THE FISHERIES ACT AS AN ENVIRONMENTAL PROTECTION STATUTE

A. William Moreira*

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*A. William Moreira, QC, FCIArb, Partner, Stewart McKelvey, Halifax NS

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INTRODUCTION

Protection of the marine (in the sense of oceanic) environment in Canadian law primarily relies on the application of federal legislation; however constitutional limitations on scope of federal jurisdiction somewhat constrain to specific subject-matters the valid enactment and application of federal statutes[1]. One such statute is the *Fisheries Act*[2], the preponderance of which deals with regulation of the fishing industry and of the activity of fishing in waters to which it applies, but a portion of which (generally ss. 34 to 41 inclusive) deals with protection of fish habitat and related prohibitions against pollution.

The habitat protection provisions of the *Fisheries Act* have a long history – language corresponding to present s. 36(1), prohibiting "throwing overboard" of "prejudicial or deleterious substances" in "any water where fishing is carried on", is to be found in the 1927 statutory revision[3], in which the section is said to have been enacted in 1914[4]. Section 36(3) was enacted in substantially its present form in 1970[5] and what was until 2013 s. 35(1) was enacted in 1977[6]. The focus of this paper is to provide an update (roughly 2002 to 2016) of jurisprudence and practice in respect of the long-standing use of these two sections as the primary environmental protection provisions of the *Fisheries Act.*

It must be stated at the outset that although they apply to all waters under Canadian jurisdiction these provisions of the *Fisheries Act* are more frequently engaged in context of pollution of inland (as opposed to oceanic) waters principally because oceanic pollution tends to be ship-sourced, and resulting legal proceedings are generally more efficiently conducted under other more subject-specific federal statutes which apply to shipping.

UPDATE ON FEDERAL CONSTITUTIONAL POWERS

Despite the possibility of debate whether the results would be the same under contemporary theories of co-operative federalism in Canada, the scope of federal jurisdiction to include environmental protection provisions in the *Fisheries Act* was considered, and for all practical purposes was considered settled, in two 1980 decisions of the Supreme Court:

- In *Fowler* v. *R*[7] the accused had been prosecuted under then s. 33(3) of the *Fisheries Act*, which prohibited persons engaged in "logging, lumbering, land clearing or other operations" from putting "slash, stumps or other debris into any water frequented by fish". Very briefly summarized, the unanimous court held this section *ultra vires* Parliament, as a "blanket prohibition of certain types of activities, subject to provincial

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[1] Other federal statutes generally accepted to impose penal consequences for marine pollution include the *Canada Shipping Act, 2001* SC 2001 c. 26; the *Migratory Birds Convention Act, 1994* SC 1994 c. 22; and, in respect of the specific maritime subjects to which it applies, the *Canadian Environmental Protection Act, 1999* SC 1999 c. 33 ("*CEPA 1999*").

[2] RSC 1985 c. F-14

[3] RSC 1927 c. 73 s. 44

[4] According to the legislative history notation, 1914 c. 8 s. 44

[5] RSC 1970 1st Supp c. 17, s. 3

[6] SC 1976-77 c. 35 s. 5

[7] [1980] 2 SCR 213

jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries"[8].

- With contrary result, *Northwest Falling Contractors* v. *R*[9] concerned, and upheld, the validity of s. 33(2) – essentially the same as present s. 36(3) – prohibiting the release of a deleterious substance into water frequented by fish. A fuel pipe on a wharf had broken spilling diesel fuel into tidal waters in a bay. The same unanimous court as in *Fowler* found the section valid as legislation in relation to "sea coast and inland fisheries" for purposes of s. 91(12) of the *British North America Act*[10] (as it was then named) – saying that the power to regulate the fisheries includes protection of the creatures that are part of them[11] and that the challenged section, intended to protect fisheries by preventing substances deleterious to fish from entering waters frequented by fish, addresses a "proper concern of legislation under the heading Sea Coast and Inland Fisheries"[12].

In *R*. v. *MacMillan-Bloedel Limited*[13] the accused logging firm was charged under then s. 31 (later but no longer s. 35(1)) with harmful alteration, disruption or destruction of fish habitat resulting from its operations on an unnamed creek inhabited by a unique species of small fish. The fish were isolated by impassable waterfalls from other watercourses, and there was in fact no sport or commercial fishery in the waters where the operations were conducted. The majority of the BC Court of Appeal held that constitutionally the *Fisheries Act* could validly apply only where a "fishery" existed, and because the alleged offence did not occur in such a place the accused was entitled to an acquittal.

