

May 14, 2012

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Cohen Commission
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sent via: email

Attention: Brian Wallace, Senior Commission Counsel

Dear Mr. Wallace:

Re: Supplemental written submission regarding Bill C-38

We write in response to your letter of April 27, 2012 inviting submissions regarding Bill C-38. Our clients are extremely concerned about this proposed legislation, which has reached second reading in the House of Commons. We submit that Bill C-38 will eliminate many important environmental protections in the *Fisheries Act* and the *Canadian Environmental Assessment Act*. To call this proposed legislation the “Jobs, Growth and Long-term Prosperity Act” is a grave inaccuracy, especially as it relates to the commercial fishery. The proposed legislative amendments threaten fish and fish habitat, which are the foundation of the commercial fishery on the coast of British Columbia.

We have had the opportunity to review the comprehensive submissions prepared by the Conservation Coalition and we adopt their analysis and conclusions. Further to this, we will highlight several particular areas of concern with the proposed legislation.

First, Bill C-38 proposes drastic amendments to s. 35 of the *Fisheries Act*, which has been an important tool for the federal government to prevent and halt activities that will cause harmful alterations, disruptions or destructions of fish habitat. The proposed amendment to s. 35 eliminates this crucial habitat protection, and instead prohibits work, undertaking or activities that will result in “serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.” Despite the federal government’s apparent concern for the commercial fishery, our clients are not satisfied with legislation that would limit protection to situations where a defined and existing fishery is at risk. Nor do they believe that such protections should be limited to circumstances that meet the “serious harm” threshold. If the proposed version of s. 35 becomes law, then it is our submission that DFO will be abdicating its responsibility to make decisions in the interest of the conservation and protection of all fish and all fish habitat.

On this point, we feel it is important to bring the Commissioner's attention to the comments of former federal Minister Tom Siddon in an interview on CBC on May 1, 2012. Mr. Siddon was appointed Minister of Fisheries from 1985 to 1990 under the Conservative Brian Mulroney government. He was responsible for bringing in the *Fisheries Act* that is in force today. Upon hearing Mr. Siddon's comments, we engaged a court reporter to transcribe the interview, which is attached as Appendix A to these submissions. We encourage the Commissioner to read the comments of Mr. Siddon, who describes Bill C-38 as a "covert attempt to gut the *Fisheries Act*," and says "it's appalling that they should be attempting to do this under the radar in this way."¹

Mr. Siddon also comments on a second area of major concern for our clients, which is found in Division 1 of Part 3 of Bill C-38. This aspect of the Bill would repeal the *Canadian Environmental Assessment Act* and replace it with new legislation that weakens the environmental assessment process. On this point, Mr. Siddon states that this legislative reform would mean, "moving projects, major and important economic projects, rapidly through the approval process." He goes on to say that, "...when Mr. Ashfield uses words like... removing and clarifying timelines for permitting, that -- that equates to shortening, hurrying up, cutting corners, and I am extremely concerned about where this is leading."²

It is completely unacceptable that Bill C-38 is being pushed through without consultation with key experts and stakeholders, such as commercial fishers, First Nations and conservation groups. By way of comparison, Mr. Siddon describes the consultation that took place in the lead up to the *Fisheries Act*, which he says, "modernized the application of these habitat provisions by getting everyone concerned around the table." Mr. Siddon says that Minister Ashfield is, "talking about handing those responsibilities off in some cases to private interests, certainly to local governments or even the National Energy Board."³

During his time as Minister, Mr. Siddon says, "I ... had to face square on was the major and in some cases catastrophic disasters in the fishery because in past times, we always got environmental development ahead of responsible stewardship to our fisheries and fish bearing waters, so when I was minister, we discovered high levels of dioxins and furans in the bottom fish that were feeding around our pulp mills, and we brought in major policy change at huge costs to the pulp and paper industry to rectify that.... We know so much more now about properly managing and protecting the habitat, but Mr. Ashfield just doesn't seem to get that point."

A third area of concern is the proposed legislation in Division 18 of Bill C-38, which proposes to incorporate the following provisions into the *Fisheries Act*:

FISH ALLOCATION FOR FINANCING PURPOSES

10. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may determine a quantity of fish or of fishing gear and

¹ Appendix A, at transcript p. 2.

² *supra*, at transcript p. 2.

