

Protecting a natural resource: *an overview of fisheries management in British Columbia*

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Abstract

The purpose of this article is to give a brief overview of the legislative regime in relation to fish habitat and fisheries management and protection in British Columbia. The article outlines the roles of the provincial and federal governments and the requirements of key legislation and policy instruments.

Introduction

Vancouver, British Columbia is a cosmopolitan city nestled at the base of some of the most beautiful mountains you are ever likely to see. Unique because only 30 minutes drive from the downtown centre are wild forest hiking trails and world class ski fields, Vancouver is also special because it lies along the banks of the magnificent Fraser River.

The Fraser River drains water from nearly 250,000 square kilometres – nearly one quarter of the land area of British Columbia. The River and the estuary where the Fraser drains into the Strait of Georgia and the Pacific Ocean is also home to the world's biggest salmon run. Salmon cross the Pacific to the Estuary, where they adjust from salt to fresh water and then swim upstream into the mountains to their breeding grounds. Juvenile salmon then swim downstream, pausing at the Estuary and then out into the Pacific, where the cycle begins again. It's an amazing spectacle of nature for sure but even more amazing when you consider the obstacles salmon face to keep the cycle going.

As well as supporting salmon and many other fish species which are sought after by commercial fishermen and First Nations (Indian) Bands that fish on the River as a part of exercising their traditional rights, the Fraser River is a vital part of the Province's forestry industry, as millions of logs are floated down to the mouth of the River before being processed into lumber or pulp and exported. Vancouver Port is Canada's largest port with a variety of materials being shipped in and out, including coal, grain, sulphur, potash and steel. Vancouver International Airport is located on Sea Island which separates the north and middle arms of the Fraser. The River Estuary is part of the Sturgeon Bank, a designated wildlife management area and on the path of the Pacific Flyway – a stop for millions of migratory birds on their journeys north and south¹. Further upstream in the mountains, the tributaries of the Fraser and Columbia Rivers support a dozen dams and hydroelectric facilities which in turn generate electricity for most of British Columbia and for a substantial export market into the western United States. Construction and operation of these dams and facilities has an enormous impact on fish because breeding and spawning grounds are affected by the changes in water quality and flow and because the fish have to avoid being sucked into the tunnels that force the water past the generation turbines and have to climb dam walls as they swim upstream to breed!!

So how does the Provincial government and the Federal government, both of whom have legislative responsibility for fisheries management and related issues, balance the competing interests of electricity generators, fishermen, forestry companies, First Nations Bands, the shipping industry, recreational users of the Fraser River and the fish themselves??

Division of powers under the Canadian Constitution

The Constitution Act 1867 divides legislative authority between the federal and provincial governments.

The Federal government has exclusive legislative authority over the “sea coast and inland fisheries” pursuant to Section 91(12) of the *Constitution Act*. The courts have interpreted the phrase “inland fisheries” to mean that the “fisheries” in question must have some sort of commercial or recreational value. The Federal government’s power does not extend to general legislation in relation to the prevention of water pollution, which is the domain of the provincial governments.

There are many other heads of legislative power that have an impact on fisheries management. These include (but are not limited to):

Federal Authority

- Public property: s91(1A)
- The regulation of trade and commerce: s91(2)
- Navigation and shipping: 91(10)
- Indians and land reserved for Indians: s91(24)
- Agriculture: s95

Provincial Authority

- Management of public lands: s92(5)
- Local works and undertakings: s92(10)
- Property and civil rights: s92(13)
- Development, conservation and management of facilities for the production of electricity: s92A
- Agriculture: s95

As in Australia, in the case of inconsistency between a Federal and Provincial law, the Federal law will prevail. However, the test adopted for inconsistency is much narrower than Australia’s, with the consequence that there is more room for both Federal and Provincial laws to operate concurrently in Canada than there is in Australia².

Further, the peace, order and good government power is vested in the Federal Parliament in Canada, rather than the Provincial legislatures (which is the position in Australia).

