

A PRACTICAL GUIDE TO THE FISHERIES ACT AND TO THE COASTAL FISHERIES PROTECTION ACT

Forward

The Legal Services Sector of the Department of Justice Canada takes pride in offering prosecutors, who represent the Attorney General of Canada, this series of Practical Guides to several federal statutes.

Counsel in our Legal Services Units prepared these Guides to support prosecutors in their work. Our goals are:

- to instruct prosecutors as to what may be unfamiliar legislation.
- to shorten the time it takes to prepare a case by providing, in one volume, essential information about the purpose of the statute, issues and defences that may come up in court, and key court decisions.
- to provide information about sentencing so that courts can be encouraged to impose penalties that reflect the seriousness of the offence.

We want to raise the profile of regulatory prosecutions so that the criminal penalties imposed under federal statutes appropriately balance the compliance remedies in the law.

We intend to update these Guides regularly. We are counting on you to provide us with comments on this Guide and to let us know about litigation in which you are involved. Please call or use the form at the beginning of this Guide to keep in touch. Your contribution to information sharing is essential to the success of this co-operative venture.

This Guide was initially prepared by Jane Dudley for the Legal Services Sector. It has been updated with the assistance of Leslie A. Walden.

Senior Assistant Deputy Minister
Departmental Legal Services

Important!

This Guide is for prosecutors representing the Attorney General of Canada. It provides information about the Acts. It does not instruct prosecutors on how to proceed. Prosecutors are expected to exercise their discretion in these matters.

This Guide does not represent the prosecution policies of the Attorney General of Canada. These policies are in the Criminal Prosecutions Desk Book.

This Guide may be treated as a public document.

Please refer to the Resources Chapter in this Guide for a list of people who can answer your questions about the information in this Guide and about the Acts.

Please Help

Prosecutors

Take the Time to INVEST in the KNOWLEDGE BANK

This Guide will be a success if you use it when handling prosecutions under this Act. Counsel in the Legal Services Units, whose names are in the Resources Chapter of this Guide, are assigned the task of answering your questions about the law and keeping the information in this Guide up-to-date.

You can call Legal Services counsel for information about this Guide and prosecutions under this Act.

You can also call and tell them about prosecutions that you are working on or that you know about. If you prefer, use this form to keep everyone informed.

Please share your experience. Invest in the knowledge bank.

Here is information about a case under:

Section Number:	Name of Statute:
Case Information:	
Court's Decision:	
Sentence:	
I am enclosing a copy of the judgement:	<input type="radio"/> yes <input type="radio"/> no
If no, please say why you cannot provide a copy of the judgement:	
Name:	
Address:	
Telephone Number:	Fax Number:
I was	<input type="radio"/> the prosecutor in this case
	<input type="radio"/> acting as an agent representing the Attorney General of Canada
	<input type="radio"/> other

Please make a copy of this form and send it to the Legal Counsel in the departmental Legal Services Unit, whose name appears in the Resources Chapter of this Guide.

Your contribution to information sharing will be recognized.

Thank you.

Part I

A Practical Guide to the Fisheries Act

Chapter 1

I. Legislative History

In 1868, the *Fisheries Act*, 31 V. c.60, received royal assent. The Act repealed pre-confederation statutes of the legislatures of the late Province of Canada and the Province of New Brunswick which regulated fishing and fisheries within their respective jurisdictions. As well, it continued in force other related statutes which had been enacted prior to 1867 by the legislatures of the Provinces of New Brunswick and Nova Scotia. Since its enactment, the *Fisheries Act* has been amended no fewer than seventeen times.

II. Purpose of the Act

The *Fisheries Act* does not contain a section setting out the purpose of the legislation. Rather, the purpose and the objectives may be gleaned from a reading of the Act in its entirety and the regulations and from the relevant case law. The three fundamental subject matters dealt with in the legislation are the proper management and control of the fisheries, the conservation and protection of fish, and the protection of fish habitat and prevention of pollution. The scope of the “fisheries” power of Parliament is clearly broad enough to include the protection of public health: *Western Pulp Inc. v. Roxburgh* (1990), 39 F.T.R. 134 (F.C.T.D.), aff’d (1990), 122 N.R. 156, 41 F.T.R. 160 (F.C.A.)

III. Constitutional Framework

A. Division Of Powers

Section 91(12) of the *Constitution Act, 1867*, assigns to the federal Parliament exclusive legislative authority over “Sea Coast and Inland Fisheries”. Although it was initially believed that the federal government had exclusive jurisdiction over all fisheries throughout Canada, section 91(12) did not have the effect of transferring ownership of the beds of freshwater rivers and lakes to the federal government. The fisheries authority vested in Parliament ends where provincial authority over property and civil rights begins, unless an encroachment is essential to the effectiveness of federal legislation.

Under ancient British fisheries law, rights to fish in tidal waters were of a fundamentally different legal character from rights to fish in inland or non-tidal waters. The former were public rights vested in the Crown as *parens patriae* for the use of the public and could have no new private owner after *Magna Charta*. The latter, which were the subject of property, required an owner and could not be vested in the public generally.

In determining the respective jurisdictions of Parliament and the provinces, the courts seized on the distinction between fishing as a public right and fishing as a proprietary right. In the *Provincial Fisheries Reference*, the Court distinguished between rights of property and legislative jurisdiction, holding that section 91 conferred the latter on the federal Parliament and that only the provinces were competent to deal with the private right of fisheries in inland waters under section 92(5), Management and Sale of Public Lands, or under section 92(13), Property and Civil Rights. Since such “legislation deals

directly with property, its disposal, and the rights to be enjoyed in respect of it”, it does not fall under section 91(12).

As a result, the Province was entitled to allocate the resource; that is, to decide who may fish, how much may be harvested per person, and where the harvesting may occur. It could do this through the issuing of licences, through its own legislation and through property transactions. The federal government retained the right in inland waters to preserve, protect and manage the fisheries. This included the right to set the maximum amount of fish to be harvested, and to impose gear restrictions and limitations on locations. The federal government also retained the right to legislate with respect to the protection of fish habitat and waters frequented by fish.

It has been suggested by LaForest J., in his work *Water Law in Canada*, that the federal Parliament can, using clear language, do pretty much what it wants, including the creation of an exclusive right to fish. Despite Parliament’s inability to legislate respecting property and civil rights, the Privy Council, in the *Provincial Fisheries Reference*, has made it clear that if federal legislation is truly legislation respecting fisheries it may powerfully affect proprietary rights. Although legislation directing the times when and the manner in which a landowner may fish on his or her land seriously affects that landowner’s property rights, it is nonetheless valid as legislation respecting fisheries even if it amounts to a practical confiscation of property: La Forest, G.V. and Associates, *Water Law in Canada - The Atlantic Provinces*, Ottawa: Information Canada, 1973.

Case law

- The exclusive right of fishing in fresh water rivers and the public right of fishing in tidal waters depend upon the existence of a proprietorship in the soil of the private river by the private owner and by the Crown in the public river, respectively. The federal Parliament may legislate “generally and effectually for the regulation, protection and preservation of fisheries in the interests of the public at large”. *R. v. Robertson* (1882), 2 S.C.R. 52, aff’g (1880), 1 Ex. C.R. 374.
- Section 91(12) of the *Constitution Act, 1867* did not convey to the federal Parliament any proprietary rights in relation to fisheries. Whatever proprietary rights were previously vested in private individuals or the provinces remained untouched by the federal *Fisheries Act*. *Attorney General of Canada v. Attorney General of Ontario*, [1898] A.C. 700 (P.C.) (“*Provincial Fisheries Reference*”)
- Fishing in navigable non-tidal waters is the subject of property and, according to English law, must have an owner and cannot be vested in the public generally. The right of fishing in the sea is the right of the public in general which does not depend on any proprietary title. The federal Parliament has the exclusive right of legislating with regard to it. *Attorney General of British Columbia v. Attorney General of Canada*, [1914] A.C. 153, 5 W.W.R. 878, 13 E.L.R. 536, 15 D.L.R. 308 (P.C.), aff’g (1913), 4 W.W.R. 525, 47 S.C.R. 493, 11 D.L.R. 255 (“*B.C. Fisheries Reference*”)
- The provincial legislature does not have the power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits or

arms of the sea of the province or of the high seas washing its coasts. Insofar as the soil is vested in the province, it has the exclusive power to grant the right to use fixed gear provided such use does not interfere with the right of the public to fish. The federal Parliament's power of regulation must be exercised so as not to deprive the province or any private person of vested proprietary rights. This, however, applies only to waters between the high-water mark and the low-water mark. *Attorney General of Canada v. Attorney General of Quebec*, [1921] 1 A.C. 413, 56 D.L.R. 358 (P.C.), rev'g (1917), 26 Que. K.B. 289, 35 D.L.R. 1 (C.A.) ("*Quebec Fisheries Reference*")

- A provision of the federal *Fisheries Act*, prohibiting the operation of a fish cannery or curing establishment without a federal licence, was held to be invalid as dealing with property and civil rights and not with fisheries. *Attorney General of Canada v. Attorney General of British Columbia*, [1930] A.C. 111, [1930] 1 D.L.R. 194 (P.C.), aff'g [1928] S.C.R. 457, [1929] 3 W.W.R. 449, [1928] 4 D.L.R. 190 ("*B.C. Fish Canneries Reference*")

B. Tidal Fisheries - Scope Of The Federal Power

The scope of the federal power to legislate with respect to tidal fisheries has long been the subject of judicial scrutiny. Traditionally, this scope was thought to relate to the protection and preservation of fisheries as a public resource. Federal fisheries laws were regarded as valid only if they related to biological conservation. This view was first formulated by Ritchie C.J. in *R. v. Robertson* and it continued to be applied by the Supreme Court of Canada in the 1970's and 1980's; see for example *Interprovincial Co-operatives Ltd. v. The Queen*. In such cases, the impugned legislation was attacked on distribution of power grounds; that is, where an infringement of a specific law-making power of the other level of government was alleged. Over time, the narrow "protection and preservation" test took on a life of its own outside the intended purpose and came to be used as the standard test for determining the constitutional authority of Parliament to pass any law on sea coast and inland fisheries.

Two recent decisions of the Federal Court have rejected this approach and affirmed a broad federal power to legislate with respect to tidal fisheries. In *Re Minister of Fisheries & Oceans and Gulf Trollers Association*, the chinook fishing season for commercial trollers was reduced pursuant to public notices issued by Department of Fisheries and Oceans. Similar restrictions did not apply to sport fishermen. On an application by the trollers for an order to quash the public notices, the Federal Court of Appeal found that the establishment of close times for fishing was a legislative, rather than an administrative, function, clearly falling under section 91(12). The applicants were not able to show an intrusion into any provincial power under section 92. In so finding, Marceau J. rejected the argument that the notices could be said to be illegal for the reason that they were part of a legislative scheme adopted in pursuance not only of conservation purposes but also of objectives of allocation founded on social and economic factors.

The case of *MacKinnon v. Canada* considered a challenge to the Department of Fisheries and Oceans' east coast policy of sector management, which restricts the operation of fishing vessels less than 65 feet to sectors adjacent to the home ports of the vessels. In the opinion of Martin J., Ritchie C.J. was saying in the *Robertson* decision that the

legislation contemplated by section 91(12) was legislation tending to the regulation, protection and preservation of the fisheries; he was not laying down an exhaustive description of the federal regulatory authority but was citing those areas of federal authority in contradistinction to the authority of the legislatures to enact proprietary laws relating to the fisheries. Martin J. went on to find that the federal authority to regulate fisheries includes the right to determine where fishermen may fish and therefore, in his view, the sector management policy was not *ultra vires* Parliament or the *Fisheries Act*.

While constitutional law may place some restrictions on the power of the federal government to legislate over tidal fisheries, there is nevertheless broad authority to manage and control those fisheries for biological, economic, social, cultural or other purposes. This broad authority to regulate tidal fisheries clearly gives a flexibility to fisheries managers to alter management schemes where, for example, biological, social or economic considerations dictate a change.

Case law

- The federal Parliament may legislate “generally and effectually for the regulation, protection and preservation of fisheries in the interests of the public at large”. *R. v. Robertson* (1882), 2 S.C.R. 52, aff’d (1880), 1 Ex. C.R. 374.
- Although a province has exclusive jurisdiction to deal with the effects of pollution, such legislation cannot have extra-provincial effect. A province does not derive authority to legislate with extra-provincial effect from section 92(14) of the *Constitution Act, 1867* since that head does not confer jurisdiction over a particular head of substantive law. As a result of the extra-territorial effect of the *Fishermen’s Assistance and Polluters’ Liability Act, 1970* (Man.), c. 32 (Continuing Consolidation F100), only Parliament would have legislative jurisdiction in the matter, either under section 91(12) or under its residual legislative power over matters not specifically allocated to the provinces or Parliament. *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321.
- The power conferred on Parliament in section 91(12) of the *Constitution Act, 1867* is not qualified by any inherent condition that it be used to pursue some specific objectives and not others. Parliament may manage the fishery on social, economic or other grounds, either in conjunction with steps taken to conserve, protect, or harvest the resource or simply to carry out social, cultural or economic goals and policies. Unless and until the party attacking legislation on division of power grounds identifies a possible trespass on a specific law-making power of the other level of government, the purpose for which a piece of legislation was passed is of no concern to the courts. *Re Minister of Fisheries & Oceans and Gulf Trollers Association* (1986), 32 D.L.R. (4th) 737 (F.C.A.), rev’d [1984] 6 W.W.R. 220 (F.C.T.D.) (leave to appeal to S.C.C. refused (1987), 77 N.R. 157n)
- The “protection and preservation” rule formulated in *R. v. Robertson* was not an exhaustive description of the federal regulatory authority. The fact that the policy of sector management was directed at socio-economic conditions and not at protection and preservation did not render it *ultra vires* the federal fisheries power. *MacKinnon v. Canada (Department of Fisheries and Oceans)* (1986), 6 F.T.R. 203, 26 C.R.R. 233,

[1987] 1 F.C. 490 (F.C.T.D.)

C. *Inland Fisheries - Administrative Inter-Delegation*

The federal and provincial governments have each sought to carry out its mandate in the same inland waters. To avoid a duplication of effort, administrative inter-delegation has been effected by assigning to provincial Ministers or other persons administrative powers in regulations promulgated under the *Fisheries Act* and by designating provincial wildlife or conservation officers as fishery officers under the Act. Since the administrative authority is given to a provincial official, rather than to a legislature, it neither expands provincial legislative authority nor diminishes federal legislative authority.

Case law

- Neither the Parliament of Canada nor the legislature of any province can delegate one to the other any of the legislative authority respectively conferred on them by the *Constitution Act, 1867*. *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31 (“*Nova Scotia Inter-delegation Reference*”)
- The Minister of Natural Resources of Ontario, acting under the provisions of the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, imposed fishing quotas for individual species in the licences of commercial fishermen. The scheme of delegation to a provincial Minister of the federal government’s licensing function was challenged as an unlawful delegation of power. The scheme was upheld on the basis that the delegation was one of administrative power and not of legislative authority since the action of the Minister in fixing the individual quotas for commercial fishermen for particular waters was the application of general policy in relation to particular situations or cases in the province. *Re Peralta and the Queen in right of Ontario* (1985), 16 D.L.R. (4th) 259 (Ont. C.A.), aff’d (1989), 56 D.L.R. (4th) 575 (S.C.C.)
- Similar delegation was found to be invalid as an improper subdelegation of a power and authority to legislate or regulate. The scheme had been created under the same regulation-making section of the *Fisheries Act* as had the scheme in *Peralta* (s. 43(m) - formerly s. 34(m)). [To the extent that issues in *Peralta* are also issues in *Tenale*, the latter decision has been overruled by the Supreme Court of Canada’s approval of the decision and reasons of the Ontario Court of Appeal.] *R. v. Tenale* (1982), 145 D.L.R. (3d) 521 (B.C.C.A.), aff’g (1982), 134 D.L.R. (3d) 654 (B.C. Co. Ct.)
- The delegation by Parliament of administrative authority to a provincial Minister and officials, including the authority to issue licences and to impose conditions on those licences, is a proper exercise of Parliament’s legislative authority. *Re Shoal Lake Band of Indians No.39 and The Queen in right of Ontario* (1979), 25 O.R. (2d) 334, 101 D.L.R. (3d) 132 (H.C.J.)

D. *Aboriginal Fishing Rights - Section 35(1) Of The Constitution Act, 1982*

Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing aboriginal (non-treaty) and treaty rights of the aboriginal peoples of Canada. This provision has been given a broad and liberal interpretation by the courts. In applying section 35(1), the

courts have indicated that the food fishing rights of the aboriginal peoples have priority over other uses of the resource. Such rights are subject only to its reasonable regulation.

Case law

- While the Indian treaty rights to fish constitute existing treaty rights within the meaning of section 35(1), those rights like all other rights recognized by our legal system are limited by the rights of others. Conservation and management of fish resources are required if they are to be protected and preserved for the benefit of Indians as well as other Canadians. Section 12(1) of the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, which requires a licence for gill-net fishing and applies to all residents of Ontario, serves a valid conservation purpose and constitutes a reasonable limit on the Indian treaty right to fish. The impugned provision, therefore, does not infringe section 35(1). *R. v. Agawa* (1988), 53 D.L.R. (4th) 101 (Ont. C.A.) (leave to appeal to S.C.C. refused (1990), 41 O.A.C. 320n)
- “Existing” in the context of section 35(1) is to be equated with the term “unextinguished”. On April 17, 1982, the aboriginal peoples had an unextinguished right to fish for food in the waters in question. Section 35 provides the appellants with the right to an allocation of any surplus of the fisheries resource which may exist after the needs of conservation have been taken into account. This right is subject to reasonable regulation of the resource in a manner that recognizes and is consistent with the appellants’ guaranteed constitutional rights. The regulations under which they were charged are a valid exercise of federal legislative power pursuant to section 91(12) of the *Constitution Act, 1867*. Any regulatory scheme must be consistent with the guaranteed constitutional rights of persons such as these appellants who enjoy a limited immunity from prosecution under the provisions of the *Fisheries Act* and regulations. To the extent that the provisions under which they are charged are inconsistent with their constitutional rights, section 52 of the *Constitution Act, 1982* renders them of no force and effect. *R. v. Denny, Paul and Sylliboy* (1990), 94 N.S.R. (3d) 253, 247 A.P.R. 253, [1990] 2 C.N.L.R. 115 (App. Div.)
- The word “existing” in section 35(1) means those rights which were in existence on April 17, 1982 when the *Constitution Act, 1982* came into effect. The provision does not revive extinguished rights. The phrase “existing aboriginal rights” cannot be read so as to incorporate the specific manner in which they were regulated before 1982 but must be interpreted flexibly so as to permit their evolution over time. Moreover, an aboriginal right is not extinguished merely by its being controlled in great detail by the regulations under the *Fisheries Act*. While government policy can regulate the exercise of an existing aboriginal right, such regulation must be in keeping with section 35(1). *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160, aff’g (1986) 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, [1987] 1 C.N.L.R. 145 (C.A.)

