

THE FISHERIES ACT – NOT JUST FOR FISHERMEN!

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In Canada, jurisdiction over the environment is shared by all three levels of government. A key piece of *federal* environmental legislation which often takes a back-seat in terms of awareness to provincial environmental protection legislation is the [Fisheries Act](#) (“**FA**”). The FA provides for the management and control of fisheries and the conservation and protection of fish and fish habitat, including by preventing pollution. The far-reaching scope of the FA is often overlooked.

Section 36(3) of the FA has the potential to impact activities undertaken in remote as well as urban areas where one would not expect there to be any kind of “fishery”. This provision of the FA prohibits any person from depositing (or permitting the deposit of) a “deleterious substance” in “waters 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 substance is defined very broadly and includes *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 that 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. “Deleterious substance” thus captures substances ranging from highly toxic substances all the way to, for example, naturally occurring soil sediment. In addition, the courts have held that the environmental concern over “death by a thousand cuts” requires that any deposit that is deleterious be prohibited, even in the smallest of concentrations; a *de minimis* deposit of a deleterious substance won’t get you off the hook.

The FA’s focus on “waters frequented by fish” and on the protection of fish habitat results in the FA being found to apply in practically any body of inland water in addition to the obvious oceans and rivers. For example, a small creek running through the back of your property would fall under the scope of the FA. Canada’s Department of Fisheries & Oceans (the “**DFO**”) has been known to take enforcement action under the FA where there has been a deposit of deleterious substances in such an area and the water body in issue need not be the initial receptor of the contaminant to attract FA regulation – that is how broad the application of the FA can be.

As with other environmental protection legislation, failing to report a prohibited deposit or the serious and imminent danger of such an occurrence constitutes a separate offence under the FA. It is therefore important

to respond quickly to an actual or potential deposit incident and understand the FA's reporting obligations in these circumstances.

For instances where harmful alteration of fish habitat can be expected or is unavoidable, the Act provides a mechanism for obtaining a permit which would allow for the harmful alteration of fish habitat, for example, during or as part of a construction project.

The maximum fine that can be imposed under the FA is \$12 million. In addition, any contravention committed or continued on more than one day constitutes a separate offence for each day on which the contravention is committed or continued. The [highest sentence](#) for a violation on record is a conviction under Section 36(3) of the FA for a spill event in 2021 for \$60 million.

It is important to note that a deposit regulated under Section 36(3) of the FA may also trigger obligations under *provincial* environmental legislation dealing with spills, including reporting and remediation obligations, which if not complied with may result in independent charges, fines and penalties in addition to those incurred under the FA.

Enforcement Casts a Wide Net

The prohibitions in the FA are enforced through quasi-criminal prosecutions that could lead to significant fines and a record of a conviction (in extreme cases they can also result in periods of incarceration) if convicted. Officers, directors, agents and senior officials of a company can also be found guilty of the offence regardless of whether or not the company has been charged or convicted.

A recent example of an incident involving a violation of the FA occurred at a car rental company's service centre located in Dorval, Québec. A spill during a fuel delivery resulted in the discharge of approximately 15,000 litres of gasoline into the site's storm sewer system. The spill eventually reached a creek, whose waters were determined to be fish habitat (almost all creeks and tributaries are) and the company was charged, convicted and fined \$1 million.

Another recent example which also led to a \$1 million fine occurred during construction activities in North Vancouver where concrete leachate, a common effluent from construction sites, was discharged and eventually reached a nearby creek.

In the event of a possible contravention of the FA, a party should seek legal advice at the earliest possible opportunity in order to assist them in responding to the incident and correcting their non-compliance in accordance with their obligations under the FA. Counsel will ensure that the full panoply of the procedural rights afforded to parties subject to regulatory investigation or enforcement action under the *Charter of Rights and Freedoms* and the common law are considered. Where charges are being investigated or laid pursuant to

an FA offence, counsel will also be able to assist in responding to search warrants, interview requests and in defending the charges in court.

As there has been a recent increase in enforcement action by federal authorities under the FA, we also recommend by way of risk management that companies carefully assess the potential impact of their business on “waters frequented by fish” together with ensuring that there are internal processes in place to assess, avoid and/or mitigate such impacts. Even in the middle of a large urban area, there is a potential for such impacts and for drawing the unwelcome attention of the DFO.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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