Photo by David Johnson
Barkley Sound sockeye, Toquaht Nation

BRIEF TO THE HOUSE OF COMMONS STANDING COMMITTEE ON FISHERIES AND OCEANS REGARDING BILL C-68, AN ACT TO AMEND THE *FISHERIES ACT* AND OTHER ACTS IN CONSEQUENCE

Submitted on behalf of a coalition of the
First Nations Fisheries Council of British Columbia (FNFC),
Island Marine Aquatic Working Group (IMAWG),
Lower Fraser Fisheries Alliance (LFFA),
Okanagan Nation Alliance (ONA),
Upper Fraser Fisheries Conservation Alliance (UFFCA)
Coastal First Nations / Great Bear Initiative (CFN/GBI),
Skeena Fisheries Commission (SFC),
North Coast Skeena First Nations Stewardship Society (NCSFNSS), and
Nuu-chah-nulth Tribal Council (NTC)
(collectively, the "Coalition")

April 20, 2018

I. BACKGROUND

This Coalition of First Nations organizations in British Columbia was formed in 2016 through coordination with the First Nations Fisheries Council of British Columbia (FNFC) to collaboratively participate in the Government of Canada's current and ongoing review of the *Fisheries Act,* RSC 1985, c F-14 (the "Act"). With the support of the First Nations Leadership Council, the FNFC works at a provincial scale on fisheries issues of importance to BC First Nations. The regional organizations that are part of this Coalition provide assistance to over 145 First Nation communities on fish and aquatic resource issues at local and watershed scales. While individual First Nations and First Nations organizations may provide their own submissions unique to their regions and circumstances, we wish to emphasize from the outset the strength and breadth of this Coalition that has developed these collective recommendations on how to revise the Act so as to restore lost protections and incorporate modern safeguards in a manner that recognizes and respects Indigenous peoples inherent and constitutional rights and responsibilities, and that conforms with Canada's domestic and international obligations and commitments to Indigenous peoples.

The Coalition previously submitted a Brief to Standing Committee on Fisheries and Oceans (FOPO) in its review of changes made in 2012 to the Act.[1] Brenda Gaertner also appeared as a witness before FOPO and provided evidence on behalf of the Coalition.[2] The Coalition has also provided recommendations directly to the Department of Fisheries and Oceans (DFO) with respect to necessary reforms to the Act and to existing DFO policies and programs.

The Coalition submits this Brief to FOPO to provide our recommended revisions to Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, 1st Sess, 42nd Parl, 2018 (the "Bill"). Given the breadth and strength of the Coalition, and in the spirit of reconciliation, the Government of Canada, including FOPO, should give significant weight to our recommendations on how the Bill must be improved.

II. THE COALITION'S RECOMMENDED REVISIONS TO THE BILL

1. Include environmental flows in the definition of fish habitat

(a) Commentary

We strongly support the proposed amendment to the definition of "fish habitat" to include "water frequented by fish"; however, the protection of fish and fish habitat requires conserving not only the areas of water that they depend on to carry out their life processes but also must include water quality, quantity and timing of water within those areas. Fish habitat without sufficient water is not helpful to protecting, conserving and restoring fish and aquatic resources.

DFO's Canadian Science Advisory Secretariat (CSAS) agrees: "The scientific literature supports natural flow regimes as essential to sustaining the health of riverine ecosystems and the fisheries

[1]First Nations Fisheries Council of British Columbia et al, *Submission to Standing Committee on Fisheries and Oceans on Review of Changes to the Fisheries Act* (29 November 2016) [*FNFC FOPO Brief*].

[2] Canada, Parliament, House of Commons, Standing Committee on Fisheries and Oceans, *Minutes of Proceedings and Evidence*, 42st Parl, 1st Sess, No 40 (7 December 2016).

dependant on them. Riverine ecosystems and the fisheries they sustain are placed at increasing risk with increasing alteration of natural flow regimes."[3]

CSAS also concluded: "The fact that there is no existing national framework to set environmental flow standards has led to a situation where fisheries resources, fish habitat and the supporting freshwater ecosystems may not be consistently protected across Canada. With increasing water demand, and potentially changing background levels in water availability (as predicted from current consensus on the long-term effects of global climate change; IPCC 2007), there is an urgent need to establish such an environmental flows framework in Canada."[4]

Revising the definition of fish habitat to account for environmental flows will provide the statutory framework to empower the Government of Canada to actively protect the quantity, timing and quality of water flows that fish and aquatic resources require.

