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Canada's Fisheries Act:
The Evolution of a Modern Pollution Prevention Regulatory Regime

Mike Beale

Practitioner-in-Residence, School of Public Policy and Administration, Carleton University

The author was the Assistant Deputy Minister responsible for administration of the pollution prevention provisions of the Fisheries Act from 2013 to 2018; however, all elements of this case study are in the public domain. Research assistance was provided by Thomas Arnason McNeil and Keely O'Brien.

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Introduction

The pollution prevention provisions of Canada's *Fisheries Act*, and the regulations made pursuant to those provisions, form the core of Canada's federal water pollution regime. The Act applies nationally, and the sectoral regulations apply to an ever-expanding list of activities. The regime is actively enforced. The *Fisheries Act* and the *Canadian Environmental Protection Act, 1999* (CEPA)[1] together form the key underpinnings for Environment and Climate Change Canada's pollution regulations.

The *Fisheries Act* also takes an unusual approach to pollution prevention: a general *prohibition* against pollution in the Act itself, while the regulations under the Act *permit* pollution under specified conditions.

The *Fisheries Act* itself is over 150 years old. Where did the modern regime come from, and how did it take the form it has today? That is the subject matter of this Case Study.

Overview

The *Fisheries Act* dates from 1868, and is one of Canada's oldest pieces of legislation. The original Act contained remarkably strong provisions against water pollution – perhaps too strong for the times, as is suggested by the fact that enforcement was at best uneven for the first 100 years. Amendments in the 1970s modernized the Act, establishing a regulatory regime that gave the Act's pollution prevention provisions greater practical effect. The Act, and the regulations under it, now constitutes the core of Canada's water pollution prevention regime, with a scope that is increasing year by year.

The modern Act's approach to pollution prevention -- a general prohibition against pollution in the Act itself, with regulations under the Act that permit pollution under specified conditions – is highly unusual. Enforcement activities address both potential violations of the general prohibition and potential violations of regulatory conditions. In contrast, most environmental legislation is enabling in nature, and the regulations under it prohibitive rather than permissive.

This Case Study reviews the history of the pollution provisions of the *Fisheries Act*, and traces their evolution to the modern regulatory pollution prevention regime we see today. This includes a review of enforcement activities over time.

The Case Study concludes with some Lessons Learned. A key message is that the enactment in the 1970s of a permissive regulatory regime paradoxically made the Act far more effective than it had been for the first century of its existence – what might have appeared to be a

[1] CEPA provides broad authority to reduce and manage toxic releases to the environment.

weakening was actually a strengthening. Finally, some questions for further research are identified in an Annex.

1868 Act and the first 100 years

The 1868 *Fisheries Act* – or more formally, *An Act for the regulation of Fishing and protection of Fisheries* – reflected the clear federal jurisdiction that exists under Canada's Constitution over fisheries. As well as providing authorities to the Governor in Council, Minister and fishery officers, and establishing offences and penalties, the Act repealed a series of pre-Confederation provincial acts and regulations.

Interestingly, the concept of pollution already found its place in the Act, specifically through a number of provisions under the heading of "Injuries to Fishing Grounds and Pollution of Rivers". The following provision is of particular interest:

> Lime, chemical substances…or any other deleterious substance, shall not be drawn into, or allowed to pass into, be left or remain in any water frequented by any of the kinds of fish mentioned in this Act; and saw-dust or mill-rubbish shall not be drifted or thrown into any stream frequented by fish, under a penalty not exceeding one hundred dollars: Provided always that the Minister shall have power to exempt…any stream or streams in which he considers that its enforcement is not requisite for the public interest;

Evidently, the substantive content of the current Act – a general prohibition against deposit of a deleterious substance unless authorized – was present in the original Act. The 1868 Act also provided authority for the Governor in Council (GiC) to make regulations, including to "prevent or remedy the obstruction and pollution of streams"; however, it does not appear that this regulatory authority was used to prevent pollution.

Uneven enforcement – the sawdust issue

By all accounts, the strong general prohibition against pollution was not fully enforced for the first 100 years. In part, this likely reflects the fact that much of the administration of the Act was delegated to the provinces. In introducing amendments to the *Fisheries Act* in 1970, then Minister of Fisheries and Forestry, Jack Davis, noted[2] that the federal government administered the Act only in the four Atlantic provinces, British Columbia, the Yukon and Northwest Territories; elsewhere, administration had been delegated to the provinces.

