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Federal Government Introduces Modernized *Fisheries Act*

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On Dec. 13, 2006, the Federal government tabled Bill C-45, *An Act respecting the sustainable development of Canada’s seacoast and inland fisheries (Fisheries Act, 2007)*. The new act is a welcome modernization of fisheries legislation and would replace the 138-year-old *Fisheries Act*, long criticized as outdated and inadequate. The proposed act contains numerous changes and looks very different from its predecessor.

Of the numerous changes incorporated in Bill C-45, two are of particular significance to industry. The first is significant to the **fishing** industry. The overarching principles under which the fishing industry is managed will be altered. The Minister’s “absolute discretion” to manage the fisheries through licensing will be replaced by a fisheries management scheme governed by principles specified in the *Act*.

The second is significant to **all** of industry whereby “harmful alteration, disruption and destruction” provisions (now found in section 35 of the current *Fisheries Act* and commonly referred to as “HADD”) will be altered in a subtle manner but potentially significant manner. The revision clarifies that a “disruption” to fish habitat is prohibited only if it is “harmful”.

Preamble and Purpose Clause

Unlike the current *Fisheries Act*, Bill C-45 contains both a Preamble and a “purpose” clause. The Preamble sets out the government’s commitment to

- conservation and protection of fish habitat;
- sustainable management of the fisheries;
- provision of a predictable, transparent and effective legislative framework for fisheries management;
- intergovernmental cooperation;
- recognition of the importance of the fisheries to aboriginal communities;
- stable access to fisheries resources; maintenance of the public character of fisheries management; and
- greater public engagement in the decision making process.

The purpose of Bill C-45 is in line with those commitments, and is stated to be:

“to provide for the sustainable development of Canada’s seacoast and inland fisheries,

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through the conservation and protection of fish and fish habitat and the proper management and control of fisheries.”

Fishing Industry Management Principles

Bill C-45 seeks to provide for more transparent and predictable decision-making by outlining principles for the management of fishing. Under the current *Fisheries Act*, the Minister of Fisheries and Oceans has an “absolute discretion” to issue licenses, giving the Minister substantial control over the management of fisheries. Under Bill C-45, the Minister and Department of Fisheries and Oceans must make their fisheries management decisions in accordance with a set of principles:

- principles of “sustainable development”, the application of an “ecosystem approach”, and of a “precautionary approach”;
- management in a manner consistent with the constitutional protection provided to existing Aboriginal and treaty rights, and to consider traditional knowledge;
- the use of scientific information in management of fisheries and protection and conservation of fish habitat;
- cooperation with other governments; and
- encouragement of Canadians in the decision-making process.

Given the differing views on the application of the “precautionary principle”, Bill C-45 sensibly offers the following clarification on how these principles will be applied:

The Minister...must ... seek to apply a precautionary approach such that, if there is both high scientific uncertainty and a risk of serious harm, they will not

use a lack of adequate scientific information as a reason for failing to take, or for postponing, cost-effective measures for the conservation or protection of fish or fish habitat that they consider proportional to the potential severity of the risk;

Issues for Industry: Conservation and Protection of Fish and Fish Habitat, and Pollution Prevention:

Harmful alteration of fish habitat

Section 35 of the current *Fisheries Act* contains a prohibition against:

“... harmful alteration, disruption or destruction of fish habitat.”

This provision has been criticized by industry for some because it is unclear as to whether a “disruption” that was not “harmful” to fish habitat was prohibited. Under Bill C-45, the grammar of this provision has been modified in a way that should make it clear that only harmful disruptions are prohibited:

“... harmful alteration or disruption, or the destruction, of fish habitat.”

Deleterious

Like the current *Fisheries Act*, Bill C-45 contains a prohibition against the deposit of a “deleterious substance” into waters frequented by fish. The definition of “deleterious substance” has been simplified, which should clarify the nature of the prohibition. The new definition clarifies that it is the substance itself - not the substance in water - that is defined as deleterious to fish or fish habitat.

