

**A private citizen's recourse under the Criminal Code
to violations of the Fisheries Act.**

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i. Introduction

Northern Ontario's pristine waterways and forests are the subject of this paper. The forestry industry of Northern Ontario currently uses the aerial application of herbicides as their primary tool for vegetation management. The herbicides are applied to eliminate the competition for recently planted coniferous seedlings. It is the focus of the paper to explore the possibility of laying a private citizen's information before a justice of the peace under s. 504(a) of the Criminal Code (R.S., 1985, c. C-46)¹ for violations of the Federal Fisheries Act (R.S., 1985, c. F-14).² Of interest to many future environmental lawyers, the Fisheries Act is one of two pieces of Canadian legislation which includes provisions for paying half of the fine (if one is granted) to the party who started the prosecution.³

“The purpose of the Fisheries Act is to conserve and protect Canada's fisheries resources, including fish habitat. It applies to all Canadian fisheries waters, including ditches, channelized streams, creeks, rivers, marshes, lakes, estuaries, coastal waters and marine offshore areas. It also applies to seasonally wetted fish habitat such as shorelines, stream banks, floodplains and intermittent tributaries and privately owned land. **It is an offence to damage fish habitat or put harmful substances such as pesticides into water frequented by fish. This includes pesticide drift.** Fisheries and Oceans Canada and Environment Canada administer this legislation.”⁴

ii. Fisheries Act Legislation

Fisheries Act (R.S., 1985, c. F-14), s. 36. (1) **No one shall**

(3) Subject to subsection (4), no person shall **deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions**

¹ *Criminal Code*, R.S., 1985, c. C-46, online: < <http://laws.justice.gc.ca/en/C-46>>

² *Fisheries Act*, R.S., 1985, c. F-14 , online: <<http://laws.justice.gc.ca/en/F-14/index.html>>

³ <http://www.probeinternational.org/ebi/guide/chapter1.html#1.1>

⁴ http://www.agf.gov.bc.ca/pesticides/i_3.htm

where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

EXCEPTION

(4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of

(a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or

(b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5).

Terms of interest are included in the Fisheries Act at s. 34(1).

“deleterious substance”

« substance nocive »

“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 to the use by man of fish that frequent that water,

“deposit”

« immersion » ou « rejet »

“**deposit**” means any **discharging, spraying**, releasing, **spilling**, leaking, **seeping**, pouring, emitting, emptying, throwing, dumping or placing;

“fish habitat”

« habitat du poisson »

“fish habitat” means 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;**

Penalties for contravention of the act.

40(2) Every person who contravenes subsection 36(1) or (3) is guilty of

(a) an offence punishable on summary conviction and liable, for a first offence, to a fine not

exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or

(b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

Contravention of section 36(1) or (3) thus seems to be a hybrid offence, as the crown may elect to proceed summarily or by indictment. A private citizen can lay an information for indictable offences under s. 504 of the criminal code. Indictable offences include hybrid offences according to s. 34(1)(a) of the Interpretation Act, R.S.C. 1985, c. 1-21.

iii. Laying a private citizen's information

S. 504 is the foundation upon which a private citizen can lay an information before a justice of the peace. S. 507.1 of the Criminal Code provides additional information regarding the process involved to lay a private citizen's information.⁵ "The information must be in writing and under oath. The justice must receive the information if it contains any of the allegations set out in paragraphs (a) to (d)".⁶

504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

Although not fatal if done otherwise, an information is to be laid upon a justice using Form 2, R.S., c.2 (2nd Supp.) s. 5. The judge exercises his discretion in deciding whether to issue a summons. Generally mandamus cannot lie against him⁷, except for a case where the justice's

⁵ A sample information found at <http://www.probeinternational.org/ebi/guide/appendixG.html>

⁶ Edward L. Greenspan & Marc Rosenberg, *Martins Annual Criminal Code 2007* (Canada: Canada Law Book Inc, 2006) (p. 965)

⁷ *R. v. Coughlan* [1970] 3 C.C.C. 61 (Alta S.C.)