This decision was generally neither widely considered nor followed, perhaps because of its very unusual facts, but it remained uncriticized for many years. Finally in *R*. v. *BHP Diamonds Inc.*[14] criticism was offered by the Supreme Court of the Northwest Territories. The accused developer of a mine having built a diversion channel between certain lakes was charged with three counts under *Fisheries Act* s. 36(3) (deleterious substance, resulting from downstream sedimentation) and one count under s. 35(1) (harmful alteration of habitat, as it then was, resulting from the channel itself) and relying on *MacMillan Bloedel* defended on the basis that there was no "fishery" in any of the affected lakes. The Court at paras 42-68 rejected this argument, saying particularly at paras 53 and 57:

> [53] It is this *obiter* comment [in *Northwest Falling Contractors*] which appears to have encouraged the majority in *MacMillan Bloedel (1984)*. The majority took the view that Martland J. contemplated the existence of waters with fish in them that did not constitute fisheries. I disagree that this is a reasonable interpretation of the language used by Martland J. in the judgment as a whole.

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[8] *per* Martland J at p 226

[9] [1980] 2 SCR 292

[10] 30&31 Vict. c. 3 (UK), now named *Constitution Act, 1867*

[11] *per* Martland J at p 300

[12] *per* Martland J at p 301

[13] [1984] 2 WWR 699 (BCCA)

[14] 2002 NWTSC 74

> ...
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> [57] For these reasons and with respect, I am in disagreement with the narrow approach taken by the majority in *MacMillan Bloedel (1984)*. In my view the fish and fish habitat of Kodiak Lake, Little Lake and Moose Lake are afforded the protection of the federal *Fisheries Act* for the reason that they are part of the fisheries resource, a natural resource and a public resource of this country. To protect fish and fish habitat is to protect the resource (fishery).

These criticisms may however be themselves *obiter dicta*, because the Court found at paragraph 58 evidence of the existence of a fishery in the watershed of which the named lakes form part, and so the "watershed is distinguishable from the small isolated stream in *MacMillan Bloedel*". Furthermore, the Court ultimately acquitted BHP Diamonds because of appropriate permitting of the works and the accused's establishing a due diligence defence.[15]

Note that in a later consideration of *BHP Diamonds*, the BC Provincial Court considered itself still bound by *MacMillan Bloedel*[16]. Both *BHP Diamonds* and *MacMillan Bloedel* were referred to by the Ontario Superior Court in *R*. v. *Zuber*[17], in which the Court without expressing any preference between the two authorities held that the *Fisheries Act* habitat protection provisions constitutionally validly apply to waters in which there are either commercial or recreational fisheries.

UPDATE ON S. 35(1) – HARMFUL ALTERATION, DISRUPTION OR DESTRUCTION OF HABITAT

From its enactment in 1977 until significant amendment in 2012, the substantive prohibition in s. 35(1) read:

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

Under the first of the so-called "omnibus" bills[18] that arose out of the winter, 2012 federal budget this was replaced by new ss. 35(1) and 2(2), as follows:

> 35 (1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.
>
> 2 (2) For the purposes of this Act, serious harm to fish is the death of fish or any permanent alteration to, or destruction of, fish habitat.

On the face of these amendments, one might have thought that addition of "activity" to "work or undertaking" would enlarge the scope of operations to which the section applies but conversely

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[15] *Ibid*., at para 205

[16] *R*. v. *Sapp*, 2004 BCPC 442

[17] 2004 CanLII 2459 (ONSC)

[18] SC 2012, c. 19, ss. 133(4), 142(2); amendments in force November 25, 2013

the requirement of proof that the affected fish indeed support a "commercial, recreational or Aboriginal fishery" may restrict the section's scope of application consistently with the constitutional theory in *MacMillan Bloedel*. The requirement in new s. 2(2) that there be either death of fish, or "permanent alteration" or "destruction" of habitat, might have been thought to clarify significant prior controversy in the jurisprudence over what words are qualified by the former "harmful" and in any case what degree of "harm" was required to be proved. One might reasonably have expected to await initiation of and decisions in prosecutions under these new provisions in order to understand their impact as environmental protection measures.

All that can be presently said is there is not yet any reported judicial decision in a prosecution under new s. 35(1), nor on Environment and Climate Change Canada's website[19] is there notation of any conviction under it having been entered. Perhaps it can be speculated based on the lack of any reported enforcement proceedings in the nearly three years since the amendment came into force that officials are in fact declining to prosecute under this section – either for policy reasons or because of perceived proof problems associated with the amended statutory language.

There are however two published references to these amendments in contexts other than prosecutions.