Legislative and policy instruments

Federal

The primary piece of legislation governing fisheries management is the *Fisheries Act*³, which is administered by the Department of Fisheries and Oceans (DFO). The Act provides the framework for management of “fish habitats”, which are those parts of the environment “on which fish depend, directly or indirectly, in order to carry out their life processes”. “Fish” include shellfish and crustaceans and marine animals and plants.

The key obligations under the Act are as follows:

- (a) Cannot destroy fish by any means, other than fishing, unless authorized by the Federal Minister ;
- (b) Cannot carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat, unless authorized by the Federal Minister ;
- (c) Unless authorized by the regulations, cannot deposit or permit the deposit of a “deleterious substance” of any type in water frequented by fish, or in any place under any conditions where a deleterious substance may enter the water;

- (d) If so required by the Federal Minister, a person must construct a durable and effective fish-way or canal around any obstructions across or in any stream and must ensure that the fish-way or canal is supplied with enough water to allow fish to pass through it ;
- (e) Must make such provision as the Federal Minister deems necessary for the free passage of ascending and descending migratory fish during the construction of an obstruction (such as a dam) ;
- (f) Must permit the escape into the river-bed below an obstruction of such quantity of water at all times as will, in the opinion of the Federal Minister, be sufficient for
 - the safety of fish; and
 - the flooding of spawning grounds to such depth as may be necessary for the safety of the ova deposited⁹;
- (g) every water intake, ditch, channel or canal must, if so required by the Federal Minister, be fitted with a fish guard or screen to prevent the passage of fish into the water intake, ditch, channel or canal¹⁰.

The key DFO policy in relation to fisheries is the 1986 Policy for the Management of Fish Habitat. The overall goal of the Policy is to achieve an overall net gain in the productive capacity of fish habitat in Canada. This goal is to be achieved through conservation, restoration and development of fish habitats. It also requires integrated resource planning with industry sectors that have an impact on fisheries such as hydroelectricity generation.

Based on the “Not Net Loss” principle, the DFO has developed a set of Habitat Conservation and Protection Guidelines which are used by DFO staff when implementing the Policy. In terms of proposed developments that may have an impact on fish habitats or may result in the loss or destruction of the habitat, application of the Policy and the Guidelines means that DFO will consider what steps can be taken by the proponent to mitigate or compensate for the likely impact. DFO has a hierarchy of preferred options for dealing with fish habitat impacts:

- *Relocation*: Maintain the natural productivity of the habitat by relocating the project to an alternate site.
- *Redesign*: Redesign the project to remove the harmful effects of the project on the fish habitat.
- *Mitigation*: If neither relocation or redesign is possible, the DFO will consider the application of proven mitigation techniques. The DFO will often require a proponent to use a combination of redesign and mitigation before approving the project.
- *Compensation*: If damage to the fish habitat cannot be avoided, the DFO will consider compensatory mechanisms such as the reservation of land or waters near the development area or in another ecological area for fisheries conservation purposes (at the proponent’s cost) or the use of artificial methods to supplement fisheries. This is the DFO’s least preferred option and the details of the compensation required by the DFO will usually be spelt out in the authorization given to the proposed works.

In addition to the DFO, Environment Canada, through its administration of the *Canadian Environmental Assessment Act*¹¹ and the federal environmental impact assessment process, also has a significant role in the management and protection of fisheries and fish habitats.

The Canadian Coast Guard and federally-mandated port authorities such as Vancouver Port Authority and the North Fraser and Fraser Port Authorities also have a role.

The Federal government has also introduced into Parliament, although not yet passed, the *Species at Risk Act*¹² (SARA) which is intended to implement Canada’s obligations under the Biological Diversity Convention 1992 and various other commitments entered into on an inter-governmental level.

SARA covers all wildlife species at risk in Canada, together with their critical habitats. The Bill establishes a process for the independent assessment of the status of wildlife species, mechanisms for the conservation of species and habitats and prohibits the killing of extirpated¹³, endangered or threatened species or the destruction of their habitats.

Provincial

The key piece of legislation dealing with fisheries issues in British Columbia is the *Fish Protection Act* (FPA)¹⁴. While the Act was passed in 1997, only selected provisions of the Act have been proclaimed into operation. The FPA aims to address four broad objectives:

- ensuring water for fish;
- protecting and restoring fish habitat;
- providing a renewed focus on riparian protection and enhancement; and
- giving local governments greater powers for environmental planning.