refusal to issue process was based on extraneous considerations, or if his discretion was not exercised judicially following a proper hearing.⁸ In the event that a justice fails to act on an information or refused to issue a summons, the private citizen may reapply to another justice for process to be issued.⁹

Three types of attacks likely for this type of information include insufficiency, duplicity, and passage of time.

iv. Defects in the information

Insufficiency – The information must comply with the general requirements laid out in s. 581 and s. 583 of the CC. The defense must show on a “preponderance of evidence” that the informant didn’t meet this requirement of having reasonable grounds to believe the offence had been committed to quash the information.¹⁰ Generally, “It is not sufficient in a count to charge an indictable offence in the abstract. Concrete facts of a nature to identify the particular act which is charged and to give the accused notice of it are necessary ingredients of the indictment”.¹¹

An information should include the exact section of the code which is alleged to have been breached¹², as well as information relating to all elements of that offence.¹³ However, an attack of insufficiency can be corrected by a demand for particulars by the justice under s. 587 of the criminal code.

⁸ *R. v. Blythe* [1973] 13 C.C.C. (2d) 192 (B.S.S.C.)

⁹ *R. v. Allen* [1974] 20 C.C.C. (2d) 447 (Ont. C.A.)

¹⁰ *R. v. Pilcher* [1981], 58 C.C.C. (2d) 435 (Man. Prov. Ct.)

¹¹ *Brodie v. R* [1936] S.C.R. 188 (S.C.C.).

¹² *R. v. Wis Dev. Corp* [1984] 1 S.C.R. 485 (S.C.C.)

¹³ *R. v. McKenzie* [1972] S.C.R. 409 (S.C.C.)

Duplicity – The primary issue for duplicity is whether “the accused know(s) the case he has to meet, or is he prejudiced in the preparation of his defense by ambiguity in the charge?”¹⁴

Violations of this rule may arise if the evidence adduced at trial relates to more than one offence, any one of which would be sufficient to support a conviction.¹⁵ This problem may arise in a situation where herbicides are entering the waterway frequented by fish on an extended and continuing basis, such as slow ground water leaching. Similarly to an assault consisting of multiple punches, the court would likely require the information to be framed as a continuing offence and have the offence tried once. “Subsequent acts were an extension, prolongation or continuation of his original intention.”¹⁶ However, an information may include multiple counts under different legislative schemes (i.e. the Federal Fisheries Act and the Ontario Water Resources Act).

In this situation, the court will have to grapple to define the parameters of the offence. Is a new offence committed every time the applicator sprays, each new day of spraying, each forest unit sprayed, every river polluted, etc. “The real test is whether either the count itself or the evidence adduced by the crown in support of it, can fairly be said to simply be occurrences within a single transaction”.¹⁷ The Rafael case involved a series of scams over several years and the court found it proper to charge for every scam, rather than once for all of them. It is uncertain how the court would define the offence, but it could required individual charges to be laid for each river, creek, or stream which was contaminated as a result of the spraying.

Passage of Time – Generally, if the information is not laid within a prescribed period of time after the offence has been committed, the accused can no longer be compelled to answer to the

¹⁴ *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 (S.C.C.)

¹⁵ *R. v. Hulan* [1970] 1 C.C.C. 36 (Ont. C.A.)

¹⁶ *R. v. Hulan* [1970] 1 C.C.C. 36 (Ont. C.A.)

¹⁷ *R. v. Rafael* [1972] 7 C.C.C. (2d) 325 (Ont. C.A.)

charge. Section 82.1 of the Fisheries Act provides 2 years from the time “when the Minister became aware of the subject-matter of the proceedings” to lay an information for summary charges. Some case law indicates that the limitation period of 2 years begins to run when fisheries officers, as opposed to the Minister, becomes aware of the offence. No reference is made in the act to indictable offences, but there is no limitation period if the crown proceeds indictably.

v. Making out the elements of the offence

A) Demonstrating that herbicides (deleterious substances) were actually deposited in a waterway frequented by fish.

B) Determining whether the Governor in Council has made regulations permitting the deposit of herbicides (the deleterious substance in question), and if so whether the deposit of these herbicides is being done in accordance with the prescribed regulations.