³ *supra*, at transcript pp. 2-3.

equipment that may be allocated for the purpose of financing scientific and fisheries management activities that are described in a joint project agreement entered into with any person or body, or any federal or provincial minister, department or agency.

(2) The Minister may specify, in a licence issued under this Act, a quantity of fish or of fishing gear and equipment allocated for the purpose of financing those activities.

We understand this legislative amendment to be a reaction to the 2006 Federal Court of Appeal ruling in *Larocque v. Canada (Minister of Fisheries and Oceans)*⁴. In *Larocque*, the Court concluded that the *Fisheries Act* was silent on the issue of whether the Minister of Fisheries and Oceans had the power to finance DFO research activities through the sale of fishery resources that it managed. The proposed s. 10, as set out above, would authorize the Minister to allocate fish or fishing gear and equipment for the financing of scientific and fisheries management activities. While our clients are not opposed to the basic premise of this authorization, they are concerned both about the broad spectrum of government bodies or agencies that can enter into joint project agreements and the lack of assurance that there will be the proper controls and oversight in place to ensure that there are not substantial reallocations of fish to finance unspecified "fisheries management activities".

It is our submission that the proposed amendments to the *Fisheries Act* and the *Canadian Environmental Assessment Act* will have devastating consequences to fish and fish habitat. Further, we submit that it is inappropriate for the federal government to be pushing through major legislative changes without proper consultation, and months before the Commissioner is scheduled to produce his report, which will provide important and evidence-based recommendations on these exact issues. With respect, we recommend that the Commission's final report include a critique of the proposed amendments to the *Fisheries Act* and the *Canadian Environmental Assessment Act* found in Bill C-38. Further, we recommend calling on the federal government to make evidence and conservation-based decisions regarding the need for legislative reform once the Commissioner has issued his findings of fact and his recommendations.

Yours truly,

ETHOS LAW GROUP LLP
per:



Katrina Pacey
Barrister & Solicitor

cc Don Rosenbloom

⁴ *Larocque v. Canada (Minister of Fisheries and Oceans)* [2006] F.C.J. No. 985

INTERVIEW OF TOM SIDDON

BY ANNA MARIA TREMONTI

CBC RADIO, THE CURRENT

MAY 1, 2012

ANNA MARIA TREMONTI: Well, one former Fisheries minister is openly critical of what the current Fisheries minister is proposing.

Tom Siddon was minister from 1985 to 1990 in the Progressive Conservative government of Brian Mulroney. He is responsible for bringing in the Fisheries habitat policy now in place, and he is concerned about the proposed changes to this Act.

Tom Siddon joins us from Kaleden, British Columbia. Good morning.

TOM SIDDON: Good morning, Anna Maria. It's pronounced Kaleden.

ANNA MARIA TREMONTI: Kaleden. I'm sorry.

TOM SIDDON: That's fine.

ANNA MARIA TREMONTI: What did you think when you first heard about the proposed amendments?

TOM SIDDON: Well, I was left somewhat aghast because contrary to Mr. Ashfield's answer to you a few moments ago, the minister of Fisheries is the one remaining and most powerful person in Canada to protect this marvelous resource, historically important resource we have in Canada, our fishery. That's his job.

ANNA MARIA TREMONTI: And so what concerned you the most about the changes?

TOM SIDDON: Well, you can play with all the words you like,

but there's no two ways about it, and when I've read now the provisions of omnibus bill C-38, this is a covert attempt to gut the **Fisheries Act**, and it's appalling that they should be attempting to do this under the radar in this way.

ANNA MARIA TREMONTI: And why would they want to gut the **Fisheries Act**?

TOM SIDDON: Well, for reasons that you've already opened up there, questions of moving projects, major and important economic projects, rapidly through the approval process, and when Mr. Ashfield uses words like sort of removing and clarifying timelines for permitting, that -- that equates to shortening, hurrying up, cutting corners, and I am extremely concerned about where this is leading.

We've had the habitat protection in our **Fisheries Act** since 1976, and I was able to bring to parliament in 1986 the policy for implementing that habitat protection, which involved a principle called integrated planning for fish habitat management, so when Mr. Ashfield claims that we're modernizing the **Fisheries Act**, this is just not true.