Further evidence that the Act was not fully enforced is provided by the fact that a private member's bill *An Act for the Better Protection of Navigable Streams and Rivers* was passed

[2] Jack Davis, House of Commons, April 20, 1970

into law in 1873, prohibiting the dumping of sawdust into navigable streams and rivers. This despite the fact that, as was recognized in House of Commons Debates at the time[3] , a similar prohibition already existed in the *Fisheries Act*. As detailed in *Rivers of Sawdust: The Battle Over Industrial Pollution in Canada, 1865-1903* by Peter Gillis[4], sawdust was the key form of industrial pollution at the time. Concern that accumulated refuse from sawmills was harming fish life and even leading to methane explosions in the Ottawa River below Parliament Hill was a keen political issue in the late 1800s and early 1900s.[5]

While the prohibition on dumping sawdust was present in two separate pieces of legislation, the prohibition was not necessarily applied everywhere. In 1880, saw-mill owners on the Ottawa River were exempted from the 1873 Act's prohibition on the dumping of sawdust; a similar exemption was made in 1885.

Some other rivers were also exempted from the prohibition on dumping sawdust, although the application seems to have been uneven; for example, Senator Power in 1891 noted that "In certain rivers in Nova Scotia the law is carried out; as to certain other rivers it is not carried out."[6] Senator Power went on to suggest that enforcement of the law was driven by political considerations: "Where their friends are interested they have allowed the law to remain a dead letter, and have only enforced it where the mill owners were unfriendly to the Government".[7] This suggestion was resisted by Senator Abbott, speaking for the Government side: "The Government are enforcing the law…against letting sawdust run into the rivers, in all cases brought under their notice, which are not exempt by Order in Council".[8]

In the same debate, Senator McClelan said that "the general application of the Fisheries Law in its application to fishing streams has not been a very good one – that is to say, the regulations have not been strictly enforced. A very general complaint exists throughout the country that the rivers formerly frequented by fish…have become destroyed as fishing rivers". He suggested that the lack of enforcement was because, in the case of the lumber industry "their political influence is more concentrated and they are better able to bring it to bear on the Government, the consequence being that the interest of the lumbermen is better served in that way than the interest of the people".[9]

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[3] See for example Mr. Mackenzie on April 16, 1870, and Mr. Wright, February 28, 1871
[4] *Rivers of Sawdust: The Battle Over Industrial Pollution in Canada, 1865-1903* by R. Peter Gillis, Journal of Canadian Studies, Spring 1986.
[5] For a detailed and highly readable account of this controversy, see *Rivers of Sawdust*; this section of the Case Study draws heavily on that account.
[6] Senate Debate on the *Sawdust Bill*, 1891.
[7] Ibid.
[8] Ibid.
[9] Ibid.

The official government view on this issue is set out in a report by the Minister of Marine and Fisheries , Mr. Charles H. Tupper – the report was submitted to a Cabinet committee in October 1889, and tabled in the Senate in December 1890.[10] Tupper's report notes a criticism from the inspector of fisheries for New Brunswick that "the influence of mill-owners and politicians has been sufficient to set the law aside". The report also acknowledges the harmful effects of sawdust and other deleterious substances on fish life.

In his concluding paragraphs, however, Tupper sets the record straight as his department sees it:

- Both the 1873 *Act for the Better Protection of Navigable Streams and Rivers* and the *Fisheries Act* prohibit the dumping of sawdust into rivers
- Both acts "are strictly enforced, except under special circumstances as contemplated by their provisions. Instances occur where the fishing interest is of so little importance and the danger to navigation so small owing to local reasons, where it is advisable to exempt a stream either wholly or in part from the operations of the provisions of the statute. In such cases, the minister of marine and fisheries may exempt streams or parts of streams".
- The St. John River and its tributaries is a special case since the river flows through the state of Maine where sawdust pollution is not prohibited. For this reason, "The enforcement of the law on the Canadian side of the boundary had also to be somewhat relaxed (though the department refused petitions for complete exemption), owing to the fact that it was almost useless to prohibit a nuisance in one section of the river which prevailed with impunity in another."

As set out in *Rivers of Sawdust*, attempts by individual MPs and Senators to remove the sawdust exemptions led to lively debates until about 1903, when the practice of dumping sawdust into rivers was largely phased out.

[10] Senate Sessional Paper No. 43C, 54 Victoria, 1891

Final thoughts on the first 100 years

As well as the perspectives outlined above, the difficulties in enforcing the general prohibition of the *Fisheries Act* over the first 100 years may be seen through two additional sets of lenses. One was provided by Fisheries Minister Jack Davis in 1970, and identifies the problem as being the very strength of the pollution provisions, what Minister Davis referred to as the "formidable powers" of the Act itself. Referring to the pollution provisions of the Act, he noted

> "The sections in question were all too embracing, all too comprehensive. For instance, anyone who threw sawdust, bark or lime into a stream could be prosecuted. As the years and decades went by and prosecutions were not laid, it became more and more difficult to enforce legislation of this kind. In other words, it withered away; it fell into disuse, and indeed we failed ourselves in not using it more effectively."

