Canada's proposed Fisheries Act regulations: do the feds want "out" of s.91(12) of the Constitution Act?

Author : Jason Unger

Section 91 (12) of Canada's Constitution clearly states that "Sea Coast and Inland Fisheries" are the jurisdiction of the federal government. It appears, though, that the federal government might no longer want this authority, as a recent proposed regulation is set on deferring management of waterway pollution to provincial regulatory bodies.

The focus of the proposed regulation is s.36 of the *Fisheries Act* and the type of regulations that may be passed to allow for the deposit of harmful substances in waters frequented by fish. The pollution prevention provision of s. 36(3) of the Fisheries Act is an example of a proactive and precautionary approach to environmental management.

> s. 36(3) Subject to subsection (4), no person shall 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 the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

This approach to pollution control should be emulated elsewhere, yet the proposed federal approach seeks to undermine this precaution in favour of broad-ranging adoption of provincial standards.

The proposed regulation outlines the scope of Ministerial regulatory powers, stating at section 4:

> The power that is conferred by subsection 36(5.2) of the Act may be exercised in relation to any other subject matter if the following conditions are met:
>
> (a) the deleterious substance to be deposited, its deposit or the work, undertaking or activity that results in the deposit is authorized under federal or provincial law or is subject to guidelines issued by a federal or provincial government and is subject to an enforcement or compliance regime;
>
> (b) the federal or provincial law or guidelines set out conditions that result in a deposit that is not acutely lethal and contains a quantity or concentration of deleterious substance that, when measured in that deposit or in the relevant water frequented by fish, satisfies
>
> (i) the recommendations of the Canadian Water Quality Guidelines for the Protection of Aquatic Life that were published in 1999 by the Canadian Council of Ministers of the

> Environment, as amended from time to time, or the recommendations that were derived from those guidelines on their site-specific application, as amended from time to time, or
>
> (ii) the recommendations of any peer-reviewed guidelines that are established for the purpose of protecting aquatic life and adopted by a federal or provincial body; and
>
> (c) the effects of such a deposit on fish, fish habitat and the use by man of fish have been evaluated in accordance with generally accepted standards of good scientific practice.

Basically, this approach is focused on, with some qualifiers that raise significant uncertainty, giving polluters with provincial authorization a “pass” for s.36(3). If regulatory equivalency was one end of the constitutional inter-delegation spectrum (wherein provincial regulations mimic federal standards), this approach would be leaning to the other.

The regulations promulgated under this section can rely on dilution of pollution (unlike the approach taken in section 36(3)) with the focus on “the relevant waters frequented by fish”. This approach to regulation, if to be effective for environmental outcomes, requires significant knowledge of the assimilative capacity of water bodies at all relevant times as well as a fulsome understanding of cumulative contributions (both anthropogenic and natural) to water quality. Further, the reliance on Canadian Council of Ministers of the Environment and site-specific guidelines, an undefined peer-review process, and the inherent inability to manage and asses provincial compliance monitoring and enforcement under the proposed regulation add to the likelihood that accountability for outcomes for fish and their habitat will be elusive.

The Regulatory Impact Analysis Statement (RIAS) itself provides the following justification for the approach:

> deposits from an industrial sector that are managed by a provincial permitting program may not be authorized under the Act, even if they comply with the provincial permit requirements. This uncertainty could pose a challenge to some industries in that it could discourage investment decisions or delay business development.

In effect, the RIAS statement appears to be saying that ignorance of (and/or frustration with) federal law is now a valid argument to have blanket authorizations of harmful deposits driven by provincial standards and permits.

It is becoming increasingly clear that s. 91(12) of the Constitution has become viewed as a major nuisance to development rather than a positive mandate to protect fish and their habitat. The proposed approach is divergent from sound environmental law principles, directly undermining pollution prevention and the precautionary principle, both of which are embodied in the section

36(3) prohibition. The federal government may not readily get “out” of managing sea coast and inland fisheries but our environment need stewards not spectators.

For more commentary on the proposed regulations see the brief of the Canadian Environmental Law Association and West Coast Environmental Law.

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