The key provisions currently in force are Sections 6 and 7 in relation to sensitive streams. Sensitive streams are streams which fish are considered to be at risk (based on public consultation and scientific information) due to inadequate water flow or habitat concerns. A set of criteria has been developed to determine what will be a sensitive stream and several streams in British Columbia have already been classified. The significance of a "sensitive stream" designation is that where a water licence application is made which will affect a sensitive stream (eg a water licence is required to take or store water for the purposes of hydroelectricity generation), a "fish first" policy will apply in setting the conditions attached to the licence.

Section 7 of the FPA provides for the development of recovery plans for sensitive streams which are not expected to recover naturally.

In January 2001, the *Streamside Protection Regulation* was introduced pursuant to the FPA¹⁵. Under this regulation, local governments must create streamside protection and enhancement areas within their municipal boundaries within the next five years. The Regulation also requires local governments to amend their zoning laws to establish setbacks from streams or watercourses of between 5 and 30 metres, based on a variety of factors.

Another important provincial provision is the *Fisheries Renewal Act*¹⁶ which creates Fisheries Renewal B.C., a Crown Corporation. Fisheries Renewal B.C.'s mandate is to undertake strategic initiatives to renew fisheries and enhance fish, fisheries and fish habitat in British Columbia.

As at the federal level, provincial legislation providing for environmental impact assessment also has an impact on fisheries. The B.C. *Environmental Assessment Act*, administered by the Ministry of Sustainable Resource Management, will take fisheries issues into account as part of the project approval certificate process¹⁷.

Also relevant to fisheries protection is the *Waste Management Act*¹⁸ and the *Environmental Management Act*¹⁹, which provides for the development of environmental management plans.

Conclusion

This has been a very brief overview of the fishery protection regime in British Columbia. Of course, legislation dealing directly with fisheries and fish habitat management is only one part (albeit an important one) of the complete picture. There are also comprehensive water management strategies and policies in place at both the Federal and Provincial levels which have a significant influence on fisheries through the management of water levels and the rate at which water is removed from, or replaced in, a river system and the control over industrial or resource developments which will affect a body of water. These strategies are particularly important in the context of operating the many dams and hydroelectric plants on British Columbian Rivers. Because many of these dams have been built in a line along one or two connected river systems, the manner in which one dam is operated will affect the operation

of all the other dams on the same system. This, in turn, has a tremendous impact on the way in which the river system is able to support fish life.

In addition, general environmental protection and pollution prevention legislation at the Provincial level is important for its role in maintaining and improving water quality.

Because of the importance of the fishing industry to the Provincial economy, salmon fishing in particular, the protection and sustainable management of fisheries resources is extremely important. Of interest in the coming months will be the approach to these matters taken by the recently elected Provincial Liberal government. The focus of the new government is on the restoration of the economic health of the Province, and many are wondering whether this will be at the expense of the health of the natural environment.

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1. The problem of having a busy international airport in the path of millions of birds is a tricky one – and worthy of an article in itself!
2. In Australia, a state law will be of no effect if there is a federal law on the same subject which is intended to cover the field. In Canada, the test is one of impossibility of compliance with both the Federal and Provincial law.
3. RSC 1985, Chap. F-14
4. Section 32
5. Section 35
6. Section 36(3)
7. Section 20
8. Section 22(2)
9. Section 22(3)
10. Section-30
11. RSC 1992, Chap. 37
12. Bill C-5
13. An “extirpated” species is one that no longer exists in the wild in Canada, but exists elsewhere in the wild or in captivity.
14. S.B.C. 1997, Ch. 21
15. B.C. Reg. 10/2001
16. S.B.C. 1997, Ch. 22
17. Under the BCEAA, a project approval certificate must be obtained for certain projects which have an impact on the environment before those projects can proceed. In order to obtain the certificate, an environmental impact assessment must be carried out.
18. RSBC 1996, Ch. 482
19. RSBC 1996, Ch. 118