A second lens, complementary to the first, is available in hindsight. The 1868 Act was an all-or-nothing statute – pollution was prohibited unless exempted by Order-in-Council. While the Act contained a provision for regulations, these do not appear to have been enacted. In retrospect, perhaps the greatest contribution of the 1970 amendments was to create the basis for a workable regulatory regime, whereby a third option – controlled pollution – would become possible.

Opposition MPs in 1970 were not as ready as Minister Davis to blame the Act for the shortcomings in enforcement. One said "It was not that the old Act was ineffective. I am not exactly saying that the Department is to be blamed for this – we all were not aware of the extent of pollution – but if this Act had been enforced there would not be the extent of pollution that we have today. So let us not blame the old Act, Mr. Chairman. Let us put the blame where it belongs." Another added: "I do not think there is any doubt about which was ineffective. I do not think it was the Act."

Mr. Crouse and Mr. Lundrigan, Standing Committee on Fisheries and Forestry, May 12, 1970

1970 Amendments

In her book *Passing the Buck: Federalism and Canadian Environmental Policy*, Kathryn Harrison talks of the first wave of public concern for the environment as taking place in the

late 1960s, and bringing with it the emergence of a more assertive federal role in environmental policy in 1969-72.[11]

It is in this context that amendments to the pollution provisions of the *Fisheries Act* were brought forward in 1970. Fisheries Minister Jack Davis characterized these amendments as updating, bringing in modern wording and phraseology, and placing the emphasis on prevention rather than cure; he also spoke of regulations to be developed that would bring in national standards, thereby avoiding pollution havens, and that would be based on ecosystem principles. Interestingly, he repeatedly asserted that while the amended Act would be an improved instrument for addressing industrial pollution, it could not so easily address municipal pollution.[12]

Another perspective was provided by a Departmental official testifying before the Standing Committee examining the proposed amendments. Mr. Kenneth Jackson, a Pollution Section Leader based in Vancouver, identified three criticisms of the Act in its pre-amendment form:

- One was that the Act implicitly gave the Department power to take action only after the fact (or at least that was the way the Department had chosen to interpret the Act), that it did not give any power of prevention.
- The second was that the Act was "totally prohibitive", whereas in reality even the best treatment systems could not remove 100% of pollutants from the waste stream.
- The third was that there was a contradiction between the prohibitive nature of the Act and the authority it provided to make regulations, given that the intent of such regulations would be to specify what could or could not be discharged into a body of water.[13]

From the perspective of 2020, Mr. Jackson hit the nail on the head. Working backwards through his three criticisms, the single most important amendment made to the Act in 1970 was the modernization of the regulatory provisions, making it explicit that the general prohibition did not apply to deposits that were made under conditions authorized by regulations. These regulatory conditions in turn could include permissible levels of pollution, allowing for a departure from the previous "all or nothing" nature of the Act.

An interesting curiosity is that much of the debate in 1970 centred on the relationship between the amended *Fisheries Act* and the new proposed *Canada Water Act*. Cabinet

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[11] *Passing the Buck: Federalism and Canadian Environmental Policy* by Kathryn Harrison, UBC Press, 1996; Ch. 4

[12] Jack Davis, Globe and Mail August 7, 1969; House of Commons Debates April 20, 1970; Standing Committee on Fisheries and Forestry, April 30, May 5, May 12, 1970

[13] Mr. Kenneth Jackson, Standing Committee on Fisheries and Forestry, May 5, 1970

documents from the time reveal lively debate between Ministers about these two divergent approaches to combating water pollution.[14,15] The Minister of Energy, Mines and Resources favoured the *Canada Water Act*, which proposed "total management and multi-use plans" and stressed the importance of federal-provincial consultation; he worried that the *Fisheries Act* would appear to the provinces to be unilateral. Fisheries Minister Jack Davis did not deny the "comprehensive" approach of the *Canada Water Act* in contrast with the "simplistic" approach of the *Fisheries Act*, but saw the *Fisheries Act*'s "direct, simple approach to water quality control" as being necessary in the interim while the *Canada Water Act* was being progressively implemented.

> The importance given by both the Minister and Mr. Jackson to the pollution prevention aspect is interesting. The amendment would allow the Minister to require plans or specifications related to a proposed work that will or is likely to result in the deposit of a deleterious substance in water frequented by fish, and potentially require modifications to the work or prohibit it. The new provision fit into the overall theme of the 1970 amendments, i.e. improving the workability of the Act's pollution provisions. That said, a provision that contemplates the violation of another provision in the same Act seems unusual. Moreover, arguably if the general prohibition was being enforced in the first place, it would be in the interest of industry to do what was necessary upfront to avoid being found in violation of the Act after the fact.
>
> Looking back at the implementation of the 1970 amendments over the last 50 years, this forward-looking pollution prevention provision did not achieve the importance that Minister Davis and the Department attached to it in 1970. One instance where this provision was used was in 2015 when the Environment Minister made an Order respecting the City of Montreal's planned discharge of wastewater into the St. Lawrence.
>
> Arguably the role that Minister Davis saw this provision as playing is now played by environmental assessment legislation; in fact, potential impact on fisheries is today one of the key triggers for federal environmental review.

