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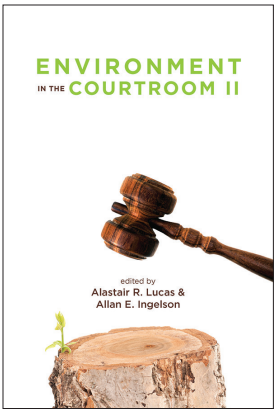

ENVIRONMENT IN THE COURTROOM II

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The *Fisheries Act* as an Environmental Protection Statute

A. William Moreira[1]

Introduction

Protection of the marine (in the sense of oceanic) environment in Canadian law primarily relies on the application of federal legislation; however, constitutional limitations on the scope of federal jurisdiction somewhat constrain to specific subject matters, the valid enactment and application of federal statutes.[2] One such statute is the *Fisheries Act*,[3] which predominantly deals with the regulation of the fishing industry and of the activity of fishing in waters to which it applies. Also, a portion of it (generally ss 34 to 41 inclusive) deals with the protection of fish habitat and related prohibitions against pollution.

The habitat protection provisions of the *Fisheries Act* have a long history. Language corresponding to the present s 36(1) that prohibits the "throwing overboard" of "prejudicial or deleterious substances" in "any water where fishing is carried on," which was introduced by the 1927 statutory revision,[4] but which is said to have been enacted in 1914.[5] Section 36(3) was enacted in 1970 in substantially its present form[6] while section 35(1), which was enacted in 1977, was amended in 2013.[7] This chapter provides an update regarding the long-standing use of these two sections as the primary environmental protection provisions of the *Fisheries Act* throughout the years of 2002 to 2016. For additional information regarding how the subject law has evolved since 2016, see the addendum attached to this chapter.

It must be stated at the outset that although they apply to all waters under Canadian jurisdiction, these provisions of the Fisheries Act are more frequently engaged in the context of pollution of inland (as opposed to oceanic)

waters principally because oceanic pollution tends to be ship-sourced, and resulting legal proceedings are generally more efficiently conducted under other more subject-specific federal statutes that apply to shipping.

Federal Constitutional Powers

Despite the possibility of debate on whether the results would be the same under contemporary theories of cooperative federalism in Canada, the scope of federal jurisdiction to include environmental protection provisions in the *Fisheries Act* was considered. Also, for all practical purposes, this situation was considered settled in two 1980 decisions of the Supreme Court, *Fowler v. R* and *Northwest Falling Contractors v. R*.

In *Fowler v. R*[8] the accused had been prosecuted under the then section 33(3) of the *Fisheries Act*, which prohibited persons engaged in "logging, lumbering, land clearing or other operations" from putting "slash, stumps or other debris into any water frequented by fish." Briefly summarized, the unanimous court held this section *ultra vires* Parliament as a "blanket prohibition of certain types of activities, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries."[9]

With a contrary result, *Northwest Falling Contractors v. R*[10] upheld the validity of the then section 33(2), which essentially functioned the same as the present section 36(3) by prohibiting the release of a deleterious substance into water frequented by fish. A fuel pipe on a wharf had broken, spilling diesel fuel into tidal waters in a bay. The same unanimous court as in *Fowler* found the section valid as legislation in relation to "sea coast and inland fisheries" for purposes of s 91(12) of the *British North America Act*[11] (as it was then named). It stated that the power to regulate the fisheries includes the protection of the creatures that are part of them[12] and that the challenged section intended to protect fisheries by preventing substances deleterious to fish from entering waters frequented by fish. Thus, the section addresses a "proper concern of legislation under the heading Sea Coast and Inland Fisheries."[13]

In *R v. MacMillan-Bloedel Limited*,[14] the accused logging firm was charged under the then s 31 (later but no longer s 35(1)) with harmful alteration, disruption, or destruction (HADD) of fish habitat resulting from its operations on an unnamed creek inhabited by a unique species of small fish. The fish were isolated by impassable waterfalls from other watercourses, and there was, in fact, no sport or commercial fishery in the waters where the operations were

conducted. The majority of the British Columbia Court of Appeal (BCCA) held that constitutionally, the *Fisheries Act* could validly apply only where a "fishery" existed, and because the alleged offence did not occur in such a place, the accused was entitled to an acquittal.

