

FEDERAL FISHERIES ACT  
AMENDMENTS AND THE  
MINING INDUSTRY

Paper Presented  
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AND THE MINING INDUSTRY

This section presented by B.A. Heskin

Mr. Boyd and I appreciate the opportunity to speak to you on the Fisheries Act and more specifically, the recent amendments to the act, which became law through proclamation of Bill C-38, September 1, 1977. Through opportunities such as these, we feel that a better understanding of the amendments will be possible and we hope to be able to allay the concerns and what to us are misconceptions with the understanding of the intent of the Fisheries Act.

My comments will relate to the pollution provisions of the act, and Mr. Boyd will be covering the fish habitat section.

In general, it would appear that some segments of the mining industry saw the amendments not as merely amendments to existing legislation to make its administration more effective, but as the creation of a whole new federal power. Let me assure you this is not the case. I have with me a copy of the Fisheries Act as it existed 25 years ago and also a copy of the section of the act dealing with pollution taken from the 1868 version and these illustrate the point.

The Fisheries Act has been amended on numerous occasions to keep a current with the times. In 1970 it was amended to give authority to deal with a variety of problems before they actually became problems and to give authority for setting out requirements in the form of regulations. Such regulations have been developed for a number of industrial sectors, including the metal mining industry. It was under this version of the Fisheries Act that the present mining regulations were issued. They are not as many seem to believe, an example of extended powers created by the 1977 amendments.

If you were to examine the general and unaltered provision of section 33 (2), you will note the broad sweeping prohibition of how, unless a regulation clarifies and authorizes deposits:

- (I) Every activity of man is in potential violation, and
- (II) No one knows exactly what must be achieved to operate within the law.

The current amendments as they relate to section 33, and which are likely to be of primary interest to your industry, are: Section 33 (13) This will give authority to make regulations to allow the Minister, or other designated persons, to authorize existing plants to deposit deleterious substance while it is proceeding in taking actions to satisfy requirements set out in regulations, i.e. to give legal recognition to a compliance schedule. This section also gives the authority to handle those site-specific situations where total compliance may not be attainable for a variety of reasons.

Section 33.2 gives authority for requiring the mandatory reports of spills of deleterious substance. The reporting requirements are being designed to operate in conjunction with other existing reporting requirements.

This section will also obligate persons who cause spills or who have ownership status, to clean-up. If such clean-up is not initiated, an Inspector now has the power to direct clean-up when immediate action is necessary.

The penalty provisions of the act have been strengthened and these are summarized in a table in the little booklet Mr. Boyd will be distributing.

I would like to deal with some specific points and concerns which I believe have been of interest to the mining industry:

- (A) Constitutional jurisdiction - Your industry, I believe, has considered Bill C-38 to represent an expansion of Federal powers beyond what was contemplated in the British North America Act.

t In this objection your industry is really dealing with the Fisheries Act, not with the amendments. Even the 1868 version of the Fisheries Act prohibited deposits of deleterious substances. The points I made previously are very relevant to this objection. First, such an absolute prohibition requires clarification by way of regulations to enable your industry to know when it is, or is not, violating the Fisheries Act. Secondly, the recently issued regulations were not made possible by the amendments, but pursuant to an authority which has been in existence for years. Proof of this really is in the date of issuance February 1977 - six months before the amendments became law.

- (B) Your industry is concerned, I believe, that the amendments created overlapping controls with provincial laws regarding pollution control.

Again, their concern and comments were in reality addressed to the existing Fisheries Act and its regulations, rather than to the proposed amendments. However, the concerns are valid. There were, and are overlapping controls, varying requirements and two separate agencies to deal with. However, the amendments were designed to reduce rather than increase this problem.

In some provinces, the provincial agency is the sole contact with industry regarding both Provincial and Federal requirements pursuant to the Fisheries Act. My service and the federal government have been striving to see such a system in place here

in B.C. Towards this end we are currently developing a federal/provincial accord on environmental protection, which appears to be in the offing. I would like to say that as a result of recent discussions on this subject, I am very encouraged that arrangements will soon be in place whereby the provincial government will undertake to play the lead role and to implement and enforce federal requirements or their equivalent for the protection of fish. In the meantime, however, we cannot avoid our responsibilities and will continue with the implementation of federal requirements.

- (C) Your association is concerned with the ministerial discretion provided in the amendments, and of the uncertainty in how the legislation will be used. Virtually all such ministerial discretion that is included in the amendments and all that was inherent from the Fisheries Act prior to amendment, is discretion allowing the Minister to permit or authorize activities or deposits that would otherwise be offenses under the previously mentioned absolute prohibitions inherent in the legislation. Such discretion allows the Minister to deal with real events in a real world rather than dogmatically "protecting fish" to the exclusion of all other uses of water. Such discretions provide a flexibility that allows the Minister to consider economics, jobs and regional priorities in applying the Fisheries Act. Such discretion provides for the very considerations that your industry must have available to it if it is to operate in conjunction with fish rather than in competition with fish.
- (D) Your industry is naturally concerned that the amendments could deter new mining and threaten the continuation of existing mines. Again, I must repeat that the amendments are not new powers,

in general, the mining industry in British Columbia has operated well within the requirements of the Fisheries Act. I see no reason for any change. Many mines are on total recycle as a result of negotiations with fisheries dating back to the early sixties. Most provincial requirements reflect previous identified fisheries' requirements.

With, or without, the amendments to the Fisheries Act, new mines would be subject to requirements that reflect "state of the art" pollution abatement. This is reasonable technology where existing mines are not in a position to comply. Compliance then will be subject to sensibly scheduled improvements that reflect site specific requirements or new environmental concerns. It is recognized that some existing operations might not be able to comply. Both these situations can now be handled through the recent amendments.

