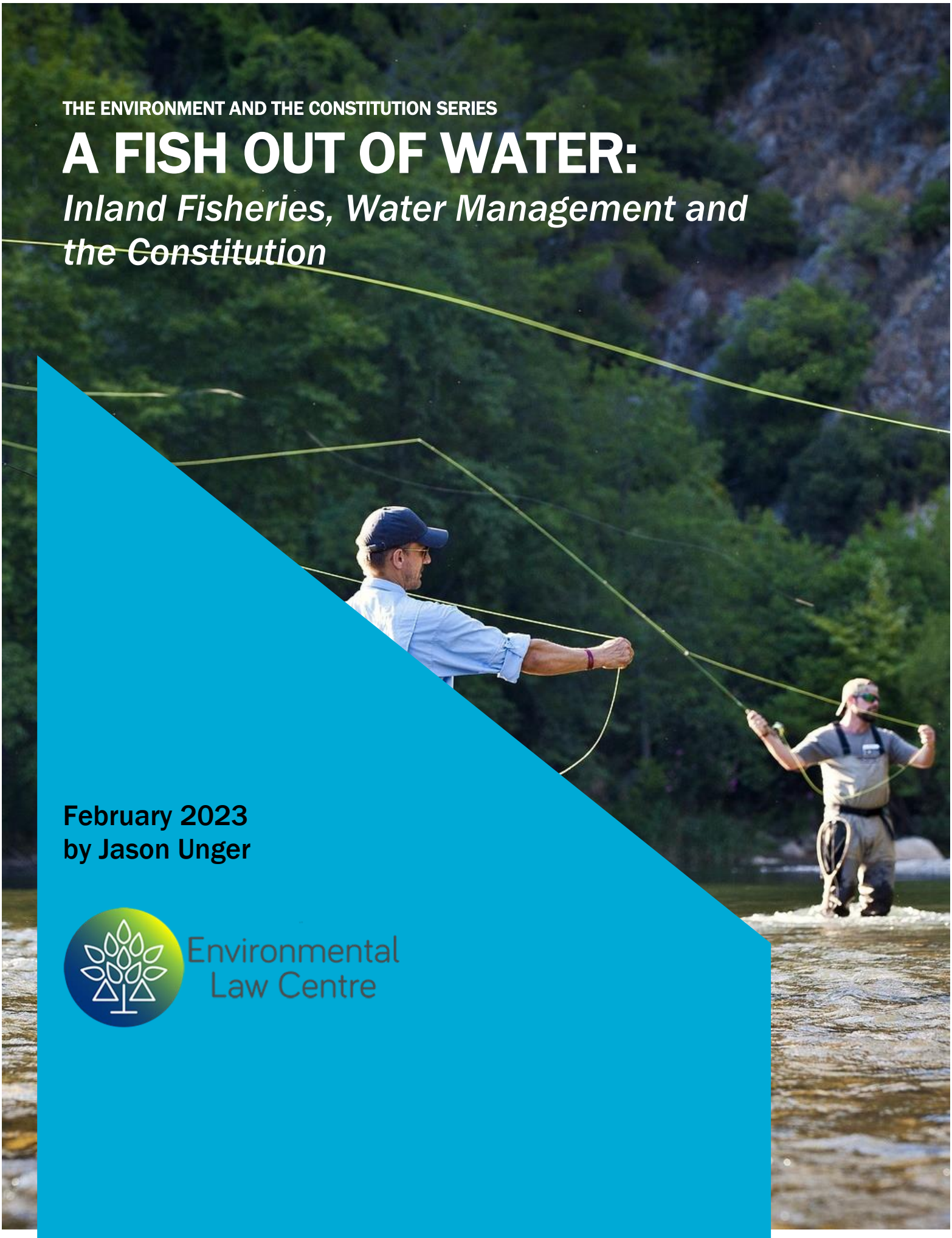

THE ENVIRONMENT AND THE CONSTITUTION SERIES

A FISH OUT OF WATER:

Inland Fisheries, Water Management and the Constitution

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INTRODUCTION

Sea coast and Inland Fisheries are the jurisdiction of the federal government under section 91(12) of the Constitution.[1] Water in the province of Alberta, unless fully on federal lands is the property of the Government of Alberta, by virtue of the s. 3 of the *Water Act* and other historic legislation.

The split of jurisdiction between inland fisheries and water management results in a direct overlap and potential jurisdiction conflict when it comes to surface waters and activities on land which may result in impairment of fish or fish habitat. This report dives into this area of overlapping laws in an effort to clarify roles and responsibilities of both levels of government. We conclude with looking at whether harmonization of jurisdictional approaches can be achieved.

This report does not deal with the complex issue of the impacts of fisheries and water regulation and its implications for Indigenous rights. Clearly there is a linkage in fisheries, treaty rights to fish, and the water management of the province, however it is beyond the scope of this report.

[1] *Constitution Act 1867*, 30 & 31 Victoria, c. 3 (U.K.).

For a discussion of the water rights of Alberta First Nations see *Water Law in Alberta - A Comprehensive Guide Chapter 4: Water in Indigenous Communities*.[2]

The Scope of Federal Power

Section 91 (12) of the Constitution states that the "exclusive legislative authority" over "Sea Coast and Inland Fisheries" lies with the Parliament of Canada.[3] The *Fisheries Act* of 1906 set out the initial path of fisheries management, some of which is maintained in the current *Act*.[4] The 1906 Act enabled the appointment and empowerment of fisheries officers, licencing and rules related to specific fisheries, and set out general prohibitions against killing of fish, blocking of fish passage, and the construction of fish ways (associated with obstructions). It also included a provision prohibiting the throwing of "prejudicial or deleterious substances…in any river, harbour or roadstead or any water where fishing is carried on" or knowingly put lime, chemical substances or drugs, poisonous matter, or any other deleterious substances, in water frequented by fish". [5]

In 1977 Parliament substantially amended the *Fisheries Act* by adding fish habitat protection provisions.[6] More changes were made to the Act in 2012 that aimed to limit the scope of the *Fisheries Act* prohibitions, only to be reversed with a change of government in 2018.[7]

The scope of the federal power over inland and coastal fishery is constrained by the requirement that federal legislation passed must be related to a "fishery". What constitutes a fishery has been at issue in several cases. The Supreme Court of Canada (SCC) in *R. v. Fowler*, citing previous fisheries cases, outline how a "fishery" may be defined:[8]

> "In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:
>
> " 'A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.'
>
> "In Dr. Murray's New English Dictionary, the leading definition is:

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[2] Allison Boutillier, (Edmonton: Environmental Law Centre, 2022) online: https://elc.ab.ca/wp-content/uploads/2021/12/Water-Law-Guide-Chapter-4-Water-in-Indigenous-Communities.pdf.
[3] The *Constitution Act, 1867*, 30 & 31 Victoria, c 3, https://canlii.ca/t/ldsw.
[4] R.S.C. 1906, c. 45.
[5] *Ibid*. at s. 58. See Bill C-38, An Act to Amend the Fisheries Act and to amend the Criminal Code in consequence thereof, 2nd session, 30th Parliament, 25-26 Elizabeth II, 1976-1977, online: https://parl.canadiana.ca/view/oop.HOC_30_2_C27_C44/634.
[6] Bill C-38 An Act to amend the Fisheries Act and to amend the Criminal Code in consequence thereof.
[7] See Brenda Heelan Powell, An Overview of Bill C- 38: The Budget Bill that Transformed Canada's Federal Environmental Laws, (Edmonton: Environmental Law Centre), online: https://elc.ab.ca/Content_Files/Files/Bill38AnalysisArticlefinal.pdf.
[8] *Fowler v. The Queen,* 1980 CanLII 201 (SCC), [1980] 2 SCR 213, <https://canlii.ca/t/1z488>.

> " 'The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.' "
>
> …
>
> "The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised."