- *Courtoreille* v. *Canada*[20] involved an application by the Chief of the Misikew Cree First Nation for judicial review of the decision to introduce into Parliament the "omnibus" bill by which s. 35(1) was amended, on grounds (among others) that there had not been sufficient prior consultations with affected aboriginal peoples. Although mostly the decision involves lengthy and very interesting discussion of the distinctions between political processes and justiciable issues, the Federal Court said with specific reference to amended s. 35(1):

> [91] Hence the amendments to the *Fisheries Act* removed the protection to fish habitat from section 35(1) of that *Act*. The Applicant submitted that this amendment shifted the focus from fish habitat protection to fisheries protection which offers substantially less protection to fish habitat and the term "serious harm" permits the disruption and non-permanent alteration of habitat:
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> ...
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> [93] I agree that no actual harm has been shown but that is not the point. As the Supreme Court of Canada in *Haida Nation* at paragraph 5 has said, the "potential existence" of a harm (in that case, the potential right as title to land, here to fishing and trapping) is sufficient to trigger the duty. I find that, on the evidence, a sufficient potential risk to the fishing and trapping rights has been shown so as to trigger the duty to consult.

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[19] "Enforcement Notifications", http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=8F711F37-1; "Environmental Offenders Registry" http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=1F014378-1, searched under "Environment Canada – Pollution Prevention Provisions of Fisheries Act", both searched August 16, 2016

[20] 2014 FC 1244

> ...
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> [101] ... In addition, for the reasons the Applicant expressed above, the amendment to s. 35(1) of the *Fisheries Act* clearly increases the risk of harm to fish. These are matters in respect of which notice should have been given to the Misikew together with a reasonable opportunity to make submissions.

In the result the Court issued declaratory judgment that the government should have consulted on the occasion of introduction of the Bill, but in view of the enactment of the resulting legislation ordered no other remedy[21].

- Under s. 35(2) also as amended by the 2012 omnibus bill, considerable provision is made in respect of regulatory permissions for and/or Ministerial permitting of works, undertakings or activities, which where available exclude contravention of (amended) s. 35(1). Substantial and very detailed guidance is provided on the website of the Department of Fisheries and Oceans[22] as to kinds of works or activities which may be performed without need to seek Ministerial permit. As examples only, cottage docks and boathouses below a maximum size, dredging below specified maximum areas for recreational and commercial purposes, and installation of new or replacement moorings, all of which on occasion previously gave rise to prosecutions, are here said not to require Departmental review.

In summary given passage of time since coming into force of these amendments it may be submitted based on lack of reported convictions and substantial reductions in scope of application that the former HADD prohibition, once a very vigorous environmental protection element of the *Fisheries Act*, has indeed lost much of its historic effectiveness.

UPDATE ON S. 36(3) – DEPOSIT OF DELETERIOUS SUBSTANCES

Section 36(3), the long-standing prohibition against the deposit of deleterious substances into waters frequented by fish, was not the subject of amendment in 2012 and has fully retained its utility and its frequent use in environmental protection prosecutions. Recurring case-specific issues continue to arise, and continue to be the subject of judicial decisions, for example whether proof has been made of the deleterious quality of the particular substance or whether the particular accused has made out the "due diligence" defence – which also retains all its vigour and utility for the defence side in *Fisheries Act* prosecutions. Those fact-specific issues aside, the section generally remains substantively well-understood based on decades of interpretation in scores if not by now hundreds of individual prosecutions.

In way of a very brief substantive update the following decisions may be noted:

- There had been some earlier inconsistent jurisprudence regarding whether it is sufficient to prove the deleterious quality of the substance itself, or whether the deleterious impact on receiving waters must be proved. It now appears to have been settled by the Ontario

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[21] *Ibid*., at para 109

[22] See generally http://www.dfo-mpo.gc.ca/pnw-ppe/index-eng.html

Court of Appeal in *R*. v. *City of Kingston*[23] that the proof must relate to the substance alone, and not its effect in waters into which it is discharged.

- In *R*. v. *Williams Operating Corporation*[24], a case in which the discharged substance was deemed deleterious by regulation, the Court made the somewhat sweeping statement that *de minimus not curat lex* does not apply to public welfare offences or strict liability offences[25] – including in context environmental offences.

- In *R*. v. *MacMillan Bloedel Limited*[26] the facts were that replacement of a buried pipe was recommended because of its age but the replacement was assigned low priority by the accused because an inspection described the pipe as being in "mint condition". The pipe failed and a deleterious substance was discharged from it not because of age but because of "microbiological corrosion". Finding unforeseeability of the actual failure mechanism the majority of the BC Court of Appeal acquitted on the basis of the first branch of the "due diligence" defence – the accused's honest and reasonable, but mistaken, belief in the soundness of the pipe[27].

- In *Canada (Fisheries and Oceans)* v. *Ontario (Ministry of Transportation)*[28] a provincial highway washout, believed to be caused by a blocked culvert, deposited debris into nearby stream and lake. The province was prosecuted, and convicted, under both ss. 35(1) (former language) and s.36(3). On appeal it was argued that the two convictions represented double jeopardy contrary to the so-called *Kienapple*[29] principle. The court upheld both convictions, noting that s. 35(1) protected habitat and s. 36(3) protects water quality, and although subtle these differences were sufficient to exclude the argument of double jeopardy[30].

