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Bill C-38 and offloading Fisheries onto the Provinces

Bill C-38, the Budget Implementation Bill, with its various amendments to Canada's environmental laws, is a complicated statute, with many long-term implications that have not been fully explored. One of the most significant, however, has to be the possibility that the Bill may have the effect of offloading responsibility for the protection of fish habitat to some or all of the provinces.

This may sound surprising, as none of the provinces have expressed a desire to take over the federal government's role in respect of fish habitat. But although there is no apparent provincial appetite for offloading, the amendments create both:

- a legal mechanism for the offloading of responsibility for fish habitat, **and**
- a weakening of fish habitat protection provisions that will leave gaps that put pressure on provinces who wish to see responsible stewardship of fish and fish habitat.

If this offloading occurs, it is likely to result in a significant additional burden on cash-strapped provinces, and, as a result, less effective protection of fish and fish habitat, and inconsistent protection between jurisdictions. This would mean a less efficient, and less effective, *Fisheries Act* for all of Canada.

It should be noted that there are significant legal questions about the ability of the federal government to delegate legal responsibility for fisheries to the provinces,[1] which may result in litigation if a delegation occurs under the provisions enacted through Bill C-38. This backgrounder does not attempt to answer these questions.

Offloading Fisheries

That the amendments in Bill C-38 provide for offloading of the federal responsibility for Fisheries is clear. Section 134 of the Bill, if enacted, will create ss. 4.1 to 4.2 of the *Fisheries Act*, which provide for wide flexibility to define relationships between the federal government and provincial governments, up to and including offloading.

These partnership/offloading provisions appear very close to the start of the amendments, and of the *Fisheries Act* as amended, suggesting that the federal government attaches a fair level of importance to them.

[1] *Alexandra Morton v. BC*, 2009 BCSC 136.

Section 4.1 gives the federal government a wide authority to enter into agreements with a province for a variety of purposes. Having done so, section 4.2 then allows the federal government to suspend all or part of the *Fisheries Act* in that province.

> **4.2** (1) If an agreement entered into under section 4.1 provides that there is in force a provision under the laws of the province **that is equivalent in effect to a provision of the regulations**, the Governor in Council may, by order, declare that **certain provisions of this Act or of the regulations do not apply in the province** with respect to the subject matter of the provision under the laws of the province.
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> (2) Except with respect to Her Majesty in right of Canada, **the provisions of this Act or of the regulations that are set out in the order do not apply within that province** with respect to the subject matter of the provision under the laws of the province. [Emphasis added][2]

A couple observations about this provision. First, it does not require equivalence with the *Fisheries Act*, but rather with "a provision of the regulations." It is not at all clear which regulation, or which provisions, are referred to here, and whether the legal requirements will necessarily remain equivalent to the *Fisheries Act* once delegated. This may be clarified in as yet undeveloped regulations.

Second, clearly the provision goes beyond providing for cooperation between the two levels of government, and actually contemplates removing the federal role in respect of parts of the *Fisheries Act*. This goes well beyond the cooperation required in existing federal-provincial agreements on fish habitat and other fisheries matters.

Third, there does not appear to be any limit on which provisions of the *Fisheries Act* might be so suspended, or on how much of the Act could be offloaded in this way.

Finally, there are unanswered legal questions about the extent to which the federal fisheries powers can be delegated in this way, and legal challenges are a significant possibility if delegation does occur.

Why would a province want to accept responsibilities for fisheries?

There is, of course, nothing in section 4.1 or 4.2 which would force the province to accept the offloading of fisheries related responsibilities, and, as noted, the provinces have not been requesting such powers, to the best of our knowledge. On its face it might seem that these provisions will only be used for minor delegations of authority in respect of specific issues.

Interestingly, there have been calls for delegation of fish habitat provisions from at least one conservative think tank – the Frontier Centre for Public Policy – an organization which argues that the federal laws protecting fish habitat are overly onerous, and an intrusion into Manitoba's rural economy.[3] In 2004 Stephen Harper, then leader of the Opposition, spoke on his party's tax policy at an event organized by the Frontier Centre. At that time he expressed sympathy for

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[2] Canada. *The Jobs, Growth and Long Term Prosperity Act*, Bill C-38, Second Reading, June 14, 2012 (41st Parliament, 1st Session), s. 134.

