

FISH OUT OF WATER: FISHERIES ACT CHANGES REFLECT DIVERGENCE OF SCIENCE AND LAW

By Jason Unger, *Staff Counsel*

Enforcement of environmental laws is notoriously difficult. The prosecutor is faced with conveying to the court evidence of a scientific nature in an effort to prove the aspects of the offence, beyond a reasonable doubt. Because there is science, there is uncertainty. For their part defendants need only raise a doubt about the science and facts around a case and they will be acquitted. Trials often devolve into competing experts. This is why clear, enforceable environmental laws are so important.

As environmental laws go, the *Fisheries Act* has been viewed as one of the more powerful environmental protection tools due to the phrasing and scope of its prohibitions. Enforcement of these provisions had become quite effective, with the science in prosecutions being well established and the courts consistently interpreting and applying the Act. With recent passage of the Budget Bill (Bill C-38), the *Fisheries Act* has seen its protective nature significantly whittled away.¹ As discussed below, the amendments effectively nullify habitat protections (albeit contingent on a Cabinet order) and narrowly focus on prescribed fisheries. Even beneficial boosts to fines under the Act reflect a minimal gain when considering the enforcement capacity of the Department of Fisheries and Oceans in the Prairie and Northern region.

The former *Fisheries Act*: Clean water, good habitat protection

The two central prohibitions of the *Fisheries Act* that were viewed as fundamental to fisheries protection (and through this environmental protection) relate to the deposit of deleterious substances in waters frequented by fish (s.36) and to the protection of fish habitat against harmful alteration, destruction or disruption from “works and undertakings” (s.35).

When a person (or company) violates s.36 and is charged, the Crown must prove that the person released a substance that is deleterious to fish in fish bearing waters (or in waters that lead to fish bearing waters). The term “deleterious” is defined as:²

- any substance that, when added to water, would render it deleterious to fish or fish habitat;
- water containing substances in a

quantity and concentration that is changed from its natural state that makes the water deleterious to fish or fish habitat; or

- substances prescribed as deleterious.

The definition of deleterious is somewhat circular in this regard, as a deleterious substance is simply reframed as something that is “deleterious to fish.” The meaning of “deleterious to fish” is not set out in the Act but Environment Canada, which administers and enforces this portion of the Act, uses standard test procedures to determine whether a deposit is deleterious. These standards effectively establish what is “deleterious to fish.” The standards typically involve acute lethality tests prescribed by Environment Canada for different species.³

The provision is protective insofar as it prohibits the release of substances notwithstanding the dilutive capacity of the receiving water body. Ignorance of this provision has been seen on several fronts, from municipalities dumping provincially approved effluent into water bodies⁴ contrary to the Act to consultants not understanding the operation of the provision.⁵

While protective, the provision could apply a higher standard in reference to what is “deleterious.” For example, instead of using acute toxicity, the test may determine a level of impairment to fish physiology that may be deemed deleterious. This would require changing the standard away from one that is not applied consistently and clearly by the courts.

Previously, proposed amendments to section 36 arrived in 2007 by way of Bill C-45, which would have replaced the *Fisheries Act* if it had passed. The prospect of amending s.36 raised concerns among some environmental lawyers, insofar as the changes to the definition of “deleterious” may have resulted in an altered and potentially less protective judicial interpretation.⁶ The changes from the 2007 Bill were not brought forth into the Budget Bill.

The other section of keen interest from an environmental protection standpoint is section 35. Section 35 has also seen broad application, insofar as it prohibits works

and undertakings that harmfully alter, disrupt or destroy fish habitat (the “HADD” provision). “Fish habitat” is broadly defined in the Act to mean:⁷

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.

The nature of habitat disturbance covered by this provision is broad, as displayed by the jurisprudence. Suffice it to say, if one is working in or around fish habitat, the prohibition (and potentially the *Canadian Environmental Assessment Act* – or CEAA) was likely to be triggered.