The majority of the BC Court of Appeal, in considering this decision, found that a fishery did not extend to smaller fish that may make up important ecosystem components for a downstream fishery (see *R. v. MacMillan Bloedel Limited).*[9] The dissenting judge in the case noted that one must consider the "system" that supports a fishery.

The current *Fisheries Act* defines a fishery as:

> with respect to any fish, includes,
>
> **(a)** any of its species, populations, assemblages and stocks, whether the fish is fished or not,
>
> **(b)** any place where fishing may be carried on,
>
> **(c)** any period during which fishing may be carried on,
>
> **(d)** any method of fishing used, and
>
> **(e)** any type of fishing gear or equipment or fishing vessel used; (*pêche*)

This definition of a fishery has been influenced overtime through changes to the Act as well as by past jurisprudence.[10] Whether the term "fishery" includes fish in the aquaculture industry was discussed in *Morton v. British Columbia (Agriculture and Lands)*, in which responding parties arguing that fish that are part of aquaculture should be considered private property or agriculture, areas of provincial jurisdiction.[11] The court concluded in that case that the finfish farms were "part of the overall British Columbia Fishery or are a fishery unto themselves".[12]

What it means to have "exclusive" jurisdiction to legislate regarding inland and coastal fisheries is explored further below.

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[9] 1984 CanLII 740 (BC CA), https://canlii.ca/t/249vr).

[10] Codified in 2019 and its change from an early version is of note. Prior to 2019 the definition did not include (a) above, in relation to species and populations of fish whether the fish is fished or not. See section 2(1) in 2016 version of the Act at *Fisheries Act*, RSC 1985, c F-14, https://canlii.ca/t/52f0t. It is also of note that significant amendments to the Act in 2012 focused on including language and constraining the protective provisions and purpose of the Act to prescribed fisheries (i.e. narrowing the focus of the legislation). See *Fisheries Act*, RSC 1985, c F-14, https://canlii.ca/t/524r4 in force between Nov 25, 2013 and August 28, 2019. These 2012 amendments were subsequently reversed.

[11] *Morton v. British Columbia (Agriculture and Lands),* 2009 BCSC 136 (CanLII), https://canlii.ca/t/22fh7, retrieved on 2022-11-28.

[12] *Ibid*. at para 156.

It is also important to note that while the *Fisheries Act* is the focal point for federal fisheries management the federal power to legislate around fisheries extends to fisheries health under the *Canadian Food Inspection Agency Act*, the *Fish Inspection Act*, the *Food and Drugs Act*, the operation of commercial fisheries, and the management of fish that are listed as species at risk under the *Species at Risk Act*.

Fish as property vs. a fishery

We have talked about what "fishery" is, so what about the fish? Fish (like other wildlife) are treated as property that are within the jurisdiction of the provincial government. As such, the distinction between fish as property and a fishery is important and the risk of jurisdictional conflict arises.

The line between fisheries legislation and provincial rights around private property and civil rights is not always clear. As noted, by Chief Justice McLachlin in *Ward v. Canada (Attorney General)*: [13]

> Thus we have before us two broad powers, one federal, one provincial. In such cases, bright jurisdictional lines are elusive. Whether a matter best conforms to a subject within federal jurisdiction on the one hand, or provincial jurisdiction on the other, can only be determined by examining the activity at stake. Measures that in pith and substance go to the maintenance and preservation of fisheries fall under federal power. By contrast, measures that in pith and substance relate to trade and industry within the province have been held to be outside the federal fisheries power and within the provincial power over property and civil rights.

In this regard, the fisheries power is only constrained by a requirement that federal legislation must relate to the "maintenance and preservation" of fisheries. This was reflected in the case of *R v. Fowler*, where it was found that prohibitions related directly with forestry, with no prescribed direct linkage to the harm of fish, was found to be *ultra vires* the Government of Canada as it was focused on regulating forestry. Interestingly, the forestry activities that were the subject of the invalidated provision have, in some instances, been found to violate other portions of the *Fisheries Act* which have been found to been constitutionally valid (as described further below).

[13] 2002 SCC 17 (CanLII), [2002] 1 SCR 569, https://canlii.ca/t/51vl at para 43.

Scope of Provincial Power over Water and Waterways

Water in the geographic region that is now Alberta was largely federally regulated under the *Dominion Waters Act* and the *North-West Irrigation Act* until the 1930s.[14] The *North West Irrigation Act* vested the ownership of water within the North West Territories, a portion of which would become Alberta, in the Crown.[15] The use and diversion of water was licenced by the federal government.[16] This regulatory approach was taken to facilitate settlement of the west and to overcome limits of the riparian rights approach to water rights, which limited the flexibility to divert water across a semi-arid landscape in southern Alberta. The federal ownership of water was then changed after Alberta became a province (1905) with the passage of the *Alberta Natural Resources Act* (S.C. 1930, c. 3) arising from the Natural Resources Transfer Agreement (NRTA).[17]

Section 1 of the NRTA states (in part):

> In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province and the interest of the Crown in the waters and water-powers within the Province under the *North-west Irrigation Act, 1898*, and the *Dominion Water Power Act*, and all sums due or payable for such lands, mines, minerals or royalties, or for interests or rights in or to the use of such waters or water-powers, shall, from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province,

Following the NRTA the province passed the *Water Resources Act* in 1931.[18] Section 5 of the Act set out that "all waters in any stream, lake or other body of water whatsoever which is the property of the Province shall be vested in the Province and from and after the date of the passing of this Act no person shall have any right of property therein or shall have any right to divert and use the same unless he has obtained a license so to do under his Act…" except as authorized by the previous federal laws.

Fast forward to the current provincial *Water Act*, where section 3(2) states "the property in and the right to the diversion and use of all water in the Province is vested in His Majesty in right of

[14] For a more in depth review see David R. Percy "Seventy-Five Years of Alberta Water Law: Maturity, Demise & Rebirth"(1996) *Alberta Law Review* vol:35, No. 1.online: https://albertalawreview.com/index.php/ALR/article/view/1069/1059.
[15] 1898 (61 Vict. ch. 35), at s.8.
[16] 1898 (61 Vict. ch. 35), at s.8.
[17] An Act respecting the *Transfer of the Natural Resources of Alberta*, SA 1930, c 21, https://canlii.ca/t/5402d.
[18] S.A. 1931, c. 71.

Alberta except as provided for in the regulations." In this way the Government of Alberta has extensive control over water within the province.[19]

Further, the land under the water is also largely owned by the Crown by virtue of the *Public Lands Act*, which states that the "title to the beds and shores of (a) all permanent and naturally occurring bodies of water, and (b) all naturally occurring rivers, streams, watercourses and lakes, is vested in the Crown in right of Alberta…".[20] The legal ownership of beds and shores of water bodies evolved from the historic legal common law right to access water bodies for navigation.[21] It was recognized that to properly ensure the right of navigation was maintained then augmentation of water bodies would need to be facilitated by the Crown. In this regard, there is again overlap in the Constitution between the owner of the bed and shore of water bodies (provincial jurisdiction for non-federal lands) and navigation (federal jurisdiction). Specifically, only the federal government can authorize an impairment to the common law right of navigation by operation of the *Canadian Navigable Waters Act*.[22]

Finally, the province has jurisdiction generally over pollution, by operation of its constitutional power over property and civil rights, local works and undertakings, and the provinces power over provincial lands, non-renewable and other resources.[23]

As such there is clear legislative relevance of the province to matters that directly relate to fisheries, including water quantity and flows, water quality and aquatic habitat.

Constitutional validity of legislation and the fisheries-water management nexus

Legislative jurisdiction around fisheries and water are relatively clear under the Constitution. The provincial *Water Act*, the *Environmental Protection and Enhancement Act* and the *Public Lands Act* are all, in pith and substance, about provincial regulation of provincial matters. Similarly, the current federal *Fisheries Act* is about the management and preservation of fisheries, an area of federal jurisdiction. Yet the underlying reality is that fisheries and the ecosystems services that provincial law manages, augments and degrades are intimately connected.