The Supreme Court of Canada has considered in some detail the meaning of section 35(1). It stated in *Sparrow* that the aboriginal right to fish is a right to fish for food, social and ceremonial purposes. The Court established that Parliament has the obligation to act in a fiduciary capacity with respect to aboriginal peoples and that the federal power must be reconciled with a federal duty by way of a justificatory scheme or process. In the

opinion of the Court, section 35(1) imposes on the federal government the requirement of justifying any legislation that has a negative impact on aboriginal rights. Where an affected person establishes a *prima facie* infringement of a section 35(1) aboriginal right, the onus shifts to the Crown to justify the infringement and to establish that the objectives of the limitation are valid. If the court finds that the objectives are valid, it then must be satisfied that the limitation ensures that Indian food requirements are met before other allocations. Where there are cutbacks for conservation purposes, those cutbacks are to be borne by other users first and not by both Indians and other users. The *Sparrow* decision has been applied in other cases dealing with aboriginal fishing rights.

Case law

- The majority of the Court of Appeal for British Columbia held that the requirement for a fishing licence, imposed by the *British Columbia Fishery (General) Regulations*, did not constitute a *prima facie* infringement of, or interference with, an aboriginal right. Moreover, the Bulkley River was found not to be “on the reserve” within the meaning of the *Indian Act* and the Band’s fishing by-law did not apply beyond the boundaries of the reserve. *R. v. Nikal*, 1993 4 C.N.L.R. (B.C.C.A.), rev’g [1991] 1 C.N.L.R. 162 (S.C.B.C.), which aff’d 1989 4 C.N.L.R. 143 (B.C. Prov. Ct.) [NOTE: leave to appeal to the Supreme Court of Canada was granted on March 10, 1994]
- Where the band to which the accused belonged claimed that its allocation of sockeye salmon had not been met, the closure of a food fishery pursuant to the *British Columbia Fishery (General) Regulations* interfered with their aboriginal right to catch the amount of fish needed to satisfy their reasonable and societal needs. While the regulations had a valid legislative objective as they were directed toward the management and conservation of the fishery resource in British Columbia, they did not spell out the priority which must be given to the native food fishery. Nor was it established that the interference was justified. *R. v. Robinson*, [1991] 4 C.N.L.R. 125 (B.C. Prov. Ct.)
- The majority of the Court of Appeal for British Columbia held that the commercial sale of fish (salmon) was not integral to the organized society of the Upper Sto:lo people and their distinctive culture prior to contact with the Europeans. The practice which was induced and driven by European influences does not qualify for protection and priority as an aboriginal right. Persons of aboriginal ancestry are not precluded from participating in the commercial fishery but they are subject to the same rules as other Canadians who seek a livelihood from that resource. As the accused was not exercising an aboriginal right when selling fish caught under an Indian Food Fish Licence, she was in contravention of the fishing regulations prohibiting such sale. *R. v. Van der Peet*, (1993) 80 B.C.L.R. (2d) 75 (C.A.), 83 C.C.C. (3d) 289, 29 B.C.A.C. 209, 48 W.A.C. 209 [NOTE: leave to appeal to S.C.C. was granted on March 10, 1994]

The question of extinguishment of aboriginal and treaty rights has been considered by the courts.

- The test for extinguishment was stated by the Supreme Court of Canada in the following way: “The test of extinguishment to be adopted, in our opinion, is that the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right.”

The Court did not include express statutory language as a part of its test. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160, aff'g (1986) 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, [1987] 1 C.N.L.R. 145 (C.A.)

- The majority of the Court of Appeal for British Columbia has held that there has been no “blanket extinguishment” of aboriginal rights of the Gitksan and Wet’suwet’en people in a 58,000 square kilometre territory identified in a statement of claim. While they have unextinguished aboriginal rights in the territory in question, these rights are less than rights of ownership. The majority also held that there was no aboriginal right to sovereignty or jurisdiction. *Delgamuukw (Muldoe) v. The Queen in right of British Columbia and Attorney General of Canada*, (1993) 5 W.W.R. 97 (B.C.C.A.) 104 D.L.R. (4th) 470, 30 B.C.A.C. 1, 49 W.A.C. 1 [NOTE: leave to appeal to the Supreme Court of Canada was granted on March 10, 1994] For a discussion of the extinguishment of aboriginal rights, see also the decision of the trial judge which is reported at [1991] 5 C.N.L.R. 1 (S.C.B.C.)
- A treaty reached into between the Crown and the Hiawatha Band in 1923 was held to have extinguished the band’s fishing rights on the Otonabee River. The absence of an order in council of the Government of Canada ratifying the treaty did not render it invalid. Not only did the government evidence its intention to be bound by the treaty when it made its payment to the band but band members lived for decades in accordance with the treaty-provision that they had no off-reserve fishing rights. Their fishing rights having been extinguished by the 1923 treaty, the band members had no existing rights at the time the *Constitution Act, 1982* came into force and, accordingly, section 35(1) thereof does not apply. *R. v. Howard*, [1994] 2 S.C.R. 299, [1994] 3 C.N.L.R. 146 (S.C.C.), aff'g [1992] 2 C.N.L.R. 122, 8 O.R. (3d) 225, 55 O.A.C. 189 (C.A.)

E. Other Federal Laws Relating To Fish And Fisheries

It should be noted that provisions of the *Indian Act*, (bylaws and regulations), in effect on reserves prevail over conflicting provisions contained in the *Fisheries Act*. As well, provisions of the *National Parks Act* will prevail in national parks.

Additionally, the Minister of Fisheries and Oceans is responsible for administering the following statutes which relate to fish and fisheries:

Fish Inspection Act, R.S. 1985, c. F-12

Freshwater Fish Marketing Act, R.S. 1985, c. F-13

Great Lakes Fisheries Convention Act, R.S. 1985, c. F-17

North Pacific Fisheries Convention Act, R.S. 1985, c. F-18

Northern Pacific Halibut Fisheries Convention Act, R. S. 1985, c. F-19

Fisheries Improvement Loans Act, R.S. 1985, c. F-22

Fishing and Recreational Harbours Act, R.S. 1985, c. F-24

Coastal Fisheries Protection Act, R.S. 1985, c. C-33

Chapter 2 - Scheme of the Act

The *Fisheries Act* provides for the management and control of fisheries on the one hand and for the protection of fish habitat on the other. The provisions with respect to the protection of fish habitat are contained in the Act while control over harvesting appears largely in the regulations in the form of prohibitions. A review of the history of the legislation suggests that the drafters considered the two activities to be complementary rather than separate.

A. Key Definitions

The following definitions applicable to the *Fisheries Act* are found at section 2:

Canadian Fisheries Waters

Means all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada;

Case law

- Pursuant to section 4(1) of the *Territorial Sea and Fishing Zones Act*, the “fishing zones” of Canada comprise such areas of the sea adjacent to the coast of Canada as may be prescribed by order of the Governor in Council. The primary meaning of “adjacent” is contiguous. Things are said to be adjacent when they touch each other. It is intended that the coast of Canada and the fishing zone should be contiguous. One area is contiguous to another where both have a common boundary or even a common point of contact. *Rivas v. The Queen* (1992), 102 Nfld. and P.E.I.R. 271, 323 A.P.R. 271 (Nfld. C.A.) [NOTE: leave to appeal to S.C.C. was refused] [ALSO NOTE: although the charges in this case were laid pursuant to the *Coastal Fisheries Protection Act*, the definition of Canadian fisheries waters is the same in that Act as in the *Fisheries Act*.]
- The term “adjacent”, which is not uncertain or ambiguous, means that area of the sea around the Canadian coast with an outer limit necessary to encompass fully the complete fishing regions where fish stocks are regenerated, multiply and are ultimately harvested. The term, as it appears in the statute and the regulations, is not to be measured in distance, land mass or bodies of sea but, rather, must be viewed as the area over which Canada must have control in order to protect and preserve its fishing industry. *R. v. Alegria* (1992), 96 Nfld. and P.E.I.R. 128, 305 A.P.R. 128 (Nfld. C.A.) [NOTE: leave to appeal to S.C.C. was refused]

Close Time

Means a specified period during which fish to which it applies may not be fished, and “closed time” or “closed season” has a similar meaning;

Fish - Includes

- (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;

Fishery

Includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing gear or equipment is used, set, placed or located, the area, tract or stretch of water in or from which fish may be taken by the pound, seine, net, weir or other fishing gear or equipment, and the pound, seine, net, weir or other fishing gear or equipment used in connection therewith;

Case law

- In *Paterson on 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 or water; and it is also frequently used to denote the locality where such right is exercised.” *Attorney General of Canada v. Attorney General of British Columbia*, [1928] S.C.R. 457, [1928] 4 D.L.R. 190, aff’d [1930] A.C. 111, [1929] 3 W.W.R. 449, [1930] 1 D.L.R. 194 (P.C.) (“*B.C. Fish Canneries Reference*”)
- The point of Paterson’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. *Mark Fishing Co. v. United Fishermen & Allied Workers’ Union*, [1972] 3 W.W.R. 641, 24 D.L.R. (3d) 585 (B.C.C.A.)
- A “fishery” refers to the right to catch fish in the sea or a particular stream or to a locality where such a right is exercised. An area containing only fish which have neither commercial nor sporting value does not constitute a “fishery”. *R. v. MacMillan Bloedel Ltd.* (1984), 11 C.C.C. (3d) 143, [1984] 2 W.W.R. 699, 50 B.C.L.R. 280 (C.A.), [NOTE: leave to appeal to S.C.C. refused 12 W.C.B. 154]
- The definition of “fishery” in the Act includes sealers as persons engaged in the seal fishery. *International Fund for Animal Welfare Inc. v. Canada (Minister of Fisheries and Oceans)* (1986), 5 F.T.R. 193, [1987] 1 F.C. 244 (F.C.T.D.), rev’d in part (1988), 83 N.R. 303, 19 F.T.R. 159 (F.C.A.)

Fishery Guardian

Means a person who is designated as a fishery guardian pursuant to subsection 5(1);

Fishery Officer

Means a person who is designated as a fishery officer pursuant to subsection 5(1);

Fishing

Means fishing for, catching or attempting to catch fish by any method;

Case law

- The act of fishing is a pursuit consisting not of a single act but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish

by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. *Ship Frederick Gerring Jr. (The) v. The Queen* (1897), 27 S.C.R. 271.

- The act of fishing is a continuous process, beginning from the time when preliminary operations are being made to the taking of the fish and extending down to the time when they are finally reduced to actual possession. *R. v. Morash* (1993), 124 N.S.R. (2d) 241, 345 A.P.R. 241 (S.C.), aff'd (1994), 129 N.S.R. (2d) 34, 345 A.P.R. 34 (C.A.)
- The meaning of “fishing” as used in s. 33(2) of the *Atlantic Fishery Regulations, 1985* appears somewhat broader in the context of the highly regulated modern fishery. For the purposes of s. 33(2), “fishing” appears to mean following the pursuit or vocation of fishing, and not the mere taking of fish. “Fishing under the authority of a licence” would appear to be broad enough to include the whole of a fishing voyage from wharf to wharf; the requirement for compliance with the conditions of a licence is intended to apply to the entire operation. *R. v. Newell* (1988), 87 N.S.R. (2d) 157, 222 A.P.R. 157 (Co. Ct.)
- “Fishing” means any act for the purpose of gaining possession of fish and not “every act” in a continuum of acts for that purpose. Stealing from another person’s traps, in the circumstances of this case, was held to constitute fishing. *R. v. Kehoe*, unreported, May 11, 1992, N.S. Co. Ct.
- An accused who threw his line into the water in an attempt to free a loop therein was engaged in the act of “fishing”. The accused had thrown his line back into the water after having caught his limit for the day of two bass. *R. v. Kennedy* (1991), 109 N.S.R. (2d) 300, 297 A.P.R. 300 (C.A.)
- A ship’s captain, who illegally caught and brought ashore pollock, although he had intended to catch haddock, was, in the opinion of the Appeal Division, “fishing for” pollock. *R. v. Saunders*, (1989), 94 N.S.R. (2d) 224, 247 A.P.R. (App. Div.), rev’g (1989), 92 N.S.R. (2d) 328, 237 A.P.R. 328 (Co. Ct.)
- In establishing that an accused has committed the offence of fishing contrary to the terms of his or her licence, it is not necessary to prove that the licensee was fishing in the narrow sense. It is only necessary to show that the accused was engaged in the fishing industry under the authority of a licence and that he or she failed to comply with the conditions of the licence. *R. v. Savoury* (1992), 108 N.S.R. (2d) 245, 294 A.P.R. 245 (C.A.) aff’g (1990), 102 N.S.R. (2d) 368, 279 A.P.R. 368 (Co.Ct.).

Fishing Vessel

Means any vessel used, outfitted or designed for the purpose of catching, processing or transporting fish;

Inspector

Means a person who is designated as an inspector pursuant to subsection 38(1);

Minister

Means the Minister of Fisheries and Oceans or, in respect of any matter related to the Northern Pipeline referred to in the *Northern Pipeline Act*, the member of the Queen's Privy Council for Canada designated as the Minister for the purposes of that Act;

Obstruction

Means any slide, dam or other obstruction impeding the free passage of fish;

Vehicle

Means any conveyance that may be used for transportation, including aircraft.

The following definitions applicable to fish habitat protection and pollution prevention are contained in section 34 of the Act:

Deleterious Substance

Means

- (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 that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or 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, processed or changed, 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 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.

Case law

- The definition of a deleterious substance is related to the substance being deleterious to fish. In essence, the subsection seeks to protect fisheries by preventing substances deleterious to fish entering into waters frequented by fish. *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292, 53 C.C.C. (2d) 353, 113 D.L.R. (3d) 1, 9 C.E.L.R. 145, [1981] 1 W.W.R. 681.
- The word deleterious includes lethal and sublethal effects which would result in damage to an aquatic organism and this may include matters such as growth, respiration, reproduction, larval survival or abnormal development. The added phrase "or is likely to be rendered" denotes "potential deleteriousness". *R. v. Suncor Inc.* (1985), 4 F.P.R. 409 (Alta. Prov. Ct.)

Deposit

Means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing.

Case law

- There was clear evidence upon which the trial judge in this case could find that deposits of silt, sand and clay constituted the deposit of deleterious substances in water frequented by fish. *R. v. Jack Cewe Ltd.* (1983), 3 F.P.R. 472 (B.C. Co. Ct.)
- The “depositing” aspect of the offence set out in section 36(3) centres on direct acts of pollution. The “permitting” aspect of the offence centres on the defendant municipality’s passive lack of interference, or its failure to prevent an occurrence which it ought to have foreseen. *R. v. Vespra (Township)* (1989), 9 W.C.B. (2d) 166 (Ont. Prov. Ct.)
- Providing the opportunity for pollution to continue is not sufficient to constitute the *actus reus* of the offence of permitting a deposit of a deleterious substance in water frequented by fish. Accordingly, where oil entered a creek from a drainage ditch controlled in part by the corporate accused and in part by its neighbour and the trial judge concluded that the accused did not control the pollutant, the conviction was set aside by the appeal court. *R. v. Rivtow Straits Ltd.* (1992), 8 C.E.L.R. (N.S.) 16 (S.C.B.C.)

Fish Habitat

Means any spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

Case law

- It does not matter that an accused person’s activity resulted in the harmful alteration of one or more of the five elements of a fish habitat. Proof that he or she carried on an undertaking resulting in the harmful alteration of any one of those elements with proof of existence of fish at the site is all that is necessary to constitute the offence. *R. v. Maritime Electric Co.* (1990), 82 Nfld. & P.E.I.R. 342, 257 A.P.R. 342, 4 C.E.L.R. (N.S.) 289 (S.C.P.E.I.)

Water Frequented By Fish

Means Canadian fisheries waters.

Case law

- The trial judge concluded that, in using the word frequented, Parliament had intended to mean that “there had to be an element of habitual association of fish with that water”. The Court of Appeal concurred with that interpretation of the word ‘frequented’ but did not agree that the word could be extended to mean that the water was required to be occupied by the fish continually or even very frequently. If it is apparent that the fish use the water regularly - even if only annually for a short period - then such water qualifies as water frequented by fish. *R. v. MacMillan Bloedel (Alberni) Limited* (1978), 7 B.C.L.R. 210 (Co. Ct.), aff’d in part (1987), 12 B.C.L.R. 29 (C.A.)

The following definitions applicable to the protection of marine plants are set out in section 47:

Coastal Waters Of Canada

Means all Canadian fisheries waters not within the geographical limits of any province;

Harvest

Includes cut, take, dredge, rake or otherwise obtain;

Marine Plant

Includes all benthic and detached algae, marine flowering plants, brown algae, red algae, green algae and phytoplankton.

B. Management And Control Of Fisheries

The two principal provisions used to manage and control fisheries are the Minister's licensing power under section 7 and the cabinet's regulation-making power under section 43.

i) Licensing Power Of The Minister

Pursuant to subsection 7(1), the Minister of Fisheries and Oceans may "... in his absolute discretion, wherever the exclusive right of fishing does not otherwise exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on". The scope of this power has been considered by the courts. The case law suggests that, although the discretion is not totally unfettered, if the Minister stays within the framework of the Act and applies the principles of administrative law in making decisions with respect to licensing, he or she is not subject to challenge before the courts.

Case law

- The discretion of the Minister under section 7(1) is absolute and should not be restrained by injunction, provided that the Minister acts within the scope of his or her statutory authority. *Delisle v. Canada (Minister of Fisheries and Oceans)* (1991), 27 A.C.W.S. (3d) 708 (F.C.T.D.)

The nature of a fishing licence issued under the Act has also been the subject of debate. The Department of Fisheries and Oceans considers a licence to be an instrument granting a person permission to harvest a certain species of fish, subject to the conditions attached thereto. It is viewed as a limited fishing privilege rather than an absolute or permanent right. While it may be that a licensee only acquires a permission, the courts are indicating that there may be rights of a proprietary nature attached to the holding of a fishing licence.

Case law

- A licensee may sell the beneficial interest in a fishing licence to a person who holds it as a nominee or a trustee. The restrictions apply only to dealing with the legal title. *British Columbia Packers Ltd. v. Sparrow* (1988), 22 B.C.L.R. (2d) 302 (S.C.); aff'd (1989), 35 B.C.L.R. (2d) 334 (C.A.)