Budget Bill changes: habitat under siege

The deleterious deposit provisions of the *Fisheries Act* remain (largely) intact. One noteworthy change is that the Act is altered to enable the Minister to:

- create regulations allowing for deleterious deposits to take place; and
- prescribe classes of waters and substances that are not prohibited.

Under the former Act these regulations were passed at the Cabinet level (by Order in Council).⁸

Protection of fish habitat, on the other hand, is significantly undermined. The breadth of potential application of the HADD prohibition and its linkage with CEAA (as a trigger for environmental assessment) made it a primary target for law reform for those in industries impacting fish habitat. Law reform lobbying appears to have been successful, as the *Fisheries Act* is set for a change from the HADD provision to a provision that prohibits “serious harm” to “fish that are part of a commercial, recreational or Aboriginal fishery or to the fish that support such a fishery.”⁹ [emphasis added] Serious harm to fish is defined as “death of fish or any permanent alteration to, or destruction of, fish habitat.” [emphasis added]



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The change from the HADD provision is not immediate and occurs on a date fixed by cabinet order.¹⁰ Until this date the HADD prohibition applies and is even expanded to include “activities.”¹¹ In this way the Budget Bill is effectively expanding the nature of HADD prohibitions but then removing these changes upon the passage of the requisite Order in Council.

As part of the “interim HADD” prohibition, other amendments occurred under the budget that expanded the types of activities, works or undertakings that could proceed without violating s.35(1). Under the previous HADD prohibitions only those parties with a Ministerial authorization or carrying on activities covered by cabinet regulations could lawfully cause a HADD.¹² The interim HADD provision expands this to instances where:¹³

- the activity, work or undertaking is a “prescribed” work, activity or undertaking and is carried out in a prescribed fashion in prescribed waters;
- the Ministry has authorized the work;
- a “prescribed person” authorizes the work with prescribed conditions;
- the serious harm is a result of doing anything that is otherwise permitted under the *Act*; or
- the activity is carried out in accordance with the regulations.

As mentioned, once an Order in Council fixing the date for the new s.35(1) to come into effect is issued, both the old and interim HADD provisions will be replaced with the abovementioned “serious harm” provision.

This provision effectively undermines scientifically meaningful habitat protections under the *Act*. By requiring a finding of permanence and removing prohibitions against disruption of habitat, legislative intent is clearly focused on longer term impacts on fish habitat. The “permanence” of alteration or destruction of habitat is not defined. What is permanent? What habitat cannot be restored? As discussed below, the provision will likely result in no protection of fish habitat at all as it appears the provision may be practically unenforceable.

Take for instance temporary dredging of a reach of a stream where high quality

habitat exists for fish reproduction. The proponent has undertaken appropriate steps to determine whether the habitat can be restored and it can be. The proponent then proceeds, without authorization, to undertake the activity. Under the “serious harm” test the activity is not prohibited nor does it need to be authorized. As it is not authorized, there exist no conditions to restore the habitat. Has the party violated the *Act*? The proponent can always claim it is not a permanent change to habitat and the Crown would be hard pressed to prove that the change is indeed permanent. But without a condition requiring restoration, who will be responsible for ensuring the habitat is restored? Apparently no one.

Perhaps jurisprudence will clarify this, but even with requisite conditions being placed on an authorization fish may be denied significant portions of their habitat for extended periods of time. This is undoubtedly going to impact fisheries in the geographic location of habitat loss. Will restoration, even if it is required, be successful?

From whole systems to prescribed fisheries

The Budget Bill also amended the *Fisheries Act* to focus specifically on Aboriginal, recreational and commercial fisheries and fish that “contribute to” or “support” a fishery.¹⁴ This focus is built into prohibition against “serious harm” as set out above as well as guiding general administration and authorizations under the *Act*.¹⁵ In defining what constitutes a “fishery” there is reliance on the licencing system for that fishery. This is a divergence from the previous focus of a “fishery,” which the *Act* defined as an area or location where tools are used to take fish. This definition is not removed from the *Act*, but the prohibitions and administration of the *Act* are refocused on the specific fisheries named.