In his public comments and in the House, Minister Davis played the good soldier, arguing that the two proposed pieces of legislation were complementary. Interestingly, the Conservative Opposition supported Minister Davis and the *Fisheries Act* approach. Conservative MP John Lundrigan, for example, stated:

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[14] Of course, neither piece of legislation was only about pollution: the *Fisheries Act* addressed fisheries management more generally, while the *Canada Water Act* was largely about water resource management.

[15] See Cabinet Document 225-70, February 20, 1970; Cabinet Conclusions March 5, 1970

"I suggest we do not need the *Canada Water Act*. The act is a nebulous document, one which is totally ineffective. The provinces do not want it and the Minister cannot enforce it. The legislation has no teeth. We want pollution control placed where it belongs, under the Department of Fisheries. We want the responsibility for fighting pollution to lie with the Minister of Fisheries."[16]

In the end, both pieces of proposed legislation passed into law, and are still on the books. The history of the last 50 years, however, would suggest that the amendment to the *Fisheries Act* has been by far the more important piece of legislation, at least to this point. The simple, "unilateral" approach of the *Fisheries Act*, grounded in clear federal jurisdiction over fisheries, has proven to be more effective than the comprehensive but "nebulous" approach of the *Canada Water Act*, grounded in shared federal-provincial jurisdiction over water management.

Fisheries Act today – a modern regulatory regime

The modernization of the *Fisheries Act* in 1970 ushered in a period of rapid regulatory development under the pollution authorities of the Act. This regulatory development took place under Environment Canada; the department was created in 1971, with Jack Davis as its first Minister, and took on responsibility for administration of the pollution provisions of the *Fisheries Act*.

First out of the gate were the *Pulp and Paper Effluent Regulations* (PPER) in 1971; these were followed over the course of the 1970s by *the Chlor-Alkali Mercury Liquid Effluent Regulations* (1972), the *Petroleum Refinery Liquid Effluent Regulations* (1973), the *Meat and Poultry Products Plant Liquid Effluent Regulations* (1977), the *Potato Processing Plant Liquid Effluent Regulations* (1977), the *Metal Mining Liquid Effluent Regulations* (MMLER, 1977) and the *Alice Arm Tailings Deposit Regulations* (1979).

Following a period of relative quiet in the 1980s, in 1990 Environment Canada announced its intent to update the MMLER; this resulted in the making of the *Metal Mining Effluent Regulations* in 2002. The PPER and MMER became the two major sets of *Fisheries Act* pollution regulations, and were joined in 2012 by the *Wastewater Systems Effluent Regulations* (WSER).

Today, the MMER have been expanded to include diamond mines (the *Metal Mining and Diamond Effluent Regulations* of 2018). In addition, the Department is in the process of

[16] Mr. Lundrigan, House of Commons, April 20, 1970

developing coal mining effluent regulations, and proposed regulations to cover the deposit of brine at the Alton Natural Gas Storage Project site in Nova Scotia.

Regulatory innovation

The nature of the sectoral regulations developed under the *Fisheries Act* has evolved over time. As noted, pulp and paper became the first regulated sector under the Act; the regulations set national effluent quality standards for mills across the country. However, the initial 1971 regulatory standards applied only to new mills, i.e. mills that would commence operation after the coming into force of the regulations. It was not until 1992 that the regulations would be amended to apply enforceable effluent quality standards to all mills, existing as well as new.[17] Similarly, the 1977 MMLER applied only to new mines, whereas the 2002 MMER applied to all metal mines.[18] The application of *Fisheries Act* regulations to existing operations was facilitated by subsequent amendments to the Act that were made after the major modernization of 1970; these amendments provided broader and more flexible authority to make regulations.[19]

An innovative element that was introduced in the 1992 amendments to the PPER, and is also found in the MMER/MDMER, is Environmental Effects Monitoring (EEM). This is a requirement on regulatees to conduct biological monitoring studies that examine the effect of their particular effluent on fish. These studies are reported to government, and are used to inform possible future amendments to the regulations. These future amendments could take the form of more restrictive conditions on the release of already-regulated substances, or adding new substances to be regulated. A 2019 Report of the Commissioner for the Environment and Sustainable Development (CESD) found that Environment and Climate Change Canada (ECCC) did in fact use the data it collected through EEM to propose changes to metal mining regulations. EEM is an example of adaptive management in regulation.