This BCCA decision was generally neither widely considered nor followed, perhaps because of its very unusual facts, and it remained uncriticized for many years. Finally, in *R v. BHP Diamonds Inc.*[15] criticism was offered by the Supreme Court of the Northwest Territories. The accused developer of a mine built a diversion channel between certain lakes and was charged with three counts under the *Fisheries Act*: two counts under s 36(3) (deleterious substance, resulting from downstream sedimentation) and one count under s 35(1) (harmful alteration of habitat, as it then was, resulting from the channel itself). The accused developer then sought to rely on *MacMillan-Bloedel* by arguing that there was no "fishery" in any of the affected lakes. The Court rejected this argument, saying that

> [53] It is this *obiter* comment [in *Northwest*] which appears to have encouraged the majority in *MacMillan Bloedel* (1984). The majority took the view that Martland J. contemplated the existence of waters with fish in them that did not constitute fisheries. I disagree that this is a reasonable interpretation of the language used by Martland J. in the judgment as a whole.
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> …
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> [57] For these reasons and with respect, I am in disagreement with the narrow approach taken by the majority in *MacMillan Bloedel* (1984). In my view, the fish and fish habitat of Kodiak Lake, Little Lake and Moose Lake are afforded the protection of the federal *Fisheries Act* for the reason that they are part of the fisheries resource, a natural resource and a public resource of this country. To protect fish and fish habitat is to protect the resource (fishery).[16]

These criticisms may, however, be themselves *obiter dicta* because the court found evidence of the existence of a fishery in the watershed of which the named lakes form a part. Therefore, the "watershed is distinguishable from the small isolated stream in *MacMillan Bloedel*."[17] Furthermore, the

court ultimately acquitted *BHP Diamonds* because of appropriate permitting of the works and the accused's establishing a due diligence defence.[18]

Note that in a later consideration of *BHP Diamonds*, the British Columbia Provincial Court considered itself still bound by *MacMillan-Bloedel*.[19] Both *BHP Diamonds* and *MacMillan-Bloedel* were referred to by the Ontario Superior Court in *R v. Zuber*.[20] Here, the court, without expressing any preference between the two authorities, held that the *Fisheries Act* habitat protection provisions validly apply to waters in which there are either commercial or recreational fisheries.

SECTION 35(1)—HARMFUL ALTERATION, DISRUPTION, OR DESTRUCTION OF HABITAT

From its enactment in 1977, until a significant amendment came into force in 2013, the substantive prohibition in s 35(1) read:

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

> Under the first of the so-called omnibus bills[21] that arose out of the winter 2012 federal budget, this was replaced by sections 35(1) and 2(2) as follows:

> 35(1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.

> 2(2) For the purposes of this Act, serious harm to fish is the death of fish or any permanent alteration to, or destruction of, fish habitat.

From their enactment in 2013, these amendments persisted until these sections were once again amended in 2019.

On the face of the 2013 amendments, one might have thought that the addition of "activity" to "work or undertaking" would enlarge the scope of operations to which the section applies. Conversely, the requirement of proof that the affected fish indeed support a "commercial, recreational or Aboriginal fishery" may restrict the section's scope of application consistently with the constitutional theory in *MacMillan-Bloedel*. The requirement in

the now repealed section 2(2) that there be either death of fish, or "permanent alteration" or "destruction" of habitat, might have been thought to clarify significant prior controversy in the jurisprudence over what words are qualified by the former "harmful" and in any case what degree of "harm" was required to be proved. One might reasonably have expected to await initiation of, and decisions in prosecutions under, these new provisions in order to understand their impact as environmental protection measures.

During its six-year lifespan, there were only two reported judicial decisions of prosecutions under the 2013 amended section 35(1),[22] with there being one other notation of a conviction on the federal website.[23] Perhaps, it can be speculated based on the sparse number of reported enforcement proceedings in the nearly six years since the amendment came into force that officials were in fact declining to prosecute under this section, either for policy reasons or because of perceived proof problems associated with the amended statutory language.

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

Courtoreille v. Canada[24] involved an application by the Chief of Mikisew Cree First Nation for judicial review of the decision to introduce into Parliament the omnibus bill by which section 35(1) was amended, on grounds (among others) that there had not been sufficient prior consultations with affected Aboriginal peoples. Although mostly the decision involves lengthy and fascinating discussion of the distinctions between political processes and justiciable issues, the Federal Court said with specific reference to the 2013-amended section 35(1):

> [91] Hence the amendments to the *Fisheries Act* removed the protection to fish habitat from section 35(1) of that *Act*. The Applicant submitted that this amendment shifted the focus from fish habitat protection to fisheries protection which offers substantially less protection to fish habitat and the term "serious harm" permits the disruption and non-permanent alteration of habitat.
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> . . .
>
> [93] I agree that no actual harm has been shown, but that is not the point. As the Supreme Court of Canada in *Haida Nation* at paragraph

> 5 has said, the "potential existence" of harm (in that case, the potential right as title to land, here to fishing and trapping) is sufficient to trigger the duty. I find that, on the evidence, a sufficient potential risk to the fishing and trapping rights has been shown so as to trigger the duty to consult.
>
> . . .
>
> [101] . . . In addition, for the reasons the Applicant expressed above, the amendment to s. 35(1) of the *Fisheries Act* clearly increases the risk of harm to fish. These are matters in respect of which notice should have been given to the Mikisew together with a reasonable opportunity to make submissions.