[3] http://www.fcpp.org/pdf/3dec2001.pdf, last accessed 9 May 2012. Mr. Robert Sopuck, the author of this report, was subsequently appointed by Prime Minister Harper to the National Roundtable on the Environment and Economy which, of course, is now being cut in the current budget.

the Frontier Centre's proposal that the Federal Government make powers over fish habitat available to the provinces:

> **FC:** You are likely aware that the Fisheries Department has developed a very heavy handed jurisdiction here on the Prairies forcing farmers to put in impact plans for drainage ditches on roadways and so on. One option to return to more sensible regulation would be to have the provinces regain control over their fisheries. What do you think about that?
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> **SH:** I am open to some of that discussion. I have said even in the case of off-shore, that I would like to see more resource jurisdiction to the provinces. I would think that with inland resources, there would be a lot of room for a lot more local and provincial control over those matters. I am very open to that and said so recently when I was on a trip to Nova Scotia talking about how the federal authority over navigable waterways has become all encompassing.[4]

So one reason that a province might wish to take over fish habitat protection under an agreement under the amended *Fisheries Act* might relate to its belief that the federal fish habitat protection laws are overly stringent, and that a weaker or more flexible provincial regime was possible. This is a concern for anyone who believes in strong, nationally-consistent protection of fish habitat, particularly given the fact, discussed above, that s. 4.2 does not clearly require provincial rules to be equivalent to the federal Act.

However, the amendments also make sweeping changes to the fish habitat provisions of the *Fisheries Act*, with the government justifying these changes using similar arguments about the need for flexibility that has been used by the Frontier Centre. As discussed below, these changes will provide far less legal protection for fish habitat than is currently the case.

As a result, it is our view that some provinces will now find themselves in the opposite position – of considering whether to take over the protection of fish habitat because the new regime includes inadequate protection for fish and their habitat. Former federal Fisheries Ministers, from both Conservative and Liberal governments, have referred to these changes as "gutting" the habitat provisions of the Act.[5] In our view, the resulting habitat provisions provide incomplete, scientifically indefensible and ineffective protection for fish habitat.

What's so awful about the habitat protection provisions?

So what do we mean when we say that the proposed amendments to the *Fisheries Act* will result in "incomplete, scientifically indefensible and ineffective protection for fish habitat"?

Section 35 of the Fisheries Act currently says that it is illegal to "harmfully alter, disturb or destroy" fish habitat.[6] This is important because fish cannot survive unless their habitat is protected.

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[4] http://www.fcpp.org/publication.php/760, last accessed 9 May 2012.

[5] T. Siddon et al. An Open Letter to Stephen Harper on Fisheries. Globe and Mail. 1 June 2012, available on-line at http://www.theglobeandmail.com/commentary/an-open-letter-to-stephen-harper-on-fisheries/article4224866/, last accessed 14 June 2012.

[6] *Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(1)

Bill C-38 would – if and when the Federal Cabinet enacts the relevant provisions – change this legal protection so that it is only illegal to cause "serious harm" to fish. The proposed new wording reads:

> 35. (1) 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.

"Serious harm" is defined in the Bill as: "**death** of fish or any **permanent** alteration to, or destruction of, fish habitat." [Emphasis added]

This definition is much narrower than the definition of fish habitat, and results in far less protection for fish – **even for fish and habitat that everyone agrees should have legal protection**. In addition, it introduces a host of issues of proof, and requires much more field work, to enforce effectively.

On its face:

- Activities which fall short of killing fish, including maiming, deforming or stunting their growth, do not amount to "serious harm".
- Temporary alteration or destruction of fish habitat is not prohibited unless it can be shown to have resulted in the death of fish that are part of a commercial, recreational or Aboriginal fishery.
- Multiple activities which individually do not actually cause "serious harm" to fish will not be prohibited, even if collectively the actions do kill or permanently harm fish habitat.
- The new provision will be far more difficult to enforce than the current section 35. While the current provision applies to anyone who harms fish habitat, the new definition introduces legally undefined and subjective terms such as "permanent" and issues of proof such as whether the alleged offence can be shown to have directly caused the death or the permanent alteration/destruction. Even where dramatic alteration of fish habitat has occurred, it may be difficult to prove beyond a reasonable doubt that it is the cause of the death of fish, or that the alteration will not recover. The result of the more complicated elements of the offence will be increased cost of effective enforcement, increased uncertainty over the law, and increased likelihood of offenders getting off.
- The provision adopts a fishery specific, rather than an ecosystem-based, approach to habitat protection which is arguably unscientific.

In our view, it may still be possible to hold individuals and corporations responsible for worst-case destruction of fish habitat or killing of fish accountable under these provisions, where the incident is well documented and the scientific evidence is clear. But actions directly and provably resulting in the death of fish and the permanent alteration of fish habitat are actually relatively rare. It is more common for permanent harm to fish habitat and the resulting death of fish to occur over years, with many different individuals altering the fish habitat, none of whom individually could be held responsible for "serious harm" under the new section 35.

The new provisions will provide little in the way of legal protection for habitat for such alterations.