(b) Recommendation

The proposed definition of fish habitat should be revised to read:

> **2(1)** ***fish habitat*** means water frequented by fish and any other areas and on which fish depend directly or indirectly to carry out their life processes, including spawning grounds, nursery areas, rearing areas, food supply areas, migration areas and the environmental flows that sustain these areas*; (habitat)*

2. Revise the definition of Indigenous (in relation to a fishery) to recognize and respect Indigenous rights

(a) Commentary

As set out in our 2016 Brief to FOPO, this Coalition strongly supports the proposed repeal of the definition of "Indigenous" (in relation to a fishery). [5] However, as we understand it, the Bill proposes to temporarily carry forward the definition (changing "Aboriginal" to "Indigenous"), and all references to it in the Act, that were unilaterally imposed in 2012 for an unknown amount of time following the date that the Bill receives royal assent and until being eventually repealed on a date to be set by the Governor in Council. The proposal to carry forward the definition, even on a temporary basis, is concerning.

As this Coalition detailed in our 2016 Brief to FOPO[6], the unilaterally definition of "Aboriginal" (in relation to a fishery) is an impoverished and inaccurate understanding of Indigenous peoples' inherent and constitutional rights and responsibilities. The definition was imposed without a robust consultation process with Indigenous peoples and without their free, prior and informed consent.

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[3] Canada, Department of Fisheries and Oceans Canada, *Framework for Assessing the Ecological Flow Requirements to Support Fisheries in Canada*, DFO Can Sci Advis Sec Sci Advis Rep 2013/017 at p 2 (emphasis added).

[4] Canada, Department of Fisheries and Oceans Canada, *Review of approaches and methods to assess Environmental Flows across Canada and internationally,* DFO Can Sci Advis Sec Res Doc 2012/039 at p 1 (emphasis added).

[5] *FNFC FOPO Brief*, *supra* note 1.

[6] *Ibid.*

The definition ignores Indigenous peoples' perspectives and the body of case law regarding the scope of existing rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Contrary to this imposed definition, Indigenous peoples' inherent and constitutional rights and responsibilities to fish are not based simply on what they currently are harvesting and are not limited strictly to fishing for food, social or ceremonial purposes. In addition to the practice of harvesting, Indigenous fisheries include governance, ownership, management, and stewardship for a myriad of living purposes, including spiritual, cultural, social and economic purposes. For example, the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River summarized the Indigenous perspective on the nature of their inherent and constitutional rights and responsibilities to fish as: "[A] broad right, which in their perspective includes the following: a responsibility to protect, conserve, and sustain the fishery; a responsibility to other Aboriginal peoples dependent on salmon; a right to fish for all purposes; a right to use all traditional and modern fishing methods; and a right and responsibility to maintain proper relations to the salmon and their ecology."[7]

Further, limiting fisheries conducted for sale, trade or barter to the definition of "commercial" (in relation to a fishery) is constitutionally inaccurate. Some Indigenous peoples have already established sale, trade or barter as part of their Indigenous fishing rights[8], and others exercise and rely upon traditional trade or barter practices as part of their food, social and ceremonial fishing rights and do not consider these important food exchanges as commercial in nature. Deeming any Indigenous fishery for sale, trade or barter purposes as a commercial fishery and not part of an Indigenous fishery is inconsistent with pre-contact, post-contact, historical and modern fisheries conducted by many Indigenous peoples.

(b) Recommendation

The proposed temporary definition of "Indigenous" (in relation to a fishery) should be revised after consultation with Indigenous peoples to ensure it correctly addresses the nature and scope of Indigenous fisheries, including all purposes that fisheries may be conducted for.

3. Revise the purpose section of the Act to include restoration of fish and fish habitat and reconciliation with Indigenous peoples

(a) Commentary

As set out in our 2016 Brief to FOPO[9], this Coalition strongly supports the addition of a purpose section. However, the purposes proposed in section 3 of the Bill do not provide sufficient guidance on the Act's intended purpose. The proposed purposes simply reflect a codification of the status quo. Over 20 years ago the Supreme Court of Canada confirmed that "Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest."[10]

[7] Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River and Bruce Cohen, *The Uncertain Future of Fraser River Sockeye: The Sockeye Fishery*, 2012, Vol 1, Ch 2 at p 22.
[8] *R. v Gladstone*, [1996] 2 SCR 723; *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2013 BCCA 300.
[9] *FNFC FOPO Brief*, *supra* note 1.
[10] *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at pp 25-26.