As a regulation allowing for the deposit of herbicides into these waterways may be a complete defense to a violation under the Fisheries Act, this issue will be dealt with first.

Issue B) Has the Governor in Council made regulations allowing the deposit of herbicides into waterways frequented by fish?

All regulations passed under the Fisheries Act are found at the Justice Canada website for the Fisheries Act.¹⁸ The following regulations appear on their face as though they may apply, but do not for the reasons that follow.

- Fish Toxicant Regulations (SOR/88-258): Section 5 of the regulation allows the Minister of Natural Resources to make regulations allowing for the deposit of fish toxicants into waterways frequented by fish. However, section 2 of the Act limits the powers of the

¹⁸ *Fisheries Act*, R.S., 1985, c. F-14, online: <<http://laws.justice.gc.ca/en/F-14/index.html>>

Minister by limiting the circumstances in which a deposit maybe authorized to as being only for “the purpose of destroying any fish that is a pest as defined in section 2 of that Act.”

- Pulp and Paper Effluent Regulations (SOR/92-269) – The regulation deals strictly with the processing of timber, and not the harvesting or post harvest vegetation management.
- Ontario Fishery Regulations, 1989 (SOR/89-93)– The act deals with fishing regulations, and not the release of deleterious substances into waterways frequented by fish.

Further review into the matter with Mark Mattson, President of Lake Ontario Waterkeeper¹⁹, indicated that the Governor in Council has not made regulations allowing for the deposit of herbicides by the forestry industry into waterways frequented by fish. As the Governor in Council has not prescribed acceptable limits for deposits of herbicides into waterways frequented by fish (assuming that they are considered a deleterious substance) depositing them into waterways frequented by fish would be considered an offence.

Issue A) Making out the elements of the offence.

Section 507.1(2) indicates that the informant seeking a summons or warrant must show that “a case for doing so is made out”. This requirement indicates that a prima facie case must exist, showing all of the elements of the offence, before a summons to answer those allegations will be granted. As such, the private citizen is going to be required to demonstrate that some herbicide ended up in some water frequented by fish, and that the herbicide (or its breakdown products) are deleterious to fish.

Section 548 of the CC provides that the justice shall order the accused to stand trial “if in his opinion there is sufficient evidence to put the accused on trial.” The test for assessing sufficiency of evidence of the information is the same standard as required to move beyond a

¹⁹ <http://www.waterkeeper.ca>

preliminary inquiry. The test for committal is the same whether dealing with circumstantial or direct evidence.²⁰ A mix of direct and circumstantial evidence could be prepared in this case including wind drift (circumstantial), surface water run off (direct), and stream / river / lake water sampling pre and post harvest (circumstantial). Ground water sampling and mapping should also be done, but the cost is currently prohibitive.

“If the crown’s case consists of circumstantial evidence, however, the judge must engage in a limited weighing of the evidence because there is an inferential gap between the evidence and the matter to be established. The judge must determine whether the evidence is reasonably capable of supporting the inferences that the crown asks the jury to draw”.²¹ Wind sampling would require the justice to make the inference that some of the pesticide drift did fall into the water body, thus constituting an offence under the Fisheries Act.

1) Herbicide has been applied which has entered a water body

The current guidelines for aerial application of herbicides come from the Ontario Ministry of Environment (OMOE) document titled “Buffer Zone Guidelines for the Aerial Application of Pesticides in Crown Forests of Ontario”.²²

These guidelines require a 60 to 120 metre buffer zone for aerial application of herbicides.

<u>DESIGNATED AREAS</u>	<u>HERBICIDES</u> (including Glyphosate and 2,4-D)
SIGNIFICANT AREA	60 metres
SENSITIVE AREAS	120 metres
HUMAN HABITATION	120 metres

²⁰ R. v. Arcuri [2001] 2 S.C.R. 828 (S.C.C.)

²¹ R. v. Arcuri 2001 SCC (p. 1053 Martins).