As noted above, when laying the foundation for the modern regulatory regime in 1970, Minister Jack Davis was sceptical about bringing municipalities under the *Fisheries Act* regulatory structure. It is not completely clear why. He stated that *Fisheries Act* amendments "do not really deal with municipal wastes unless they are unnatural substances like chlorine"[20], which is a restrictive interpretation of the Act. There is also a suggestion that he was mindful of potential complexities from dealing with another level of government, and

[17] Status Report on the Pulp and Paper Effluent Regulations, June 2012

[18] Regulatory Impact Analysis Statement for *Metal Mining Effluent Regulations*, Canada Gazette Part II, June 19, 2002

[19] Aquamin – Assessment of the Aquatic Effects of Mining in Canada, April 30, 1996; Supporting Document I, p55.

[20] Jack Davis, Standing Committee on Fisheries and Forestry, April 30, 1970

saw the *Canada Water Act* as being a more relevant tool in those cases.[21] In any event, the exclusion of municipalities did not last forever; in 2012 the *Wastewater Systems Effluent Regulations* (WSER) brought municipal discharges under the *Fisheries Act* regulatory structure.

> The CESD 2019 Report, which focused on the metal mining sector, found that ECCC had developed technical guidelines for companies to study the effects of metal mining effluent on fish; collected data on environmental effects and verified that it was complete and accurate; and used the data to propose changes to metal mining regulations.
>
> For example, the data indicated effects on the growth and reproduction rates of fish downstream of some metal mines. As a result, the Department proposed changes to the allowable limits for several harmful substances in mining effluent. The 2018 MDMER introduced stricter limits for some substances that already had limits in place, added a substance to the list of substances with authorized limits and imposed even stricter limits for new mines for substances already on the list. The amended regulations also introduced additional monitoring requirements for selenium, and Departmental officials indicated that they would take into account the information collected from this monitoring when determining whether additional controls were needed for selenium.
>
> The CESD was of the view that more complete reporting on environmental monitoring of mining effluent would help Canadians understand the effects of mining effluent on fish and their habitat, and recommended that ECCC publish information on environmental effects with clear identification of mine sites, so that Canadians can know about the effects of mining effluent in specific locations.
>
> The CESD also found that the Department did not require mining companies to address the environmental effects identified through monitoring, and recommended that ECCC consider measures to address the negative environmental effects of effluent when these effects are confirmed through monitoring. The Department agreed to develop options to address residual effects.

While there are common elements across the various *Fisheries Act* sector regulations – e.g. a focus on setting standards for effluent rather than for the receiving water – there are necessarily unique elements in each regulation. One element in the MDMER/MMER that is both environmentally and economically significant is the provision for tailings impoundment areas, or TIAs. This provision allows a mine operator to deposit waste with any concentration of deleterious substances into a defined body of water; it is essentially an exemption from the regulation. In the original MMLER it was sufficient for this exempted water body to be

[21] Jack Davis, House of Commons, April 20, 1970

designated by the Minister; since the 2002 MMER, however, a stand-alone regulatory amendment is required for a water body to be designated as a TIA. As noted in the Regulatory Impact Analysis Statement for a recent TIA, in order to qualify, the mine operator must demonstrate that the disposal of mine waste in water bodies frequented by fish is the most appropriate option from an environmental, technical, economic and socio-economic perspective. As of June 2019, 46 water bodies had been listed as TIAs.

Enforcement

Data on enforcement activities for the 1970-2000 period is not readily available. In terms of the more recent period, the Commissioner of the Environment and Sustainable Development (CESD) found in 2009 that Environment Canada (EC) had not established clear objectives or results expectations for meeting its *Fisheries Act* responsibilities. The CESD found that while EC had a compliance strategy and enforcement plan in place for what were at the time the two major regulations under the *Fisheries Act* – the PPER and MMER – it did not have a compliance strategy for the general prohibition, and had not instituted a risk-based approach but rather was following a reactive approach based on complaints.

In a more targeted 2019 report specifically on MMER/MDMER, the CESD found that ECCC met its requirements to monitor metal mining effluent. The report also found that ECCC's inspections of metal mines were significantly less frequent in Ontario, the region with the highest number of mines in Canada, than in other regions, without any corresponding risk-based rationale. In addition, the report found that ECCC inspected non-metal mines less often than metal mines; perhaps not a surprise, given there is no regulation covering non-metal mines.

ECCC's Compliance and Enforcement Policy for Habitat and Pollution Provisions of the Fisheries Act distinguishes between inspections and investigations as follows. The purpose of an inspection is to verify compliance. Enforcement personnel carry out a program of inspections to verify compliance, and respond to information or complaints that are brought to their attention. The purpose of an investigation is to gather evidence of a suspected violation. An investigation is conducted when there is suspicion that a violation has occurred, or when there are reasonable grounds to believe that an offence is being or has been committed.