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[19] This regulatory system can be differentiated from the historic legal approach to water diversion, based in common law riparian rights (which is maintained in certain jurisdictions in Canada and the US, and has some residual rights for specified purposes codified in the Alberta *Water Act*).

[20] Section 3 of the *Public Lands Act* RSA 2000, c. P-40.

[21] See *Flewelling v. Johnston*, 1921 CanLII 357 (AB CA), https://canlii.ca/t/gbgn2.

[22] *Canadian Navigable Waters Act,* RSC 1985, c N-22, <https://canlii.ca/t/543m7>.

[23] See section 92 & 92A of the *Constitution Act, supra* note 1. These heads of power include s.92(5)" The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon, s.92(1) Local Works and Undertakings, s92(13) Property and civil rights in the province and s. 92(16) generally all matters of a merely local or private nature in the province."

In this way federal and provincial jurisdiction clearly overlap. What happens in such instances where both the provincial government and federal government have deeply connected and potentially conflicting legislative powers? The courts have clearly noted that there is often overlap of valid exercises of power under the Canadian Constitution under what is referred to as the double aspect doctrine.[24] Constitutional analysis nonetheless has to deal with the potential conflict and the apparent "eco-illogical" nature of how we legislate around aquatic ecosystems. Indeed, the fisheries-water nexus is a prime example of how our laws and the constitution have parsed out distinct jurisdictions on a matter that is so intricately linked that, from an ecological perspective, it makes little sense. Water quality and water flows are essential to fisheries, bed and shores of water bodies are fisheries' habitat. In this regard, the constitutional division of powers is, unsurprisingly, an area where provincial and federal approaches can come into direct conflict. From an environmental perspective, the constitutional divide also elevates the relevance of whichever jurisdiction's laws are more protective and precautionary in how the aquatic environment is treated.

Given both the province and the federal government have valid legislative roles to play in the aquatic realm, the question remains whether constitutional principles may invalidate specific legislative provisions (or administrative action). We know the legislative "lanes" in which the provincial and federal government need to stay: water management and use provincially and maintenance and preservation of fisheries federally.

Are there instances where the provincial and federal government may leave their lane by operation of a specific constitutional doctrine? Recognizing the intimate connection of these heads of power, how do constitutional principles apply to the fisheries-water nexus? We consider three constitutional doctrines below: the "necessarily incidental" doctrine, the doctrine of interjurisdictional immunity and the doctrine of paramountcy.

We look at each doctrine and how it might apply in the context of water and fisheries management.

Necessarily incidental doctrine

As noted in the case of *Morton v. British Columbia,* the necessarily incidental and ancillary doctrine allows for the encroachment "on the federal sphere of competence".[25] The Supreme Court of Canada elaborated on what the doctrine entails in the case of *Canadian Western Bank v. Alberta.* The SCC observed that "incidental" means effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature:

[24] See *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161.
[25] *Morton*, *supra* note 11 at para 121.

see: *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 , 2005 SCC 49, at para. 28."[26]

It is clear that provincial decision making will have both direct and indirect effects on fisheries. Almost any activity on the landscape which impacts surface water quality, water quantity, temperature and the biophysical nature of fisheries habitat may have a resulting impact on fish and fisheries.

The SCC went on to note:

> 31 When problems resulting from incidental effects arise, it may often be possible to resolve them by a firm application of the pith and substance analysis. The scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power. The usual interpretation techniques of constitutional interpretation, such as reading down, may then play a useful role in determining on a case-by-case basis what falls exclusively to a given level of government. In this manner, the courts incrementally define the scope of the relevant heads of power. The flexible nature of the pith and substance analysis makes it perfectly suited to the modern views of federalism in our constitutional jurisprudence.
>
> 32 That being said, it must also be acknowledged that, in certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level.

The difficulty of this type of analysis in the case of water and fisheries is that the matters are so intrinsically linked that the notion of "incidental" effects begins to lose all meaning, especially when one considers the cumulative effects of water management decisions and the implications of those decisions for aquatic species (particularly species at risk). For example, through multiple causes (many of which arise from provincial decisions), bull trout is now an at-risk fish species. Habitat fragmentation, habitat alteration and removal, nutrient loading, stream temperature, and contaminants are all listed as high-level threats to the trout species in the federal Recovery Strategy of the species (along with non-native species and harvest pressure).[27] Many of these threats are largely within provincial control, therefore leading to the question: how is provincial law merely "incidentally" invading upon the fisheries head of power? This is a prime example of how cumulative environmental effects - arising from the impacts of many decisions that individually may be passed off as having incidental impacts - as a whole are significantly undermining or impacting a federal sphere of power. Indeed, it is this reality that illustrates the failure of our environmental constitutional reality.

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[26] *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), [2007] 2 SCR 3, https://canlii.ca/t/1rmr1.

[27] Fisheries and Oceans Canada. 2020. Recovery Strategy for the Bull Trout (Salvelinus *confluentus*), Saskatchewan-Nelson Rivers populations, in Canada [Final]. *Species at Risk Act* Recovery Strategy Series. Fisheries and Oceans Canada, Ottawa. viii + 130 pp. online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/Rs-BullTroutOmblesTetePlateSaskNelson-v00-2020Sept-Eng.pdf.

Interjurisdictional immunity

The interjurisdictional immunity doctrine may also arise in the context of water and fisheries. The doctrine is founded in the notion that the Constitution references jurisdiction as "exclusive" and, as such, the jurisdictional buckets created by section 91 and 92 are such that each jurisdiction cannot interfere or influence the other. The courts have noted that this doctrine should attract minimal application and that both levels of government have public interest outcomes that may overlap the jurisdictional divide.[28]

Can there be "exclusive" fisheries jurisdiction? The doctrine has been focused on defending federal undertakings and persons who attract federal regulation from provincial legislative oversight. [29] The notion of a similar core of federal jurisdiction being found in a fishery as it relates to provincial water decision making is again challenged by the vague notion of a clear delineation of a jurisdictional boundary around a "fishery".

In the case of *Morton v. British Columbia,* the court found that the province was, in pith and substance, regulating a fishery. The court went on to find BC legislation involved "the provincial Crown in the management and regulation of fisheries, and thus constitutes an interference with the core of a matter within the exclusive jurisdiction of Parliament: the management and regulation of fisheries."[30] The court notes that, by application of the interjurisdictional immunity doctrine, the legislation would be read down such that it would only apply to marine plants.

While this notion of "exclusive" power over fisheries may be more readily defended against provincial efforts to regulate aquaculture, it seems that the notion of "exclusivity" in other contexts quickly runs headlong into other areas of provincial "exclusivity", and what it means to define the "core" of the federal fisheries power. General legislation focusing on environmental protection and water management does not, on its face, undermine the core of the federal fisheries power, but practically speaking a vast suite of activities can be shown to impact fisheries.[31]

The underlying question in relation to this doctrine is whether there can be discerned a "core" of management and preservation of fisheries? Theoretically at least, maintaining aquatic ecosystem function, is the central "undertaking" or purpose that a fisheries jurisdiction should entail. In reality, however, such an approach - an ecosystem based approach to constitutional interpretation - would be challenged by entrenched jurisprudence and law around provincial property and civil rights as well as a host of other provincially regulated activities.

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[28] *Ibid*. at para 36-7.
[29] *Ibid*. see paras 39-47.
[30] *Morton supra* note11 at para 190.
[31] *Ibid.* at para 189-1901.

The Doctrine of Paramountcy

Finally, the doctrine of paramountcy dictates that in instances where provincial law is inconsistent with federal law then federal law will prevail. The doctrine of paramountcy has typically been applied in areas of clear jurisdiction that could be readily undermined by provincial legislative schemes, including communications, aerodromes, and interprovincial pipelines.[32] It was described by the SCC as follows:[33]

> … To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.

