beamentgreen

WATER - FEDERAL LEGISLATION

By: Michael S. Hebert, Beament Green

Navigable Waters Protection Act (R.S.C., 1985 c. N-22)

This Federal Legislation is concerned primarily with the keeping open and non-obstruction of navigable waterways in Canada. The *Act* had very few changes since 1882 and was amended in 2009. The 2009 amendments included the following highlights:

(a) the *Act* became binding on Her Majesty in Right of Canada, a Province and the Territories;

(b) the definition of "work" was clarified so as to provide easier determination of whether a work is covered by the *Act*; and

(c) the *Act* was given new regulation making powers in keeping with the modern regulation of issues of minor importance. Certain exemptions are routinely now made for low risk activities arising out of approved processes;

The *Act* prohibits any "work" to be built or placed, on, over, under, through or across any navigable water without the applicable ministerial approval prior to the work being undertaken. The criteria is that the work should not substantially interfere with navigation.

A number of exemptions are made for works constructed under an Act of Parliament or an Order of the Governor in Counsel where the work was carried on and constructed before the coming into force of the *Act*. A similar exemption exists for works owned by Her Majesty the Queen In

Right of Canada prior to the subsection coming into force.

This *Act* deals primarily with ensuring the continued navigability of Canadian waterways and has little concern for their environmental conditions per se.

The *Act* also contains provisions in part 2 for the removal of sunken vessels or other obstacles which obstruct or impede navigation. The *Act* provides a number of remedies for enforcement such as orders, interim orders, injunctions and fines.

The legislation is administered by Transport Canada. Pursuant to the recent regulation enacting ability, several technical requirements have now been accomplished in CRC CA 1232 and a number of other regulations.

The Protection of Water Resources and Fish Habitat in Canada

Apart from some dovetailing Provincial Regulations, the primary sources of protection of water resources and fish habitat in Canada was derived since Confederation from *The Fisheries Act*, and in the future will become more and more regulated by *The Species At Risk Act.*

The Fisheries Act

This legislation is one of the oldest pieces of legislation in Canada and was rarely amended prior to recent amendments attempted in Bills C32, C45 and C52 starting in 2005.

The Fisheries Act is paramount and supercedes all Provincial law where it is applicable.

The *Act* contains two main regulatory schemes, the first is the Habitat Management Regulatory Program set out in s. 35 of the *Act* and the Prohibition Against The Deposit of Deleterious Substances under s. 36 into areas frequented by fish

The Habitat Management Regulatory Program is regulated primarily by s. 35 which prohibits any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat (HADD). The key to this section is that the enjoined activities must be harmful and not simply result in an alteration, disruption etc.

If the undertaking or work could result in a HADD an approval must be obtained from DFO prior to the work being undertaken. Section 37 of the *Act* lays out the requirement for plans, specifications, studies, schedules, analysis, sampling and so forth that needs to be undertaken in order to establish that the work will not result in a harmful alteration, disruption or destruction of fish habitat or that a suitable alternative system is being created.

Typically, environmental consulting experts will need to be retained to comment on the work and to propose mediating strategies so as to not result in the creation of a HADD. These studies are quite extensive and can involve inventories of existing fish, description of flora and fauna, protective measures to be undertaken and so forth. The reports must be submitted along with the application. The proposed work can be ordered to be modified or prohibited altogether if the supporting material fails to establish to DFO that a satisfactory case for allowing a HADD is made out. This legislation is administered by DFO itself and a number of biologists and other marine officers are involved in the scrutinization of plans and approval applications.

Obtaining studies, retaining experts and designing and implementing measures to curtail HADD can be a lengthy, expensive and complicated procedure and must be weighed as part of a project expense in any area were work or undertakings are to be conducted in an area frequented by fish. The *Act* applies in all waters in the fishing zones of Canada, all waters in the Territorial Sea of Canada and all internal waters of Canada.[1]

It is important to note that the approvals required by the *Act* are for the allowable existence of the

[1] *Fisheries Act*, s. 2

HADD itself and not for the project. It therefore follows that the HADD approval at the DFO level is only one of the levels of approval that will be needed and you will still need all Provincial approvals required for the project. More important, if a proponent goes ahead and builds a work or undertaking that results in a HADD, that proponent can be prosecuted and the extensive sentencing authority given to the Courts under *The Fisheries Act* can result in orders for the complete undoing of the project or the consideration modification thereof.
Several other sections of the *Act* dovetail with the HADD provisions of s. 35:

1. s. 20 requires a fish passage to be constructed where any obstruction is created across or in any stream;

2. under s. 22 the flow requirements of any fish way must be sufficient so as to allow for the safe passage of fish;

3. s. 32 prohibits the killing of fish by a means other than fishing. This broad prohibition is a catch all that is utilized by DFO in circumstances that may not fall squarely within s. 35. Please note that it is possible to obtain a s. 32 authorization under the protection of a s. 35 (2) approval for the HADD. The s. 32 killing prohibition is commonly a problem where blasting is occurring in areas containing fish habitat. Where such activities are part of the contemplated works, proper planning mandates that sufficient time be afforded for the approval process before the work is undertaken.