The issue of whether the *Act* is limited to commercial or economically driven fisheries has been considered by the courts. For instance, a split BC Court of Appeal in *R. v. MacMillan Bloedel Limited* acquitted the defendant in that case on the basis that a “fishery” was not established.¹⁶ Craig J.A. dissented in the case and took a more ecosystem-based approach, citing Justice Martland of the Supreme Court who has noted “the power to control and regulate that resource must include the authority to protect all those creatures which form a part of that system.”¹⁷ The majority approach in *MacMillan Bloedel* has subsequently been rejected by courts in both the NWT and Ontario.¹⁸ A decision of the NWT Supreme Court cited the nature of a fishery as a public resource and noted that “to protect fish and fish habitat is to protect the resource (fishery).”¹⁹ The courts have found that, as a public resource, the federal government is not constrained to managing fisheries of a “commercial enterprise.”²⁰

Amendments to the *Fisheries Act* attempt to narrow the application of the *Act* in contrast to this broader judicial view of a fishery. Defining what is a commercial or recreational fishery under the new *Act* occurs pursuant to regulations under the *Act* and delegates to the licencing jurisdiction, i.e., the province.²¹ (Presumably if a province wanted to license brook stickleback or water fleas - crustaceans that may be included under the definition of fish - as a commercial or recreational fish, that would just be fine.)

The nature of how a “fishery” is to be interpreted by the judiciary is also likely to cause a narrowing of the application of the *Act*. For example, “serious harm” prohibitions apply not only to fishery species but also those species of fish that “support” fishery fish. The question

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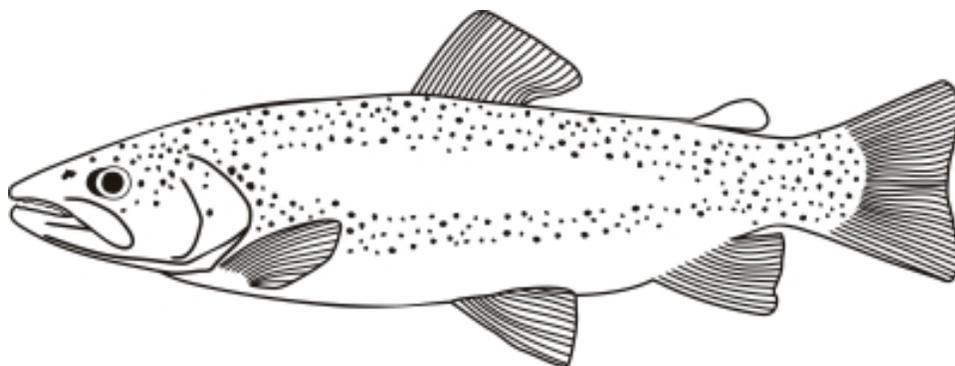


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becomes a scientific one in terms of support, and will only be answered through numerous judicial interpretations (assuming a new s.35(1) is enforced at all). Is 10% of a commercial fish's normal diet significant enough to establish "support"? Is 1%? 50%? Scientifically it is clear that certain copepods (crustaceans of significant importance to the food chain) support commercial or recreational fisheries. The "serious harm" provision may apply to these freshwater crustaceans (which are within the purview of fish under the *Fisheries Act*), but evidentiary problems arise again, as once the harm is done there is little likelihood of proving said harm.

Whatever the right standard of "support" might be, it seems that the intent of the amendments is to step back from treating the fishery resource as a "whole system." That said, perhaps the judiciary will continue to recognize the relevance of an ecosystem approach to fisheries management.

Increased fines but diminished habitat enforcement

The Budget Bill did increase fines for those who violate the HADD/serious harm prohibitions multiple times or for corporate offenders, which is laudable.²² Unless enforcement capacity in the Central and Arctic Region allows for rigorous application and prosecution of offences the fines may be less like "teeth" and more akin to dentures that have no owner. •



Image: Tina Phillips / FreeDigitalPhotos.net

¹ Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 41st Parl., 1st session, (2012) Royal Assent 2012-06-29, online: Parliament of Canada <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5514128>>. See also the amended *Fisheries Act*, R.S.C. 1985, c. F-14, online: Department of Justice Canada, <<http://laws-lois.justice.gc.ca/PDF/F-14.pdf>>.