In terms of fisheries and the nature of fisheries, the doctrine of paramountcy is unlikely to arise except in the most extensive impacts on a fishery. Water management laws, on their face, are not likely to be incompatible with "management and protection" of fisheries, as again definitional challenges of demarcating lines between fisheries and water arise in the complexity of ecosystems, habitat and water quality and quantity decisions that have various temporal and spatial effects.

The multiple aspects of aquatic ecosystems

Protecting aquatic ecosystems from degradation and impairment is an essential function of our legal system in Alberta. In this section we delve into some of the central approaches to aquatic ecosystem protection offered by the different levels of government. Specifically, we look at water flows, physical impairment of water bodies and pollution of water ways.

Federal Fisheries Management and Water Flows

The scope and application of the fisheries power to preserve and protect a fishery are set out in the *Fisheries Act* and related jurisprudence. Importantly, the provisions of the Act are informed by factual foundations of the ecosystems needs of fish (including those related to habitat and water quality). For the purpose of water flows, the primary prohibition of relevance in the *Fisheries Act* is section 35 which states:

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[32] See the discussion and citations in *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), [2007] 2 SCR 3, <https://canlii.ca/t/1rmr1> and also see *Burnaby (City) v. Trans Mountain Pipeline* ULC, 2015 BCSC 2140 (CanLII), <https://canlii.ca/t/gm6wf> upheld in *Burnaby (City) v. Trans Mountain Pipeline* ULC, 2017 BCCA 132 (CanLII), <https://canlii.ca/t/h2sx4>.

[33] *Canadian Western Bank v. Alberta*, *ibid*. at para 75.

> **s.35 (1)** No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.

This provision has been referred to as the HADD provision.

The scope of fish habitat is defined by the Act to include

> "**water frequented by fish** and any other areas **on which fish depend directly or indirectly** to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas".
>
> [emphasis added]

The term fish is also broadly defined to include:[34]

> **(a)** parts of fish,
>
> **(b)** shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans or marine animals, and
>
> **(c)** the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals; (*poissons*)

It is within this framing that prohibitions (and prosecutions for violations of the Act) take place.

Relevant elements of a section 35 offence will require the Crown to prove:

- That the water is frequented by fish,
- That area is one that fish depend on for its life processes (directly or indirectly),
- There is harmful alteration, disruption or destruction of fish habitat, and
- A party alleged to have violated the act undertook the activity, work or undertaking.

While dead fish may be evidence of the fish habitat, proof of harm to fish not required.[35]

The activities that are covered by the section are extensive and can include activities on lands adjacent to waters frequented by fish (as is discussed further below). Notably the wording of the prohibition was amended in 2018 to add "activity" to other "works" and "undertakings". As noted in the court in *R. v. French*[36]

> [135] The words "any work, undertaking or activity" in their ordinary sense cover a wide range of actions. The breadth of the actions caught within the ordinary

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[34] *Fisheries Act* at s.2.

[35] *R. v. Heinrich,* 1995 CanLII 1852 (BC SC), <https://canlii.ca/t/1drtq>, *R. v. Posselet*, [1999] B.C.J. No. 1141 (S.C.) and *R. v. Procter*, 2008 BCSC 19 (CanLII), <https://canlii.ca/t/1vccl>.

[36] *R v French*, 2018 ABPC 296 (CanLII), <https://canlii.ca/t/hwn34>The wording is not likely to extend to government administrative actions (as found in *Ecology Action Centre Society v. Canada (Attorney General)*, 2004 FC 1087 (CanLII), <https://canlii.ca/t/1hvt1>).

> meaning of these words is designed to give very extensive protection to fish from a wide variety of external actions.
>
> [136] The use of the word "any" serves to illustrate the breadth of the actions caught by the section.

A HADD may result from the diversion of water in certain instances and will be circumstance specific. The prohibition is not likely to cover an entire watershed *per se*, rather there must be some evidence that fish are dependent on an area.[37] In the case *R. v. Rio Tinto Alcan Inc*. the operator of a hydroelectric power station "rapidly reduced the volume of water flowing through the powers station into the Kemano River" in BC. [38] The change in flow was to "facilitate the urgent repair of a "hot spot" on a BC Hydro transmission line. The company was convicted under sections 35(1) and section 32 (as it then was) of the *Fisheries Act*. Section 32 of the Act at that time prohibited the killing of fish by any means other than fishing.

Other provisions of the *Fisheries Act* enable Ministerial Orders to maintain flows (discussed further below) and the power to make "respecting the flow of water that is to be maintained to ensure the free passage of fish or the protection of fish or fish habitat".[39]

Provincial law and flow management

The water quantity provisions most directly related to the health of fish and fisheries are found in the *Water Act*. The *Water Act* requires certain authorizations be obtained prior to the diversion of water for use and for the operation of works or other activities that impact water bodies. In addition, the related regulations set out those activities where an authorization is exempt. These exemptions are reflective of the double aspect of fisheries interests insofar as many activities that are exempt in the absent of fish are not exempt where fish are present.

The question nonetheless arises whether licenced diversions should in certain instances require a federal fisheries authorization. The answer is yes in certain instances, however issues of proof of impairment and causation, in the instances where diversions are cumulatively impacting habitat, would frustrate enforcement activities. Nonetheless, clearly activities of provincial and private entities that may be provincially authorized may result in apparent violations of the *Fisheries Act*.

A licenced diversion (just like an any other provincial authorization) does not insulate a party from prosecutions under the *Fisheries Act*. The situation therefore remains that a licenced diverter under the *Water Act*, may, in theory, violate section 35 of the *Fisheries Act* by virtue of

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[37] See *R. v. Bowcott*, 1998 CanLII 999 (BC SC), <https://canlii.ca/t/1f7d6>.
[38] 2017 BCCA 440 (CanLII), <https://canlii.ca/t/hpghp>.
[39] Section 34.3(7).

their diversion. This is most likely to be the case where the diversion is significant in nature, such as a dam, weir, or significant irrigation diversions.

On a broader, more practical aquatic health level, however, each diversion is incremental and enforcement of the *Fisheries Act* against a specific diverter becomes more complicated. The way water is allocated can incrementally chip away at habitat needs such that a basin can be "overallocated" and result in habitat related impacts (particularly when water is limited in supply, i.e., drought). In this way, having a legal mechanism to ensure base flows for the protection of aquatic ecosystems become increasingly relevant, whether that base flow is protected provincially or federally.

For its part, the *Water Act* enables the setting of water conservation objectives (WCO), which can be licenced to the Crown under the Act or can be embedded in the conditions on a licence to curb diversions when water levels diminish below objective levels. There is no mandatory statutory language regarding how to set these flows, so there is no direct binding linkage to scientifically driven instream flow needs. The purposes of the water conservation objective can include:[40]

> (i) protection of a natural water body or its aquatic environment, or any part of them,
>
> (ii) protection of tourism, recreational, transportation or waste assimilation uses of water, or
>
> (iii) management of fish or wildlife.

The WCO can include "water necessary for the rate of flow of water or water level requirements".[41] It is important to note that a WCO can, but need not be, based in science, as a variety of potential purposes are outlined in the Act. WCO's can gain priority over other licenced uses (that are issued licences after the WCO) where the government issues a licence for that purpose.[42].

For example, the WCOs for the South Saskatchewan River Basin (SSRB) is set by an Approved Water Management Plan (AWMP). The WCOs for the Bow, Oldman and South Saskatchewan River Basin are "either 45% of the natural rate of flow, or the existing instream objective increased by 10%, whichever is greater at any point in time".[43]

Further, flows can be obtained through the closure of basins or the discretionary decisions of the Director in issuing licences. The SSRB (with the exception of the Red Deer River Basin) in Alberta is closed to further surface water allocations due to the basin being overallocated. This

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[40] *Water Act* at s.1 (hhh).
[41] *Ibid*.
[42] *Water Act* at s.51(2).
[43] Government of Alberta, *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)* (2006), online: https://open.alberta.ca/dataset/7541cb1e-b511-4a98-8b76-af33d7418fa1/resource/483eb9b0-29fd-41d4-9f81-264d53682b9a/download/2006-ssrb-approvedwatermanagementplan-2006.pdf.

being the case, there is some level of protection of flows from future licenced volumes although intensifying uses under currently issued water licences may also have adverse effects on flows (and on fish and fish habitat).