²² Ontario Ministry of the Environment and Energy, *Buffer Zone Guidelines for Aerial Application of pesticides in Crown Forests of Ontario*, online: < <http://www.ontariosportsman.com/pesticide-documents/MOE-Buffer-Zone-Guideline-1992.pdf>>

SIGNIFICANT AREA is defined as: lakes with surface area equal to or greater than 10 hectares which have permanent surface drainage to a lake or river system; lakes less than 10 hectares which possess or may possess significant fisheries values (fisheries value is determined by MNR fisheries biologist); streams which appear as permanent streams on a topographic map of scale 1:50,000

SENSITIVE AREA is defined as: critical fish habitat e.g. spawning areas, wetlands, headwaters, migration areas, nursery areas, intermittent streams that provide spawning habitat for fish; fish sanctuaries; fish hatcheries; stocked lakes and rivers; endangered species habitat; patented land (reduction of buffer zones may be considered with written notification to the owner).

As such, it appears that in most cases a 60 metre buffer zone is required unless factors dictate that the area is particularly sensitive. The guideline indicates that “It will be the Ministry of Natural Resource's (MNR) responsibility to identify and indicate all areas requiring protection in the project description for each spray program, in particular lakes which possess or may possess fisheries values.” However, no buffer zone at all is offered for small streams and creeks not appearing on a 1:50,000 scale map. Clearly, allowing herbicides to be deposited into these small creeks would be a violation of the Fisheries Act should the creeks either hold fish or flow into larger fish bearing waters.

vi. Empirical evidence regarding a violation of the Fisheries Act

In order to quantify exactly how far pesticides can drift, the Northwest Coalition for Alternatives to Pesticides examined 16 studies. Typical estimates of pesticide drift following aerial applications ranged from 100 meters (330 feet) to 1600 meters (5250 feet). However, in virtually every study pesticides were detected as far away from the application as samples were taken.²³

Pesticides (and herbicides) can also leach in to groundwater or runoff into rivers and streams and travel to non target sites. Numerous studies have found glyphosate and glyphosate's primary

²³ Cox, C. Indiscriminately From the Skies. 1995. *Journal of Pesticide Reform* 15: 1-7.
<http://www.ontariosportsman.com/pesticide-documents/PESTICIDEPAPER-Jenna.rtf>

breakdown product, AMPA (aminomethylphosphonic acid) as water contaminants.²⁴ Its important to note that if the pesticide has broken down into AMPA before it entered a waterway frequented by fish, this breakdown product would need to be “deleterious to fish” in order to constitute an offence.

A study conducted by the U.S. Geological Survey as part of the Toxic Substances Hydrology Program examined streams in the Midwestern United States to determine the geographic and seasonal distribution of herbicides. Of the 51 streams examined, glyphosate was found in substantial quantities in 21 of the streams collected. Furthermore, AMPA was found in 43 of the samples.²⁵

Additional research regarding glyphosate drift after aerial application is required. Discussions with Domtar and Tembec (two of the largest multinational forestry companies operating in Northern Ontario) indicate that these forestry companies don’t perform post spray surveys, which would be relevant to rebutting the defense of due diligence (s. 78.6) to a charge under the Fisheries Act. From what I’ve gathered, neither the OMNR or the OMOE routinely perform such sampling.

vii. Herbicide testing

If a charge under the Fisheries Act cannot be sustained on empirical evidence of likely violation, actual testing will be required. Discussions with individuals familiar with prosecutions of this type indicate that actual testing would be required to prove guilt beyond a reasonable doubt.

²⁴ Frans, L.M. 2004. Pesticides detected in urban streams in King County, Washington, 1999-2003. U.S. Geological Survey Scientific Investigations Report 2004-5194. <http://pubs.water.usgs.gov/sir2004-5194/>.

²⁵ Schribner, E.A. Battaglin, W.A., Dietze, J.E., and Thurman, E.M. 2003. Reconnaissance data for glyphosate, other selected herbicides, their degradation products, and antibiotics in 51 streams in nine Midwestern states, 2002. U.S. Geological Survey Toxic Substances Hydrology Program. Open-File Report 03-217. <http://ks.water.usgs.gov/Kansas/pubs/reports/ofr.03-217.html>.