In the result, the court issued a declaratory judgment that the government should have consulted on the introduction of the bill, but in view of the enactment of the resulting legislation ordered no other remedy.[25]

Under section 35(2), which was also amended by the 2012 omnibus bill, considerable provision is made in respect of regulatory permissions for and/or ministerial permitting of works, undertakings, or activities, which when available, exclude contravention of the 2013-amended section 35(1). Substantial and very detailed guidance is provided on the website of the Department of Fisheries and Oceans[26] as to the kinds of works or activities that may be performed without the need to seek ministerial permit. As examples only, cottage docks and boathouses below a maximum size, dredging below specified maximum areas for recreational and commercial purposes, and installation of new or replacement moorings, all of which on occasion previously gave rise to prosecutions, are said not to require departmental review.

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

UPDATE ON SECTION 36(3)—DEPOSIT OF DELETERIOUS SUBSTANCES

Section 36(3), the long-standing prohibition against the deposit of deleterious substances into waters frequented by fish, was not the subject of amendment in the 2012 omnibus bill and has fully retained its utility and its frequent use in environmental protection prosecutions. Recurring case-specific issues continue to arise and be the subject of judicial decisions. For example, whether proof has been made of the deleterious quality of the particular substance or whether the accused has made out the "due diligence" defence—retain all their vigour and utility for the defence side in *Fisheries Act* prosecutions.

By way of a very brief substantive update, the following decisions are noted.

There had been some earlier inconsistent jurisprudence regarding whether it is sufficient to prove the deleterious quality of the substance itself, or whether the deleterious impact on receiving waters must be proved. It now appears to have been settled by the Ontario Court of Appeal in *R v. City of Kingston*[27] that the proof must relate to the substance alone, and not its effect in waters into which it is discharged.

In *R v. Williams Operating Corporation*,[28] a case in which the discharged substance was deemed deleterious by regulation, the court made the somewhat sweeping statement that *de minimus not curat lex* does not apply to public welfare offences or strict liability offences,[29] including environmental offences.

In *R v. MacMillan Bloedel Limited*,[30] replacement of a buried pipe was recommended because of its age but the replacement was assigned low priority by the accused because an inspection described the pipe as being in "mint condition." The pipe failed, and a deleterious substance was discharged from it not because of age but because of "microbiological corrosion." Finding unforeseeability of the actual failure mechanism, the majority of the BCCA acquitted on the basis of the first branch of the "due diligence" defence—the accused's honest and reasonable but mistaken belief in the soundness of the pipe.[31]

In *Canada (Fisheries and Oceans) v. Ontario (Ministry of Transportation)*[32] a provincial highway washout, believed to be caused by a blocked culvert, deposited debris into a nearby stream and lake. The province was prosecuted and convicted under both section 35(1) (pre-2013 amendment language) and 36(3). On appeal, it was argued that the two convictions represented double

jeopardy contrary to the so-called *Kienapple*[33] principle. The court upheld both convictions, noting that section 35(1) protected habitat and section 36(3) protected water quality, and, although subtle, these differences were sufficient to exclude the argument of double jeopardy.[34]

Newfoundland Recycling Limited v. The Queen[35] is noteworthy both because it is an actual case of discharge of a deleterious substance into tidal waters and, more broadly, because it involves the increasingly serious environmental (and economic) problem of derelict ships. The accused had been engaged in 1994 to scrap an out-of-service ship and arranged for the ship to be berthed at a private wharf in Long Harbour, Newfoundland. Deconstruction of the ship proceeded sporadically but was never completed, and the remains of the ship sank at the berth in 1999 causing the discharge of oil. Ownership of the ship at all these times was unclear, but it was not alleged that the accused was the owner. The accused argued that they were under no contractual duty to care for the ship. The court considered that the principal issue was whether the appellant had sufficient "control" of the ship to have "permitted" the discharge of oil contrary to section 36(3). The Newfoundland and Labrador Supreme Court upheld the trial court's conviction based on a conclusion that the accused "had the ability to exercise control" over the ship and its "failure to make certain" that the [ship] was safe and secure at the time of the sinking "permitted the deposit" of the deleterious substance.[36]

A selective update is also offered of noteworthy sentences imposed on convictions under section 36(3), which can be found in full detail on the federal government's website.[37] Of note is the extent to which penalty amounts are directed to be paid into the federal Environmental Damages Fund.