Can the federal government impose minimum water levels and/or surface water flows?

The federal government does have administrative powers to order minimum flows for the purpose of conserving and protecting fish and fish habitat. Minimum flow orders are feasible under the *Fisheries Act* in prescribed instances.[44] Section 34.3(2) states

> If the Minister considers that doing so is necessary to ensure the free passage of fish or the protection of fish or fish habitat, the owner or person who has the charge, management or control of an obstruction or any other thing that is detrimental to fish or fish habitat shall, on the Minister's order, within the period specified by him or her and in accordance with any of his or her specifications,
>
> **(a)** remove the obstruction or thing;
>
> **(b)** construct a fishway;
>
> **(c)** implement a system of catching fish before the obstruction or thing, transporting them beyond it and releasing them back into the water;
>
> **(d)** install a fish stop or a diverter;
>
> **(e)** install a fish guard, a screen, a covering, netting or any other device to prevent the passage of fish into any water intake, ditch, channel or canal;
>
> **(f)** maintain the flow of water necessary to permit the free passage of fish; or
>
> **(g)** maintain at all times the characteristics of the water and the water flow downstream of the obstruction or thing that are sufficient for the conservation and protection of the fish and fish habitat.

There are factors that must be considered by the decision maker prior to issuing an order. Specifically, section 34.1 states that the Minister

> shall consider the following factors,
>
> **(a)** the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected;
>
> **(b)** fisheries management objectives;

[44] Note that obstruction of navigable water ways are also federally regulated under section 91(10) of the Constitution and the *Canadian Navigable Waters Act*, R.S. C. 1985 c. N-22 Act.

(c) whether there are measures and standards

(i) to avoid the death of fish or to mitigate the extent of their death or offset their death, or

(ii) to avoid, mitigate or offset the harmful alteration, disruption or destruction of fish habitat;

(d) the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat;

(e) any fish habitat banks, as defined in section 42.01, that may be affected;

(f) whether any measures and standards to offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat;

(g) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister; and

(h) any other factor that the Minister considers relevant.

Use of orders to maintain flows has seen limited use to date. The phrasing of the order power appears to be quite broad, capturing both obstruction and "other thing" that may be detrimental to fish and fish habitat. In this regard, the *Fisheries Act* may be used to set and maintain instream flows.

There is limited jurisprudence regarding these orders and there appears to be few instances where the orders have been used. In one instance, a minimum flow order was issued directing BC Hydro to maintain prescribed flows below a dam and the court found that the government should have given notice of its decision to issue the order and to make submissions to the regulator.[45] This decision involved a minimum flow order issued under a now repealed provision of the Act. The government's order was quashed in that case for failing to meet a duty of fairness which included a right to notice and a right to make representations to the Minister on an urgent basis.[46] Interestingly, in this case the Department and Fisheries and Oceans had been discussing a minimum flow with BC Hydro over several years.[47] These efforts were rejected and/or resisted by BC Hydro. In finding that the issuance of the administrative order should have offered BC Hydro notice and a time to respond to the issuance of the order, it appears that the court minimized the weight of the long opposition of BC Hydro to an altered flow regime. The court quashed the order on this basis, but the decision begs the question of

[45] *British Columbia Hydro and Power Authority v. Canada (Attorney General*) 1998 CanLII 7998 (FC), https://canlii.ca/t/4blm.
[46] 1998 CanLII 7998 (FC), https://canlii.ca/t/4blm.
[47] *Ibid*.

whether last minute comment periods would have changed the department's approach substantively.

Alberta has not seen the use of federal instream flow orders of this nature. Nor is the author aware of an instance where the federal government has exercised its discretion to order a reduction of water diversions to maintain WCO or instream objectives.

Direct physical impairment of the aquatic environment and the Fisheries Act

Section 35 of the *Fisheries Act* prohibits activities that result in the harmful alteration, disruption or destruction of fish habitat. As such there is a broad spectrum of activities prohibited and regulated by the Act. We have considered how changes in water flows may harm habitat but clearly a wide range of activities that directly harm the biophysical attributes of fish habitat are also covered by section 35.

The scope of activities that are regulated are broad, from activities that result in sedimentation to direct physical destruction of habitat, the prohibitions have applied from the creation of berms to motocross races.[48]

One question that has arisen is the geographic extent to which this the HADD provision might apply. The language of the prohibition focuses on habitat on which fish depend "directly or indirectly". The question arises as to whether riparian habitat can be viewed as "fish habitat" that is protected by the HADD provision.

Fish habitat can extend to riparian areas for its reduction of "reduced food sources for the fish by reducing the input of debris to the creek" and the adverse effect on water temperatures.[49] Whether impacts on a riparian area will be caught by these prohibitions will depend on the sufficiency of evidence that will guide the court's decision.[50]

In discerning whether riparian areas are areas on which "fish depend" for their life processes, the courts have observed that evidence must show some level of dependence and that "rare instances" of dependence may not be covered by the prohibition.[51] For instance, it was found

[48] *R v French*, 2018 ABPC 296 (CanLII), <https://canlii.ca/t/hwn34>.
[49] (see *R. v. Larsen and Mission Western Developments Ltd.*, 2013 BCPC 92 (CanLII) upheld on appeal *R. v. Larsen*, 2014 BCSC 2084 (CanLII), <https://canlii.ca/t/gf6qg>. Another case example is *Regina v. District of Chilliwack* 1988 (unreported B.C. Provincial Court Chilliwack Registry #18465) as cited in R. v. Bowcott, 1998 CanLII 999 (BC SC), <https://canlii.ca/t/1f7d6>.
[50] For a case where it was found that riparian impacts were not found to violate the Act see (although findings in prosecutions have varied as to whether the evidence was sufficient to establish a HADD) see *R v. Rhodes et al*, 2007 BCPC 1 (CanLII), <https://canlii.ca/t/1q8t6>.
[51] *R. v. Bowcott*, 1998 CanLII 999 (BC SC), <https://canlii.ca/t/1f7d6>.

that insufficient evidence of how often a flooded area was inundated with water meant that the Crown could not prove that area to be one on which "fish depend". [52]

The determination as to the nature and extent of the dependence will vary with the circumstances and with the evidence presented.

Therein lies one of the precautionary aspects of the HADD provision, insofar as it is significantly fact dependant, and favours anyone doing an activity to approach fish bearing waters with caution. In the words of the court in R. v. Sapp," s. 35(1) of the *Fisheries Act* ensures that the law is flexible enough to accommodate a wide range of activities and still prohibit unforeseen and unpredictable activities which adversely affect fisheries, fish and fish habitat resulting in HADD."[53] The court in that case found that the provision was not so vague as to render the law void.

Provincial law and direct physical impairment of fish habitat.

The *Fisheries Act* HADD prohibition is quite encompassing of impacts on water bodies, and specifically the geophysical attributes that make up habitat for fish species. In Alberta, the province does have comprehensive laws in relation to impacts on water quality and the bed and shores of water bodies that may apply to fish habitat but there are significant differences in how they might be applied.

In this regard, there is some overlap or alignment between the legislation but there remains a need to obtain both federal and provincial authorizations where activities are taking place in or near water where fish or fish habitat is present.

The table below highlights various types of activities that are likely to be captured by the HADD provisions.

Table 1: Table of aquatic habitat impacts and related provincial regulation

Activity	Provincial legislative coverage	Comments
Erosion and sedimentation	Activities that cause erosion and sedimentation require approvals under the Water Act Erosion and sedimentation may be considered "destruction" of	A variety of activities are exempt from approvals but typically those where the water body is frequented by fish (Water Ministerial Regulation)

[52] *Ibid*.
[53] *R. v. Sapp*, 2004 BCPC 442 (CanLII), <https://canlii.ca/t/1jpv8> at para 84.