That habitat policy modernized the application of these habitat provisions by getting

everyone concerned around the table, and now he's talking about handing those responsibilities off in some cases to private interests, certainly to local governments or even the National Energy Board. Well, who is looking after the fishery in that type of process? It ought to be Canada's federal ministry, minister of Fisheries and Oceans.

ANNA MARIA TREMONTI: Now, when you brought in those changes for implementing in the mid-80's, did you get any resistance from industry?

TOM SIDDON: When the first draft of the habitat policy was written and presented to me shortly after I became minister, I was quite concerned because I didn't think there had been enough consultation, and so I personally chaired roundtable discussions for many, many hours in Vancouver, Ottawa, and elsewhere in Canada so we could get it right, so we could include this policy of integrated planning, as well as the no net loss principle of the habitat policy, so that interests on all sides of the question would be present in the process after the implementation of this policy in perpetuity.

It's always been modern in the sense of involving the various interests, and that does take time, but it means both the environmental advocacy

groups and fishing industry groups are present, as well as forestry groups, mining groups, and petrochemical producers. I had them all around the table, we developed this policy, and it works as well today as it was meant to work when it was brought into being 25 years ago.

ANNA MARIA TREMONTI: So what do you think when you hear that some in industry and the minister says cottage owners as well see it as onerous.

TOM SIDDON: You know, they make a big to-do of a slough being drained so they could park cars on it for a rock festival in Saskatchewan. I've heard that this has been raised at the national caucus, conservative caucus, and they talk about cottage owners.

Well, cottage owners do things along a lake's edge, and in some cases, lakes that we drink water from, that are without permit and without authority. He wants to fast track the building of docks and wharves. We know cottage owners who truck in sand, who take out riparian and wetland areas without permission, and that just cannot be allowed.

When we drain a slough or we talk about drainage ditches and irrigation canals, these are all part of a watershed. And when we stir up the

bottom of a canal or a drainage ditch, we're creating mud that moves downstream and ultimately can destroy salmon bearing gravels, egg bearing gravels which support and nurture our salmonid and trout and other species, so everything in the watershed is integrated, and this minister just doesn't seem to get that point.

ANNA MARIA TREMONTI: You know, there are those who say that the economic development is being thwarted and you can't have the environmental concern and the development. What do you say to that?

TOM SIDDON: Absolutely -- absolute rubbish. What I was -- had to face square on was the major and in some cases catastrophic disasters in the fishery because in past times, we always got environmental development ahead of responsible stewardship to our fisheries and fish bearing waters, so when I was minister, we discovered high levels of dioxins and furans in the bottom fish that were feeding around our pulp mills, and we brought in major policy change at huge costs to the pulp and paper industry to rectify that.

This collapse of the Atlantic ground fish fishery, if the truth may be known, arose out of the Kirby task force and the move to corporatize

the Atlantic ground fish fishery, which led to over exploitation, and I was given false information by my scientist because we rushed into something under a previous government that we're still paying a price for in Atlantic Canada more than 20 years later.

The poisoning of shellfish and the dying of humans in Prince Edward Island from eating tainted blue mussels was caused by the rush to bring shellfish culture into the brackish sloughs of Prince Edward Island. We know so much more now about properly managing and protecting the habitat, but Mr. Ashfield just doesn't seem to get that point.

ANNA MARIA TREMONTI: We're almost out of time here, Mr.

Siddon, but have you been in touch with the government or the department about your concerns?

TOM SIDDON: I have written to numerous ministers in the cabinet, to the prime minister, to Mr. Ashfield, whom I asked personally for even a phone call, and that was five or six weeks ago. I haven't heard boo from them. I'm supposed to be, as a privy councillor, someone who the government calls on for guidance from time to time, but that never happens.

I am just extremely concerned. When I hear

from people like the Atlantic Salmon Federation, thousands of them who have struggled for decades to protect the Atlantic salmon stocks, and the Pacific Salmon Foundation as well, I'm appalled that these voices and the concerns they're expressing are being absolutely disregarded.

ANNA MARIA TREMONTI: Mr. Siddon, we have to end it there. We have to end it there, but thank you for speaking to us today.

Tom Siddon, former federal Fisheries minister under Brian Mulroney in the 1980's.

I hereby certify the foregoing to be a true and accurate transcript of the proceedings herein to the best of my skill and ability

Vicki Webster
Official Reporter