Panther Industries Limited, the nature of whose business is not given, was ordered by the Alberta Provincial Court on July 28, 2015, to pay in total $370,000 into the Environmental Damages Fund plus a $5,000 fine resulting from a single spill of 150,000 litres of hydrochloric acid. Of this total amount payable to the Environmental Damages Fund, $170,000 was ordered on conviction under section 36(3) of the *Fisheries Act*, $150,000 on conviction of failure to respond to an environmental emergency, and $50,000 on conviction of failure to have an adequate emergency plan, the last two matters being violations of, respectively, *CEPA 1999*[38] and the *Environmental Emergency Regulations*[39] made under that Act. The note on the website asserts that this is the first conviction under the *Environmental Emergency Regulations*.

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

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

Teck Metals Ltd. was on March 4, 2016, ordered to pay $3 million in penalties on conviction of three counts under section 36(3) involving the release of 125 million litres of effluent into the Columbia River between November 28, 2013 and February 5, 2015. It appears that the whole of this amount is payable to the Environmental Damages Fund.

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

Addendum: April 2020 Update Notes

There are two substantial points on which the subject law has evolved since 2016.

SECTION 35(1)—HARMFUL ALTERATION, DISRUPTION, OR DESTRUCTION OF HABITAT

This concerns the repeal of the long-standing prohibition against HADD of fish habitat contained in section 35(1) of the *Fisheries Act* made effective November 25, 2013, and its replacement in that same section with a prohibition against work, undertaking, or activity that "results in serious harm to

fish." Both of these are now changed by amendments enacted by SC 2019 c 14, in force effective August 28, 2019.

First, the former prohibition against HADD has been re-enacted as s 35(1):

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

Second, the 2013 prohibition against serious harm to fish was amended though substantially re-enacted as what is now s 34.4(1):

> 34.4(1) No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish.

Finally, by way of update on these points, there has been one reported prosecution under section 35(1) as it was between November 2013 and August 2019, in which organizers of an off-road all-terrain vehicle competition were convicted for causing the course to include an unbridged watercourse crossing.[40] Additionally, there was another prosecution under the 2013-amended section 35(1) that, despite having taken place after August 2019, regarded events that occurred while section 35(1) was still in its 2013 iteration.[41] Here, the defendants had obtained an authorization under section 35(2)(b) of the *Fisheries Act* prior to causing serious harm to fish. The issue in this case focused on whether the defendants failed to comply with the various conditions imposed by the authorization.

SECTION 36(3)—DEPOSIT OF DELETERIOUS SUBSTANCES

Prosecutions since 2016 have seen significant increases in the severity of penalty amounts. By way of supplement to the list of sentences imposed upon conviction under section 36(3) included in this chapter, the following are noted. All amounts mentioned below are totals that typically include fines plus ordered contributions to the federal Environmental Damages Fund, the latter of which are usually the larger portion. These four cases are understood to have been the judicial acceptance of joint recommendations made pursuant to "settlement" agreements between the Crown and the accused corporations.

- *R v. Canadian National Railway*,[42] Alberta Provincial Court 2017, unreported. Penalties totalled $2 million. In addition to the summary information to be found on the website of Environment and Climate Change Canada (as it is now known) there is reference to this decision in *R v. Kirby Offshore*, mentioned below.
- *R v. Montreal, Maine and Atlantic Railway*,[43] Quebec Provincial Court 2018, unreported. This was the environmental prosecution that arose from the Lac Megantic rail casualties of July 2015. The railway was fined $1 million under *Fisheries Act* section 36(3).
- *R v. Husky Oil*,[44] Saskatchewan Provincial Court, 2019, unreported. Noteworthy because convictions were entered under both the *Fisheries Act* s 36(3) and the *Migratory Birds Convention Act 1994* section 5.1(1). Total penalties were $2.5 million. This also is referred to in the *Kirby Offshore* decision.
- *R v. Kirby Offshore*.[45] Noteworthy because convictions were entered under both the *Fisheries Act* s 36(3) and the *Migratory Birds Convention Act 1994* section 5.1(1), and because prosecution for ship-source pollution was brought under these Acts and not under the *Canada Shipping Act 2001*, which prescribes lower maximum fine amounts. Total penalties were $2.9 million.