Activity	Provincial legislative coverage	Comments
	public land in certain instances (under the Public Lands Act)	e.g., landscaping is exempt from approvals except where it is in or adjacent to a watercourse frequented by fish or in a lake or a wetland.
Instream alterations & disruptions	Approvals required for altering flows, for activities capable of causing siltation or erosion of any bed and shore, or activities capacity of causing an effect on the aquatic environment (Water Act) Approvals required to occupy public land, "damage" public land, "injuriously affect watershed capacity. (Public Lands Act)	Provincial prohibitions are general in nature. Sample prosecutions are limited (particularly in comparison to hadds). The Public Lands Act lacks definitions and this may undermine the relevance of prohibitions (e.g., "injuriously affect watershed capacity").

The different approaches of protection the biophysical aspects of aquatic ecosystems

The approach of the federal government to physical impairment of water bodies focuses on a broadly framed prohibitions against altering, disrupting, or destroying habitat. It matters not whether the harm is temporary or permanent, it only matters that it can be proven as "harmful".

In contrast, Alberta has equally broad prohibitions for water bodies and beds and shores but no direct consideration or mandate that the needs of aquatic ecosystem are to be protected. Approvals under the *Water Act* are broadly required, however in authorizing these activities, a specific environmental outcome is not stated. Further, public lands prohibitions are not specific to ecosystem or biophysical attributes, rather the law is focused on hydrological or physical attributes alone (i.e., watershed capacity, occupation, or damage to land).

Overall, the provincial legislation enables similar protection to the *Fisheries Act* and the question becomes one of how this discretion is used to allow, conditionally allow or deny proposals to impair Alberta's aquatic systems.

Water quality regulation under the *Fisheries Act*

Most fish need unpolluted waters to thrive. In an effort to regulate fish harming pollutants the *Fisheries Act* prohibits the release of harmful substances in into areas where fish are or into areas which lead to where fish are. Section 36(3) of the Act states:

> 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.

Deleterious is defined by the Act as a substance that, when added to water, is deleterious to fish. This somewhat circular definition is not further defined by the Act (i.e. what deleterious means) although it is defined in relation to certain substances and certain activities under in regulations.[54] For a release of substances that aren't covered by a regulation the determination of what is deleterious will depend on the nature of the substance.

The assessment of whether a substance is "deleterious" for enforcement purposes is focused on testing of the acute lethality of the substance over a prescribed time.[55] In this regard, the practical application of the provision is focused on substances that may be acutely lethal and not merely "deleterious", which means "causing harm or damage". This focus on acute lethality in relation to determining the "deleterious" nature of a substance reflects a narrowing of the application of the provision as a prosecution based on proof physiological harm to fish short of causing a lethal effect may be sufficient to justify a prosecution.

The range of substances that may be deleterious is extensive and includes such substances as chlorinated water (i.e., treated potable water), municipal wastewater, and oil and diesel fuel. The ability to release substances that are deleterious are set out in various regulations.[56]

Provincial regulation of water quality

Where pollution is often regulated by provincial law, primarily under the *Environmental Protection and Enhancement Act.* The Act has broad prohibitions against certain harmful releases and otherwise regulates activities based on risk management approach, i.e. the higher the risk, the higher the regulatory scrutiny.

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[54] A case example of the operation of the regulations can be seen *in R. v. Zellstoff Celgar Limited Partnership*, 2012 BCPC 38 (CanLII), <https://canlii.ca/t/fqcqc>.

[55] See Environment and Climate Change Canada, Biological Test method: Acute lethality of effluents to rainbow trout. https://www.canada.ca/en/environment-climate-change/services/wildlife-research-landscape-science/biological-test-method-publications/acute-lethality-effluents-rainbow-trout.html#abstract.

[56] These regulations are promulgated under section 36(4)–(6) of the Act.

The general substance release provision under *EPEA* prohibits the release "into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect."[57] An adverse effect is defined to mean " impairment of or damage to the environment, human health or safety or property".[58] The term "significant" is not defined nor has it received extensive judicial consideration, leaving questions about what type of release is significant.

When authorizing activities regulated under EPEA the legislation takes a risk-based approach to polluting activities. Not all activities are regulated, rather, prescribed activities may fall within different regulatory classes (approvals, registrations, notice) and these activities will often be governed by relevant regulations, codes of practice or conditions on authorizations. In addition, there are setbacks from waterbodies meant to limit the risk of water impairments (under several sector focused regulations related to agriculture and manure management, oil and gas, and forestry.[59]

The *Fisheries Act* vs *EPEA* on water pollution

The differences of the foundational prohibitions in the *Fisheries Act* and EPEA is significant. Both provisions (section 109(2) of EPEA and section 36(3) of the *Fisheries Act*) focus on releases into the environment. The federal prohibition is focused the release of a deleterious substance and not on the effect in the environment whereas the provincial prohibition focuses on the effect in the environment.

Federally, the notion of "significant" effects does not come up in relation to *the Fisheries Act* prohibition although, in practice, the Crown tests substances for lethality to determine whether the release is deleterious. In this regard, the test for prosecution purposes is stricter than a plain meaning of "deleterious" which can be defined as "causing harm or damage".[60]

Provincially, "significant" is not defined by EPEA, so we can look to case law which has determined that "significant" means "more than trivial".[61] Further, there is a need for some evidence as to the extent of how "significant" an effect there is.[62] For instance, the court has found that a release of PCBs at a City of Edmonton facility was insignificant, relying a characterization of the risk of the release on a significant impact on human health.[63] The court in

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[57] *Ibid*. at section 109(2).
[58] *Ibid*. at section 1.
[59] See for instance the *Standards and Administration Regulation*, Alta Reg 267/2001, <https://canlii.ca/t/jcfg> for setbacks for manure application under tables 1 and 2 of Schedule 2. Also see *Oil and Gas Conservation Rules*, Alta Reg 151/1971, <https://canlii.ca/t/55mcd> at section 2.120.
[60] Oxford Learner's Dictionaries, online: https://www.oxfordlearnersdictionaries.com/definition/american_english/deleterious.
[61] *R v Auto Body Services Red Deer Ltd*., 2014 ABPC 168 (CanLII), https://canlii.ca/t/g8nsl.
[62] *R. v. Edmonton (City of)*, 2006 ABPC 56 (CanLII), https://canlii.ca/t/1mm3g.
[63] *Ibid*.

this case adopted a risk based approach provided by the defendant's expert which focused on occupational toxicological risk assessments of the release increasing the serious health impacts.

Underlying the "significance" of an adverse effect determination is the assumption that environmental releases result in a readily provable harm in the receiving environment. This makes prosecutions quite difficult to prove as effects may be challenging to prove in a receiving environment.

There can be both acute and chronic impacts on the receiving environment that are extremely difficult to prove within the burden of proof of environmental laws which are quasi-criminal in nature and require proof beyond a reasonable doubt. Air and water emissions may have effects on species that evade monitoring or initial incident responses. Effects may result either acutely, to organisms that may not be detected (i.e., transitory), or chronically, where effects are not evident in a timeframe of an investigation.

As such, the efficacy of the provisions is significantly undermined and the practical reality of prosecuting releases under this section of EPEA is limited to only the most significant releases that result in clear and evident harm, even when scientific understanding of the substance released knows that the risk of some harm to the environment is significant.

If one compares the EPEA release provisions with that of section 36(3) of the *Fisheries Act* there are several factors of note. First, the *Fisheries Act* prohibition deals with the "deleteriousness" or adverse effect at the point of release. This is in contrast with EPEA's release provision focuses on the "effect" on the receiving environment. As such the federal approach is more aligned with a central principle of environmental law: pollution prevention. The *Fisheries Act* avoids the risks of the variable dilutive capacity of the receiving environment. Further the *Fisheries Act* does not require that the Crown prove that harm in fact occurred, rather only that the release was harmful.