Notable among the other changes with respect to conservation are:

- The Federal government claims that the new Act will now distinguish between large and small-scale projects in the review process. The government claims it will focus on large scale developments that have a higher risk of causing harm to fish habitat by creating regulations for lower risk activities. (It remains to be seen whether this is put into action.)
- With respect to works and undertakings, the Minister will only require the approval of the Governor in Council in order to direct the closure or cessation of the work or undertaking but not to order modifications or restrictions. Currently, the approval of the Governor in Council is required for any modification, restriction or closure of the work or undertaking.
- The Minister's power to order the removal of obstructions or the construction of fishways (fish ladders or fish passes) is subject to a finding that the obstruction is detrimental to fish habitat. Further, the provisions on obstructions and fishways have been consolidated into one provision.

Compliance and Enforcement:

The proposed act seeks to modernize compliance and enforcement with:

- The creation of a new offence for failing to meet the terms and conditions set out in an authorization;
- The creation of a new offence for making misleading or false statements to enforcement personnel or managers as well as making a new offence for providing misleading or false statements when applying for authorization under the act;
- The modernization of the search and seizure provisions to include reference to computers and electronic data. The proposed act also provides authority to make seizures while executing a search warrant;
- Provision for the management of aquatic invasive species. Bill C-45 prohibits the export, import, transport, or release of a prescribed aquatic invasive species unless it is done in conformity with the regulations;
- An expanded duty to notify, including a duty to notify of any harmful alteration or disruption or destruction of fish habitat, in addition to the current duty to notify of a deposit of a deleterious substance. Further, the duty to take corrective measures will be expanded to include a violation of the HADD provisions;
- Providing clear guidance for utilization of Alternative Measures Agreements as an alternative to lengthy and costly judicial proceedings for some fisheries and habitat offences;
- Expanding civil liability for violations of the HADD provisions. Under Bill C-45 any person who has suffered a loss of income as a result of a harmful alteration, disruption, or destruction of fish habitat or a deposit of a deleterious substance may now claim for damages. The current act limits loss of income claims to licensed commercial fishers. Additionally, the limitation period on claims for violations of the HADD provisions has been increased from two to five years; and
- The creation of the Canada Fisheries Tribunal, which will deal with the majority of violations under the act and lessen the role of the criminal courts in fisheries enforcement. Offences dealing with habitat alterations will continue to be dealt with by the courts.

Other amendments that Bill C-45 would introduce include:

- Giving the Minister clear authority to enter into agreements with the Provinces to further the purposes of the act thereby increasing cooperation between the Federal government and the provinces. In particular, the proposed act provides for agreements with respect to facilitating joint action in areas of common interest, and reducing overlap between the two levels of government.
- The Minister would be given expanded authority to collect information for the purpose of conducting research, collecting data, and reporting on the state of fisheries and fish habitat if that information is relevant to the conservation and protection of fish and fish habitat, proper management and control of fisheries or the sustainable development of aquaculture, or the prevention of pollution in waters frequented by fish.
- Permission for the establishment of advisory panels in order to carry out the purposes of the act or the regulations.
- The Minister would have clear authority to enter into legally binding Fisheries Management Agreements with different stakeholders to further the conservation or protection of fish, the sustainable development of a fishery or the

participation of Canadians in fisheries management.

Bill C-45 must still receive second reading and be submitted to committee. Currently, there is no timeline for the progression of this bill through Parliament.

Conclusion

If enacted, Bill C-45 would result in an extensive overhaul of the *Fisheries Act*. The legislative principles upon which the fishing industry is regulated will be changed in a very significant way. The revision of the environmental protection provisions will be less pronounced, but important, nonetheless. The tools for enforcement will be enhanced. It remains to be seen to what extent the proposed changes would trickle down to affect industry, but if Bill C-45 is an indication, Parliament is intent on making real change.

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