Deleterious Substance Prohibition

Section 36 of the *Act* makes it an offence to deposit a deleterious substance in water frequented by fish. Deleterious substance is defined as:

(a) any substance that if added to any water would degrade or alter or form part of a process of degradation or alteration of the quality of water so that it is rendered or is likely to be

rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water; or

(b) any water that contains a substance in such quantity or concentration or that has been so treated process or change by heat or other means from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the qualities of waters so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water.[2]

Similarity, "deposit " is defined as "discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing".[3] Fish habitat is also defined as "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life process"[4].

Unlike s. 35 which, if the project is approved, can result in allowable HADD there is no authorization whatsoever to allow for the ongoing contravention of s. 36 except by regulations under the *Act* made by way of Order in Counsel. Currently the regulations permit affluent discharge from industries such as pulp and paper, mining, petroleum and miscellaneous industrial sectors. Unlike s. 35 which is administered by DFO, s. 36 is administered by Environment Canada and prosecutions can result in serious fines. The discharge or waste emitted or deposited into the waterway does not have to be toxic per se.

Sentencing and Other Matters

Under the provisions of s. 79 of the *Act* broad sentencing remedies are provided for Courts in the prosecutions under the *Act*. Section 79(2) contains the bulk of the commonly used requirements such as:

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[2] *The Fisheries Act*, s. 34(1)
[3] *The Fisheries Act*, s. 34(1)
[4] Ibid

(a) prohibition orders;

(b) directing the accused to take appropriate remedial action;

(c) payment to the compensation fund by way of fines; and

(d) broad capability of imposing "any other conditions that the Court considers appropriate for securing the persons is good conduct and for preventing the person from repeating the offence".[5]

The leading case for the sentencing criteria are as contained in *R. v. United Keno Hill Mines Ltd.* (1980), 10 C.E.L.R. 43 (Y. Terr. Ct). The Court determined that the following factors are to be assessed and determine the appropriate amounts of penalties:

1. the harm or risk caused by the offence;

2. an estimate of the total cost of cleanup, of harm caused, and of best available mitigation measures;

3. the remedial action taken, or proposed to be taken, by the offender to mitigate the harm;

4. whether the pollutant that was discharged was reported on a timely basis as required by the regulations;

5. whether the offence was deliberate or inadvertent;

6. the incompetence, negligence or lack of concern of the offender;

7. any precautions taken by the offender to avoid the offence;

8. any economic benefits accruing to the offender that, but for the offence, the offender would not have received; and

9. any evidence from which the court may reasonably conclude that the offender has a history of non-compliance with legislation designed to prevent or minimize pollution.

The British Columbia Provincial Court provides useful guidance in *R. v. First Pro Shopping Centres Inc.* 2006 BCPC 0231.

The Fisheries Act provides for the diversion of up to 90% of any "fine" to DFO for the specific purpose of restoring, managing, constructing and protecting fish habitat in designated areas.[6]

Federal Species At Risk Act

Species At Risk Act Statutes of Canada 2002, c.29. This relatively new piece of legislation has important implications for the protection of fish species and their habitat.

The *Act* contains an elaborate mechanism for the listing of various species at risk. This process involves studies, consultations, meetings and collaboration. As a result of the consultation and study a species, if thought to be in danger, is put on the list which is ongoing and subject to revision. Several species have already been placed on the list for both fish and reptiles. Once the species is listed, there is a requirement to list the accompanying habitat and once the species and the habitat are defined the *Act* provides mechanisms that prohibit the killing, harming or harassing of any listed species or the damaging or destroying of their residence. Obviously, this

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[5] Section 79(2)
[6] *The Fisheries Act*, s. 79.2(f)

Statute can have a huge impact on the value of land that may contain listed species and can result in an outright prohibition of development activity on those lands. The *Act* contains a process for project review if the potential for destruction of habitat is present.

While this legislation may seem at first blush of little relevance in local works, its applicability must be carefully scrutinized where any work is contemplated in the vicinity of any waterway that is navigable. The approvals required require approval of the work, the site on which the work is to be undertaken and the plans proposed for the construction of the work. Compliance with approval procedures can be lengthy, expensive and onerous.

Case Study

We will analyze a typical prosecution under s. 35 and under s. 36 from commencement to sentence.