An example of this can be seen in the prosecution of the Town of Beaverlodge where the wastewater effluent was permitted provincially based on the concentration of the effluent and the presumed flows of the receiving water body.[64] However, in that case, due to low flows, the wastewater effluent release resulted in fish kills. The Town was subsequently charged and pled guilty to violating the *Fisheries Act*, resulting in a $20,000 fine.

Enforcement and remedial response

Another aspect of the respective jurisdictions around fish and water relates to potential penalties and remedial administrative order powers granted to the respective governments.

[64] Environmental Law Centre of Alberta, *The Polluter Pays Principle in Alberta Law*, Environmental Law Centre of Alberta, 2019 CanLIIDocs 3671, https://canlii.ca/t/sp6g.

Table 2 below sets out the relevant penalties under both laws. Provincial laws and related penalties distinguish between "knowingly" violating a prohibition versus violating a prohibition by undertaking an action. For the *Fisheries Act,* the potential penalties resulting from a prosecution differentiate between summary conviction offences and indictable offenses. The choice lies with the Crown as to whether to lay an information (i.e., bring a charge) by way of indictment or summary conviction, typically based on the severity of offences.

Table 2: Comparative potential fines, remedial orders, and time limits on prosecutions

Provision	Individual	Corporation	Remedial orders	Time limit on prosecution
Provincial				
EPEA 109(1) Knowingly release (must show intent to release)	max $100,000 no more than 2 years in prison	$1,000,000	Environmental Protection Orders	2 years (s.226)
EPEA 109(2) release (w/out intent)	max $50,000	$500,000	Environmental Protection orders	
Public Lands Act (harm to bed and shore) (s.54)	max $25,000 (s.59.1)	max $100,00	Enforcement Order s.59.1(3)	2 years (s.56.1)
Water Act (activity w/out approval) (knowingly)	max $100,000 no more than 2 years in prison	$1,000,000	Water Management Order (Part 7 Division 2) Enforcement Order	2 years (s.141)
Water Act contravention w/out intent	max $50,000	$500,000	as above	
Federal				
Fisheries Act	Individual	Corporation		2 years

Provision	Individual	Corporation	Remedial orders	Time limit on prosecution
		(*small rev corp = $5,000,000 gross rev in previous 12 mths)		(s.42(6))
Deleterious release (section 36(3)) and HADD (s.35) Indictment 1st offence	min. $15,000 max. $1,000,000	Min. $75,000 max. $4,000,000 (small rev corp) min. $500,000 max.$6,000,000	Inspector/fishery officer order (s 38(7.1))	
Indictment 2nd offence	min. $30,000 max.$2,000,000	min. $150,000, max.$8,000,000 (small revenue Corp) min. $1,000,000 max.$12,000,000	Inspector/fishery officer order (s 38(7.1))	
Deleterious or HADD Summary conviction. 1st offence	min. $5,000 max. $300,000	min. $25,000 max.$2,000,000 1st Offence (small rev. corp.) min. $100,000 max.$4,000,000	Inspector/fishery officer order (s 38(7.1)) Removal of Obstructions (	
2nd offence	min. $10,000 max. $600,000	min.$50,000, max.$4,000,000 (small revenue Corp) min.$1,00,000 max.$8,000,000	Inspector/fishery officer order (s 38(7.1))	

As can be seen the difference between the federal and provincial legislation is significant. A large harmful event under federal law may attract, on a second offence a **minimum** penalty of $1,000,000 for a corporation with annual revenue above $5,000,000 (in the preceding 12 months). This is in comparison with **maximum** fine $1,000,000 for knowingly violating the prescribed provisions of *EPEA* and the *Water Act* (and $100,000 under the *Public Lands Act* prohibitions). Maximum fines are very unlikely to be given in most instances. Fines may be augmented as well where there is an economic benefit derived from the violation.

It is anticipated then that the *Fisheries Act* acts a more significant general deterrent (i.e., influences broader conduct of activities), as well as a specific deterrent (in the case of a defendant).[65]An example of this difference is seen in the prosecution of Canadian National Railway in 2015 by both the federal and provincial governments for a diesel spill that entered the North Saskatchewan River. The provincial fine in that instance was $125,000, whereas the federal fine under the *Fisheries Act* was $2.5 million.[66]

Remedial orders

Administrative orders are available under both provincial and federal laws. Remedial orders related to harm to the environment are quite common in Alberta with the issuance of environmental protection orders, water management orders and enforcement orders (under the EPEA and *Water Act*). Administrative enforcement orders, while available for some activities under the *Fisheries Act,* appear to be used sparingly. Under section 34.3(2) the Minister has the ability to issue an order to "owner or person who has the charge, management or control of an obstruction or any other thing that is detrimental to fish or fish habitat". Further, under section 38(7.1) an inspector or fishery officer may director a person to take measures to "counteract, mitigate or remedy an adverse effect" (that related to death of fish, HADDs, or deposits of deleterious substances).[67] The inspector or officer must have reasonable grounds on which to base their directions. As stated in a recent review of an order the courts have noted, [68]

> "the officer must be satisfied on reasonable grounds that immediate action is necessary to take the ordered corrective measures to prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result or might reasonably be expected to result from the unauthorized disruption of fish habitat. Therefore, "not only is the appreciation of the circumstances left to the inspector, but he also has to decide which of the measures. . . he will take. . . It is not [however] an absolute discretion for it is very clearly limited to the specific

[65] For further discussion of the purpose and principles of sentencing see Alberta Court of Appeal decision of *R. v. Terroco Industries Limited*, 2005 ABCA 141 (CanLII), <https://canlii.ca/t/1k3n3>.
[66] The Joint Agreed Statement of Facts in the provinces case can be seen at https://www.alberta.ca/assets/documents/ep-cn-bissell-agreed-facts.pdf.
[67] See *Fisheries Act* section 38 (6) as well as sections 38 (4), (4.1), & (5).
[68] *Conesa v. Canada (Attorney General)*, 2021 FC 632 (CanLII), <https://canlii.ca/t/jhlgq> at para 28.

situations described in subs. 38(4) of the Act and when immediate action is necessary" *(St. Brieux (Town) v. Canada (Fisheries and Oceans)*, 2010 FC 427 at paras 54–55 [emphasis added])"

Restoration activities may be ordered as part of result of a creative sentencing order where a successful prosecution has occurred.

The practical dynamics of managing fisheries, water and cumulative effects

From an environmental perspective, the ecological niches that fish inhabit creates a challenging area of management and preservation in Canada's constitutional context. Activities on the landscape will often have direct impacts on aquatic systems which in turn impact fish. When we use the landscape, we often have direct impacts on the water bodies in the region. These impacts may be permanent (roads, dams, diversions) or temporary (entering a water body and impacting habitat). Further, activities will have a variety of polluting impacts on water quality from specific points or more nebulous non-point sources that may impact aquatic system health.

Layered on the reality of impacts of land use and direct water impacts are divergent goals for legislation that have impacts on aquatic systems. The *Water Act* can serve both fish and aquatic ecosystem health; however, it is challenged on two fronts in relation to fisheries specifically. First, in terms of water quantity, the *Water Act* is primarily focused on water diversions and use. In light of how it treats prior water allocations as paramount, the administration of the Act to proactively protect fisheries is extremely important. Yet water management in Alberta has not been driven by proactive planning around fisheries needs.[69] Further, while the regulatory approach to approvals under the Act can clearly be used to protect fish habitat, direct consideration of cumulative habitat effects are not clearly considered in current implementation of the Act. Impairment of aquatic systems has a long history, with many incremental impacts, the collection of which have failed to result in effective consideration of fisheries needs. Introduction of non-native species and harvest pressures combined with cumulative effects of development in and around water ways, have pushed several Alberta fish species to be categorized as threatened and endangered under federal law.[70]

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[69] See Unger, Jason *Aquatic Ecosystems & Alberta's Water Law: Gaps, Opportunities and Law Reforms*, (Edmonton: Environmental Law Centre, 2022), online: https://elc.ab.ca/wp-content/uploads/2022/05/Aquatic-Ecosystems-Gaps-Opportunities-and-Law-Reforms-May-2022_final.pdf.