- Given that what the trustee in bankruptcy possesses with respect to the bankrupt's property is the capacity to do what the bankrupt might have done, it follows that if the bankrupt had the power to contract with respect to the beneficial interest in his fishing licence then so does the trustee. The licence is not purely personal to the holder. Although a fishing licence may be considered property within the meaning of the *Bankruptcy Act*, any interest therein vests only in the year of issue. *Re Bennett* (1988), 67 C.B.R. (N.S.) 314 (S.C.B.C.) [NOTE: leave to appeal refused (1989), 38 B.C.L.R. (2d) xxxii (S.C.C.)]
- On the other hand, where a fishing licence is issued and reissued in successive years, the licence may become "...something pretty close to a chose in action, as is a patent right, a bank note, a share in a company. In more vernacular language, it is property." *Johnson v. Ramsay Fishing Co.* (1987), 15 F.T.R. 106, 47 D.L.R. (4th) 544 (F.C.T.D.)
- In view of the absolute discretion conferred upon the Minister, it can only be concluded that a citizen who holds a fishing licence, entitling him or her to exercise this discretionary power, has merely received a privilege, or conditional and temporary right, and not an acquired or absolute right. There are no acquired rights to obtaining a fishing licence. *R. v. Leclerc*, [1990] R.J.Q. 455 (C.S.) (re: acquired right as defence to charges of fishing without a licence). See also: *Roy v. Attorney General of Quebec*, unreported, Que. S.C., March 1, 1990 (re: civil claim arising from fishing rights alleged to have been based on an act of concession of the Seigneurie de Matane in 1672)
- A person to whom a fishing licence has been issued holds a "beneficial interest" in the licence for the year in respect of which it issued. The licence is personal to its holder and cannot be transferred. Although the plaintiff in this case had the use of the licence by virtue of a ninety-nine year lease entered into with the deceased licence holder, the beneficial interest in the lease did not continue beyond December 31 of the year of its issue because there was no legal right of renewal vested therein. *Smith v. Seymour* (1990), 48 B.C.L.R. (2d) 361, [1990] 2 C.N.L.R. 176 (S.C.)
- A fishing licence issued under federal legislation is not a right that an individual can claim but is a privilege accorded him or her. Accordingly, a fishing licence possessed by a bankrupt is not covered by the definition of property in the *Bankruptcy Act*. (The court distinguished *Re Bennett*.) *Re Noël*, unreported, July 24, 1990, Que. Sup. Ct.
- Where a corporation claimed to have purchased a tuna licence through the individual licence holder, the trial judge found that the contract, if it did exist, would have been void. Any agreement to hold and use a licence which was, in fact, the property of the corporation would be contrary to the stated will of Parliament. The licence and the control thereof are to be in the hands of a fisherman. The licence can belong to no one as it may be cancelled or suspended by the Minister at any time. *Island Marine Products Ltd. v. Maxwell* (1991), 101 N.S.R. (2d) 294, 275 A.P.R. 294 (Co. Ct.)
- A category T commercial fishing licence, issued in respect of a commercial fishing vessel, is property of the Crown and may be transferred in accordance with the *Pacific Fishery Registration and Licensing Regulations, 1983*. It does not become an independent and individual article of commerce in which the holder has a disposable title

of which the holder, by reason of bankruptcy, may be deprived. This is different from an H category licence which is issued to a person. *Waryk v. Bank of Montreal* (1991), 85 D.L.R. (4th) 514 (B.C.C.A.)

- The *Fisheries Act* gives the Minister absolute discretion to issue or authorize the issue of a fishing licence. Upon authorizing the issue of licences to the plaintiff, subject to certain conditions to be discussed with departmental officials, the Minister exhausts his or her discretion under the Act. The purported withdrawal of the licence authorizations is therefore beyond the Minister's power. The court agreed that there was a sufficiently close relationship between the parties, flowing from the Minister's original representation that the licences would be issued, to give rise to a *prima facie* duty of care. The Federal Court authorized the appeal by the Crown of the decision of the trial Judge, in favours of Comeau Seafoods Ltd., on the question of negligence and rejected the portion of the appeal or the issue of liability. *Comeau Sea Foods Limited v. Canada (Minister of Fisheries and Oceans)* (1992), 11 C.C.L.T. (2d) 241 (F.C.T.D.) [NOTE: It is anticipated that a Motion to file a Notice of Appeal to the Supreme Court of Canada will be filed by Comeau Sea Foods Ltd.].

- Where a plaintiff commenced action for moneys alleged to be owing for repairs he made to the defendant's fishing vessel and the trial judge found that the plaintiff was entitled to be compensated on a *quantum meruit* basis, she imposed a constructive trust on two commercial fishing licences held by the defendant, as well as on the vessel. *Jesionowski v. Gorecki*, (1992), 55 F.T.R. 1, (*sub nom* Jesionowski v. "Wa-Yas" (The)) [1993] 1 F.C. 36.

ii) Regulation-Making Power Of The Governor In Council

Section 43 empowers the Governor in Council to make regulations:

- (a) for the proper management and control of fisheries;
- (b) respecting the conservation and protection of fish;
- (c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;
- (d) respecting the operation of fishing vessels;
- (e) respecting the use of fishing gear and equipment;
 - (e.1) respecting the marking, identification and tracking of fishing vessels;
 - (e.2) respecting the designation of observers, their duties and their carriage on board fishing vessels;
- (f) respecting the issue, suspension and cancellation of licences;
- (g) respecting the terms and conditions under which a licence and lease may be issued;
 - (g.1) respecting any records, books of account or other documents to be kept

under this Act;

(g.2) respecting the manner in which the records shall be produced and information shall be provided under this Act;

(h) respecting the obstruction and pollution of any waters frequented by fish;

(i) respecting the conservation and protection of spawning grounds;

(j) respecting the export of fish from Canada;

(k) respecting interprovincial transport of fish;

(l) respecting the powers and duties of officials employed in the administration and enforcement of the Act; and

(m) authorizing officials to vary close times, fishing quotas and limits on the size and weight of fish that are fixed by regulations.

For example, the Fishery (General) Regulations apply generally to fishing and related activities in Canadian fisheries waters off the Atlantic, Pacific and Arctic Coasts, in the Atlantic provinces and British Columbia and in the Yukon Territory and the Northwest Territories. Additionally, the primary regulations used to control commercial east coast fisheries are the *Atlantic Fishery Regulations, 1985*, while the commercial west coast fisheries are governed in large part by the *Pacific Fishery Regulations, 1993*, and the *Pacific Management Area Regulations*. Numerous other regulations apply with respect to fishing other than commercial fishing on the two coasts and with respect to fishing and other related activities in the interior provinces.

C. Protection Of Fish Habitat

For the purpose of protecting fish habitat, the *Fisheries Act* has identified certain activities as offences under the Act and has provided penalties for the commission of those offences.

Chapter 3 - Enforcement

I. Enforcement Action

The *Fisheries Act* provides different regimes for enforcement action depending upon the subject matter: fisheries management or habitat protection.

A. Enforcement Action Related To The Protection Of Fish Habitat - Role Of Fish Habitat Inspectors

The *Fisheries Act* provides for the protection of fish habitat in sections 34 to 43. It confers upon fish habitat inspectors (who are not to be confused with inspectors appointed pursuant to the *Fish Inspection Act*) the power to enter a place for the purpose of conducting an inspection where it appears that any work or undertaking has resulted in the deposit of a deleterious substance. An inspector may also obtain a search warrant in respect of such a place. Unless accompanied by a peace officer, however, an inspector

may not use force. Moreover, any use of force must be specifically authorized in the warrant. A fish habitat inspector has no power of seizure or of arrest and is not allowed to enter or search a private dwelling-house.

a) Enforcement officers - fish habitat inspectors

b) Designation - s. 38(1)

- For the purposes of section 38, the Minister may designate as an inspector any person who, in the opinion of the Minister, is qualified to be so designated.

c) Role - to ensure compliance with the Act and regulations insofar as they provide for the protection of fish habitat

d) Powers of fish habitat inspectors

i) *power to conduct inspections - s. 38(3)*

- At any reasonable time, an inspector may enter a place, other than a private dwelling place, if he or she believes on reasonable grounds that there is any work or undertaking resulting or likely to result in the deposit of a deleterious substance in water frequented by fish or where any person carries on work which results in the destruction of fish habitat.

ii) *power to search with a warrant - s. 38(3.2)*

- An inspector may obtain a warrant authorizing him or her to enter and search a place, subject to any conditions specified in the warrant, where he or she has reasonable grounds to believe that an offence under s. 40(2) is being or has been committed or that a search will afford evidence with respect to the commission of such an offence. There is no provision permitting an inspector to search a private dwelling-place. It must also be noted that an inspector, in executing the warrant, cannot use force unless accompanied by a peace officer and the use of force is specifically authorized in the warrant.

iii) *power to search without a warrant - s. 38(3.4)(3.5)*

- Where the conditions for obtaining a search warrant exist but, by reason of exigent circumstances, it would not be practical to obtain the warrant, an inspector may exercise the powers of search and seizure without obtaining the warrant. Exigent circumstances include those situations in which the delay necessary to obtain a warrant would result in danger to human life or safety or in the loss or destruction of evidence.

iv) *power to take remedial measures - s. 38.6*

- In the event of a deposit of a deleterious substance in water frequented by fish, where there is a risk of damage to fish habitat, fish or the use by persons of fish, an inspector may take any necessary remedial measures or direct that they be taken by any person who owns or has control of the deleterious substance or causes or contributes to the deposit.

B. Other Enforcement Actions Related To The Protection Of Fish Habitat

i) directions by Minister - s. 36(6)

- Where a person is authorized under the regulations to deposit a deleterious substance, the Minister may direct that person to conduct tests, install equipment, comply with procedures or report information to determine whether the deposit is being done in the manner authorized.

ii) requirement for plans and specifications - s. 37(1)

- Where a person carries on any work that results or is likely to result in the destruction of fish habitat or in the deposit of a deleterious substance in water frequented by fish, the Minister may require the production of plans or specifications relating to such work as will enable the Minister to determine whether an offence has been committed and what measures might be taken to prevent the deposit or to mitigate the effects.

iii) powers of the Minister - s. 37(2)

- The Minister or a person designated by the Minister, having formed the opinion that an offence has been or is likely to be committed, may require modifications or additions to the work or undertaking or restrict the operation thereof.

C. Enforcement Actions Related To Fisheries - Role Of Fishery Guardians And Fishery Officers

Fishery officers and fishery guardians, unlike fish habitat inspectors, are peace officers by virtue of section 2 of the *Criminal Code* and are permitted to enter and inspect any premises to ensure compliance with the Act generally. Where the premises sought to be entered is a dwelling-house, however, an entry warrant must first be obtained. Additionally, a fishery officer may obtain a search warrant in respect of a place and, in exigent circumstances, may conduct a warrantless search.

Fishery officers and fishery guardians are empowered to make arrests without warrant and they may seize any vessel, vehicle or other thing which they believe to have been obtained by or used in the commission of an offence. Fishery officers enjoy the additional powers set out in sections 53 to 56.

It should also be noted that any enforcement officer designated pursuant to the *Fisheries Act* may avail himself or herself of the provisions of the *Criminal Code* in obtaining a search warrant. It is not necessary to proceed under the Act itself.

Case law

- Section 487 of the *Criminal Code* expressly authorizes the issuance of a search warrant in respect of all federal statutes, even those which contain their own provisions for the obtaining of a search warrant. *R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624, 58 C.C.C. (3d) 257, 79 C.R. (3d) 390.

a) Enforcement officers - fishery officers and fishery guardians

b) Designation - s. 5(1)

- The Minister may designate any person or classes of persons as fishery officers or fishery guardians and may limit the power or powers that such person or classes of persons may exercise.

c) Role of fishery officers and fishery guardians

- To ensure compliance with the Act and regulations.

d) Powers of fishery officers and fishery guardians

i) Power to conduct inspections - s. 49(1)

A fishery officer or fishery guardian, who believes that there is, in any place, any work or undertaking or fish in respect of which the Act or regulations may apply, may enter and inspect such place. In so doing, the officer or guardian may open containers, examine fish, conduct tests and require production of records. In carrying out an inspection, he or she may use any data processing system at the place and may reproduce any records.

Case law

- Inspections may be conducted without warrant even in the circumstances where a fishery officer suspects an individual of wrong doing but lacks the reasonable and probable grounds necessary to obtain a warrant. Fishery officers placed marked lobsters in improperly tagged lobster traps and conducted a surveillance of the area surrounding the traps in order to determine who was fishing those traps. When they subsequently boarded the accused's boat on the suspicion that he had been fishing illegally, he was found to be in possession of the marked lobsters and was charged with a strict liability offence. It was held by the trial court, and upheld by the summary conviction appeal court, that the actions of the officers amounted to an inspection rather than a search. Moreover, the accused, who was voluntarily participating in and benefitting from a regulated and licensed industry, had no reasonable expectation of privacy. *R. v. Kent* (1991), 102 N.S.R. (2d) 181, 279 A.P.R. 181 (Co. Ct.), aff'd (1991), 109 N.S.R. (2d) 335, 297 A.P.R. 335 (N.S.S.C., App. Div.)
- The purpose of the powers of inspection are to ensure compliance with the Act. An inspection, as an administrative function, may be carried out as a simple matter of routine, or as a matter of regularity, and equally so where there is a suspicion of non-compliance. It was noted by the court that a suspicion based on an anonymous tip would not provide the authority for the issuance of a search warrant. *Sable Fish Packers (1988) Limited v. The Queen*, unreported, May 30, 1991, N.S. Co. Ct.
- The broad statutory power of fishery officers to monitor or inspect the activities of those engaged in a regulated industry is justified for the purpose of ensuring compliance with the legislation which was designed to produce equity and fairness among various sectors in the industry, to ensure that conservation measures will be effective and to promote other objectives for the general welfare of the industry and the public. The authority to inspect, however, is restricted by the operation of section 49.1 of the Act

where there are reasonable and probable grounds to believe that an offence has been or is being committed under the Act. Where a fishery officer has reasonable and probable grounds to believe that an offence has been committed and leaves the fish plant which he is inspecting in order to obtain instructions from his superiors, upon his return he is no longer engaged in an inspection but is instead conducting a search. In the absence of exigent circumstances, a warrant is required. *R. v. German* (1991), 104 N.S.R. (2d) 298, 283 A.P.R. 298 (Co. Ct.)

ii) Power to enter a dwelling-house with a warrant - s. 49(3)

Where the place to be entered is a dwelling-house and the occupant does not consent to the entry, the guardian or officer may obtain an entry warrant.

iii) Power to arrest without warrant - s. 50

A guardian, officer or peace officer may arrest without warrant a person he or she reasonably believes to have committed an offence or to be preparing to commit an offence.

iv) Power of seizure - s. 51

An officer or guardian may seize any thing he or she reasonably believes was obtained by or used in the commission of an offence.

e) Additional powers of fishery officers

i) Power to search with a warrant - s. 49.1(2)

A fishery officer may obtain a search warrant in respect of any place in which he or she reasonably believes that any work is being carried on in contravention of the Act or regulations, that there is any fish or other thing in relation to which the Act or regulations have been contravened or that there is evidence with respect to such contravention.

Case law

- Though prior authorization is ordinarily a pre-condition to government intrusion upon an individual's privacy, it would be utterly impractical to require fishery officers, who decide on reasonable grounds that there has been a contravention of the *Fisheries Act* or the regulations thereto, to obtain a search warrant or authorization prior to making a seizure in certain circumstances. *R. v. Milton* (1985), 10 B.C.L.R. (2d) 1, 37 D.L.R. (4th) 694, 32 C.C.C. (3d) 159, [1987] 2 W.W.R. 622, [1987] 2 C.N.L.R. 101 (C.A.), rev'g 16 C.R.R. 215, [1985] 4 C.N.L.R. 103 (Co. Ct.)
- A fishery officer may enter and search without a warrant any private property, other than a dwelling-house, where he has reasonable and probable grounds to believe that fish, taken in contravention of the Act or regulations, may be found on the property. *R. v. Burton* (1983), 42 Nfld. & P.E.I.R. 230, 122 A.P.R. 230, 1 D.L.R. (4th) 152, 4 F.P.R. 22 (Nfld. C.A.), rev'g (1982), 40 Nfld. & P.E.I.R. 335, 115 A.P.R. 335 (Nfld. Prov. Ct.)

ii) Power to search without a warrant - s. 49.1(3)(4)

A fishery officer may exercise the power of search without a warrant if the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practical to obtain the warrant. Exigent circumstances include those situations in which the delay necessary to obtain the warrant would result in danger to human life or safety or in the loss or destruction of evidence.

iii) Power to settle disputes - s. 53

The local fishery officer may settle any disputes arising between persons which relate to fishing limits, fishery stations or the position and use of fishing apparatus.

iv) Power to prescribe distances between fisheries - s. 53

Fishery officers may prescribe distances between fisheries.

v) Power to define boundaries of estuary fishing - s. 55

Any fishery officer, duly authorized by the Minister, may define the boundaries of tidal waters and estuaries and may designate what is the mouth of any river, stream or other water for the purposes of the Act.

vi) Power to designate gurry grounds - s. 56

A fishery officer may designate or define a gurry ground.

[note: a “gurry ground” may be described as a place in which offal is permitted to be discarded]

It should also be noted that, by virtue of sections 49 and 49.1, fishery guardians and officers have the power to enforce all provisions of the Act, including sections 35(1) and 36(3).

D. Comparison Of Enforcement Powers

Prosecutors are most probably familiar with peace officer enforcement powers under the *Criminal Code*. This section compares those powers to the enforcement powers of fishery officers and fishery guardians acting under the Act generally and inspectors acting under the habitat protection provisions of the Act.

a) Inspection

Peace officers acting under the *Code* have no express powers of entry and inspection. Fishery officers and fishery guardians have a broad power to enter and inspect places to ensure compliance with the Act generally (i.e., in relation to both the habitat and fisheries provisions of the Act and regulations: s. 49). A warrant is needed to enter and inspect dwelling houses. Inspectors, however, are limited to entry and inspection of places in relation to the deposit of deleterious substances (s. 38(3)). They have no power to enter and inspect private dwelling-places; not even with a warrant.

b) Search and seizure

Peace officers have a broad power under the *Code* to search either with or without

warrants and can also avail themselves of telewarrants. The search power includes the power to seize. Articles seized by a peace officer must be brought to a justice to determine whether the articles can be further detained.

Under the *Fisheries Act*, fishery officers are authorized to search but, in the absence of exigent circumstances, only under a warrant (s. 49.1). Both fishery officers and fishery guardians, however, can seize without a warrant (s. 51). There is no duty on fishery officers and guardians to bring seized articles to a justice to determine continued detention; a separate regime exists (ss. 70-73.2).

Inspectors acting under the *Fisheries Act* are authorized to search under warrant, or without a warrant if there are exigent circumstances, but solely for offences relating to habitat protection (s.38(3.1)). Inspectors are not authorized to search private dwelling-places, even under warrant, and are not authorized to seize.

c) Powers of arrest

Peace officers have a broad power to arrest under the *Code*, either with or without a warrant. Under the *Fisheries Act*, fishery officers, fishery guardians and peace officers have the power to arrest without warrant for offences under the Act and regulations (s. 50). Inspectors have no powers of arrest.

Chapter 4 - Offences

I. Offences

A. Section 40(1) and (2)

Any person who contravenes any one of the following provisions is guilty of an offence punishable on summary conviction or of an indictable offence:

1. Harmful alteration of fish habitat - s.35(1)(2)

Any person who without authorization carries on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat commits an offence.

Case law

- Where the work carried on by an accused resulted in muddy water and siltation in a river, that person was convicted on a charge of harmful alteration of a fish habitat. *R. v. Hodgson* (1985), 4 F.P.R. 251 (N.S. Prov. Ct.)

2. Throwing overboard deleterious substances - s.36(1)

Any person who throws overboard any deleterious substance into any water where fishing is carried on, leaves on any shore or between high and low water mark on a beach the remains or offal of fish or marine animals or leaves any decayed or decaying fish in any fishing apparatus commits an offence.

3. Deposit of deleterious substances - s.36(3)

Any person who without authorization deposits a deleterious substance in any water frequented by fish or in any place where the deleterious substance or any other deleterious substance resulting from the deposit of the deleterious substance may enter such water commits an offence.