NOTES

1 A William Moreira, QC, FCIArb, Partner, Stewart McKelvey, Halifax.

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

3 *Fisheries Act*, RSC 1985 c F-14.

4 *Fisheries Act*, RSC 1927 c 73, s 44.

5 *Fisheries Act*, 1914 c 8, s 44 (according to the legislative history notation).

6 *Fisheries Act*, RSC 1970 1st Supp c 17, s 3.

7 *Fisheries Act* SC 1976-77 c 35, s 5.

8 *Fowler v R* [1980] 2 SCR 213 [Fowler]

9 *Ibid*, per Martland J at 226.

10 *Northwest Falling Contractors v R* [1980] 2 SCR 292 [*Northwest*].

11 *British North America Act*, 30&31 Vict. c 3 (UK), now named *Constitution Act, 1867.*

12 *Northwest*, *supra* note 10, per Martland J at 300.

13 *Ibid* at 301.

14 *R v MacMillan-Bloedel Limited*, [1984] 2 WWR 699 (BCCA) [*MacMillan-Bloedel*].

15 *R v BHP Diamonds Inc*, 2002 NWTSC 74 [*BHP Diamonds*].

16 *Ibid* at paras 53, 57.

17 *Ibid* at para 58.

18 *Ibid* at para 205.

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

20 *R v Zuber*, 2004 CanLII 2459 (ONSC) [*Zuber*].

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

22 See *R v DP World Prince Rupert Inc*, 2019 BCPC 302 and *R v French*, 2018 ABPC 296.

23 Government of Canada, "Company Sentenced to Pay $3,500,000 for Obed Mountain Mine Spill" (12 June 2017), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/services/environmental-enforcement/notifications/company-sentenced-obed-mountain-spill.html>.

24 *Courtoreille v Canada*, 2014 FC 1244.

25 *Ibid* at para 109.

26 See generally Government of Canada online: *Government of Canada* <www.dfo-mpo.gc.ca/pnw-ppe/index-eng.html> [perma.cc/UV9C-N9CC].

27 *R v City of Kingston*, 2004 CanLII 39042 (ONCA).

28 R v Williams Operating Corporation, 2008 CanLII 48148 (ONSC).

29 *Ibid* at para 86.

30 *R v MacMillan Bloedel Limited*, 2002 BCCA 510.

31 *Ibid* at para 51.

32 *Canada (Fisheries and Oceans) v Ontario (Ministry of Transportation)* 2014 ONSC 7071.

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

34 2014 ONSC 7071 at paras 44, 45. Note also in respect of what seems to be double jeopardy the brief notes on the "Enforcement Notifications" page of Environment and Climate Change Canada's website, *supra* note 23 to effect that Wesdome Gold Mines Limited was on 25 February 2016 separately convicted and fined in respect of violations of both the *Fisheries Act* and unspecified "provincial offences."

35 *Newfoundland Recycling Limited v The Queen* 2008 NLTD 38, leave to appeal refused 2009 NLCA 29.

36 *Ibid* at paras 34, 35.

37 *Zuber*, *supra* note 20.

38 *CEPA*, *supra* note 2.

39 *Environmental Emergency Regulations* SOR/2003-307.

40 *R v French*, 2018 ABPC 296.

41 *R v DP World Prince Rupert Inc*, 2019 BCPC 302.

42 *R v Canadian National Railway* (15 June 2017), (AB PC); Environment Canada, "Canadian National Railway Company to pay over $2.5 million in penalties for environmental offences" (16 June 2017) online: *Environment Canada* <www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=BB89523C-1>.

43 *R v Montreal, Maine and Atlantic Railway* (5 February 2018), (QC PC); Government of Canada, "Company Found Guilty of Fisheries Act Violation in Lac-Mégantic Derailment Case" (9 February 2018) online: *Government of Canada* <www.canada.ca/en/environment-climate-change/services/environmental_enforcement/notifications/company-guilty-fisheries-act-violation-lac-megantic-derailment.html>.

44 *R v Husky Oil* (12 June 2019), (SK PC); Environment Canada, "Husky Oil Operations Limited Fined $2.7 Million for Federal Offences Related to the Pipeline Release of Oil into the North Saskatchewan River" (12 June 2019), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/services/environmental-enforcement/notifications/husky-oil-operations-limited-fined-for-federal-offences.html>.

45 *R v Kirby Offshore*, 2019 BCPC 296.