects fish and fish habitat? This has been a central claim advanced by many opposed to the modifications contained in Bill C-38. They argue that the *Fisheries Act* is sacrosanct and should not be altered because it is the only and the strongest protection for fish and fish habitat. In truth, all legislation can and should be reviewed/revised from time to time to reflect modern interpretation, case law, in-the-field practice, and new knowledge. Second, a scan of existing provincial and federal environment-related statutes reveals there to be a minimum of 16 statutes that touch on or can be used to protect fish/fish habitat. These range from the *Canadian Environmental Protection Act* and the *Species at Risk Act* in the federal domain, to the British Columbia *Water Act* as well as industry specific provincial statutes such as the *Mines Act* and *Oil and Gas Activities Act*. Each of these, in some substantive way or another, enables the protection of fish and fish habitat and, when combined, provide powerful tools to deal with aquatic management issues. The *Fisheries Act* is not the only nor is it necessarily the best game in town. In Canada, where there is shared responsibility among different levels of government for the management of resources and for environmental protection, one piece of legislation cannot possibly be all things to all people, nor should it be the only tool used by government to influence behaviour.

Sections 35 and 36 of the *Fisheries Act* have been the main areas of debate. The easiest to deal with is section 36, by many accounts the flagship section of the *Act*, because it is an absolute prohibition on depositing "deleterious substances" into fisheries waters and can (and does) result in substantial fines even in circumstances where there is only a minor spill and no actual harm to fish or fish habitat. As discussed in a recent article by Janice Walton, also a lawyer with Blake, Cassels and Graydon,[8] there has been no real change to the section 36 prohibition. It is still an offense to deposit a "deleterious substance" in water frequented by fish.

Concerns about the section 35 changes are centered around the rewording of "no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat". When compared to the modified language, whereby "no person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery", it is hard to see a real change, especially when read in light of the definition of "serious harm to fish" which includes killing of fish and permanent disruption or destruction of fish habitat.

Taken on their face, the current words of section 35 prohibit virtually any activity which causes harmful impacts on fish habitat. From an economic and social development point of view, there would be very little activity impacting fish habitat if these words were interpreted strictly, as it could be argued that any disruption or alteration is harmful in some fashion. This is why the Department of Fisheries

[8] Federal Government Increases Oversight of Activities Impacting Fisheries, Janice Walton, Blakes Bulletin, Environmental Law, July 2012

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and Oceans (DFO) has developed and applied a policy to assist in the interpretation of the prohibition. The policy articulates the goals, principles, strategies and procedures for making decisions, and sets in context the criteria for human impacts on fish habitat as part of that ecosystem. It applies a concept of No Net Loss (NNL) which, in essence, interprets the current prohibition as allowing human activities impacting fish habitat to take place, so long as the productive capacity of the habitat to support the fisheries is preserved. [9]

The new prohibition in section 35 changes the prohibition from "harmful alteration or disruption" to "permanent disruption". This new "permanent disruption" prohibition would appear to embed, into law, the concept of no net loss of the productive capacity of the habitat. In this way, the altered prohibition is more scientific and potentially less open to policy interpretation than the old one. Far from being less stringent, this prohibition is clearer on its face. In this way "HADD" will not be eliminated, but instead will be based on a more science-based investigation of the consequences of a project or activity on the productive capacity of the habitat to support the fishery.

As a result, the proposed changes to section 35 do not create a situation that is less protective than the current language, in terms of the safeguarding of fish habitat. Whether the changes will lessen the challenges faced by industry in the development of projects and the undertaking of activities depends on discussions and possible revisions to the government's policy that have yet to occur. As a result, the Business Council must reserve judgment on whether the changes to section 35 in Bill C-38 represent a positive step for our members who are engaged with DFO and fisheries matters.

The second aspect of the change in section 35 which has prompted some concern is the alleged narrowing of the protection to only apply to commercial, recreational and Aboriginal fisheries. However, this change really just codifies in the statute itself the current scope of the *Act*. Managing fish and fish habitat to support some form of fishery has always been a central purpose of the *Act*. And Canadian courts have repeatedly confirmed that the federal government's power under the Constitution is not over fish or fish habitat, but over the fisheries resource. Thus, the *Act* can now only apply to fish or fish habitat that are part of a fishery. Defining the fisheries as commercial, recreational, or Aboriginal merely confirms that the *Act* applies to all types of fisheries. Furthermore, from a biological perspective, it is unlikely that there are many aquatic areas in Canada that do not support one of these categories of fishery in some fashion.