Public discussion of the Bill C-38 Fisheries Act amendments have often focussed on the government's desire to limit application of the Act to "commercial, recreational or Aboriginal fisheries", and to restrict the range of fish waters protected by the Act. It is important to realise

that the **reduced legal protection, and complicated issues of proof apply directly to salmon and other commercially, recreational and Aboriginally important fisheries, and to all fish habitat.**

In addition to section 35, the Act will give the Minister and Governor in Council broad powers to authorize "serious harm" or to exempt water bodies from the application of section 35 altogether. Precisely how these powers will be used remains to be seen, but must be a concern for anyone concerned about effective protection of fish habitat.

A no-win situation for provinces

The result is a no-win situation in which provincial governments must either accept inadequate protection of fish habitat, or chose to step in and take on such protection themselves, with the resulting cost and responsibility. Provincial governments which fail to step in will undoubtedly receive political pressure from those concerned about inadequate federal protection to do so, while governments which do will face the challenges of managing a fish habitat program within current budget constraints.

Interestingly, Bill C-38 amends the habitat provisions of the *Fisheries Act* twice over. The first amendment, which comes into force when the *Budget Implementation Act* is signed into law, contains more modest changes to the habitat provisions. It is broadly consistent with the approach to habitat that has been part of the Fisheries Act since the 1970s, and which is effective and scientifically defensible. The "serious harm" version of section 35, discussed above, will not become law unless and until the Governor General in Council (federal Cabinet) brings it into force.

We are informed by Fisheries and Oceans Canada that the intent is to bring the "serious harm" provisions into force roughly 6 months after the *Budget Implementation Act* becomes law, although it was emphasized that 6 month period, which they say is to be used to draft regulations, might well be extended. If this is correct, the initial amendments are intended to remain in force for a matter of months or possibly a year.

This explanation of the need for two sets of amendments seems implausible. Bringing new laws into force for periods measured in months, and then replacing them, with the resulting disruption to government business, is inefficient and unnecessary. To the extent that drafting of regulations needs to be done, there would have been little problem with doing so under the current Act, in advance of the revised Act (and then bringing everything in force at the same time), or under the revised Act, if necessary with transitional provisions. The explanation for enacting two versions of the Act does not hold water.

One possible explanation is that the federal government is not actually planning to enact the "serious harm" provisions of Bill C-38, but wishes to have the threat of such provisions coming into force down the road. That situation might well give rise to protracted public controversy, and controversy within Provincial governments, regarding the proposed changes, resulting in calls for the Provinces to step into a roll that they have no desire to fill. We have no concrete information that confirms this theory, but were it the case, then we can expect that the 6 month window for bringing in regulations and enacting the more egregious provisions will be pushed off, perhaps indefinitely.

A patchwork of habitat protection

The power to offload, combined with poor legislation, is an invitation for environmentally minded provinces to negotiate an offloading of habitat powers, even if those provinces might not wish to take over this responsibility.

Indeed, the BC Wildlife Federation has already warned of this possible result (albeit at a time when the precise nature of the amendments was as yet unclear, but their analysis remains sound):

> Over the years BCWF volunteer members, though broad-based community stewardship partnerships across BC, have invested heavily in stream, river and lake fisheries habitat rehabilitation projects and have a stake in the protection of that substantial stewardship investment.
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> The alteration of the provisions of Section 35 of the federal Fisheries Act would be a major step backward for these resources.
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> If this approach is taken, groups such as ours will press the province to address the protection of aquatic habitat in legislation such as the proposed provincial *Water Act*. The potential mosaic of habitat provisions will not be in the interests of the environment, industry or Canada.[7]

Even if provincial laws could compensate for the inadequate protection of fish habitat contemplated by Bill C-38, which is uncertain, other results would include:

- Increased costs to already cash-strapped provinces, including a need for provinces to hire staff with additional expertise; As a result, the enforcement of fish habitat provisions may well be less well funded than it is at the federal level.
- Reliance on provincial governments that often have a poor track record when it comes to protecting fish habitat. For example, Fisheries and Oceans Canada has in the past criticized BC's forestry laws for allowing harmful alteration of fish habitat. Provinces are often subject to political pressure from significant economic interests.
- The loss of a consistent national standard for fish habitat protection, resulting in an economic advantage to jurisdictions which implement weaker standards.
- New provincial infrastructure and programs, and a new status quo, which might create political barriers to a future Federal government seeking to reassert a meaningful federal role in fish habitat protection.

We are not suggesting that the current government intends these results, but we think it likely that Bill C-38 and its Fisheries Act amendments will have these effects over time.

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[7] Letter to Prime Minister Stephen Harper from Rod Wiebe, President, BC Wildlife Federation, dated 15 March 2012.