

## ***Recent Penalties and Developments under the Fisheries Act***

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On June 21, 2019, Bill C-68: *An Act to amend the Fisheries Act and other Acts in consequence* (the “2019 Fisheries Act”)<sup>1</sup> received royal assent and the majority of its sections came into force. On August 28, 2019, all remaining sections of Bill C-68 came into force.

The 2019 amendments represent a roll back to many of the pre-2012 *Fisheries Act* provisions. However, there are also new provisions added to the *Fisheries Act* that will affect those who impact fish, fisheries, and fish habitat in Canada.

### **1 HISTORY**

The *Fisheries Act* is one of Canada’s oldest statutes, first established in 1868.<sup>2</sup> In 2012, the *Fisheries Act* was amended to generally apply to only those fish and fish habitats related to commercial, recreational or Aboriginal fisheries. The prohibitions applied where there would be “serious harm to fish”.<sup>3</sup> The current Federal Government has rolled back many of the 2012 amendments.

The Federal Government has stated that the *Fisheries Act* is vital to environmental sustainability and coastal communities.<sup>4</sup> The 2019 *Fisheries Act* recognizes the importance of fish and healthy fish habitats, includes provisions that guide Ministerial decision-making, and prohibits certain activities related to fish, fisheries and fish habitat.

Our review of the 2019 amendments is set out below.

<sup>1</sup> Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, (assented to June 21, 2019) [2019 *Fisheries Act*].

<sup>2</sup> Fisheries Oceans and Canada, *Fisheries Protection Policy Statement*, s. 5.1.

<sup>3</sup> Fisheries and Oceans Canada, “Introducing Canada’s modernized Fisheries Act” (21 June 2019), online: <https://www.dfo-mpo.gc.ca/campaign-campagne/fisheries-act-loi-sur-les-peches/introduction-eng.html> [Introducing Canada’s modernized *Fisheries Act*].

<sup>4</sup> Fisheries Oceans and Canada “A stronger, modernized *Fisheries Act* becomes law” (21 June 2019), online: <https://www.canada.ca/en/fisheries-oceans/news/2019/06/a-stronger-modernized-fisheries-act-becomes-law.html> [Modernized *Fisheries Act*].

## **2 A NEW PURPOSE PROVISION**

The 2019 *Fisheries Act* includes a purpose provision. Prior to the 2019 amendments, the Act did not explicitly set out a purpose. The new purpose provision states:<sup>5</sup>

The purpose of this Act is to provide a framework for (a) the proper management and control of fisheries; and (b) the conservation and protection of fish and fish habitat, including by preventing pollution.

While the purpose provision is unlikely to impact the day to day application of the *Fisheries Act*, courts may use the purpose provision to interpret other provisions of the *Fisheries Act*. For example, the Act's new explicit purpose might be used by the courts if confronted with a challenge to the Minister's power under the Act. The purpose provision will also be used to determine if "Alternative Measures Agreements", discussed further below, will be available.

## **3 PROTECTION OF ALL FISH AND FISH HABITAT**

Under the 2012 amendments to the *Fisheries Act*, only fish and fish habitat related to a commercial, recreational or Aboriginal fishery were protected. The 2019 *Fisheries Act* restores protections for all fish and fish habitat.

The 2019 *Fisheries Act* also includes an explicit protection against a work, undertaking or activity (other than fishing) that results in fish death<sup>6</sup> and restores the protection against the "harmful alteration, disruption or destruction of fish habitat" or HADD.<sup>7</sup> In 2012, the concept of "serious harm to fish" was introduced into the Act and the reference to HADD was removed. The 2012 *Fisheries Act* defines serious harm to fish as "the death of fish or any permanent alteration to, or destruction of, fish habitat".<sup>8</sup> The 2012 amendments protected fish and fish habitats only when there was "serious harm to fish that are part of a commercial, recreational or Aboriginal fishery".<sup>9</sup> As such, a wider variety of activities were permitted under the 2012 *Fisheries Act* that could impact fish and fish habitats.

The concept of "serious harm to fish" survives and is found throughout the 2019 *Fisheries Act* in several sections. For example, an individual may still be required to notify the appropriate authorities prescribed by the Act of an occurrence that results in "serious harm to fish".<sup>10</sup> The 2019 amendments have not altered the definition of "serious harm to fish".