What **has** changed in this area are the powers of inspectors and officers, who have broadened authorities to issue orders regarding activities that cause deposits or impact fish habitat. Furthermore, the self-reporting requirements in the legislation have been expanded to include impacts on fish habitat, and a number of new offences have been created which increase the enforcement powers of the government, not only over incidents themselves, but over reporting, remediation and compliance with authorizations.

Once the next round of amendments to the *Act* are in force, the Minister or his designate will also have power to order activities to cease work or shut down completely. These powers are currently subject to approval by the federal cabinet, but that restriction will be removed. Additionally, the size of the potential fines will

[9] Policy for Management of Fish Habitat, Chapter 5: Procedures to Apply the No Net Loss Principle, Department of Fisheries and Oceans.

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be dramatically increased, and will include high minimums.

This is hardly a softened regulatory response to industry "demands" and influence. On the contrary, public servants with statutory decision-making responsibilities now have sharper implements in their tool kit.

Delegation and Equivalency

Environmental groups and other critics have also decried the federal government's move towards delegation and equivalency, expressing concern that this will mean a relaxation of the legal standards established in the *Act* and become the modus operandi from now on. We believe this assertion is without foundation. Delegation merely means that the administration of the *Act* is done by another agency. The legal requirements in the *Act* do not change. The equivalency powers can only be used in circumstances where a province or territory has equivalent laws. In other words, again, there is no change in the legal standard. Furthermore, equivalency is already possible under other federal environmental legislation, and its use has been very limited. For example, under the *Canadian Environmental Protection Act* the government has only used the equivalency order powers once.[10]

The Business Council remains concerned about the costs and duplication of government services, fewer dollars to do more things, and reductions in front-line resource ministry and regulatory agency personnel for demographic and financial reasons. There is only one set of taxpayers, a finite amount of money and an endless number of things that those dollars can usefully be spent on. Rationalizing and combining forces, including through enhanced cooperation and coordination between federal and provincial agencies, is entirely justified. With a history of shared decision-making, and a collective ethos of governance-closer-to-home as being more responsive to the needs of a particular community, expanding the range of tools that government has to deliver its responsibilities is a prudent response to the reality of having to operate in complex and constrained systems. Delegation to another federal government agency or a province can be the best option, depending on the nature of a project. Equivalency may also make sense in certain circumstances.

To bring us full circle, the business community in British Columbia has had longstanding concerns about the manner in which the *Fisheries Act* was drafted and interpreted, and with the lack of the kind of administrative mechanisms found in modern environmental statutes. These and other concerns about the Act were summarized a Joint BC Industry submission to the Department of Fisheries and Oceans in 2006, to which the Business Council was a contributor. The issues highlighted in that submission included: interpretation of HADD provisions, the process of evaluation and authorization of activities causing a HADD, the link with the *Canadian Environmental Assessment Act* (this concern has been addressed with the passage of CEAA 2012), overly broad interpretation of pollution prevention provisions, the absence of a general regulation authorizing section 36 deposits, the lack of both a mechanism to appeal decisions and statutory procedures and timelines, insufficient coordination between levels of government, and DFO's failure to develop alternatives to traditional enforcement.

What Did We Get?

Using a yes/no checklist approach, it would appear that many of the recommendations from the 2006 Joint BC Industry submission on *Fisheries Act* reform were considered in the recent changes, if only at a high level, with the

[10] Alberta Equivalency Order, SOR/94-752.

exception of the recommended reforms to section 36. However, based on a more in-depth exploration of the federal Omnibus bill, our judgment is that the *Fisheries Act* has been made more administratively simple for the Department, but not necessarily more manageable or efficient from the standpoint of industry. How and whether our assessment on this point evolves will depend on the scope and shape of the forthcoming regulations and the resulting updated NNL policy, which DFO is now working on.

Enforcement is a more prominent feature of all new environmental laws, including the amendments to the *Fisheries Act*, and going forward industry will need to be more vigilant about how it conducts itself in both large project development and ongoing operations and maintenance activities. One could argue that the *Fisheries Act* amendments have caught the federal government up with provinces like BC, which has had enforcement provisions in the *Environmental Management* Act and its predecessor, the *Waste Management* Act*,* for many years.

To take us back to our folktale and the moral of the story: the sky is not falling, and the issues with respect to the "old" *Fisheries Act* raised by the business community and others reflect real-life and practical experiences over many years and spanning many different kinds of projects and activities. Only time will tell if the changes Ottawa has just enacted to the legislation and the regulations which are still being developed will lead to a better and more predictable set of rules.

Finally, we note that some of the most contentious changes to the *Act* are intended to take place at some future date. While this is a rather unique implementation approach, it does give time to continue the dialogue. The Business Council will continue to work with the DFO in an effort to balance the aspirations for economic development, environmental integrity and healthy fisheries resources, all of which can and must co-exist.

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