Case law

- Section 36(3) is applicable to the provincial Crown. It would not make sense to exempt the Crown from important provisions of the *Fisheries Act* when the plain language of section 3(2) thereof says that the Crown is bound by the Act. (In *obiter dictum*, the summary conviction appeal judge also finds the federal Crown subject to the penal provisions of the Act.) *R. v. British Columbia* (1992), 66 B.C.L.R. (2d) 84, [1992] 4 W.W.R. 490 (S.C.)
- Subsection 36(3) of the Fisheries Act was found, *inter alia*, not to be so vague as to infringe section 7 of the *Charter of Rights and Freedoms*. The Supreme Court of N.W.T. dismissed an appeal against the conviction, entered against the Commissioner of the N.W.T., of unlawfully depositing or permitting the deposit of a deleterious substance (sewage) in water frequented by fish. In this case, the court further delineated the high threshold test for finding a law vague. The impugned legislation was not shown to lack fair notice to the citizen, be it in formal or substantive terms; and it was not shown to create a “standardless sweep” having insufficient limitations on its enforcement. Subsection 36(3) is not unintelligible; as the court ruled it was no less intelligible than the legislation upheld by our highest court in the *Nova Scotia Pharmaceutical Society* case. [1992] 2 S.C.R. 606, 74 C.C.C. (3rd) 289, 15 C.R. (4th) 1, 93 D.L.R. (4th) 36, 10 C.R.R. (2nd) 34, 43 C.P.R. (3rd) 1, 114 N.S.R. (2nd) 91, 31 A.P.R. 91, 139 N.R. 241 and in *R. v. Finta* (1994), 20 C.R.R. (2nd) 1 (S.C.C.). *Her Majesty The Queen v. The Commissioner of the North West Territories* [1994] N.W.T.J. 39 (S.C.N.W.T.).

B. Section 40(3)

The contravention of any one of the following provisions constitutes an offence punishable on summary conviction:

1. Failure to provide material requested by Minister - s.37(1)

Any person, carrying on any undertaking which results or is likely to result in the alteration of fish habitat, who fails to provide material requested by the Minister within a reasonable time after the request is made commits an offence.

2. Failure to provide material required by regulation - s.37(3)

Any person who fails to provide any material that is to be provided under the regulations commits an offence.

3. Failure to make a report - s.38(4)

Any person who owns a deleterious substance or causes or contributes to the causation thereof where there occurs a deposit of the deleterious substance in water frequented by fish and who fails to report such occurrence commits an offence.

4. *Carrying on work contrary to material provided - s.37(1)(2)*

Any person who carries on any work or undertaking otherwise than in accordance with any material provided to the Minister or as required to be modified by the Minister or contrary to any order made by the Minister commits an offence.

5. *Failure to take reasonable measures to prevent a deposit of a deleterious substance - s.38(5)*

Any person who fails to take reasonable measures to prevent the deposit of a deleterious substance in water frequented by fish or to remedy any adverse effects resulting from such a deposit commits an offence.

6. *Failure to comply with direction of inspector - s.38(6)*

Any person who fails to comply with the direction of an inspector to take measures to prevent the deposit of a deleterious substance or to remedy any adverse effects resulting from such a deposit commits an offence.

C. Sections 66 and 69

The following offences are punishable on summary conviction:

1. *Failure to provide fish-way - s.66*

The owner or occupier of an obstruction who refuses or neglects to provide and maintain a fish-way or to install and maintain fish stops or diverters or to provide for a sufficient flow of water is guilty of an offence.

2. *Failure to provide fish guard - s.69*

The owner or occupier of an intake, ditch, channel or canal who refuses or neglects to provide and maintain a fish guard, screen, covering or netting, or refuses or neglects to close a sluice or gate when required to do so is guilty of an offence.

D. General Prohibitions

In addition, the Act contains a number of general prohibitions, including the provisions that no one shall:

1. *Fish in an area leased to another without permission - s.23*

2. *Obstruct the navigation of boats or vessels - s.24*

3. *Place any gear within a fishery during a close time - s.25(1)*

4. *Damage or obstruct any fish-way or canal - s.27(a)*

5. *Kill fish or marine animals, other than those specified, by means of explosive materials - s.28*

6. *Unduly obstruct the passage of fish - s.29(1)*

7. *Destroy fish other than by fishing - s.32*

8. *Purchase, sell or process fish that have been caught in contravention of the Act or regulations - s.33*

E. *Limitation Period - s.82(1)(2)*

Proceedings by way of summary conviction in respect of offences committed under this Act may be commenced within but not later than two years after the Minister became aware of the subject matter of the proceedings. A certificate of the Minister stating the date on which he or she became aware of the subject matter of any proceeding is proof of the matter asserted in it.

Case law

- In interpreting subsection 82(2), which provides for the admissibility of a certificate issued by the Minister stating the date upon which he or she became aware of the subject matter of the proceeding, the court applied a “common sense” approach and noted that the 1991 amendments were designed to strengthen and extend the enforcement capabilities provided for in the Act. Where the matter comes to the Minister’s attention after two years from the date of the offence, the time limit for proceeding can be extended for two years if there is a certificate. *R. v. West Fraser Mills Ltd.* (1994), 13 C.E.L.R. (N.S.) 1 (B.C.C.A.).

II. Defences

A. *Absence of mens rea*

While a presumption exists that *mens rea* is an essential ingredient of all acts that are criminal in the true sense, there exists a wide category of offences created by statutes which are enacted for the regulation of individual conduct in the interests of the public welfare. Such regulatory offences are not subject to the presumption. Included in this category are the offences provided for in the *Fisheries Act* and regulations made under the Act.

Case law

- Where an accused was charged with having in his possession without lawful excuse undersized lobsters, contrary to the *Lobster Fishery Regulations*, it was held that the offence was one of strict liability and that *mens rea* was not required. The regulations were intended for the purpose of protecting lobster beds from depletion and thus conserving the source of supply for an important fishing industry which was of general public interest. It is significant, although not conclusive, to note that the regulations contain no such words as “knowingly”, “wilfully”, “with intent” or “without lawful excuse” whereas such words occur in a number of sections of the *Fisheries Act* which create offences for which *mens rea* is made an essential ingredient. *R. v. Pierce Fisheries Ltd.* (1970), 12 D.L.R. (3d) 591 (S.C.C.)
- Under section 32 [formerly section 30], the offence of destroying fish or fry on spawning grounds is one of absolute liability and no *mens rea* is required to be shown. *R.*

v. *McTaggart* (1972), 6 C.C.C. 258, [1972] 3 W.W.R. 30 (B.C. Co. Ct.)

- The section 36(3) [formerly section 33(2)] offence of depositing a deleterious substance into waters frequented by fish is a strict liability offence and no *mens rea* is required to be shown. *R. v. Churchill Copper Corp.*, [1971] 4 W.W.R. 481 (B.C. Dist. Ct.), aff'd (1971), 5 C.C.C. (2d) 319, [1971] 4 W.W.R. 481 (B.C. Prov. Ct.), aff'd (1972), 8 C.C.C. (2d) 36 (B.C.C.A.)

B. Due diligence - s. 78.6

i) Generally

In 1978, the Supreme Court of Canada, in *R. v. Sault Ste. Marie*, recognized three categories of offences: (1) those in which *mens rea* must be proved; (2) strict liability offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; and (3) offences of absolute liability where it is not open to the accused to exculpate himself or herself by showing that he or she was free of fault. In the case of a strict liability offence, the doing of the prohibited act, *prima facie*, imports the offence, leaving it open to the accused to avoid liability by proving that he or she took all reasonable care. The defence of due diligence will be available to a person who establishes that he or she exercised all due diligence to prevent the commission of a strict liability offence or that he or she reasonably believed in the existence of facts which, if true, would render that person's conduct innocent. The *Fisheries Act*, in section 78.6, provides for the defence of due diligence in respect of the public welfare or regulatory offences created thereby.

Case law

- The defence of due diligence is available to an accused charged with a strict liability offence where the accused reasonably, but mistakenly, believed in a set of facts which, if true, would render the act or omission innocent, or if he or she took all reasonable steps to avoid the particular event. Public welfare offences would, *prima facie*, fall into the category of strict liability offences. Such offences are not subject to the presumption of full *mens rea* and would only fall within the category of offences requiring *mens rea* if such words as "wilfully", "knowingly" or "intentionally" are contained in the statutory provision creating the offence. *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 3 C.R. (3d) 30 (S.C.C.).
- To constitute a defence, all due diligence must be exercised. While not tantamount to absolute liability, more than the care of an ordinary citizen is demanded. In the very least, the care must reflect the diligence of a reasonable professional possessing the expertise suitable to the activity in issue. *R. v. Placer Development Ltd.* (1985), 4 F.P.R. 366 (Yukon Terr. Ct.)
- No one can hide behind commonly accepted standards of care if, in the circumstances, due diligence warrants a higher level of care. A variable standard of care ensures the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each case. The care warranted in each case is principally governed by the gravity of potential harm, the available alternatives, the likelihood of harm, the skill required and the extent to which the accused could control the causal

elements of the offence. *R. v. Gonder* (1982), 62 C.C.C. (2d) 326 (Yukon Terr. Ct.)

- The concept of fault in public welfare or regulatory offences is based on a reasonable care standard and does not imply moral blameworthiness in the same manner as does criminal fault. Negligence is an acceptable basis of liability in the regulatory context. For an offence of strict liability, an accused may disprove negligence by establishing on a preponderance of evidence that he or she acted with due diligence in the circumstances. *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161.

- The objective of protecting society from lobster poachers is a sufficiently important objective for the purposes of section 1 of the *Charter*, so as to justify overriding an accused's right to be presumed innocent. Removing the burden on the Crown to prove illegal possession beyond a reasonable doubt and instead requiring the accused to establish his innocence on a balance of probabilities is one way of attaining the legislative objective. [The accused in this case was charged under section 19 of the *Fisheries Act*, R.S.C. 1985, c. F-14, which has since been repealed.] *R. v. Godin* (1992), 12 C.R. (4th) 212 (N.B.C.A.)

ii) *Protection of fish habitat*

Case law

- The alteration of a fish habitat, contrary to section 35 [formerly section 31(1)], is a strict liability offence to which due diligence is a defence. The accused in this case had no knowledge that a fish habitat had been created by its activities in an industrial area and had no reason to suspect that its use of its property would constitute an offence. Accordingly, it was able to raise the defence of due diligence. *R. v. Richmond Plywood Corp.* (1981), 63 C.C.C. (2d) 99, 3 F.P.R. 129 (B.C. Co. Ct.)

- The combination of inexperience, delay and failure to obtain outside expertise, amounted to a lack of due diligence. The court noted as well the accused's failure to attempt to clean up the river upon first being made aware of the leakage or to seek expert advice on the problem. *R. v. Suncor Inc.* (1985), 4 F.P.R. 409 (Alta. Prov. Ct.)

iii) *Management and control of fisheries*

Case law

- Where the accused contended that they had attempted to fish one mile outside the 200 mile limit but that they had strayed inside due to a navigational error, the court found that they had not exercised due diligence by fishing so close to the line. *R. v. Alvarez (No. 2)* (1990), 81 Nfld. & P.E.I.R. 37, 255 A.P.R. 37 (Nfld. S.C., T.D.)

- The defence of due diligence requires a belief in the stated facts which, if valid, would render the accused innocent. Where the accused believed that his catch exceeded the allowable catch but that it was within the allowable tolerance, he did not have a *bona fide* belief in such stated facts and the defence of due diligence was not available to him. *R. v. d'Entremont* (1989), 93 N.S.R. (2d) 245, 242 A.P.R. 245 (Co. Ct.), *aff'd* (1990), 96 N.S.R. (2d) 176, 253 A.P.R. 176 (C.A.)

- The defence of due diligence requires the holding of a belief resulting from circumstances not arising from the accused's own negligence. Two of the factors blamed for the incorrect estimate as to the quantity of the fish in the accused's possession were within the knowledge of the accused and he was found to have been negligent in not having had in place a method to double-check his estimates. *R. v. d'Entremont* (1989), 93 N.S.R. (2d) 250, 242 A.P.R. 250 (Co. Ct.), aff'd (1990), 96 N.S.R. (2d) 177, 253 A.P.R. 177 (C.A.)
- Where an accused knew that he had drifted into a closed area but believed that he was not fishing in the closed area because he caught the fish outside the closed area, he was found to have been "fishing" in the closed area. His mistake was an error of law that did not give rise to due diligence. *R. v. Denton* (1991), 105 N.S.R. (2d) 357, 284 A.P.R. 357 (App. Div.)
- Where an accused, charged with the offence of overfishing, believed that by entering into a "pooling arrangement" with other fishermen he could increase his authorized catch and that his authorized catch was to be increased by virtue of a transfer of a portion of the total allowable catch from the fixed gear sector to the mobile gear sector, he was found not to have had an honest belief in a set of facts which, if true, would have exculpated him. *R. v. Anderson*, unreported, February 7, 1990, Nfld. C.A.
- Fishing for crab using gear not authorized in the holder's licence, contrary to the *Atlantic Fishery Regulations, 1985*, is a strict liability offence which does not require proof of *mens rea* or negligence. The *Canadian Charter of Rights and Freedoms* has not reduced, diluted or diminished the burden on the accused to establish the defence of due diligence. Where an accused did not examine his licence closely to inform himself of the type of fishing gear he was permitted to use, he was not exercising due diligence. The accused took no steps to avoid his violation of the *Fisheries Act* and regulations and failed to conform to a minimum standard of care. The summary conviction appeal court applied the decision in *R. v. Wholesale Travel Group Inc.* *R. v. Careen*, (1992), 102 Nfld. and P.E.I.R. 132, 323 A.P.R. 132 (Nfld. T.D.)

C. Act of God

The defence of an "act of God" has been held to be available to an accused charged with depositing a deleterious substance.

Case law

- A corporate accused, charged under section 36(3) [formerly section 33(2)] with unlawfully permitting the deposit of a deleterious substance, in this case sediment, was permitted to avail itself of the defence of an "act of God". Evidence was adduced to establish an abnormal amount of rainfall which had rendered useless the accused's precautions. *R. v. Jack Cewe Ltd.* (1975), 23 C.C.C. (2d) 237 (B.C. Co. Ct.); [see also *Byron Creek Collieries Ltd. v. The Queen* (1978), 8 C.E.L.R. 31, 2 F.P.R. 186 (B.C. Co. Ct.)]

D. Defence of Necessity

The defence of necessity has been held to be available to accused persons who were charged with prohibited fishing.

Case law

- Charges of prohibited fishing were dismissed against the accused who, as a result of inclement weather, were unable to retrieve all of their nets by the closure time set by the fishery officer. In the view of the trial judge, “fishing” in the strict sense had ceased long before the closure time and the retrieval of the nets did not derogate from the purposes of the closure time set. The retrieval was necessary and the defence of necessity was available to the accused. *R. v. Pootlass* (1977), 1 C.R. (3d) 378 (B.C. Prov. Ct.)

E. Aboriginal Right To Fish - S. 35(1) Constitution Act, 1982

As was discussed above, section 35(1) recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. That provision has been used as a defence to charges laid against aboriginal people under the *Fisheries Act* and regulations.

i) Conservation and management of fisheries

Case law

- Section 12(1) of the *Ontario Fishery Regulations*, which requires a licence for gill-net fishing and applies to all residents of Ontario, serves a valid conservation purpose and constitutes a reasonable limit on the Indian treaty right to fish. The impugned provision, therefore, does not infringe section 35(1). *R. v. Agawa* (1988), 53 D.L.R. (4th) 101 (Ont. C.A.) [NOTE: leave to appeal to S.C.C. refused (1990), 41 O.A.C. 320n]
- The accused were charged under the *Nova Scotia Fishery Regulations* and the *Atlantic Fishery Regulations*. To the extent that these regulations preclude the accused from exercising their constitutional right to fish, they are of no force and effect. Accordingly, Denny was acquitted on appeal of charges of unlawfully using a net to catch salmon and unlawful possession of salmon. Paul was acquitted of the offence of unlawful possession of cod and Sylliboy was acquitted of fishing with a snare and the unlawful possession of a snare. *R. v. Denny, Paul and Sylliboy*, (1990), 94 N.S.R. (3d) 253, 247 A.P.R. 253, [1990] 2 C.N.L.R. 115 (App. Div.)
- The exercise of an existing aboriginal right to fish may be raised as a defence to a charge of unlawful fishing under the *Fisheries Act*. Where the accused was charged with the offence of fishing with a drift net longer than that permitted by the terms of his band’s Indian food fishing licence, the Supreme Court of Canada referred back to the trial court the constitutional question of whether the net length restriction contained in the licence was inconsistent with section 35(1) of the *Constitution Act, 1982*. *R. v. Sparrow* [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160, aff’g (1986) 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, [1987] 1 C.N.L.R. 145 (C.A.)
- Three accused were acquitted at trial of fishing at a time and in an area not authorized by the *Fisheries Act* or regulations, fishing without a licence and contravening the terms of an Indian food fishing licence. The summary conviction appeal court, setting aside the acquittals, rejected the trial judge’s conclusion that recognition of the aboriginal rights

asserted in this case did not threaten the right and ability of the federal government to manage the fishery in question. The right of aboriginal people to fish to meet their need for food, ceremonial and societal needs, cannot extend to the fishing of any stock no matter how small or how endangered. As there is a valid legislative objective, the infringement is justified. *R. v. Jack*, [1992] 1 C.N.L.R. 122 (S.C.B.C.), rev'g [1991] 1 C.N.L.R. 146 (B.C. Prov. Ct.) [NOTE: appeal to the Court of Appeal for British Columbia was heard on January 16-20, 1995. The court has reserved judgment.]

- An accused was not entitled to rely on his aboriginal right to fish as a defence to a charge of fishing in a closed area where the Court found that the Department of Fisheries and Oceans had complied with its obligation to consult with the Nanaimo Band, to provide compensation for the Band's lost opportunity to fish for chinook salmon and to give meaningful priority to the Band's native fishery. *R. v. Little* (1992), [1993] 1 C.N.L.R. 127 (B.C. Prov. Ct.), aff'd [1993] 3 C.N.L.R. 214 (B.C.S.C.)
- The commercial sale of fish (salmon) was not integral to the organized society of the Upper Sto:lo people and their distinctive culture prior to contact with the Europeans. The practice which was induced and driven by European influences does not qualify for protection and priority as an aboriginal right. Persons of aboriginal ancestry are not precluded from participating in the commercial fishery but they are subject to the same rules as other Canadians who seek a livelihood from that resource. As the accused was not exercising an aboriginal right when selling fish caught under an Indian Food Fish Licence, she was in contravention of the fishing regulations prohibiting such sale. *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, [1993] 5 W.W.R. 459, [1993] 4 C.N.L.R. 221, (sub nom *R. v. Vanderpeet*) 83 C.C.C. (3d) 289, 29 B.C.A.C. 209, 48 W.A.C. 209, rev'g [1991] 3 C.N.L.R. 161, 58 B.C.L.R. (2d) 392 (S.C.) [NOTE: leave to appeal to S.C.C. was granted on March 10, 1994]
- The possession of a large amount of herring spawn for commercial purposes cannot be considered to be in keeping with the aboriginal rights. The traditional aboriginal rights have been preserved as the individual members of the Heiltsuk Band are entitled to Indian food fish licences and the Band itself is authorized under a category "J" licence to harvest herring spawn on kelp and to trade it for commercial purposes. Therefore, the aboriginal right has not been interfered with by the *Pacific Herring Fishery Regulations* and the *British Columbia Fishery (General) Regulations* prohibiting, respectively, the sale of herring spawn not caught under the authority of a category "J" licence and the sale of herring spawn caught under the authority of an Indian food fish licence. *R. v. Gladstone* (1993), 80 B.C.L.R. (2d) 133, [1993] 5 W.W.R. 517, 29 B.C.A.C. 253, 48 W.A.C. 253, [1993] 4 C.N.L.R. 75, aff'g [1991] B.C.W.L.D. 2104 (B.C.S.C.) [NOTE: leave to appeal to S.C.C. was granted on March 10, 1994]
- To allow fish caught under an Indian food fish licence to be sold immediately lifts the operation from that which was originally intended to one of commercial activity with the consequent impact on fisheries management and preservation. By controlling the number of commercial licences issued and the total catch and length of the season, Parliament is legislating in the area of management and control of the fishery, the continued existence of which is necessary for the benefit of all Canadian residents. If fish is to be caught and sold commercially, those who wish to carry out that activity are required to be licensed

accordingly. *R. v. NTC Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158, [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 48 W.A.C. 273, [1993] 4 C.N.L.R. 158 aff'g [1990] B.C.W.L.D. 704 [NOTE: leave to appeal to S.C.C. was granted on March 10, 1994]

F. Authorized Alterations (S. 35)

- A township must exercise its powers by bylaw and not by agreement, as an annexed agreement is *ultra vires* and unenforceable. Although this case is not related to the *Fisheries Act*, the result is nonetheless analogous to ss. 35(2) authorizations. It may be cited against Fisheries and Oceans if the proponent breaches a term in a habitat compensation agreement which does not appear in a ss. 35(2) authorization. *Oro (Township) v. 57487 Ontario Ltd.* 18 O.R. (3rd) p. 676.