"Water frequented by fish" is another concept that survives the 2019 amendments. This concept also existed in the Act prior to the 2012 amendments. Notably, the 2019 *Fisheries Act* definition

<sup>5</sup> 2019 *Fisheries Act*, *supra* note 1, s 2.1.

<sup>6</sup> *Ibid*, s 34.4(1)

<sup>7</sup> *Ibid*, s 35(1).

<sup>8</sup> *Ibid*, s 2(2).

<sup>9</sup> *Fisheries Act*, RS C 1985, c F-14, s 35(1) [2012 *Fisheries Act*].

<sup>10</sup> 2019 *Fisheries Act*, *supra* note 1, s 25(3).

of fish habitat includes “water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes”.<sup>11</sup>

#### **4 CONSIDERATION OF INDIGENOUS RIGHTS**

Prior to the 2019 amendments, the *Fisheries Act* did not include explicit provisions requiring that Indigenous rights and knowledge be considered for decisions made under the *Fisheries Act*.

The 2019 *Fisheries Act* includes provisions about Indigenous knowledge and the protection of Indigenous rights. When making a decision, the Minister:<sup>12</sup>

- ◆ must consider any adverse effects the decision may impose on Indigenous rights, pursuant to s. 35 in the *Constitution Act, 1982*,
- ◆ may consider Indigenous knowledge if it is provided to the Minister; and
- ◆ may authorize agreements with Indigenous governing bodies to drive the amended *Fisheries Act*'s purpose.

This amendment aligns with the Federal Government's commitment to move towards reconciliation with Indigenous communities. Early consultation or discussions with Indigenous communities will be important for project proponents that may impact fish, fisheries or fish habitat.

#### **5 DESIGNATED PROJECTS**

The 2019 *Fisheries Act* also includes a new section for designated projects.<sup>13</sup> The 2019 amendments allow the Minister, through regulations, to designate certain projects, and works, undertakings or activities related to designated projects, as “likely to result in the death of fish or the harmful alteration, disruption or destruction of fish habitat.”<sup>14</sup> Under the 2019 amendments, proponents are prohibited from carrying on works, undertakings or activities that are designated, without first obtaining a permit.

#### **6 OFFENCES**

The 2019 *Fisheries Act* also updates and strengthens enforcement powers.<sup>15</sup> Interestingly, the 2019 amendments recognize that prosecution is not always an appropriate route and introduces Alternative Measures Agreements.<sup>16</sup> In lieu of traditional prosecutions, the Crown may enter into Alternative Measures Agreements with persons charged under the Act. However,

<sup>11</sup> *Ibid*, s 1(5).

<sup>12</sup> *Ibid*, ss 3, 5.1.

<sup>13</sup> *Ibid*, s 23.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid* s 47.

alternative measures may only be used if several conditions are met, and if using alternative measures is not contrary to the 2019 *Fisheries Act*'s purpose.

The chart below sets out the common prohibitions and duties found under the *Fisheries Act* and associated changes resulting from the 2019 amendments.

Section	2012 <i>Fisheries Act</i>	2019 <i>Fisheries Act</i>
S. 28	<ul style="list-style-type: none"> <li>Prohibition against hunting or killing fish or marine animals of any kind, other than porpoises, whales, walruses, sea-lions and hair seals with explosives</li> </ul>	<ul style="list-style-type: none"> <li>Prohibition repealed</li> </ul>
S. 34.4(1)	<ul style="list-style-type: none"> <li>Prohibition did not exist<sup>17</sup></li> </ul>	<ul style="list-style-type: none"> <li>Prohibition against carrying on work, undertaking or activity (other than fishing) that results in fish death</li> </ul>
S. 35(1)	<ul style="list-style-type: none"> <li>Prohibition against carrying on any work, undertaking or activity <b>that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery</b></li> </ul>	<ul style="list-style-type: none"> <li>Prohibition against carrying on any work, undertaking or activity <b>that results in fish death or the harmful alteration, disruption or destruction of fish habitat</b><sup>18</sup></li> </ul>
S. 35.1(4)	<ul style="list-style-type: none"> <li>Prohibition did not exist</li> </ul>	<ul style="list-style-type: none"> <li>Prohibition against carrying on work, undertaking or activity that the Minister designates as likely to result in fish death or the harmful alteration, disruption or destruction of fish habitat<sup>19</sup></li> </ul>

<sup>17</sup> Similar prohibitions against the “killing of fish” and “destruction of fish” by means other than fishing existed in previous versions of the Act.