² See section 34(1) of the *Fisheries Act*, R.S.C. 1985, c. F-14.

³ See Environment Canada, *Biological Test Method Series*, online: Environment Canada <<http://www.ec.gc.ca/faunescience-wildlifescience/default.asp?lang=En&n=0BB80E7B-1>>.

⁴ The Town of Beaverlodge was fined \$20,000 for violation of the *Fisheries Act* for releasing wastewater effluent which was deleterious to fish and which was approved by Alberta Environment. see Environment Canada, "Enforcement Notifications" August 27, 2008, online: Environment Canada <<http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=CCA8EDB-1>>

⁵ See *Siksika Nation Elders Committee and Siksika Nation v. Director; Southern Region, Regional Services, Alberta Environment, re: Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.). Erratum changes included, at para 159, online: Alberta Environmental Appeals Board, <<http://www.eab.gov.ab.ca/dec/05-053-054-R-Erratum.pdf>>.

⁶ See Bill C-45, *An Act respecting the sustainable development of Canada's seacoast and inland fisheries* 1st Sess., 39th Parl., (2007) online: <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=2590531>>.

⁷ *Fisheries Act*, *supra* note 2 at s.34(1).

⁸ *Supra* note 1 at s. 143(2).

⁹ *Ibid.* at s.142(2).

¹⁰ *Ibid.* at s.156.

¹¹ *Ibid.* at s. 142(1). This reflects a positive change as some jurisprudence had taken a narrow interpretation of what constitutes a work or undertaking.

¹² See the earlier provision of the *Fisheries Act*, R.S.C. 1985, c. F-14, s.35(2), in force from 2002-12-31 to 2012-06-28, online: Department of Justice Canada <<http://laws-lois.justice.gc.ca/eng/acts/F-14/section-35-20021231.html>>.

¹³ *Supra* note 1 s. 35(2) of the amended *Fisheries Act*, online: Department of Justice Canada <<http://laws-lois.justice.gc.ca/eng/acts/F-14/page-11.html#docCont>>.

¹⁴ See s.6 of the amended *Fisheries Act*, *supra* note 1, which dictates Ministerial consideration of "the contribution of the relevant fish to the ongoing productivity of" a fishery in administration of various aspects of the Act. Also see s. 142(2) of the Budget Bill which prohibits the work, undertaking or activity that results in serious harm to "fish that support" a fishery. 15 Budget Bill, *supra* note 1 at s.135.

¹⁶ 1984 CanLII 740 (BC CA), <<http://canlii.ca/t/249vr>> retrieved on 2012-08-21.

¹⁷ See *Northwest Falling Contractors Ltd. v. The Queen*, 1980 CanLII 210 (SCC), [1980] 2 SCR 292, <<http://canlii.ca/t/1z48k>>.

¹⁸ *R. v. BHP Diamonds Inc.*, 2002 NWTSC 74 (CanLII), <<http://canlii.ca/t/5f9qd>> retrieved on 2012-08-21 and Ontario Superior Court in *R. v. Zuber*, 2004 CanLII 2549 (ON SC), <<http://canlii.ca/t/1hgs7>> retrieved on 2012-08-21.

¹⁹ *R. v. BHP Diamonds Inc.*, 2002 NWTSC 74 (CanLII), <<http://canlii.ca/t/5f9qd>> retrieved on 2012-08-21.

²⁰ See *R. v. Zuber*, *supra* note 18 at para 34.

²¹ By operation of the *Alberta Fishery Regulations*, 1998, SOR/98/286 and the *Fisheries (Alberta) Act*, R.S.A. 2000, c. F-16.

²² See s. 40 of the *Fisheries Act*, *supra* note 2.

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