- *Newfoundland Recycling Limited* v. *The Queen*[31] is noteworthy both because it is an actual case of discharge of a deleterious substance into tidal waters, and more broadly because it involves the increasingly serious environmental (and economic) problem of derelict ships. The accused had been engaged in 1994 to scrap an out-of-service ship and the accused arranged for the ship to be berthed at a private wharf in Long Harbour, Newfoundland. Deconstruction of the ship proceeded sporadically but was never completed, and the remains of the ship sank at the berth in 1999 causing discharge of oil. Ownership of the ship at all these times was unclear, but it was not alleged that the

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[23] 2004 CanLII 39042 (ONCA)

[24] 2008 CanLII 48148 (ONSC)

[25] *Ibid*., at para 86

[26] 2002 BCCA 510

[27] *Ibid*., at para 51

[28] 2014 ONSC 7071

[29] *Kienapple* v. *R*. [1975] 1 SCR 729

[30] 2014 ONSC 7071 at paras 44, 45. Note also in respect of what seems to be double jeopardy the brief notes on the "Enforcement Notifications" page of Environment and Climate Change Canada's website, above note 20, to effect that Wesdome Gold Mines Limited was on February 25, 2016 separately convicted and fined in respect of violations of both the *Fisheries Act* and unspecified "provincial offences".

[31] 2008 NLTD 38, leave to appeal refused 2009 NLCA 29

accused was owner. The accused argued that it was under no contractual duty to care for the ship. The court considered that the principal issue was whether the appellant had sufficient "control" of the ship to have "permitted" the discharge of oil, contrary to s. 36(3). The Newfoundland and Labrador Supreme Court upheld the trial court's conviction based on conclusion that the accused "had the ability to exercise control" over the ship and its "failure to make certain" that the [ship] was safe and secure at the time of the sinking "permitted the deposit" of the deleterious substance.[32]

A very selective update is also offered of noteworthy sentences imposed on convictions under s. 36(3), all as noted on the Enforcement Notifications page of Environment and Climate Change Canada's website[33] at which detail of these and many more cases can be found. Particularly to be noted is the extent to which penalty amounts are directed to be paid into the federal Environmental Damages Fund.

- Panther Industries Limited, the nature of whose business is not given, was ordered by the Alberta Provincial Court on July 28, 2015 to pay in total $375,000 - $370,000 into Environmental Damages Fund plus a $5,000 fine - resulting from a single spill 150,000 liters of hydrochloric acid. Of this total amount payable to the Environmental Damages Fund, $170,000 was ordered on conviction under s. 36(3) of the *Fisheries Act*, $150,000 on conviction of failure to respond to an environmental emergency and $50,000 on conviction of failure to have an adequate emergency plan, the last two matters being violations of, respectively, *CEPA 1999*[34] and the *Environmental Emergency Regulations*[35] made under that *Act*. The note on the website asserts that this is the first conviction under the *Environmental Emergency Regulations*.

- In a case of industrial pollution of tidal waters, Catalyst Paper of Powell River, BC on December 18, 2015 was directed to pay $200,000 ($15,000 in fines plus $185,000 payable to the Environmental Damages Fund) on conviction of three counts under s. 36(3) of releasing untreated pulp and paper effluent on two occasions – 3.5 million litres on September 4, 2012 and 100,000 litres on September 18, 2012.

- Involving the same industry and somewhat similar facts, Northern Pulp Nova Scotia Corporation was on May 13, 2016 ordered to pay $225,000 apparently related to a single count under s. 36(3) arising from release from a pipeline break of 47 million litres of untreated pulp and paper effluent. The whole amount of these funds was directed to be paid to the Environmental Damages Fund, for distribution (whether under Court order is not clear) of $75,000 to each of the Mi'kmaw Conservation Group, the Pictou County Rivers Association and the Pictou Landing First Nation.

- Teck Metals Ltd. was on March 4, 2016 ordered to pay $3 million in penalties, on conviction of three counts under s. 36(3) involving release of 125 million litres of

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[32] *Ibid*., at paras 34, 35.

[33] Above, note 20

[34] Above, note 2

[35] SOR/2003-307

effluent into the Columbia River between November 28, 2013 and February 5, 2015. It appears that the whole of this amount is payable to the Environmental Damages Fund.

- And demonstrating that Her Majesty prosecutes Herself, the Nova Scotia Provincial Court on April 20, 2016 ordered the Department of National Defence to pay $100,000 for violation of s. 36(3) arising from spill of 9,000 litres of diesel oil from the naval vessel HMCS ST. JOHN'S at Halifax Harbour on May 8, 2013. Of this amount $98,000 was directed to the Environmental Damages Fund.