<sup>18</sup> The prohibition is subject to some exceptions.

<sup>19</sup> The Minister may issue a permit allowing persons to carry on such designated activity.

Section	2012 <i>Fisheries Act</i>	2019 <i>Fisheries Act</i>
S. 36(1)	<ul style="list-style-type: none"> <li>◆ Prohibition against throwing overboard certain substances into water where fishing is carried on</li> <li>◆ Prohibition against depositing or causing the deposit of fish or marine animal remains on a beach shore or water bank</li> <li>◆ Prohibition against leaving decaying fish in any fishing apparatus</li> </ul>	<ul style="list-style-type: none"> <li>◆ Prohibition remains the same</li> </ul>
S. 36(3)	<ul style="list-style-type: none"> <li>◆ Prohibition against depositing or permitting the deposit of deleterious substances into water frequented by fish or in a place where the deleterious substance may enter water frequented by fish</li> </ul>	<ul style="list-style-type: none"> <li>◆ Prohibition remains the same</li> </ul>
S. 38(4)	<ul style="list-style-type: none"> <li>◆ Duty to notify about an occurrence that results in serious harm to fish that are part of a commercial, recreational or <b>Aboriginal fishery</b> or of a serious and imminent danger of such an occurrence</li> <li>◆ Duty lists “<b>an inspector, a fishery officer or an authority prescribed by the regulations</b>” as persons to notify</li> </ul>	<ul style="list-style-type: none"> <li>◆ Duty to notify about an occurrence that results in serious harm to fish that are part of a commercial, recreational or <b>Indigenous fishery</b> or of a serious and imminent danger of such an occurrence</li> <li>◆ Includes an <b>additional duty to notify about the death of fish</b> or of a serious and imminent danger of the death of fish<sup>20</sup></li> <li>◆ Duty also includes “<b>fishery guardian</b>” in the list of persons to notify<sup>21</sup></li> </ul>

<sup>20</sup> 2019 *Fisheries Act*, *supra* note 1 s 25(4).

<sup>21</sup> The Minister may designate a person as a “fishery officer” or “fishery guardian” and may limit the power a fishery officer or fishery guardian can exercise under the *Fisheries Act*.

Section	2012 <i>Fisheries Act</i>	2019 <i>Fisheries Act</i>
S. 38(4.1)	<ul style="list-style-type: none"> <li>♦ Duty did not exist</li> </ul>	<ul style="list-style-type: none"> <li>♦ <b>Duty to notify about harmful alteration, disruption or destruction of fish habitat</b>, or of a serious and imminent danger of such an occurrence<sup>22</sup></li> </ul>
s. 38(5)	<ul style="list-style-type: none"> <li>♦ Duty to notify an <b>inspector, a fishery officer or an authority prescribed by the regulations</b> if               <ul style="list-style-type: none"> <li>▪ any deleterious substance is deposited into water frequented by fish</li> <li>▪ there is a serious and imminent danger of such an occurrence and detriment to fish or fish habitat or to the use of fish by humans, or if such detriment can reasonably be expected to result from the occurrence</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>♦ Duty remains the same, but also includes “<b>fishery guardian</b>” in the list of persons to notify</li> </ul>
s. 38(6)	<ul style="list-style-type: none"> <li>♦ Duty to take reasonable and corrective measures consistent with public safety and conservation and protection of fish and fish habitat to prevent the occurrence or mitigate adverse effects resulting from the occurrence</li> </ul>	<ul style="list-style-type: none"> <li>♦ Duty remains the same and extends to persons described in s. 38(4)(a) or (b) and 38(5)(a) or (b), <b>and now also to persons described in the new ss. 38(4.1)(a) or (b)</b></li> </ul>

## 7 PENALTIES

Typically, offences under the *Fisheries Act* are punishable by fine. When the offence is especially egregious, the offence may also be punishable by imprisonment.

Below is a chart depicting the fine ranges for common contraventions under the 2019 *Fisheries Act*, ss. 34.4(1), 35(1), 36(1), 36(3), 38(4), 38(4.1), 38(5) and 38(6). The fine ranges have not been amended from the 2012 *Fisheries Act*.

<sup>22</sup> 2019 *Fisheries Act*, *supra* note 1, s 25(6); this duty to notify existed prior to the 2012 amendments.