In Annual Reports[22] from 2011 through 2015, ECCC stated it was making progress in improving its risk-based approach towards compliance with the Act. In 2016, the Department stated that it had "developed and implemented a *Fisheries Act* prioritization process. This process results in a systematic approach to evaluate activities that could be subject to the pollution prevention provisions and prioritize efforts accordingly for risk management actions, compliance promotion or targeted enforcement". Despite this, the 2019 CESD report found that ECCC had no comprehensive risk analysis as the basis for inspecting non-metal mines, and that inspections occurred mostly in response to reports of spills and releases of harmful substances – essentially a repeat of the 2009 criticism.

Charts 1-3 below show inspections, investigations and prosecutions over the 2002-2018 period.[23] There are a number of points of interest:

- The number of annual inspections is significant in absolute terms – generally between 3,000 and 4,000 – but has been dropping fairly consistently since reaching a high in 2005-06.
- While annual investigations have been fairly steady, before spiking in 2017-18, there is great variability over time in prosecutions.
- While inspections are roughly equally split between the general prohibition and regulations, investigations and prosecutions are almost all related to the general prohibition. This supports the thesis that regulations give clarity and some operating certainty regarding effluent releases.
- The total number of regulatory inspections continued to trend downward after the introduction of the WSER in 2012, even though WSER accounts for a significant absolute number of inspections (259 in 2016-17). This suggests that total regulatory inspection activity may be driven more by a resource constraint in enforcement than by the number of regulated facilities.

[22] Annual Report to Parliament on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act*