As I mentioned before, I believe that the mining industry in British Columbia gets along very well with the renewable resource protection agencies. I see no reason why this should change. Certainly there will be some difficult problems associated with specific requirements to protect a valuable fishery resource that might otherwise be endangered. The track record in British Columbia over the last twenty years indicates that solutions have been possible.

An example of this is the Granisle Operation in Babine Lake which is a very important fish nursery area.

It is my sincere opinion that there will not be an arbitrary approach by the Federal Government as a result of the amendments.

Thank you for your attention.

This section presented by F.C. Boyd

I would like to express my personal appreciation to your Symposium Convenor for including Federal Fisheries on your busy agenda.

I recall that the last occasion I had to speak to the Mining Fraternity involved a slide presentation depicting salmon biology and the potential evils of placer mining and gravel quarrying. The incorporation of land and watercourse protection sections in the Mines and Coal Mines, Regulation Acts and guideline development, leads me to hope that another pictorial injection of potential resource use conflicts may be unnecessary.

Surely the potential for inter-resource problems is quite clear when one considers that there are about 2,000 salmon streams in B.C., and that hundreds of mining exploration permits, involving a wide range of activities, are issued each year. I would also like to make clear that the "Fisheries Act" has long recognized this potential by specifically identifying land clearing operations in Section 33.

Less clear, and sometimes confusing, are the jurisdictional overlaps at and between every level of government. This, I expect, is a product of our complex society, combined, I submit, with a very human (and necessary) inclination to attempt to control and conduct our own business, first and foremost.

I understand that you are interested in our most recent move to better conduct our business—the protection of fish and their environment. I refer, of course, to the Amendments to the "Fisheries

Act" which became law last September - Bill 38.

The Amendments covered a wide range of items, from Marine Plant Licensing to Seal Harvesting. No doubt of primary interest and applicability to those engaged in mining exploration and development are the Amendments concerning the fish habitat protection.

Before I review these sections, I would like to say a few words about what we in Fisheries saw as the need to have them included in the Act. Prior to the recent Amendments the Act was strong, but it had a few key shortcomings:

- 1) The definition of fish did not include all stages of their life cycles.
- 2) Those sections which addressed the protection of spawning areas and other waters used by fish were restricted in scope and punitive in nature. There was, therefore, no authority to prevent actions which were clearly destined to destroy fish or their life supporting habitats.

In recognition of this authority shortfall, over the years we welcomed, developed and encouraged co-operative referral procedures, with those agencies and industries which dominated land use and water use activities: Highways, Railways, Logging, Dredging, Flood Control, Mining, Hydro, Irrigation and others. Although these referral procedures were (and are) far from perfect, they have improved our capacity to prevent damage to the Resource simply by providing an opportunity to examine plans and proposals, and recommend mitigative procedures.

We could, however, see that this limited capacity to protect the resource would be less than adequate to sustain existing stocks and realize productive potentials in the long run. We became convinced that burgeoning urban and industrial development would continue to

impose and accelerate incremental and irreversible loss of many of the most unique and productive aquatic habitats. Among the most vulnerable of these are the intertidal mudflats and marshes and key freshwater spawning and rearing areas. This conviction dominated our move to more effectively conduct our business.

So, in the Amended Act:

- we re-defined fish to include all life cycle stages,
- we defined fish habitat as "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes",
- we provided a prohibition which could be applied to halt unacceptable activities,

and finally,

- we provided a mechanism (Authority) whereby the plans pertaining to an activity which could affect fish habitats can be reviewed, mitigative measures imposed and, if necessary, the project or development halted by Order-in-Council.

HOW THEN may these Amendments apply to the Mining Industry, particularly exploration, development and restoration activities?

FIRST, I feel that it should be more widely understood that the Minister of Fisheries assured Provincial Representatives from Government and Industry at the Canadian Council of Recreation and Resource Ministers' meeting in June, 1977, also the Commons Committee and the House of Commons, that existing referral systems would not be affected in any significant way, and that no permit system was being considered. Accordingly, I assume that co-operative arrangements and direct or indirect referral procedures now functioning would proceed essentially unchanged.

In preparation for this symposium, I spoke to our field officers about their interface with the mining industry. They indicated that

much of our information on mining activities is provided indirectly through existing arrangements with the Forest Service, Pollution Control Branch, Lands Branch and Water Resources Branch. Our officers state that the major areas of concern are road building, stream crossing, stream relocation, water intakes and draining or filling of lakes and marshes. The consensus seems to be that with some (inevitable) exceptions the present situation appears acceptable. Certainly, the development of the stream color code system for placer mining seems to be working to the general advantage of all concerned. Some of our officers, however, have a sense of uneasiness, because they are not directly involved in assessing each application, and do not have the leisure to check the effectiveness of the Schedule B restrictions.

There may, of course, be occasions when the plans for major development or access operations will be solicited by the Department.

In conclusion, I might add that the Honourable Romeo LeBlanc has publicly declared his intention to fully support the preservation of fish habitat as defined in the Amendments. The Minister has also clearly indicated his recognition of the real property and inter-jurisdictional implications of the habitat Amendments. It is his expressed wish that the widest possible proclamation of the Amendments be made, and his staff be available for discussion with government, industry and public. At this specific request, the Department has prepared an information brochure, copies of which are here today. There are also a number of copies of the Amendments available to those who wish to attempt the translation of legalese into basic English or French.

DISCUSSIONS RELATED TO B.A. HESKIN AND F.C. BOYD'S PAPER

Time did not permit discussion about this paper.