Contraventions of the amended <i>Fisheries Act</i> , ss. 34.4(1), <sup>23</sup> 35(1), <sup>24</sup> 36(1) or 36(3) <sup>25</sup>		
	Convictions on Indictment	Summary Convictions
<b>Individual offenders</b>	<ul style="list-style-type: none"> <li>♦ \$15,000-\$1,000,000 for a first offence</li> <li>♦ \$30,000-\$2,000,000 for a second or subsequent offence and/or imprisonment for a term not exceeding 3 years</li> </ul>	<ul style="list-style-type: none"> <li>♦ \$5,000-\$300,000 for a first offence</li> <li>♦ \$10,000-\$600,000 for a second or subsequent offence and/or imprisonment for a term not exceeding 6 months</li> </ul>
<b>Corporations (other than small revenue corporations)</b>	<ul style="list-style-type: none"> <li>♦ \$500,000-\$6,000,000 for a first offence</li> <li>♦ \$1,000,000-\$12,000,000 for a second or subsequent offence</li> </ul>	<ul style="list-style-type: none"> <li>♦ \$100,000-\$4,000,000 for a first offence</li> <li>♦ \$200,000-\$8,000,000 for a second or subsequent offence</li> </ul>
<b>Small revenue corporations</b>	<ul style="list-style-type: none"> <li>♦ \$75,000-\$4,000,000 for a first offence</li> <li>♦ \$150,000-\$8,000,000 for a second or subsequent offence</li> </ul>	<ul style="list-style-type: none"> <li>♦ \$25,000-\$2,000,000 for a first offence</li> <li>♦ \$50,000-\$4,000,000 for a second or subsequent offence</li> </ul>
Contraventions of the amended <i>Fisheries Act</i> , ss. 38(4), 38(4.1), 38(5), or 38(6) <sup>26</sup>		
<ul style="list-style-type: none"> <li>♦ Offence punishable on summary conviction</li> <li>♦ For a first offence—A fine not exceeding \$200,000</li> <li>♦ For a subsequent offence—A fine not exceeding \$200,000 and/or a term of imprisonment not exceeding six months</li> </ul>		

Prior to the 2019 amendments, there were several cases where a defendant was sentenced to pay significant fines for violations under the 2012 *Fisheries Act*. We highlight some of these cases below.

<sup>23</sup> 2019 *Fisheries Act*, *supra* note 1, s 27(1).

<sup>24</sup> *Ibid*, s 40(1).

<sup>25</sup> *Ibid*, s 40(2).

<sup>26</sup> *Ibid*, ss 40(3).

#### 7.1.1.1 R v. Canadian National Railway Company (June 16, 2017)

Environment and Climate Change Canada enforcement officers traced oil sheen from the North Saskatchewan River to the defendant company's fueling station through a storm drain system. A joint federal-provincial investigation determined that an oil and water separator at the defendant company's facility did not comply with Storage Tank Systems for Petroleum and Allied Petroleum Products Regulations, causing approximately 90 litres of diesel to be released into the storm sewer.

The defendant railway company pled guilty to one offence under the *Fisheries Act*, three offences under the *Canadian Environmental Protection Act, 1999*, and one offence under Alberta's *Environmental Protection and Enhancement Act* ("EPEA").<sup>27</sup> The defendant company was fined a total of \$2.5 million.

The *Fisheries Act* offence portion of the fine was \$2 million for depositing a deleterious substance into fish-bearing water or to an area where the deleterious substance may enter fish-bearing water.

#### 7.1.1.2 R. v. Obed Mountain Mine (June 12, 2017)

The defendant company operated a dike that held back wastewater at Obed Mountain Mine in Alberta. When the dike failed, contaminated water and sediment spilled into creeks and impacted the Athabasca River. The defendant company was found guilty for undertaking an activity that resulted in harm to fish habitat, and for depositing or permitting the deposit of a deleterious substance into water frequented by fish.

Additionally, the defendant pled guilty to one count under Alberta's EPEA.

The defendant company was fined a total of \$3.5 million for two counts of violating the *Fisheries Act*.<sup>28</sup>

#### 7.1.1.3 R. v. Husky Oil Operations Limited (June 12, 2019)

Between July 20 and 21, 2016, approximately 90,000 litres of crude oil leaked from the defendant company's pipeline and entered the North Saskatchewan River. The crude oil was found to be deleterious to fish and migratory birds.