III. Penalties

The penalties which currently exist for the commission of offences under the *Fisheries Act* first appeared in S.C. 1991, c. 1. The purpose of the amendment, which increased substantially the fines to be imposed for habitat offences, was to bring the penalties in line with those provided for in the *Canadian Environmental Protection Act*. On the other hand, the penalties for offences with respect to domestic fisheries follow the *Coastal Fisheries Protection Act*.

A. Specific Provisions

a. Subsection 40(1)

A person convicted of the offence of Harmful alteration of fish habitat s.35(1)(2) is liable:

- i) on summary conviction, for a first offence, to a fine not exceeding \$300,000.00 and, for any subsequent offence, to a fine not exceeding \$300,000.00 or to imprisonment for a term not exceeding six months, or to both; or
- ii) in the case of an indictable offence, for a first offence, to a fine not exceeding \$1,000,000.00 and, for any subsequent offence, to a fine not exceeding \$1,000,000.00 or to imprisonment for a term not exceeding three years, or to both.

b. Subsection 40(2)

A person convicted of either of the offences of Throwing overboard deleterious substances s.36(1) Deposit of deleterious substances s.36(3) is liable:

- i) on summary conviction, for a first offence, to a fine not exceeding \$300,000.00 and, for any subsequent offence, to a fine not exceeding \$300,000.00 or to imprisonment for a term not exceeding six months, or to both; or
- ii) in the case of an indictable offence, for a first offence, to a fine not exceeding \$1,000,000.00 and, for any subsequent offence, to a fine not exceeding \$1,000,000.00 or to imprisonment for a term not exceeding three years, or to both.

c. *Subsection 40(3)*

A person convicted of any one of the following enumerated offences:

- Failure to provide material requested by Minister s.37(1)
- Failure to provide material required by regulation s.37(3)
- Failure to make a report s. 38(4)
- Carrying on work contrary to material provided s.37(1)(2)
- Failure to take reasonable measures to prevent a deposit of a deleterious substance s.38(5)
- Failure to comply with direction of inspector s. 38(6)

is liable on summary conviction, for a first offence, to a fine not exceeding \$200,000.00 and, for any subsequent offence, to a fine not exceeding \$200,000.00 or to imprisonment for a term not exceeding six months, or to both.

d. *Injunction under section 41(4)*

Case law

Another tool available to the prosecutor where cooperation is not forthcoming from a person charged under section 40 of the Act is the provision for the commencement and maintenance of proceedings to enjoin anything punishable as an offence under that section. This power has been used to obtain an interim injunction where there was reason to be concerned that an important fish habitat was being irreparably damaged and that an injunction was the only recourse available to ensure that the habitat would be protected until the final disposition of the matter by the court. *Procureur Général du Canada c. Vernon Homes Inc.*, unreported, February 22, 1990, Que. Sup. Ct. [It should be noted, however, that the application for a permanent injunction was subsequently dismissed on the basis that the applicant had failed to establish to the satisfaction of the Superior Court that the area in question constituted fish habitat: unreported, February 18, 1993, Que. Sup. Ct.]

e. *Sections 66 and 69*

A person who commits either of the following offences

Failure to provide fish-way s.66

Failure to provide fish guard s.69

is liable on summary conviction, for a first offence, to a fine not exceeding \$200,000.00 and, for any subsequent offence, to a fine not exceeding \$200,000.00 or to imprisonment for a term not exceeding six months, or to both.

B. *General Provisions*

a. *Where penalty not otherwise provided in the Act - s.78*

Where the punishment has not otherwise been provided in the Act, a person who contravenes the Act or regulations is guilty of:

- i) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding \$100,000.00 and, for any subsequent offence, to a fine not exceeding \$100,000.00 or to imprisonment for a term not exceeding one year, or to both; or
- ii) an indictable offence and liable, for a first offence, to a fine not exceeding \$500,000.00 and, for any subsequent offence, to a fine not exceeding \$500,000.00 or to imprisonment for a term not exceeding two years, or both.

b. Continuing offences - s.78.1

Where the contravention of the Act or regulation is committed or continued on more than one day, it constitutes a separate offence for each day on which the contravention is committed or continued.

c. Offences by corporate officers - s.78.2

Where an offence has been committed by a corporation, an officer, director or agent may be a party to the offence and liable to the punishment provided for the offence, whether or not the corporation has been prosecuted.

d. Offences by employers and licence holders - ss. 78.3 and 78.4

In a prosecution for an offence under the Act, it is sufficient to establish that the offence was committed by the employee or agent of the accused or by a person acting under a lease or licence issued to the accused whether or not the person committing the offence has been identified or prosecuted unless the accused establishes that the offence was committed without his or her knowledge or consent.

Case law

- It has been held that sections 78.3 and 78.4 violate section 11(d) of the *Charter*. At the conclusion of a pre-trial motion, the Provincial Court judge “read down” the impugned provisions so as to require the accused employer or licensee merely to raise a reasonable doubt as to knowledge or consent. *R. v. Knight*, unreported, September 24, 1992, B.C. Prov. Ct. [NOTE: the trial concluded on February 1, 1993]

e. Recovery of costs - s.71.1

In addition to any penalty imposed, the court may order a person convicted of an offence to compensate the Minister for costs incurred in the seizure, storage or disposition of any fish or other thing seized under the Act.

f. Forfeiture of things - s.72(1)

In addition to any punishment imposed, the court may order the forfeiture of anything seized under the Act or the proceeds of the disposition thereof.

Case law

- The reference in subsection 72(1) to ordering forfeiture “in addition to any other penalty imposed” does not require the imposition of a penalty as a condition precedent to jurisdiction to consider forfeiture. In this case, the accused was granted an absolute

discharge after being found guilty of an offence under the *Fisheries Act*. *Cook (Re)* (1986), 16 W.C.B. 493 (S.C.B.C.)

- The Court of Queen’s Bench of New Brunswick, however, has ruled that a licence suspension may be ordered only “in addition to any punishment imposed”. The trial judge was found to have exceeded his jurisdiction in ordering the suspension of a licence without imposing a fine. *R. v. Savoie* (1988), 91 N.B.R. (2d) 261, 232 A.P.R. 261 (Q.B.)

g. Forfeiture of fish - s.72(2)

In addition to any punishment imposed, the court shall order the forfeiture of any fish seized under the Act or the proceeds of the disposition thereof where the conviction is in relation to the fish seized.

h. Forfeiture of fish on acquittal - s.72(3)

Where a person is acquitted in relation to a charge respecting fish seized but it is proved that the fish was caught in contravention of the Act or regulations, the court may order the forfeiture of the fish or the proceeds of the disposition thereof.

i. Forfeiture where ownership not ascertainable - s.72(4)

Where the ownership of any fish or other thing seized cannot be ascertained at the time of seizure, the fish or thing is forfeited.

j. Additional fine - s.79

Where it is satisfied that the person convicted of an offence acquired monetary benefits as a result of the commission of the offence, the court may order an additional fine in the amount of the monetary benefits.

k. Cancellation or suspension of lease or licence - s.79.1

Where the conviction is in respect of any matter relating to any operations under a lease or licence the court may order in addition to any punishment imposed the cancellation or suspension of the lease or licence and may prohibit the person from applying for a new lease or licence.

Case law

- Section 6(1)(e) of the *Pacific Fishery Regulations*, which empowers the Minister to specify “any other terms and conditions” in a commercial fishing licence, has been held to be *ultra vires*. In the opinion of Rouleau J., the condition that requires compliance with the *Fisheries Act* and regulations appears to be in the nature of a legislative act, the effect of which is the creation and promulgation of a general rule of conduct. Therefore, suspension of a commercial fishing licence under section 7 of the regulations is not available as a remedy. *Mark v. Canada (Minister of Fisheries and Oceans)* (1991), 52 F.T.R. 208 (F.C.T.D.)

- Section 6(1)(e) was also declared to be *ultra vires* in a decision of the Court of Appeal for British Columbia. That Court held that the impugned provision constitutes an

outright and explicit subdelegation of the power given by the *Fisheries Act* to the Governor in Council. *R. v. Roach* and *R. v. Mark*, unreported, March 22, 1991, B.C.C.A.

l. Additional penalties - s.79.2

The court may order in addition to any other punishment imposed:

- i) prohibition
- ii) direction to take remedial or preventive action
- iii) direction to publish the facts relating to the commission of the offence
- iv) direction to pay costs of remedial or preventive action taken by the Minister
- v) direction to perform community service
- vi) direction to pay amount of money for purpose of promoting proper management and control of fish habitat or fisheries or of the conservation and protection of fish or fish habitat
- vii) direction to post bond or make payment into court
- viii) direction to submit information respecting his or her activities
- ix) requiring compliance with other conditions considered appropriate by the court

The contravention of an order made under this section will, by virtue of section 79.6, constitute an offence punishable on summary conviction or an indictable offence, the punishment for which cannot exceed the maximum punishment to which the person is liable on conviction for the original offence.

m. Suspended sentence - s.79.3

Where a person is convicted of an offence under the Act and the court suspends the passing of sentence pursuant to paragraph 737(1)(a) of the *Criminal Code*, the court may, in addition to any probation order, make an order directing the person to comply with any prohibition, direction or requirement mentioned in section 79.2 of the Act. The contravention of any such order constitutes an offence punishable on summary conviction or an indictable offence, the punishment for which cannot exceed the maximum punishment to which the person is liable on conviction for the original offence (s.79.6).

n. Cancellation of licence - s.9

Moreover, the Minister of Fisheries and Oceans is authorized by the Act to suspend or cancel any lease or licence issued under the Act where operations under the lease or licence were not conducted in conformity with its provisions and proceedings with respect to such operations have not been commenced.

Case law

- See: *Mark v. Canada (Minister of Fisheries and Oceans)* (1991), 52 F.T.R. 108 (F.C.T.D.) [referred to above in section “k” with respect to section 79.1 of the Act]

IV. Ticketable Offences - S.79.7

In addition to the procedures set out in the *Criminal Code* for commencing any proceeding, proceedings in respect of any offence prescribed by regulation made pursuant to subsection (5) may be commenced by a ticket issued by a fishery officer, fishery guardian or fish habitat inspector. The accused may elect to pay the prescribed fine within the time period set out in the ticket, in which case a conviction will be entered. Where the accused wishes to plead not guilty or fails to pay the fine within the stipulated time, the accused must appear in court at the time set out in the ticket. Where any fish or other thing is seized under the Act, the officer, guardian or inspector must give written notice to the accused that, if he or she pays the fine within the prescribed time, the fish or thing seized, or any proceeds realized from its disposition, will be forfeited. The maximum amount of the fine for any offence to which this section applies cannot exceed \$1,000.00.

V. Evidentiary Provisions

A. Certificate of analyst - s.38(11)(12)(13)

A certificate purporting to be signed by an analyst, designated under section 38(1), stating that he or she has analyzed a substance or product and that the result of the analysis is admissible in evidence in a prosecution for an offence under subsection 40(2) or (3) without proof of the signature of the person appearing to have signed the certificate and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate. A party against whom a certificate is produced may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination. The party against whom the certificate is produced must be given reasonable notice.

B. Proceedings under subsections 40(2) and (3) - s.5

For the purposes of such proceedings, a “deposit” takes place whether or not any act or omission resulting in the deposit is intentional. No water is “frequented by fish” where it is established that, at all material times, the water was not and was not likely to be frequented by fish.

C. Proof of licence - s.78.5

Where a question arises as to whether an accused person was issued a licence, the burden is on the accused to establish that the licence was issued.

D. Minister’s certificate - s.82(2)

In any summary conviction proceeding, a document purporting to have been issued by the Minister, certifying the date on which he or she became aware of the subject matter of the proceeding is admissible in evidence without proof of signature of the person appearing to have signed the document and, in the absence of evidence to the contrary, is proof of the matter asserted in it.

E. Information returns

Case law

- On a charge under section 61 of failing to file a true return, a log record, being the return, is admissible in evidence without the necessity of holding a *voir dire*. When a log record is used to incriminate an accused, any *voir dire* conducted should not involve the issue of voluntariness but should be restricted to such issues as whether the record was the product of an operating mind or was inadmissible for some reason not connected to its involuntary nature. *R. v. McCaul* (1989), 90 N.S.R. (2d) 426 (App. Div.), rev'g 87 N.S.R. (2d) 344 and 361.
- The Court of Appeal for British Columbia, however, has held that a licence condition in relation to log books is not justifiable under either paragraph (d) or (e) of the *Pacific Fisheries Regulations, 1984*. The power to make a licence condition cannot be extended to the imposition of a legal requirement in the licence compelling the submitting of catch and fishing data. It can only cover the form and manner of making the submission of the data required by some other regulatory authority. *R. v. Mark*, unreported, March 22, 1991, B.C.C.A. [See also: *R. v. Mark Fishing Company*, February 28, 1990, B.C. Co. Ct., which held that to permit the Crown to enter in evidence a “voluntary” log book, maintained by fishermen before log books became mandatory, would be an abuse of process.]
- The purpose of paragraphs 61 (a) to (i) is to deal with the regulations, protection, and preservation of fisheries generally as national and general concerns and, among other things, to prevent fish from being taken in improper seasons and improper manner with destructive instruments. *R. v. Douglas*, unreported, December 6, 1991, (B.C. Prov. Ct.).

F. Informations

Case law

- Where an information charging an accused with offences under the *Fisheries Act* and *Atlantic Fishery Regulations* failed to comply with section 841(3) of the *Criminal Code*, that failure did not result in the information being a nullity. On the face of the English side of the pre-printed form, the following notation was printed in French: “Une traduction en français des détails de ce document peut être obtenue sur demand [*sic*]”. A similar notation appears in English on the French side of the form. The summary conviction appeal court held that the defect was one of form and not substance. Section 841(3) provides that any pre-printed portions of a form set out in that part of the *Code* varied to suit the case or of a form to the like effect shall be printed in both official languages. *R. v. Robinson*, unreported, September 18, 1992, S.C.N.S. (App. Div.); see also *R. v. Goodine* (1992), 112 N.S.R. (2d) 1 (App. Div.)

Chapter 5 - The Charter and its Implications in Fisheries Matters

The *Canadian Charter of Rights and Freedoms* has the potential of reducing flexibility in the administration and enforcement of fisheries laws, thereby affecting the management and control process. The courts have ruled on a number of *Charter* issues, including those relating to the requirement to file statistical returns, investigative procedures of fishery officers, inspections, search and seizure provisions and various regulations.

A. Section 2 - Fundamental Freedoms Versus Broad Administrative Discretion

One potential *Charter* constraint lies in the possible conflict between the fundamental freedoms protected by section 2 and broad delegation of administrative discretion. Discretion in law is never absolute but is subject to legal limitations, including the requirements that discretion be exercised reasonably, in good faith, taking into account only relevant considerations, and that the decision not be arbitrary or capricious. As was noted by Lamer J. (as he then was) in his minority judgment in *Slaight Communication Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.), which case dealt with discretionary delegation to an arbitrator under the *Canada Labour Code*, “an administrative tribunal may not exceed the jurisdiction it has by statute; it must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication”.

Case law

- A provision of the *Seal Protection Regulations*, prohibiting any person from approaching within one half of a nautical mile of a seal hunt without a licence, was found to violate the freedom of expression guaranteed by paragraph 2(b) of the *Charter* since it prevented the attendance at the hunt in all circumstances of the members of an animal rights group. The Court stated that the “permit procedure set up by the Regulations is official discretion at large, with no specified standards at all, not even verbal formulations of them. Limits on the freedom of expression cannot be left to official whim but must be articulated as precisely as the subject matter allows.” *International Fund for Animal Welfare Inc. v. Canada (Minister of Fisheries and Oceans)* (1988), 83 N.R. 303, 19 F.T.R. 159 (F.C.A.), rev’g in part (1986), 5 F.T.R. 193, [1987] 1 F.C. 244 (F.C.T.D.)

B. Section 6(2)(B) - Mobility Rights

Every Canadian citizen and permanent resident has the right to pursue the gaining of a livelihood in any province of Canada.

Case law

- The federal government’s Sector Management Plan, which restricts the areas in which an individual may fish, does not violate the mobility rights granted under section 6(2)(b). The geographical restrictions apply to all fishermen and are not based on residence but on where, historically, fishermen have fished. *MacKinnon v. Canada (Department of Fisheries and Oceans)* (1986), 6 F.T.R. 203, 26 C.R.R. 233, [1987] 1 F.C. 490 (F.C.T.D.)

C. Section 7 - Life, Liberty And Security Of The Person

No one may be deprived of the right to life, liberty and security of the person except in accordance with the principles of fundamental justice.