Such testing could be done by the private individual²⁶ laying the information or by the government. Mechanisms do exist to formally petition the government to investigate alleged violations of the Fisheries Act.

Process to file request for investigation under s. 74(1) of the Environmental Bill of Rights, 1993, S.O. 1993, CHAPTER 28.²⁷

Investigations under the EBR may only be conducted if a violation of a prescribed act is alleged to have taken place. The Federal Fisheries Act is one of such prescribed acts. The full act and section number of the alleged violation must be included in the request for investigation under s. 74(1) of the EBR. Other requirements include reference to the seriousness of the contravention having regarding to potential environmental damage, a summary of the evidence, a list of names of others who would have information regarding the alleged contravention, and a summary of previous contact with any ministry regarding the matter.

Process to file for investigation under s. 172(1) of the Environmental Protection Act R.S.O. 1990, CHAPTER E.19.²⁸

Section 172(1) states that “where a person complains that a contaminant is causing or has caused injury or damage to livestock or to crops, trees or other vegetation which may result in economic loss to such person, the person may within fourteen days after the injury or damage becomes apparent, request the Minister to conduct an investigation.”

This review maybe difficult in the sense of showing when the “injury or damage

²⁶ Private citizen sampling - <http://www.probeinternational.org/ebi/guide/chapter1.html#1.1>

²⁷ A sample form for investigation under s. 74(1) can be found at <http://www.eco.on.ca/english/publicat/investig.pdf>

²⁸ Ontario Environmental Protection Act, online: http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90e19_e.htm>

becomes apparent”. The regulation specifies 14 days as the time frame, but does not indicate that the private citizen has 14 days after the incident to file, but 14 days after the loss becomes apparent. As such, it could be argued that the loss has not become apparent until the person requesting investigation has taken the time to read and understand the health and environmental impacts of the herbicides being applied, and synthesized that information with the financial impact it may have on them. As my family operates a hunting and fishing lodge in Northern Ontario, the financial impact that these chemicals may have on my income is less disputable than in other cases.

2) The affected water body is one frequented by fish

Charging under the Fisheries Act also requires a determination that the particular water body is one frequented by fish. Laura Bowman, an articling student at Lake Ontario Waterkeeper, indicates that affidavit evidence from a fishery biologist would need to be prepared in this regard. With respect, I believe that such an affidavit would suffice but isn't the only manner of demonstrating that such a waterway is one frequented by fish. Written documents prepared by the Ministry of Environment such as the Guide to Eating Ontario Sportfish²⁹, a bi-annual publication describing (among other things) the fish species found in certain surveyed water bodies, could be used to demonstrate that the particular water body is one frequented by fish. For unsurveyed water bodies, several options exist including: live capture of fish by angling, underwater video of fish, and / or capturing young fish in minnow traps. However, such testing is seemingly not required if this water flows into a water body which has been surveyed (and fish were found) as s.

²⁹ OMOE Guide to Eating Ontario Sportfish 2005 - 2006 Edition. Email sportfish@ene.gov.on.ca for a copy.

36(3) of the Fisheries Act makes it an offence to deposit herbicides “in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.”

A stagnant water body would be one scenario where testing to determine whether there are fish present would be required. However, as more information becomes available regarding the groundwater movement in Northern Ontario, fishery testing even in this scenario may become redundant.

viii. Conclusion

Laying a private citizen’s information regarding a contravention of the Fisheries Act seems to have prospects of success. The major hurdle for a private individual prosecuting the charge would be the acquisition of testing results pre and post spray proving that some of the herbicides applied ended up in the waterways³⁰. However, formal means to petition to the government to perform such investigations do exist and should be attempted before the private citizen performs the sampling on his own. Cooperation with fisheries officers is advisable to ensure that the charges are successful. On another note, demonstrating that herbicides have entered the water shed is also an essential step in advancing a class action lawsuit for damages.

³⁰ See *R. v. Kingston (Corp. of the City)* [2004] 185 C.C.C. (3d) 446

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