[23] Data drawn from Annual Reports

Chart 1 – Inspections

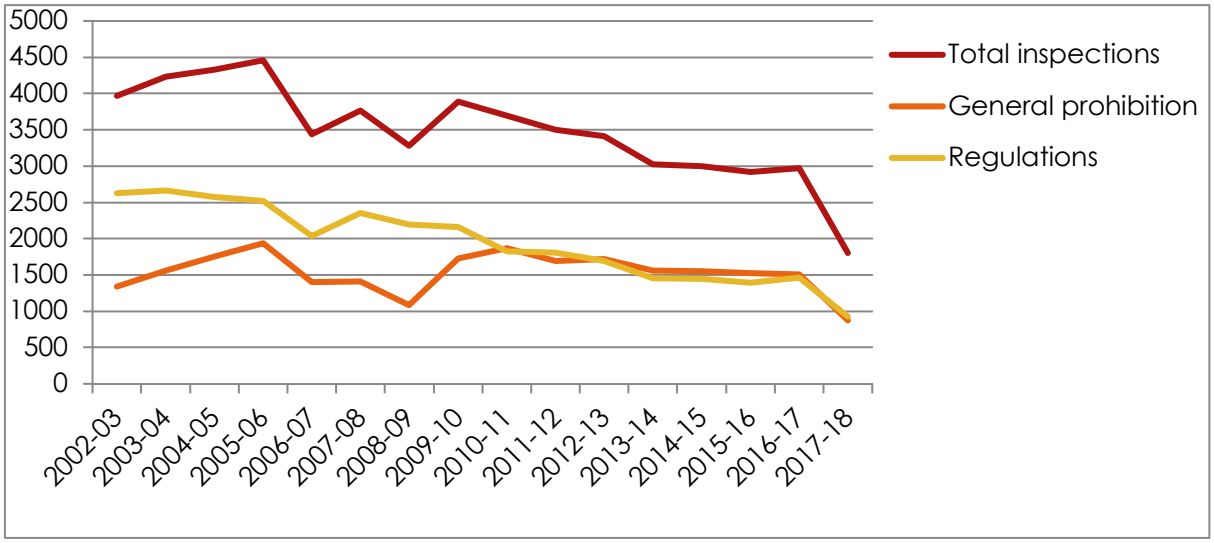


Chart 2 – Recent Investigations

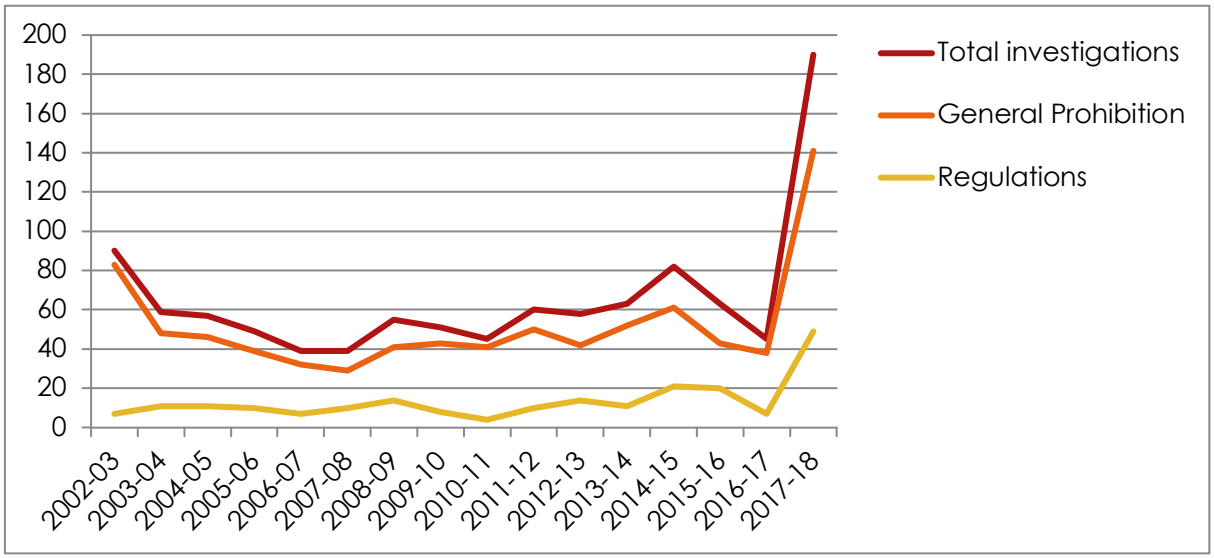
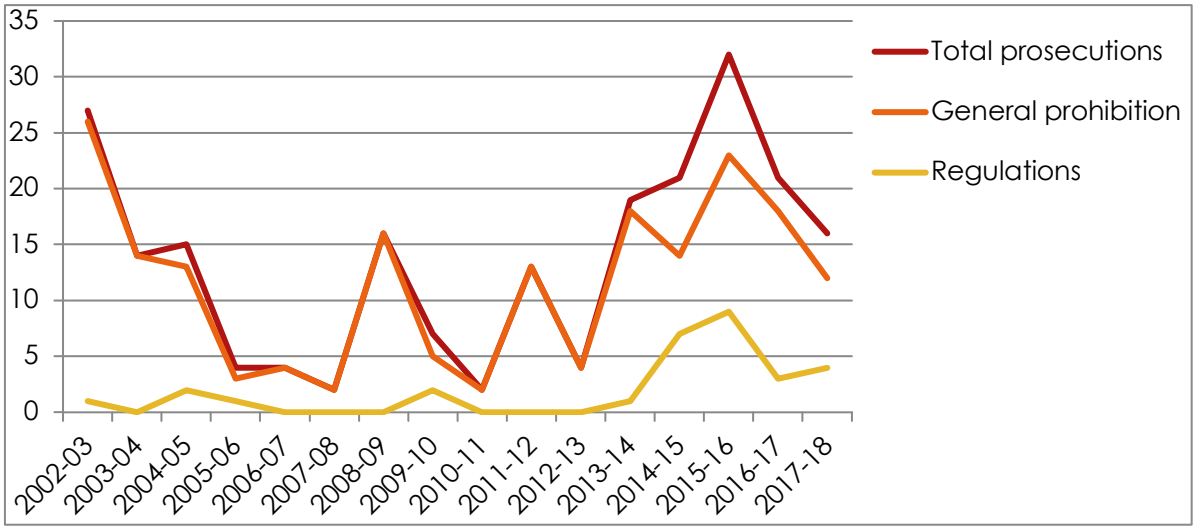


Chart 3 – Recent Prosecutions



Conclusions

The expanding range of sectors covered by regulation, and the record of significant enforcement activities, suggests that the pollution provisions of the *Fisheries Act* are – finally – being implemented in the manner that was intended in 1970. The general prohibition against pollution is being enforced, and this enforcement is being complemented by regulations that permit pollution in specific sectors under specific conditions.

Lessons learned

1. *As with a person, it can take time and adaptation for a piece of legislation to realize its full potential.* The pollution provisions of the *Fisheries Act* were enacted in 1868 as a simple prohibition which was not generally respected. It wasn't until 1970 that a workable regulatory component was added to the Act, and it took about another 30 years for that regulatory structure to be significantly built out – a process that continues to this day.

2. The Act's approach to pollution prevention is highly unusual – a general prohibition of pollution, with exceptions authorized by regulation. *Ironically, the existence of regulatory exceptions makes the prohibition itself more powerful*: by all accounts, before the regulatory exceptions were introduced the prohibition was not enforced, whereas today it is actively enforced and accounts for almost all prosecutions under the Act.