Case law

- Where a lengthy investigation resulted in charges of unauthorized entry and unauthorized fishing within Canada's two hundred mile fishing zone being laid against the captains of Spanish fishing trawlers eleven months after the alleged offence, the court ruled that the Crown's failure to give immediate notice of possible prosecution was not a breach of fundamental principles of justice protected under section 7. There is no requirement of notice of intended prosecution known to Canadian law. *R. v. Alegria* (1987), 67 Nfld. and P.E.I.R. 256, 206 A.P.R. 256 (Nfld. S.C., T.D.), aff'd April 3, 1992 (Nfld. C.A.) [NOTE: application for leave to appeal to S.C.C. dismissed on September 3, 1992]
- A condition of a commercial fishing licence issued under the *Fisheries Act*, (currently section 51), requiring the licence to be operated by an Indian, does not violate section 7 as the public right of fishing in tidal waters does not fall within the rights protected by the phrase "...life, liberty and security of the person". *R. v. Youngman* (1987), 22 B.C.L.R. (2d) 14, [1988] 3 C.N.L.R. 135 (Co. Ct.)
- The requirement to file a true return is for the purpose of gathering information. It is not designed to gather incriminating evidence as part of a criminal investigation and does not constitute a breach of an accused's rights under section 7. *R. v. Douglas*, unreported, December 6, 1991 (B.C. Prov. Ct.).
- Information obtained by statutory compulsion in the administration of a regulatory scheme is admissible in a prosecution for a violation of that scheme. The admission of the written log book and the oral "hail" report did not breach the accused's rights under the *Charter*. *R. v. Fitzpatrick* (1994), 90 C.C.C. (3rd) 161, 32 C.R. (4th) 343, 46 B.C.A.C. 81, 75 W.A.C. 81, 22 C.R.R. (2nd) 289, [1994] B.C.W.L.D. (B.C.C.A.) [NOTE: Leave to appeal to the Supreme Court of Canada was granted on March 22, 1994.].

D. Section 8 - Unreasonable Search And Seizure

Everyone has the right to be secure against unreasonable search or seizure.

Case law

- Where fishery officers seized fishing nets at several different locations, the seizure provisions of the *Fisheries Act* were held not to violate section 8. While ordinarily a precondition of governmental intrusion upon an individual's reasonable expectation of privacy must be prior authorization, there are circumstances where it would not be reasonable to insist on such prior authorization. It would be utterly impractical to require fishery officers who decide on reasonable grounds that there has been a contravention of the Act or regulations to obtain a search warrant or authorization prior to making a seizure such as occurred in this case. *Re Milton and the Queen* (1986), 37 D.L.R. (4th)

694 (B.C.C.A.)

- The seizure of the accused's net and fish did not violate section 8 of the *Charter* as the *Fisheries Act* expressly authorizes the seizure of such material where it has been used in connection with the commission of an offence against the Act and regulations. *R. v. Youngman* (1987), 22 B.C.L.R. (2d) 14, [1988] 3 C.N.L.R. 135 (Co. Ct.)
- The power to enter without a warrant and inspect any place other than a dwelling house under the Act does not violate the right against unreasonable search and seizure. *R. v. Hackett* (1988), 67 Nfld. and P.E.I.R. 353, 206 A.P.R. 353 (P.E.I. Prov. Ct.)
- Inspections may be conducted without warrant under section 49 of the *Fisheries Act* even where the fishery officer suspects the individual of wrong-doing but does not have the reasonable grounds necessary to obtain a search warrant under section 49.1. *R. v. Kent* (1991), 102 N.S.R. (2d) 181, 279 A.P.R. 181 (Co. Ct.), aff'd (1991), 109 N.S.R. (2d) 335, N.S.S.C., App. Div. [see also: *R. v. Sable Fish Packers (1988) Limited*, unreported, May 30, 1991, N.S. Co. Ct. and *R. v. German* (1991), 104 N.S.R. (2d) 298, 283 A.P.R. 298 (Co. Ct.); but see *R. v. Boudreau* (1991), 118 N.B.R. (2d) 181 (Q.B.), which held that the authority of fishery officers to inspect is contingent upon them having reasonable grounds to believe that there is, in a place, fish or fishing equipment.]

E. Section 9 - Arbitrary Detention

Everyone has the right not to be arbitrarily detained or imprisoned.

Case law

- Where fishery officers stop vehicles at a road block to enforce catch limits, there is an arbitrary detention if the officers do not have reasonable grounds to believe that there is any fish or fishing equipment in the vehicles prior to stopping them. *R. v. Brown* (1990), 89 Sask. R. (Q.B.)

F. Section 10(B) - Right To Counsel

On arrest or detention, everyone has the right to retain and instruct counsel without delay and to be informed of that right.

Case law

- A fishing captain is not detained within the meaning of section 10 where he is requested under the *Fisheries Act* by a fishery officer to submit a true return on the quantity of fish caught. *R. v. Sproule* (1988), 84 N.S.R. (2d) 353 (C.A.), aff'g (1987), 81 N.S.R. (2d) 308 (Co. Ct.): see also *R. v. Gough* (1985), 48 C.R. (3d) 276 (N.S.C.A.)
- Where, during an inspection, fishery officers develop reasonable grounds to believe an offence has been committed and then summon a fisherman to their vessel to accompany them in completing their search, a detention of the fisherman results within the meaning of paragraph 10(b). *R. v. Hackett* (1988), 67 Nfld. and P.E.I.R. 353, 206 A.P.R. 353 (P.E.I. Prov. Ct.)

G. Section 11(A) And (B) - Right To Be Tried Within A Reasonable Time

A person who has been charged with an offence has the right to be informed of the specific offence without unreasonable delay and to be tried within a reasonable time.

Case law

- Two Spanish trawlers were observed by surveillance aircraft allegedly violating Canadian fisheries laws but could not be boarded. Following a one year investigation, an information was laid and arrest warrants were issued. The accused were not arrested until they returned to Canadian waters two years later. The Court held that, in these circumstances, there is no violation of either the right to be informed without unreasonable delay of a specific offence charged or the right to be tried within a reasonable time as provided in section 11. *R. v. Alvarez* (1989), 76 Nfld. and P.E.I.R. 76, 235 A.P.R. 76, 43 C.R.R. 75 (Nfld. S.C.)

H. Sections 11(C) And 13 - Self-Incrimination

By virtue of section 11(c), a person who has been charged with an offence may not be compelled to testify against himself or herself with respect to that offence. Under section 13, a witness who testifies in a proceeding has the right not to have any incriminating evidence given in that proceeding used against him or her in any other proceeding, except in a prosecution for perjury or for the giving of contradictory evidence.

Case law

- Sections 11(c) and 13 of the *Charter* relate to testimonial matters only and have no application to a request for a true return under the *Fisheries Act*. *R. v. McCaul* (1989), 90 N.S.R. (2d) 426 (App. Div.), rev'g 87 N.S.R. (2d) 344 and 361.

I. Section 11(D): Presumption Of Innocence

Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Case law

- It has been held that sections 78.3 and 78.4 of the *Fisheries Act* violate section 11(d) of the *Charter*. The impugned sections provide that it is sufficient proof of an offence under the Act to establish that an employee or agent of the accused or a person acting under the authority of the accused's licence committed the offence whether or not the accused had knowledge of the offence or consented to it. The trial judge "read down" the impugned provisions so as to require the accused employer or licensee merely to raise a reasonable doubt as to knowledge or consent. *R. v. Knight*, unreported, September 24, 1992, B.C. Prov. Ct.

J. Section 12: Cruel Or Unusual Treatment Or Punishment

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Case law

- The increase of a maximum fine pursuant to the *Fisheries Act*, was not held to constitute cruel and unusual punishment as set out in s. 12 of the *Charter*, but instead provides a clear indication of the seriousness with which Parliament regards the need to decrease illegal fishing in the east coast of Canada. *R. v. Morash* (1993), 124 N.S.R. (2d) 241, 345 A.P.R. 241 (S.C.), aff'd (1994), 129 N.S.R. (2d) 34, 345 A.P.R. 34 (C.A.)

K. Section 15: Equality Before The Law

Every individual is equal before the law and entitled to equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Case law

- Permitting certain fishers to fish in one area while refusing the same right to others from another area, does not constitute discrimination within the meaning of section 15 of the *Charter*. The court declared that to conclude otherwise would be to divert the word “discrimination” of any real meaning, and would lead to the failure of the entire Gear Sector Management approach. *R. v. Morash* (1993), 124 N.S.R. (2nd) 241, 345 A.P.R. 241 (S.C.) aff’d. (1994), 129 N.S.R. (2d) 34, 345 A.P.R. 34 (C.A.)
- Legislation enacted by Parliament to achieve a valid federal objective, and regulations made pursuant to such legislation, do not infringe section 15 merely because the legislation or regulations are not applicable everywhere in Canada. Section 15 does not require that every person in every instance be treated in precisely the same manner; nor does it prescribe regional uniformity as a constitutional requisite. Provincially-based distinctions are not in and of themselves violative of the equality standards set by that section. If the federal regulations in effect in another province permit fishing by means prohibited in Ontario without a licence any resulting inequality of treatment between members of classes similarly situated cannot objectively be characterized as pejorative or invidious or as “discriminatory” in the sense that term is intended in section 15. The *Ontario Fishery Regulations*, which are not arbitrary or capricious in their effect and which are not based on any purpose or motive offensive to the *Charter*, do not infringe section 15. *R. v. Goulais*, [1988] 3 C.N.L.R. 125, 30 O.A.C. 5 (Ont. C.A.)
- Subsections 90(1) and (2) of the *Atlantic Fisheries Regulations, 1985*, which have the effect of permitting gillnetters from Shelburne County to fish in waters within Canadian jurisdiction that are not available to any other gill net fishers, do not constitute discrimination within the meaning of section 15. The defendants are not historically, socially or politically disadvantaged in Canadian society. Rather, they are licensed commercial fishers who, as a result, enjoy the benefits of certain exclusive rights not available to other Canadians. The fact that these exclusive rights granted by licence do not extend into the area in dispute because of the residency of the defendants may be unfair but it is not discrimination within the meaning of section 15. *R. v. MacLeod*, unreported decision, July 2, 1992, N.S. Prov. Ct.
- The automatic forfeiture provisions of the Newfoundland *Wildlife Act* do not violate section 15 as the provision does not discriminate on grounds related to any personal characteristics of any individual or group. *R. v. Brown* (1991), 92 Nfld. and P.E.I.R. 1 (Nfld. C.A.)
- It should be noted, however, that the Supreme Court of Canada has left open the possibility of a case-by-case analysis in determining whether province-based distinctions which arise from the application of federal law contravene section 15(1). *R. v. S.(S.)*, [1990] 2 S.C.R. 254 at 289.

Chapter 6 - Sentencing

The current penalties for offences under the *Fisheries Act* and regulations came into force on January 17, 1991. As a result, there is very little guidance provided by the case law

for determining the appropriate sentence in respect of a fish habitat or fisheries offence. A review of the earlier jurisprudence may be of some assistance in determining what factors will be considered by the sentencing judge and the weight which will be attributed to such factors.

A. Sentencing Factors In Habitat Cases

Sentencing by its very nature is dependent on the particular circumstances of each case. A review of fish habitat and pollution cases indicates that the courts take into account, as appropriate, the following circumstances:

- deterrence is of paramount consideration - this may be specific deterrence of the offender or general deterrence of the population
- the nature of the habitat affected - is it a unique ecological system? - did actual harm result or merely the potential for harm? - what was the extent of the injury?
- the criminality of the conduct - was the offender aware of the offence and did he or she do anything to abate or rectify the problem? - to what degree was the offence planned and deliberate? - does the offender have a previous record?
- is there evidence of diligent attempts to comply with the law?
- what was the offender's attitude after the commission of the offence? - was there remorse? - did the offender plead guilty?
- the size and wealth of a corporate offender - were profits or savings realized as a consequence of the offence?
- a sentence should be a punishment, not a licence fee to pollute - the gravity of the offence should be linked to the maximum penalty but there should also be consistency with sentences imposed on other offenders for similar offences committed in similar circumstances
- where there is more than one charge against the offender, the totality principle requires that the total sentence not be unreasonable
- maximum fines are reserved for the worst possible cases
- whether the court makes a remedial order under the *Fisheries Act*

For a discussion of the various factors to be considered in determining the sentence to be imposed in respect of a fish habitat or pollution offence please see: *R. v. F.M.C. of Canada Ltd.* (1985), 4 F.P.R. 216 (B.C. Co. Ct.)

1) Section 35(1) offences

The offence of harmful alteration, disruption or destruction of fish habitat was first introduced in the *Fisheries Act* in 1977. The fine at that time was set at a maximum of \$5,000.00 for a first offence and \$10,000.00 for subsequent offences on summary conviction.

Case law

- Where a corporate defendant pleaded guilty to a summary conviction charge committed in relation to its logging operations in a remote area and the court concluded that the only possible reason for the company's actions was its desire to make a profit, the company was fined \$4,000.00. The court considered the effect of the offence on future generations and noted that a near maximum fine was in order as a deterrent. *R. v. British Columbia Forest Products Ltd.* (1981), 3 F.P.R. 166 (B.C. Prov. Ct.)
- A developer who was convicted with respect to severe damage done to a creek adjacent to its development project was given the maximum fine on summary conviction of \$5,000.00. The court noted that the recovery of the creek would be long term, if at all. The court went on to stress that the primary consideration in sentencing in such offences is deterrence. (This fine was imposed in addition to a \$10,000.00 fine in respect of each of three counts of depositing a deleterious substance.) *R. v. Goodland Developments Ltd.* (1986), 4 F.P.R. 225 (B.C. Prov. Ct.)
- A company with a previous conviction less than two years earlier was fined \$7,500.00. The court was influenced by a breakdown in communication within the company as to what its employees should do to correct the mistakes that led to the charge. *R. v. Downie Street Sawmills Ltd.* (1981), 3 F.P.R. 318 (B.C. Prov. Ct.)

2) *Section 36(3) offences*

The offence of depositing a deleterious substance into water frequented by fish has existed since the *Fisheries Act* was first introduced in 1868. Between 1977 and 1988, fines generally ranged from \$2,000.00 to \$10,000.00. The case law indicates that even prior to the 1991 amendments the courts had begun to levy higher fines. Where repeat offenders were involved, the courts appeared willing to increase fines, but not substantially where the offender had spent money on environmental control between offences.

Case law

- Where a company was convicted on six counts in relation to discharge of toxic fly ash in 1979 although a fishery officer had pointed out the discharge to the company's employees and had requested that remedial action be taken, the company, which had a previous conviction, was fined \$20,000.00 per count. *R. v. Canadian Forest Products Ltd.* (1980), 3 F.P.R. 63 (B.C. Prov. Ct.)
- In 1981, the same company was charged after it deposited 40,000 gallons of black liqueur into a sewer in an emergency situation. Over the years, the company had been spending considerable money on environmental improvements. The court fined the company \$25,000.00 as a "token deterrence" as it believed that the company was reacting positively to the charges laid against it. The court considered the \$100,000.00 maximum fine for subsequent offences "irrelevant to the amount they [were] spending". *R. v. Canadian Forest Products Ltd.* (1981), 3 F.P.R. 162 (B.C. Prov. Ct.)
- The company contravened ss. 36(3) of the *Fisheries Act* by depositing iron sulphate

and heavy metals in the St-Lawrence River over several years. The company was fined \$1 million, and ordered to deposit an additional \$3 million in the fish habitat programme pursuant to paragraph 79.2 (f) of the *Fisheries Act*. *R. v. Tioxide Canada Inc.* (1993) A.Q. n° 852 (Cour du Québec).

3. *Section 79.2(b) orders*

An important sentencing tool for offences under both sections 35(1) and 36(3) is the court's power to make remedial orders under the current section 79.2(b) of the Act. Such orders have been made in the past.

Case law

- A company which was convicted of spilling 10,000 gallons of diesel fuel was fined \$1.00 and ordered to prepare, in cooperation with the Department of the Environment, a manual covering common environmental problems encountered in northern inland mineral exploration. The court noted that the work required by the order would be far more costly to the corporate offender than would any fine imposed under the Act and that the public would derive greater benefit from the completion of the order than from any other punishment imposed. *R. v. Placer Development Ltd.* (1985), 4 F.P.R. 366 (Yukon Terr. Ct.)
- Where charges resulted from a breakdown in communications within a company as to how to correct its mistakes, the court levied a \$7,500.00 fine, and, in addition, ordered the company to develop and implement a training programme for its supervisors, employees and contractors working in fish habitat areas. The programme was to emphasize the importance of protecting water quality and to outline the requirements of the *Fisheries Act*. *R. v. Downie Street Sawmills Ltd.* (1981), 3 F.P.R. 318 (B.C. Prov. Ct.)
- A company was fined \$2,500.00 on conviction on each of two counts involving a spill of fuel oil when its tractor-tanker units overturned on winter roads. In addition to the fine, the court ordered that the company properly equip its tankers and train personnel to deal with environmental mishaps. The court further ordered that a corporate officer be designated as an on-scene commander for future spills and that other employees be appointed to form an environmental response team. *R. v. Robinson's Trucking Ltd.*, [1985] N.W.T.R. 21, 4 F.P.R. 399 (Terr. Ct.)
- A food processing business was fined \$4,000.00 and ordered to establish a waste management system when convicted of spilling two million litres of waste water lethal to fish. The court observed the absence of a previous criminal record and a lack of evidence of criminality of conduct on the part of the accused. *R. v. Oxford Frozen Foods Ltd.* (1989), 91 N.S.R. (2d) 334, 233 A.P.R. 334, 5 C.E.L.R. (N.S.) 37 (Co. Ct.)
- A corporation was convicted of spilling oil into Rankin Inlet. In addition to a fine of \$15,000.00, the trial court ordered that the Chief Executive Officer and the Directors apologize publicly for the corporation's negligence in two Northwest Territories newspapers. On appeal, however, the court ruled that the public apology was a punishment, and as such was not authorized by the opening words of section 41(2). [That

provision has since been repealed. Instead, the court may, pursuant to section 79.2, direct the offender to publish the facts relating to the commission of the offence.] *R. v. Northwest Territories Power Corporation* (1990), 5 C.E.L.R. (N.S.) 67 (N.W.T.S.C.), rev'g (1989), 5 C.E.L.R. (N.S.) 57 (N.W.T. Terr. Ct.)

- Occasionally, the Crown and the offender will agree to remedial action being taken between the time of the offence and the date of sentencing. A corporation spilled cyanide into a river which resulted in an extensive kill of Atlantic salmon. Prior to sentencing, the company and the Department of Fisheries and Oceans entered into a restocking agreement for the river. The court commented favourably on the agreement and fined the corporation \$10,000.00. Since it is doubtful that even the maximum fine of \$50,000.00 for a first offence would have covered the cost of restoring salmon stocks, the agreement represents a positive approach to pre-sentencing cooperation between the Crown and defendants. *R. v. Hope Brook Gold Inc.* (1990) (Nfld. Prov. Ct.)

The additional sentencing powers granted to the courts by the 1991 amendments were drawn from the *Canadian Environmental Protection Act*, enacted in 1988. One early case under that Act indicates that the courts will use the new powers.

- In addition to a \$1,000.00 fine, a company convicted of ocean dumping of dredgeate was ordered to provide \$14,000.00 over a two year period to be dedicated to the use of the Alberni Valley Enhancement Society to assist in restoration of coho salmon stocks. *R. v. MacMillan Bloedel Ltd.* (1990) (B.C. Prov. Ct.)

The same factors have been examined by courts imposing sentences in respect of convictions for offences under provincial environmental legislation. There, too, the courts have attempted to devise innovative methods of sanctioning corporations so as to achieve the greatest benefit to the public, while reflecting the gravity of the particular offence and promoting compliance with the law. The following are recent examples of sentences imposed under Ontario legislation.