<sup>27</sup> Government of Canada, "Canadian National Railway Company to pay over \$2.5 million for environmental offences" (16 June 2017), online: <https://www.canada.ca/en/environment-climate-change/services/environmental-enforcement/notifications/national-railway-company-environmental-offences.html>.

<sup>28</sup> Government of Canada, "Company sentenced to pay \$3,500,000 for Obed Mountain mine spill" (12 June 2017), online: <https://www.canada.ca/en/environment-climate-change/services/environmental-enforcement/notifications/company-sentenced-obed-mountain-spill.html>.



The defendant was fined \$2.5 million under the *Fisheries Act* for depositing a deleterious substance into water frequented by fish or into an area where the deleterious substance could enter water frequented by fish.<sup>29</sup>

#### 7.1.1.4 *R. v. University of British Columbia and CIMCO Refrigeration* (June 21, 2019)

The defendant company, CIMCO Refrigeration, was convicted for depositing or permitting the deposit of ammonia-laden water, a deleterious substance, into a place that may enter water frequented by fish back in 2014.<sup>30</sup>

The defendant University was convicted for depositing or permitting the deposit of ammonia-laden water into water frequented by fish and areas that may enter water frequented by fish, and for failing to report the incident in a timely manner. The University was also ordered to conduct 5 years of storm-water quality monitoring where the effluent release took place.

The University's culpability stems from failure to have proper training and policies at its site for safe disposal of deleterious substances and the proper use of its stormwater system.<sup>31</sup>

The company and University were fined a total combined penalty of \$2 million for offences under the *Fisheries Act*. The University has filed an appeal against the convictions. While the University agreed its policies and procedures needed improvement, it did not accept that its actions amounted to lack of due diligence.<sup>32</sup> The University's appeal is scheduled to be heard on October 10 and 11, 2019.

## 8 CONCLUSION

The Federal Government has stated that the “stronger, modernized *Fisheries Act*”<sup>33</sup> will among other things:

- ◆ strengthen fish and fish habitat protection mechanisms
- ◆ clarify development projects for industry; and

<sup>29</sup> Government of Canada, “Husky Oil Operations Limited fined \$2.7 million for federal offences related to the pipeline release of oil into the North Saskatchewan River” (12 June 2019), online: <https://www.canada.ca/en/environment-climate-change/news/2019/06/husky-oil-operations-limited-fined-27-million-for-federal-offences-related-to-the-pipeline-release-of-oil-into-the-north-saskatchewan-river.html>.

<sup>30</sup> Government of Canada, “University of British Columbia fined \$1.2 million and CIMCO Refrigeration fined \$800,000 for the 2014 release of ammonia-laden water into a tributary of the Fraser River” (21 June 2019), online: <https://www.canada.ca/en/environment-climate-change/news/2019/06/university-of-british-columbia-fined-12-million-and-cimco-refrigeration-fined-800000-for-the-2014-release-of-ammonia-laden-water-into-a-tributary-o.html>.

<sup>31</sup> *R v CIMCO and UBC* (2019), 60501-1 at para 27 (BCPC).

<sup>32</sup> *Ibid* at para 43.

<sup>33</sup> Modernized *Fisheries Act*, *supra* note 3.

- ◆ strengthen the role of Indigenous peoples in decisions related to fish and fish habitat.

The 2019 *Fisheries Act* affords broader protection for all fish and fish habitat in Canada through the introduction of new prohibitions and duties. The 2019 *Fisheries Act* also restores the old protections against harmful alteration, disruption or destruction of fish habitat. These provisions, coupled with the amended Act's new explicit purpose of "conservation", may result in a notable increase in the frequency of contraventions and fine amounts levied by the courts.

With the 2019 amendments, the federal government appears to shift the responsibility of fish and fish habitat protection onto development project proponents and industry. Proponents must be proactive by applying for permits to engage in works, undertakings or activities that are designated as likely to cause fish death or to result in the harmful alteration, disruption or destruction of fish habitat. Proponents should also be diligent and notify authorities about fish death and about the harmful alteration, disruption or destruction of fish habitat, where applicable.

This shift in responsibility leaves us with some significant questions – How much more enforcement capacity will the federal government require to enforce these broader protections under the 2019 *Fisheries Act*? Will the federal government prioritize this "stronger, modernized *Fisheries Act*"? And, will the federal government commit the resources necessary to ensure that the changes found in the 2019 *Fisheries Act* are not rendered "dead in the water"?

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