[70] See Fisheries and Oceans Canada. 2020. Recovery Strategy for the Bull Trout (*Salvelinus confluentus*), Saskatchewan-Nelson Rivers populations, in Canada [Final]. *Species at Risk Act* Recovery Strategy Series. Fisheries and Oceans Canada, Ottawa. viii + 130 pp. and Fisheries and Oceans Canada. 2019. Recovery Strategy and Action Plan for the Westslope Cutthroat Trout (*Oncorhynchus clarkii lewisi*) Alberta population (also known as Saskatchewan-Nelson River populations) in Canada. *Species at Risk Act* Recovery Strategy Series. Fisheries and Oceans Canada, Ottawa. vii + 61 pp + Part 2 and Fisheries and Oceans Canada. 2020. Recovery Strategy for the

Finally, it is important to note that while the jurisdictional divide can be articulated in theory, the practical application of the federal fisheries power backed by compliance and enforcement staffing in Alberta can be a major challenge. This was recent observed by the Commissioner of the Environment and Sustainable Development (CESD) who found that the federal department did not have sufficient enforcement capacity to properly ensure compliance for aquatic species at risk.[71] The CESD audit observed that the department only had 30 fisheries officers for the Prairie, Arctic and Ontario regions, representing 6% of compliance staff as of December 2021. While Environment and Climate Change Canada (which deals with section 36(3) enforcement) has maintained a presence in Alberta, there is greatly diminished enforcement capacity by Fisheries Officers who enforce section 35 of the Act.

Similarly, the overall regulatory oversight around fisheries habitat has diminished through time, according to analysis conducted in 2015 by Martin Olsyznski.[72] This lack of regulatory and compliance presence has, to the understanding of the author, continued to 2022. The 2019-2202 Parliamentary report by the Department of Fisheries and Oceans indicates that for the entire Central and Arctic region only had 2 warnings issued and 2 directions made.[73] As such, the federal habitat provisions have decreased relevance: statutorily present but compliance absent.

Exclusive jurisdiction over fisheries and provincial aquatic habitat protection

What does it mean to have “exclusive” jurisdiction over the management and protection of fisheries? Some things are clear, provincial regulation of aquaculture operations (i.e., “fisheries”) will be unconstitutional, and requires the federal government to fill these gaps (or leave a void). Does this mean the province cannot protection fish habitat? Insofar as habitat is often made up of provincially owned resources, it seems clear that ecosystems are rightful subjects of provincial law. That said, the province cannot, under the constitution, develop and regulate a fishery as it sees fit. The difficulty then comes in matter of degrees of the double aspect of regulation. Provinces can protect the ecosystems, and by extension, the habitat on which fisheries rely, and, indeed, our constitution notes that only the federal government may authorize the impairment of a fishery. Of course, this is of minimal relevance where federal

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Rainbow Trout (*Oncorhynchus mykiss*) in Canada (Athabasca River populations). Species at Risk Act Recovery Strategy Series. Fisheries and Oceans Canada, Ottawa. vii + 90 pp.

[71] Office of the Auditor General of Canada, *Report 7 Protecting Aquatic Species A Risk,* (Ottawa: Office of the Auditor General of Canada, 2022), online: https://www.oag-bvg.gc.ca/internet/docs/parl_cesd_202210_07_e.pdf.

[72] Martin Z.P. Olszynski, “From ‘Badly Wrong’ to Worse: An Empirical Analysis of Canada's New Approach to Fish Habitat Protection Laws” (2015) 28(1) *J. Env. L & Prac*. 1.

[73] Government of Canada, Annual Report to Parliament on the Administration and Enforcement of the Fisheries / Fish and Fish Habitat and Pollution Prevention Provisions of the *Fisheries Act* – April 1, 2019 - March 31, 2020: v + 40 p.

systems of regulation are unable (or unwilling) to deal with the cumulative impacts on fisheries (some within their direct control, and some outside).

The court in Morton, cites the Minister of Fisheries and Oceans comments in describing the role of the federal government[74]

> The Minister of Fisheries and Oceans exercises this authority under the ***Fisheries Act*** and regulations. The Minister retains the authority and accountability for the protection and sustainable use of fisheries resources and their habitat. The Minister's authority includes the direction and powers necessary to regulate access to the resource, impose conditions on harvesting, and enforce regulations. Provincial, territorial and municipal governments have important authorities with respect to land, water and waste disposal that need to compliment efforts to conserve fish and fish habitat.

Further the court goes on to cite *The Queen v. Robertson (1882),* 1882 CanLII 25 (SCC), 6 S.C.R. 52 that the power is in relation to "subjects affecting the fisheries generally, tending their regulation, protection and preservation, matters of a national and general concern and important to the public, such as forbidding [of] fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries."[75]

Bringing this conception of 1882 of "protection and preservation" has inherently evolved with the increase in knowledge of fisheries and ecosystem science. Threats to species are now more well understood, ranging from climate change, introduction of non-native species, nonpoint source pollution and habitat alteration.[76]

Harmonizing, or in the words of the court in *Morton*, the need for provincial, territorial and municipal governments to "compliment efforts to conserve fish and fish habitat" is embedded in our constitution. Rather than a source of conflict, it seems that sustaining aquatic systems requires a joint effort, where habitat needs that support fisheries are inherently protected by both provincial and federal law. The fact that we have fish species at risk illustrate the shortcomings of current application and administration of the law and its enforcement. A unified front of aquatic habitat planning, protection and restoration is needed to ensure further degradation aquatic systems, and the fisheries they support, is avoided.

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[74] At para 45.

[75] *Morton supra* note 11 at para 128.

[76] See Fisheries and Oceans Canada. 2020. Recovery Strategy for the Bull Trout (*Salvelinus confluentus*), Saskatchewan-Nelson Rivers populations, in Canada [Final]. *Species at Risk Act R*ecovery Strategy Series. Fisheries and Oceans Canada, Ottawa. viii + 130 pp. and Fisheries and Oceans Canada. 2019. Recovery Strategy and Action Plan for the Westslope Cutthroat Trout (*Oncorhynchus clarkii lewisi*) Alberta population (also known as Saskatchewan-Nelson River populations) in Canada. *Species at Risk A*ct Recovery Strategy Series. Fisheries and Oceans Canada, Ottawa. vii + 61 pp + Part 2 and Fisheries and Oceans Canada. 2020. Recovery Strategy for the Rainbow Trout (*Oncorhynchus mykiss*) in Canada (Athabasca River populations). *Species at Risk Act* Recovery Strategy Series. Fisheries and Oceans Canada, Ottawa. vii + 90 pp.

CONCLUSION

Many in the environmental field laud the approach of the *Fisheries Act* on two fronts: first, it is protective of habitat, something that is largely lacking in Alberta law, at least directly; second, it largely rejects the notion of "dilution" being the solution of pollution. These two aspects of the *Fisheries Act* make the statute stand apart for taking a precautionary and proactive approach to protecting fish. Provincially, Alberta has comprehensive water-based regulation, whether it is effective in managing cumulative impacts on specific organisms relies on how the law is administered and whether the government chooses to take a strategic and planned approach to water quantity, water quality and aquatic habitat issues.

It is fair to say that both federal and provincial laws have failed to come to terms with the legacy impacts on aquatic systems and are challenged to adjust to cumulative effects on the environment. Both the federal and provincial systems lack robust and prescriptive planning for aquatic systems. In the absence of watershed-based planning, regulation and restoration, there will continue to be a favoring of the most protective regime. In this regard, the resolution of conflicts between water management and fisheries lies significantly in the realm of provincial jurisdiction, as maintaining aquatic ecosystem functions while addressing threats related to harvest pressure and non-native species are all within the regulatory and enforcement purview of the province.