Case law

- A corporate accused and its principal each pleaded guilty to one count of discharging contaminants likely to cause an adverse effect, contrary to the *Environmental Protection Act*. They had caused the emission of air contaminants by surreptitiously burning the insulation off copper wires following a warning by the Ministry of the Environment to cease the practice. In addition to a fine of \$10,000.00, the company agreed to pay a further \$20,000.00 representing profits made from the sale of wire from which the insulation had been removed. *R. v. Karten Metals (1975) Ltd.*, unreported, June 6, 1991, Ont. Prov. Off. Ct.
- A company was fined a total of \$30,000.00 for discharging liquid industrial waste. At sentencing, the Crown led evidence as to the cost of the lawful disposal of such waste. The court increased the fine which it would otherwise have imposed by \$16,000.00 in order to recapture the costs saved by the accused. *R. v. Phoenix Powder Coating Inc.*, unreported, August 13, 1991, Ont. Prov. Div.
- A corporate accused, convicted under the *Ontario Water Resources Act* of causing a

discharge of liquid industrial waste, was fined \$60,000.00 and, additionally, ordered to pay \$60,000.00 to a waste management board to assist in the funding of a reducereturn strategy for household hazardous waste. Two corporate directors were each fined \$12,000.00. The company was ordered to publish in its newsletter the facts of the conviction, the names of the responsible directors, the details of the penalties and the terms of probation. The accused was also required to prepare and circulate a Technical Advisory Circular on the subject of toxic waste and to place a caution on the affected land to warn future purchasers of the environmental damage caused. As well, it was ordered that environmental issues be placed on the agenda of every meeting of the board of directors during the term of the order. Furthermore, the company was prohibited from indemnifying the directors for the fines imposed upon them. *R. v. Bata Industries Ltd.* (1992), 70 C.C.C. (3d) 394, 7 C.E.L.R. (N.S.) 245 (Ont. Prov. Div.)

B. Sentencing Factors In Fisheries Cases

The factors to be considered in determining an appropriate sentence for a fisheries offence are not as easily discerned from the case law. The penalties to be imposed in respect of such offences are not specifically stated in the legislation and resort must be had to the general penalty provision in section 78. Prior to the 1991 amendments, the maximum fine for most summary conviction offences was \$5,000.00. Additionally, the court could impose a term of imprisonment not exceeding twelve months and it could order forfeiture. In a 1990 decision, the County Court of Nova Scotia discussed in some detail the approach to be taken in imposing sentence.

Case law

- Sanctions are necessary to induce compliance with public welfare legislation. Since violations are widespread, sentences must emphasize deterrence. Moreover, general deterrence must be achieved by other sanctions in addition to a fine. Forfeiture of the illegal catch does not provide a strong deterrent while, on the other hand, the forfeiture of vessels, vehicles or equipment may be seen as inappropriate or too harsh. The appropriate sanction in most cases would appear to be a fine reflecting the value of the seized catch, as a measure of the magnitude of the offence, together with suspension or cancellation of licences. Where the accused had no licence and suspension was therefore unavailable, the summary conviction appeal court increased the fine imposed at trial from \$1,000.00 to \$4,000.00 and confirmed the forfeiture of the catch valued at \$3,022.25. The appeal court noted in this case that the offence amounted to a “wilful and deliberate act of poaching an internationally managed species of fish inspired by the high prices available”. *R. v. Ross* (1990), 96 N.S.R. (2d) 444, 253 A.P.R. 444 (Co. Ct.)

There is one recent decision of a summary conviction appeal court which discusses sentencing principles and the appropriateness of the sentence where the offence occurred subsequent to the 1991 amendments.

Case law

- An accused who pleaded guilty to a charge of fishing for salmon using a net without a licence issued pursuant to section 20(1.1) of the *Nova Scotia Fishery Regulations* was fined \$5,000.00. The trial judge further ordered the forfeiture of the salmon which had

been seized and of two wire traps. The accused was also prohibited from engaging in recreational fishing for salmon for one year. A co-accused, who was found guilty of unlawful possession of salmon, contrary to section 20.4 of the regulations, was fined \$3,000.00 and prohibited from fishing recreationally for salmon for a period of one year. The appeal judge, in concluding that the sentences imposed were grossly inadequate and that the trial judge had underemphasized the principle of deterrence, imposed a fine of \$10,000.00 on each of the accused, confirmed the forfeiture order and increased to two years the recreational fishing bans. *R. v. Grandy* (1992), 113 N.S.R. (2d) 85, 309 A.P.R. 85 (Co. Ct.)

In the *Grandy* decision, the summary conviction appeal judge stated that Oxner P.C.J., in imposing sentence, was not entitled to take “judicial notice” of a dismal economic situation faced by the fishing community and the province as a whole. Palmeter C.J.C.C. observed that Parliament increased the maximum penalties available under the *Fisheries Act* for summary conviction offences in response to the serious depletion in the fishery resources. In his view, “in the context of regulatory offences in general and particularly relating to offences under the *Fisheries Act* and regulations, ... general deterrence is the paramount and overriding principle to be considered in imposing sentence”. Remarking that “[a] fine has to reflect the seriousness of the offence”, he went on to list the following seven “exacerbating factors” suggested by Crown counsel which would justify substantially greater penalties than those imposed at trial:

- (1) the type of fish taken;
- (2) the unprecedented quantity of the salmon taken (ninety-six);
- (3) the fact that the fish could easily have been released unharmed and alive into the wild;
- (4) the present state of salmon stocks;
- (5) the obvious effect which this violation would have on salmon stocks;
- (6) the obvious commercial motive which fuelled the accuseds’ conduct; and
- (7) the affront which this conduct constituted to all individuals who have expended time, effort and money to rehabilitate this dying resource and to others who comply with the “rules of the game”.

While it is premature to discern a trend in the imposition of sentences for fisheries offences, there have been several recent decisions indicating the severity with which the courts will treat offenders.

Case law

- Before a lawful seizure can be effected, Fisheries Officers must ensure that they have reasonable grounds to believe that at least some of the seized catch was obtained in contravention of the *Fisheries Act*. Suspicion as to where the fish was caught is not sufficient to meet the criteria set out in s. 51 of the *Act*, and a seizure order would not be justified in such instances. Consequently, the fine of \$14 000 and the suspension of the

fishing licence for the fishing vessel and all fishing licences held by the appellant for a period of three months is upheld. The order concerning the forfeiture of the sum of \$7460.00 is set aside. *R. v. Morash* (1993), 124 N.S.R. (2d) 241, 345 A.P.R. 241 (S.C.), aff'd. (1994), 129 N.S.R. (2d) 34, 345 A.P.R. 34 (C.A.).

- A corporate accused which pleaded guilty to a charge of failing to furnish accurate information with respect to its scallop landings to the Department of Fisheries and Oceans was fined \$15,000.00. In imposing the minimal fine, the court considered the cooperation provided by corporate executives to Departmental officials, the fact that the company had not overfished its allocation and the company's agreement to a reduction in its 1992 allocation quota. *R. v. Comeau Sea Foods Limited*, unreported, May 12, 1992, N.S. Prov. Ct.
- An accused who was convicted of unlawfully fishing for lobster using traps belonging to another was sentenced to pay a fine of \$2,000.00 and his licence to fish for lobsters was suspended for a period of ten days at the beginning of the next lobster season. The trial judge regarded as an aggravating factor the fact that the accused had taken advantage of his position as a licensed lobster fisherman to poach. The summary conviction appeal judge, upholding the sentence, observed that, even if the accused had not been operating under the provisions of a licence, the terms of section 79.2 of the *Fisheries Act* are sufficiently broad to authorize the court to restrain him from fishing for lobsters. *R. v. Kehoe*, unreported, May 11, 1992, N.S. Co. Ct.
- An accused who was convicted under the *Atlantic Fishery Regulations* of fishing with gillnets in a closed area was fined \$20,000.00 and his catch, valued at \$7,500.00, was ordered forfeited. The 1992 fishing licence, belonging to the accused's company and under which he was fishing, was ordered cancelled. Additionally, both the accused and his company were prohibited from applying for a licence until April 1, 1993. It should be noted that the accused had three prior convictions, two of which were for fishing in a closed area. *R. v. Morash* (1993), 124 N.S.R. (2d) 241, 345 A.P.R. 241 (S.C.), aff'd. (1994), 129 N.S.R. (2d) 34, 345 A.P.R. 34 (C.A.).
- Where an accused pleaded guilty to the offence of fishing without a licence, he was fined \$20,000.00 and his catch was ordered forfeited. The offender in this case had a prior conviction. The trial judge also considered evidence that the offender had cut his nets when his vessel was boarded by the fishery officer. *R. v. Fennelly*, unreported, April 14, 1992, Nfld. Prov. Ct. [NOTE: the sentence is being appealed to the Supreme Court of Newfoundland, Trial Division.]
- Upon conviction, an accused was fined \$3,500.00 and his crab fishing licence was ordered suspended for a three day period commencing on the opening of the 1992 crab fishing season. He filed a notice of appeal and obtained from the summary conviction appeal court a stay of the suspension. To ensure that, in the event that the conviction and sentence were upheld on appeal, the licence could be suspended during the 1993 crab fishing season, the court granted the Crown's request for an order that the licence not be assigned, transferred or sold by the accused pending further order of the court. *R. v. Stoddard*, unreported, August 27, 1992, N.S. Co. Ct.

- An accused, upon conviction for unlawfully fishing for abalone, was sentenced to pay a fine of \$5,000.00 and the abalone was ordered forfeited. He was also prohibited from engaging in commercial or sport fishing, except as a deck hand on a properly licensed vessel, for a period of twelve months. The trial judge regarded as an aggravating factor the premeditated act of the accused in poaching an endangered species. He also observed that the 1991 amendments to the *Fisheries Act* were intended to reflect the seriousness of the violations in the fishing industry and the depletion of stocks. *R. v. Pyra*, unreported, July 8, 1992, B.C. Prov. Ct.

Where the health and safety of the general public are endangered or Canada's international obligations are threatened, a court may consider such factors in determining the appropriate sentence to be imposed.

Case law

- The wilful processing and sale of contaminated clams endangered the health and safety of the general public and threatened Canada's treaty obligations with the United-States. In convicting the accused, the trial Judge stated that the sentence must reflect not only the principle of general deterrence but also the principle of specific deterrence. As a result the court imposed an additional fine of \$53,706.85 which was equal to the amount of the monetary benefit acquired through the commission of that offence, notwithstanding fines otherwise imposed. *R. v. Quang Xuan Nguyen*, unreported, June 21, 1994 (Prov. Ct. B.C.).

Prosecutors may also refer to decisions respecting provincial game and wildlife offences.

Case law

- A deer poacher who was convicted of hunting at night, hunting with a light, wasting edible flesh and unlawful possession of wildlife was fined \$4,000.00. Noting the premeditated and sophisticated nature of the offences, the trial judge further ordered that the truck used in the commission of the offences be forfeited. *R. v. Moskalyk* (1991), 121 A.R. 386 at 393 (Prov. Ct.)

Part II

-

Practical Guide to the Coastal Fisheries Protection Act

1. Introduction

The *Coastal Fisheries Protection Act* was enacted to regulate the harvesting of fisheries resources by foreigners in Canadian fisheries waters. The Department of Fisheries and Oceans patrols the fishing areas and enforces Canadian fisheries law within its 200-mile fisheries jurisdiction. The Act provides as well for the management and protection of sedentary species on the continental shelf beyond the limits of Canadian fisheries waters. Moreover, recent amendments made to the Act by Bill C-29 which received royal assent on May 12, 1994, will prohibit classes of foreign fishing vessels from fishing for

straddling stocks in the Regulatory Area of the Northwest Atlantic Fisheries Organization that lies outside Canadian fisheries waters.

2. *Scheme of the Act*

The *Coastal Fisheries Protection Act* provides the authority to control the harvesting of fish in Canadian waters and sedentary species on the continental shelf beyond the limits of Canadian fisheries waters, as well as the harvesting of straddling stocks in the NAFO Regulatory Area. The Act creates certain offences and establishes penalties for violations of its provisions. The *Coastal Fisheries Protection Regulations*, made under that Act, govern the licensing of foreign vessels to fish in Canadian waters, the terms and conditions of such licences, requirements of the masters of foreign fishing vessels for notification of entry to and exit from the Canadian zone, taking of observers on board and boarding and inspection procedures.

Additionally, the *Foreign Vessel Fishing Regulations*, promulgated under the *Fisheries Act*, contain the detailed management provisions governing foreign fishing, including close times, size limits, incidental catch limits, mesh size, closed areas and seasons. Relevant provisions of these regulations are also generally stipulated in the licence issued to a foreign fishing vessel.

3. *Management and Control of the Coastal Fisheries*

Pursuant to section 6 of the *Coastal Fisheries Protection Act*, the Governor in Council may make regulations authorizing foreign fishing vessels to enter Canadian fisheries waters and permitting persons attached to foreign fishing vessels to carry on activities in Canada or Canadian waters which would otherwise be prohibited by section 4 of the Act. Such activities include:

- (a) fishing or preparing to fish;
- (b) unloading, landing or transshipping any fish, outfit or supplies;
- (c) shipping or discharging any crew member or other person;
- (d) purchasing or obtaining bait or other supplies; and
- (e) taking or preparing to take marine plants.

The recent amendments to section 6 will also permit the Governor in Council to prescribe straddling stocks in an area by and adjacent to Canadian fisheries waters and to prescribe classes of foreign fishing vessels from which persons will not be permitted to fish for straddling stocks contrary to prescribed conservation and management measures.

Subsection 5(1) of the *Coastal Fisheries Protection Regulations* permits the Minister to issue a licence to a foreign fishing vessel and its crew to enter Canadian fisheries waters for the following purposes:

- (i) to engage in commercial fishing or fishing for purposes of scientific research;

- (ii) to transship or take on board any fish, outfit or supplies while at sea;
- (iii) to process fish at sea;
- (iv) to transport fish from fishing grounds;
- (v) to provision, service, repair or maintain any other foreign fishing vessel while at sea;
- (vi) to purchase or obtain bait, outfits or supplies at a Canadian port;
- (vii) to effect repairs at a Canadian port;
- (viii) to purchase, load, unload, transship, sell or process fish or fish products at a Canadian port
- (ix) to unload, land, re-embark, or transship at a Canadian port any equipment of that vessel or of any other fishing vessel of the same flag state;
- (x) to grant shore leave to the crew of that vessel at a Canadian port; and
- (xi) to discharge or take on board at a Canadian port a member of the crew of that vessel or of any other fishing vessel of the same flag state.

4. Enforcement

A) The Role of Protection Officers

A protection officer, for the purposes of enforcement under the *Coastal Fisheries Protection Act* and the regulations, is a person who is a fishery officer designated under the *Fisheries Act*, an officer of the Royal Canadian Mounted Police or any person authorized by the Governor in Council to enforce the Act. The protection officer's role and powers are set out in sections 7 to 9 of the *CFPA*.

- a) Enforcement officers - protection officers;
- b) Designation - s. 2
- c) Role - to ensure compliance with the *Coastal Fisheries Protection Act* and the regulations made pursuant to that Act.
- d) Powers of protection officers
 - i) power to board and inspect a vessel - s. 7(a)
 - A protection officer may board and inspect any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area to determine compliance with the Act.
 - ii) power to search with a warrant - s. 7(b)
 - With a warrant issued pursuant to subsection 7.1(1), a protection officer may search any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area and the vessel's cargo.

iii) power to search without a warrant - s. 7.1(2)

- Where, by reason of exigent circumstances, it would not be practical to obtain a search warrant, a protection officer may search without a warrant any vessel found within Canadian fisheries waters or the NAFO Regulatory Area, provided the conditions for obtaining a warrant exist.

iv) power to arrest without a warrant - s. 8

- A protection officer may arrest without warrant any person who he or she suspects on reasonable grounds has committed an offence under the Act.

v) power to use force - s. 8.1

- A protection officer may use force that is intended to, or is likely to, disable a foreign fishing vessel if he or she is proceeding to arrest the person in command of the vessel and believes on reasonable grounds that force is necessary to make the arrest. This power is limited to arrest for offences specified in the regulations and compliance with the regulations is essential prior to the use of force by the protection officer.

vi) power to seize vessel or goods - s. 9

- A protection officer who suspects on reasonable grounds that an offence under the Act has been committed may seize the fishing vessel by means of which the offence was committed and any goods aboard that vessel. Under section 10, seized vessels and goods are to remain in the custody of the protection officer or delivered into the custody of such other person as the Minister may direct.

vii) power to sell perishable articles - s. 11

- A protection officer may sell any fish or other perishable articles seized pursuant to section 9. The proceeds of such sale are to be paid to the Receiver General for Canada.

It should be noted that only those persons who are protection officers for the purposes of the *Coastal Fisheries Protection Act* enforce that Act and the regulations made under the Act. The provisions of the *Foreign Vessel Fishery Regulations* are enforced by fishery officers designated under the *Fisheries Act*.

5. Offences

I. Offences

A. Section 17

Any person who contravenes any one of the following provisions is guilty of an offence punishable on summary conviction or of an indictable offence:

1. Entering Canadian fisheries waters - s. 17(a)(i)

Any person who is master or in command of a fishing vessel and who enters into Canadian fisheries waters contrary to the Act commits an offence.

2. Refusal to bring to - s. 17(a)(ii)

Any person who is master or in command of a fishing vessel and who, without legal excuse, fails to bring to when required to do so by a protection officer or on signal of a government vessel commits an offence. The onus of establishing legal excuse lies on the master or person in command.

3. Refusal to answer questions on oath - s. 17(b)

This section provides that any person aboard a fishing vessel who refuses to answer any question on oath put to him or her by a protection officer commits an offence. It should be noted, however, that, as a result of Bill C-29, the protection officer no longer has the power to question such person under oath and, therefore, the refusal to answer questions under oath cannot be an offence.

4. Throwing cargo overboard - s. 17(c)

Any person who, after signal by a government vessel to bring to, throws overboard or staves or destroys any part of the vessel's cargo, outfit or equipment commits an offence.

5. Obstruction of protection officer - s. 17(d)

Any person who resists or wilfully obstructs a protection officer in the execution of his or her duties commits an offence.

B. Section 18

Unless authorized by the Act, the regulations or any other law of Canada or treaty, any person on board a foreign fishing vessel or attached to such vessel who in Canada or Canadian fisheries waters contravenes any one of the following paragraphs of subsection 4(1), subsection 4(2), section 5 or section 5.2 of the Act is guilty of an offence punishable on summary conviction or of an indictable offence:

1. *Fishing in Canadian fisheries waters - s. 4(1)(a)*
2. *Unloading, landing, transshipping any fish, outfit or supplies - s. 4(1)(b)*
3. *Shipping or discharging crew member or other person - s. 4(1)(c)*
4. *Purchasing or obtaining bait or supplies or outfits - s. 4(1)(d)*
5. *Taking or preparing to take marine plants - s. 4(1)(e)*
6. *Fishing for a sedentary species in any portion of the continental shelf that is beyond the limits of Canadian fisheries waters - s. 4(2)*
7. *Fishing for a straddling stock in the NAFO Regulatory Area in contravention of prescribed conservation and management measures - s. 5.2*
8. *Transporting fish into Canadian fisheries waters - s. 5*

Unless authorized by the regulations, any person aboard a Canadian fishing vessel who brings into Canadian fisheries waters fish received outside Canadian fisheries waters from a foreign fishing vessel commits an offence.

Any person who contravenes the regulations promulgated under the Act is guilty of an offence punishable on summary conviction or of an indictable offence.