3. Indeed, *the two elements of the Act have proven to be symbiotic* – the availability of a regulatory pathway has allowed the general prohibition to be enforced, and the enforcement of the general prohibition has demonstrated to industry the value of having a regulatory pathway that allows them to comply.

4. Put another way, *what might at first glance appear to be a weakening of the Act* – allowing for regulatory exceptions – *actually made the Act more protective of the environment*. A strong prohibition that is not enforced doesn't count for much.

5. Based on the experience of the last 50 years, *we can expect to see a continuous increase in the types of economic activity covered by regulation*, as more and more economic sectors see the benefits of having regulatory and operational certainty rather than risking being found in violation of the general prohibition. More and more economic sectors would be allowed a certain latitude to pollute waterways, subject to scientifically-based parameters set in regulation.

6. *Adaptive management can be built into a regulatory structure.* As well as setting limits for discharges of specific pollutants, some of the regulations under the Act require regulatees to monitor the environmental effects of additional pollutants and make that information available to government; depending on the results of this monitoring, future regulatory amendments may add these latter pollutants to the list of pollutants whose discharge is limited.

7. *Political leadership matters*. Reviewing the debates around the 1970 *Fisheries Act* amendments – both within Cabinet and in the House of Commons – it is hard to escape the conclusion that these amendments would not have happened if someone less able than Jack Davis was Minister of Fisheries. Davis went on to become Canada's first Minister of the Environment, and until the *Canadian Environmental Protection Act* was passed in 1988, the *Fisheries Act* provided Environment Canada's only regulatory authorities for pollution prevention.

8. *In environmental legislation, simple and focused beats complex and multi-jurisdictional, and clear constitutional authority helps*. The history of the last 50 years is a record of significant achievement under the *Fisheries Act*, and continued relative obscurity for the Canada Water Act.

9. *Debate on a policy initiative doesn't always focus on what in the long-term will prove to be the key element*. In the case of the 1970 *Fisheries Act* amendments, Cabinet and Parliamentary debate focused on the relationship to the *Canada Water Act*, while the Minister emphasized the addition of a forward-looking provision that in practice has been seldom used. In practice, the major contribution of the 1970 amendments was to add a workable regulatory component to the Act.

Annex 1

Questions for Discussion and/or Further Research

1. The *Fisheries Act* takes an unusual approach to pollution prevention -- a general prohibition against pollution in the Act itself, with regulations under the Act that permit pollution under specified conditions. Most environmental legislation, such as the *Canadian Environmental Protection Act, 1999* (CEPA) is enabling in nature, and the regulations under it prohibitive rather than permissive.
    a. What do you think of the relative merits of the two approaches?
    b. What approaches do other jurisdictions, eg US and UK, take to regulating water pollution?
    c. Is it reasonable to think that the *Fisheries Act* approach could be applied to other types of environmental pollution, eg greenhouse gas emissions? What kind of legislation would be necessary? What are some of the implications of taking such an approach?

2. Because of the general prohibition in the *Fisheries Act*, industries that wish to discharge deleterious substances into water require permissive regulation in order to operate lawfully.
    a. What has traditionally been the perspective of industry towards the *Fisheries Act* and its regulations?
    b. What has been the perspective of the environmental community?
    c. Would you expect the attitude of industry to be influenced by the degree of enforcement of the Act and its regulations?

3. The modernized *Fisheries Act* and the *Canada Water Act* both date from 1970. There were active debates at the time about the relationship between the two pieces of legislation. The history of the last 50 years, however, demonstrates ever increasing importance for the pollution prevention provisions of the *Fisheries Act*, while the *Canada Water Act* and its provisions are much less known.
    a. What accounts for the different histories of the two Acts over the last 50 years?
    b. To what extent is the clear federal jurisdiction over fisheries, vs. the shared federal-provincial jurisdiction for water management, a contributing factor?
    c. The Parliamentary Opposition in 1970 noted that provinces opposed the proposed *Canada Water Act*. Why do you think provinces might be more concerned about a piece of legislation that emphasized federal-provincial cooperation, than about legislation that was based on unilateral federal powers?

4. The pollution prevention provisions of the *Fisheries Act* deal specifically with water pollution, while CEPA provides broad authority to reduce and manage toxic releases to the environment. In practice, ECCC has relied more on *Fisheries Act* regulations than on CEPA regulations to control water pollution.
    a. What could explain ECCC's greater reliance on *Fisheries Act* regulations than on CEPA regulations to control water pollution?

5. At the end of the day, the purpose of environmental legislation and regulations is to protect the environment.
    a. How successful has the *Fisheries Act* been in protecting water quality in Canada?
    b. Provincial legislation also protects against water pollution. How has administration of the *Fisheries Act* worked together with provincial legislation and regulations to manage water pollution?
    c. How does Canada's water quality compare with that of other jurisdictions?