C. *Limitation Period*

Unlike the *Fisheries Act*, the *Coastal Fisheries Protection Act* does not contain a limitation period for the commencement of proceedings in respect of summary conviction offences. As a result, the *Criminal Code* applies and, by virtue of subsection 786(2), summary conviction proceedings may not be instituted more than six months after the time when the subject matter of the proceedings arose.

II. Defences

A. *Absence of Mens Rea*

The *Coastal Fisheries Protection Act*, like the *Fisheries Act*, falls into that category of statutes which are enacted for the regulation of individual conduct in the interests of the public welfare. As a result, the regulatory offences contained in the Act and the *Coastal Fisheries Protection Regulations* do not require *mens rea*. Rather, they are strict liability offences.

B. *Due Diligence*

As the offences provided for in the *Coastal Fisheries Protection Act* are strict liability offences, the mere doing of the prohibited act, *prima facie*, imports the offence, leaving it open to the accused to avoid liability by proving that he or she exercised all due diligence to avoid or to prevent the commission of the offence or that he or she reasonably believed in the existence of facts which, if true, would render that person's conduct innocent.

Case Law

- On a balance of probabilities, if the accused captain of a fishing vessel uses all reasonable care in the circumstances to ascertain his navigational position in order to avoid fishing inside the 200 mile limit, he has done all that the law of strict liability requires and is not negligent. *R. v. Scheffer* (1990), 96 N.S.R. (2d) 310 (C.A.).
- Where the accused contended that they had attempted to fish one mile outside the 200 mile limit but that they had strayed inside due to a navigational error, the court found that they had not exercised due diligence by fishing so close to the line. *R. v. Alvarez (No. 2)* (1990), 81 Nfld. & P.E.I.R. 37, 255 A.P.R. 37 (Nfld. S.C., T.D.).
- The court convicted the accused of unauthorized fishing in Canadian waters and fined him \$25,000 and ordered the forfeiture of his fishing gear. Although the evidence did not prove beyond a reasonable doubt that the accused fished inside the 200 mile limit, the court noted that the captain was the "controlling mind" of fishing activities and that there was a "real and substantive link to Canada". The court however, acquitted the accused

on the unauthorized entry charge as there was no language in the *Coastal Fisheries Protection Act* providing for “constructive entry”. The judge opined that given the possible imposition of large fines, any intention to impose liability for constructive entry should be expressly set out in the legislation. *R. v. Dos Santos* (1992), 96 Nfld & P.E.I.R. 13, 305 A.P.R. 13 (Nfld. S.C., T.D.).

III. Penalties

The penalties which currently exist for the commission of offences under the *Coastal Fisheries Protection Act* were introduced in R.S. 1985, c. 39 (2nd Supp.) s.1, in response to a growing concern about foreign overfishing.

A. Specific Provisions

a. Subsection 18(1)

A person convicted of the offence of

Fishing or preparing to fish in Canada or Canadian waters s.4(1)(a)

Fishing for sedentary species in portion of continental shelf beyond limits of Canadian fisheries waters - s. 4(2)

Fishing for a straddling stock in NAFO Regulatory Area - s. 5.2

is liable

- (a) on conviction on indictment, to a fine not exceeding \$750,000.00; or
- (b) on summary conviction, to a fine not exceeding \$150,000.00.

b. Subsection 18(2)

A person convicted of one of the offences of

Unloading, landing, transshipping any fish, outfit or supplies - s. 4(1)(b)

Shipping or discharging crew member or other person - s. 4(1)(c)

Purchasing or obtaining bait or supplies or outfits - s. 4(1)(d)

Taking or preparing to take marine plants - s. 4(1)(e)

Transporting fish into Canadian fisheries waters - s. 5

Contravention of the regulations
is liable

- (a) on conviction on indictment, to a fine not exceeding \$500,000.00; or
- (b) on summary conviction, to a fine not exceeding \$100,000.00.

c. Subsection 18(3)

A person convicted of one of the offences of

Entering Canadian fisheries waters - s. 17(a)(i)

Refusal to bring to - s. 17(a)(ii)

Refusal to answer questions on oath - s. 17(b)

- It must be noted that, as the protection officer no longer has the power to question persons under oath, the offence of refusing to answer questions under oath has ceased to exist.

Case Law

- The court convicted the accused of unauthorized fishing in Canadian waters and fined \$25,000 and ordered the forfeiture of his fishing gear. Although the evidence did not prove beyond a reasonable doubt that the accused fished inside the 200 mile limit, the court noted the the captain was the “controlling mind” of fishing activities and that there was a “real and substantive link to Canada”. The court however, acquitted the accused on the unauthorized entry charge as there was no language in the *Coastal Fisheries Protection Act* providing for “constructive entry”. The judge opined that given the possible imposition of large fines, any intention to impose liability for constructive entry should be expressly set out in the legislation. *R. v. Dos Santos* (1992), 96 Nfld & P.E.I.R. 13, 305 A.P.R. 13 (Nfld. S.C., T.D.).

1

Throwing cargo overboard - s. 17(c)

is liable

(a) on conviction on indictment, to a fine not exceeding \$500,000.00; or

(b) on summary conviction, to a fine not exceeding \$100,000.00.

d. Subsection 18(4)

A person convicted of the offence of

Obstructing a protection officer - s. 17(d)

is liable

(a) on conviction on indictment, to a fine not exceeding \$500,000.00 or to a term of imprisonment not exceeding two years or to both; or

(b) on summary conviction, to a fine not exceeding \$100,000.00, or to a term of imprisonment not exceeding six months or to both.

B. General Provisions

a. Forfeiture of vessel or goods - s. 14

In addition to any other punishment imposed, a court may order the forfeiture of any vessel or goods seized in accordance with the Act or the forfeiture of the proceeds of the

disposition of the vessel or goods.

b. Detention or sale of seized vessel or goods - s. 16(2)

Where a court has imposed a fine in respect of an offence under the Act, the fishing vessel or goods seized may be detained until the fine is paid or may be sold under execution in satisfaction of the fine.

c. Suspension or cancellation of licence or permit - s. 13.1 CFP Regs

Under section 13.1 of the *Coastal Fisheries Protection Regulations*, the Minister may suspend or cancel any licence or permit issued pursuant to the Regulations.

C. Application of the Criminal Law

By virtue of section 18.1, an act or omission that would be an offence under an Act of Parliament if it occurred in Canada is deemed to have been committed in Canada if it occurs, in the course of enforcing this Act, in the NAFO Regulatory Area on board or by means of a foreign fishing vessel where that vessel has been involved in fishing for a straddling stock in contravention of section 5.2 or in the course of continuing pursuit. Powers of arrest, entry, search and seizure that could be exercised in Canada in respect of such act or omission may be exercised on board the foreign fishing vessel or, where pursuit has been commenced, at any place on the seas which is not within the territorial seas or internal waters of another state. The exercise of such powers may be authorized by a justice of the peace or judge in any territorial division in Canada.

It should be noted, however, that the consent of the Attorney General of Canada is required to exercise powers of arrest, entry, search and seizure outside Canada where the offence is alleged to have been committed on board or by means of a vessel that is registered or licensed under the laws of another state. Similarly, the consent of the Attorney General or the Deputy Attorney General is required before proceedings may be commenced in respect of a contravention of section 5.2, an offence deemed under section 18.1 to have been committed in Canada or the offence of resisting or obstructing a protection officer in the course of his or her duties in relation to section 5.2.

D. Jurisdiction of the Courts

Pursuant to section 19 of the Act, all courts, justices of the peace and magistrates in Canada have the same jurisdiction with respect to offences under the Act as they have under sections 610 and 611 of the *Canada Shipping Act*. R.S., c. S-9. Section 611 provides that a court, justice of the peace or magistrate has jurisdiction over vessels lying off the coast.

Part III

-

Practice Notes and Resource Information

Practice Notes

Reference Material and Instructions

The Criminal Prosecutions Desk Book

The Desk Book was prepared by the office of the Assistant Deputy Attorney General (Criminal Law). It contains comprehensive information on essential prosecution topics, including Crown disclosure and the relationship between prosecutors, police and investigators.

Please refer to the Desk Book for information on prosecutorial discretion and the role of the Attorney General.

The Memorandum of Instructions to Agents and the Special Instructions to Agents

The Memorandum and the Special Instructions contain the general guidelines for agents involved in regulatory prosecutions.

Copies of judgments and sentences

Prosecutors are requested to provide copies of all judgments rendered and sentences imposed in prosecutions under the *Fisheries Act*, the *Coastal Fisheries Protection Act* or the regulations to the contact person designated below by Departmental Legal Services - Fisheries and Oceans.

Leslie A. Walden, Paralegal Officer
Departmental Legal Services - Fisheries and Oceans
Centennial Tower, 8th floor
200 Kent Street,
Ottawa, Ontario
K1A 0E6

Telephone: (613) 993-7785

Facsimile: (613) 990-9385

Copies of the Fisheries Act, the Coastal Fisheries Protection Act and the regulations:

As copies of the Acts and relevant regulations are provided by the Department of Fisheries and Oceans to all Regional Justice Offices and standing agents prosecuting offences on behalf of the Department, the Act and regulations are not being attached as appendices hereto. Agents who are missing their copies are requested to contact:

Jack Thompson, Project Officer
Regulations Unit
Department of Fisheries and Oceans
200 Kent Street
Ottawa, Ontario
K1A 0E6

Telephone: (613) 990-0120

Facsimile: (613) 940-9574

Resource Persons

People

Prosecutors can contact the following persons for more information:

Contact Person in the Department of Justice

Jane Dudley, Counsel
Departmental Legal Services - Fisheries and Oceans
Centennial Tower, 8th floor
200 Kent Street
Ottawa, Ontario
K1A 0E6

Telephone: (613) 990-8520
Facsimile: (613) 990-9385

Regional Department of Justice Contacts

Edmonton Regional Office

Wesley W. Smart, Counsel
Royal Trust Tower, Room 928
Edmonton Centre
Edmonton, Alberta
T5J 2Z2

Telephone: (403) 495-3498
Facsimile: (403) 495-2964

Halifax Regional Office

Michael A. Paré, Counsel
Royal Bank Building
5161 George Street, 4th floor
Halifax, Nova Scotia
B3J 1M7

Telephone: (902) 426-7038
Facsimile: (902) 426-2329

Montreal Regional Office

Pierre Gilbert, Counsel
Guy Favreau Complex
200 René Lévesque West
East Tower, 9th floor
Montreal, Quebec
H2Z 1X4

Telephone: (514) 283-4974

Facsimile: (514) 283-1086

Saskatoon Regional Office

Horst Dahlem Q.C., Section Head
Churchill Building
229 4th Avenue S., 7th floor
Saskatoon, Saskatchewan
S7K 4K3

Telephone: (306) 975-4762
Facsimile: (306) 975-5013

Toronto Regional Office

2 First Canadian Place
Exchange Centre, Suite 3400
Box 36
Toronto, Ontario
M5X 1K6

Facsimile: (416) 973-8253

For the Counties of Durham, Simcoe, Northumberland, Victoria, and Peterborough, and the Judicial District of Muskoka:

- Harvey Frankel Q.C., Senior Counsel
Telephone: (416) 973-9823

For the Counties of Brant, Oxford and Wellington and the Judicial Districts of Haldimand and Norfolk:

- Fergus O'donnell, Coordinator of Agents
Telephone: (416) 973-6528

For the Judicial District of Peel:

- Morris Pistyner, Counsel
Telephone: (416) 973-3150

For the Judicial Districts of Halton, Niagara South and North and Hamilton-Wentworth:

- Hugh O'Connell, Counsel
Telephone: (416) 973-2206

For the County of Middlesex and the Judicial District of Waterloo:

- Fergus O'Donnell, Coordinator of Agents
Telephone: (416) 973-6528

For the Counties of Kent, Elgin, Lambton and Essex:

- Jim W. Leising, Senior Counsel
Telephone: (416) 973-3746

**For the Counties of Grey and Huron, and the Judicial District of York
Region:**

- Steven Albin, Counsel
Telephone: (416) 973-2241

For the Counties of Perth, Bruce and Dufferin:

- Tom Beveridge, Counsel
Telephone: (416) 973-9710

For the Judicial District of York:

- David Littlefield, Counsel
Telephone: (416) 973-9079

Vancouver Regional Office

James A. Wallace, Senior Counsel
Suite 900
984 Howe Street
Vancouver, B. C.
V6Z 2S9

Telephone: (604) 666-0211
Facsimile: (604) 666-1599

Whitehorse Regional Office

Malcolm Florence, Counsel
#200-300 Main Street
Whitehorse, YT
Y1A 2B5

Telephone: (403) 667-8100
Facsimile: (403) 667-3979

Winnipeg Regional Office

Clyde Bond, Group Head
Centennial House
310 Broadway Avenue, Suite 301
Winnipeg, Manitoba
R3C 0S6

Telephone: (204) 983-2345
Facsimile: (204) 983-3636

Yellowknife Regional Office

Sandi Aitkin, Group Head
Joe Tobie Building, 3rd floor
5020 48th Street
Yellowknife, NWT
X1A 2N1

Telephone: (403) 920-7711
Facsimile: (403) 920-4022

Regional Department of Fisheries and Oceans Contacts

Central and Arctic Region

J. Grant Pryznyk, Coordinator
Legislation and Compliance
Box 2310
Yellowknife, NT
X1A 2P7

Telephone: (403) 920-6642
Facsimile: (403) 873-8871

Gulf Region

Carol Ann Rose, Director
Conservation and Protection
343 Archibald Street
Moncton, N.B.
E1C 9B6

Telephone: (506) 851-7795
Facsimile: (506) 851-2504

Newfoundland Region

Regional Office

Ernest Collins, Chief
Enforcement Section
Regional Office
Department of Fisheries and Oceans
P.O. Box 5667
St. John's, Nfld.
A1C 5X1

Telephone: (709) 772-4494
Facsimile: (709) 772-5983

Field Offices

Morley Knight, Area Chief

Eastern Newfoundland
Department of Fisheries and Oceans
Suite 301, Viking Bldg, 136 Crosbie Rd.
St. John's, Nfld.
A1B 3K3

Telephone: (709) 772-5857

Lou Ryan, District Protection Officer
Area II
Department of Fisheries and Oceans
P.O. Box 580
Grand Bank, Nfld.
A0E 1W0

Telephone: (709) 832-1301

George Burke, Area Chief
Conservation and Protection
Department of Fisheries and Oceans
P.O. Box 459
Grand Falls, Nfld.
A2A 2J9

Telephone: (709) 292-5166

William Brake, Area Chief
Conservation and Protection
Department of Fisheries and Oceans
P.O. Box 7003, Station "A"
Goose Bay, Labrador
A0P 1S0

Telephone: (709) 896-2924

Pacific Region

Robert Martinolich, Chief Enforcement Officer
Regulations and Enforcement Services Unit
Conservation and Protection Division
Fisheries Branch
Fisheries and Oceans Canada
Station 420, 555 West Hastings Street
Vancouver, B.C.
V6B 5G3

Telephone: (604) 666-2185
Facsimile: (604) 666-2186

Région du Québec

Hugh Cotton, Conseiller en réglementation
Division Protection et réglementation
C.P. 901, Cap-Diamant
Québec (P.Q.)
G1K 7Y7

Téléphone: (418) 648-5888
Télécopieur: (418) 648-7981

Scotia-Fundy Region

Regional Headquarters

C.E. Goodwin
Surveillance Operations Division
Conservation and Protection Branch
P.O. Box 550
Halifax, Nova Scotia
B3J 2S7

Telephone: (902) 426-7242
Facsimile: (902) 426-9380

L.J. Muise
Regulations Division
Fisheries and Habitat Management
P.O. Box 550
Halifax, Nova Scotia
B3J 2S7

Telephone: (902) 426-2473
Facsimile: (902) 426-3479

J.D. Conway, Head
Investigations and Legal Affairs Unit
Conservation and Protection Branch
P.O. Box 550
Halifax, Nova Scotia
B3J 2S7

Telephone: (902) 426-2392
Facsimile: (902) 426-3479

K.A. Vienot, Chief
Enforcement and Training Division
Conservation and Protection Branch
P.O. Box 550
Halifax, Nova Scotia
B3J 2S7

Telephone: (902) 426-2393
Facsimile: (902) 742-3479

Southwest Nova Scotia

A.J. Clarke
Chief Enforcement Officer
215 Main Street
Yarmouth, Nova Scotia
B5A 1C6

Telephone: (902) 742-0885
Facsimile: (902) 742-1511

Eastern Nova Scotia

R.C. Thompson
Chief Enforcement Officer
P.O. Box 1085
Sydney, Nova Scotia
B1P 6J7

Telephone: (902) 564-3935
Facsimile: (902) 564-7398

Southwest New Brunswick

Anne Harrington
Operations Officer
P.O. Box 210
St. Andrews, New Brunswick
E0G 2X0

Telephone: (506) 529-5871
Facsimile: (506) 529-5858

Precedents

Informations, search warrants, etc., are those issued or obtained under the *Criminal Code* with the necessary changes. The following forms of orders issued under the *Fisheries Act* are unique to fisheries prosecutions and are included as precedents:

- (a) Order of licence prohibition
- (b) Order of forfeiture
- (c) Order of suspension

Fisheries Pêches
and Oceans et Océans

ORDER OF LICENCE PROHIBITION

Canada,

The Queen

vs.

Province of

County of

Be it remembered that on the day of, 19.....
at,

.....

(DEFENDANT)

having been convicted
of.....

.....
.....

Contrary to section of
the.....

.....

(APPROPRIATE ACT OR REGULATION)

and in addition to the penalty
of.....

.....
.....imposed upon himher, the defendant is prohibited from applying for a
19.....

.....

(LICENCE AND DESCRIPTION)

issued under the authority of the Fisheries Act, during the period commencing
....., 19..... to....., 19.....

Dated this day of....., 19.....

at

.....

A

in and

for

Fisheries Pêches
and Oceans et Océans

ORDER OF FORFEITURE

Canada,

The Queen

vs.

Province of

County of

Be it remembered that on the day of, 19.....

at,

.....

(DEFENDANT)

having been convicted of

.....

.....

.....

contrary to section

..... of the

.....(Act)

(Regulations)

and that

.....

.....

.....

was seized from him pursuant to section 51 of the Fisheries Act, R.S.C. 1985, c. F-14, and that, in addition to the penalty imposed upon him the said

.....

.....

.....

(or the proceeds thereof) (is) (are) hereby forfeited to Her Majesty in right of Canada.

Dated this day of.....A.D.

at

.....

A
in and for

1. Description of Articles Forfeited

.....

.....

.....

2. Where

Stored.....

.....

3. Estimated Value

.....

Fisheries and Oceans Pêches et Océans

ORDER OF SUSPENSION

Queen Canada, The
vs.

Province of

County of

Be it remembered that on the day of, 19.....
at

.....
.....

(DEFENDANT)

having been convicted of

.....
.....
.....

contrary to section

..... of the
.....
.....

(APPROPRIATE ACT OR REGULATION)

and in addition to the penalty of

.....
.....
.....

imposed upon himher, the following suspension (is) (are) ordered for the period
commencing, 19..... to, 19.....

Description of licence(s) affected:

.....
.....
.....
.....

Dated this day of....., 19.....
at

.....

A

in and for

“Protection officer” means a fishery officer, an officer of the Royal Canadian Mounted Police or any person authorized by the Governor in Council to enforce the Act.