The addition of a purpose section at this time can and must do better. The purpose section should provide a clear compass for tackling modern fisheries governance and management issues in Canada which promotes restoration of fish and fish habitat and reconciliation with Indigenous peoples.

In both the fresh and marine waters of British Columbia, the restoration of fish and fish habitat are fundamental to conservation, protection and reconciliation. Through a clear purpose section the Government of Canada can direct and empower the change that has been a constant promise from this Government. Fish and Fish Habitat throughout British Columbia has not been adequately protected under the current Act. Indigenous peoples are consistently seeking DFO to take proactive efforts to restore fish populations and lost or degraded fish habitat. Providing clarity that an overall purpose of the Act is restoration will help to empower required action from the Government of Canada.

Given the long standing devastating impact that DFO's implementation of the Act has had on Indigenous peoples, it is critical that the Government of Canada clearly state that one purpose of this improved Act is the reconciliation with Indigenous peoples. This change will empower those who administer the Act and its associated policies and programs to move away from the long history of denial to recognition and respect of Indigenous rights.

(b) Recommendation

The proposed purpose section should be revised to read:

2.1 The purpose of this Act is to provide a framework for

(a) the proper management and control of fisheries;

(b) the conservation, protection and restoration of fish and fish habitat, including by preventing pollution; and

(c) reconciliation with Indigenous peoples, including respect for the existing rights of the Indigenous peoples of Canada recognized and affirmed under section 35 of the *Constitution Act, 1982*.

4. Revise the non-abrogation and derogation section to reflect Parliament's positive intention to uphold and protect Indigenous rights

(a) Commentary

This Coalition supports measures intended to uphold and protect Indigenous rights, including the addition of a non-abrogation and derogation section to the Act; however, the language proposed in the Bill is inadequate and inconsequential. As a matter of law, it is trite to say that a statutory instrument such as the Act cannot take away protections guaranteed by the *Constitution Act, 1982.* We can and must do better.

In 2007 the Standing Senate Committee on Legal and Constitutional Affairs examined and reported on the implications of including, in legislation, non-abrogation and derogation clauses relating to

Aboriginal and Treaty rights. In canvassing such clauses, the Senate Committee specifically considered the identical language now proposed in the Bill, which is language employed in various federal statutes from 1998 to 2002, and then went into disuse. At the time, witnesses from the Department of Justice described that the limited purpose of such language was to merely remind those administering and enforcing the Act that Indigenous rights exist.[11]

Rather than a non-abrogation and derogation section that uses neutral language, the Senate Committee recommended that the following language should be used which reflects Parliament's positive intention to uphold and protect Indigenous rights: "Every enactment shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*, and not to abrogate or derogate from them."[12]

(b) Recommendation

The proposed non-abrogation and derogation section should be revised to read:

> **2.3** This Act shall be construed so as to uphold the existing rights of the Indigenous peoples of Canada recognized and affirmed under section 35 of the *Constitution Act, 1982*, and not to abrogate or derogate from them.

5. Revise the duty of the Minister to address existing obligations and commitments to Indigenous peoples

(a) Commentary

The Minister has an existing constitutional obligation to consult and, if appropriate, accommodate Indigenous peoples when contemplating any conduct that has the potential to adversely affect their Indigenous rights[13], and in the case where Indigenous rights are recognized by Government of Canada, may only infringe upon those Indigenous rights without the consent of the affected Indigenous peoples in a manner that is consistent with the Crown's fiduciary duties to them.[14]

The Minister also has an existing international commitment to obtain the free, prior and informed consent of Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.[15]

Therefore, section 2.4 of the Bill is problematic and legally incorrect to the extent that its intended to describe the scope of Canada's existing domestic and international obligations and commitments

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[11] Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, *Taking Section 35 Rights Seriously: Non-Derogation Clauses Relating to Aboriginal and Treaty Rights: Final Report of the Standing Senate Committee on Legal and Constitutional Affair,* 39th Parl, 2nd Sess, No 3 (6 December 2007) at p. 8-19 (Chair: Joan Fraser).

[12] *Ibid*.

[13] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 26-51; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paras 43-45 [*Clyde River*].

[14] *R v Sparrow*, [1990] 1 SCR 1075 at pp 1110-1119, Dickson CJ [*Sparrow*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 77-92.

[15] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No. 49, UN Doc A/RES/61/295, Art 19 (2 October 2007) [*UNDRIP*].

to Indigenous peoples in the administration of the Act. The failure to describe this obligation correctly within the Act will cause uncertainty and the likelihood of legal challenges. This Coalition confirms it does not in any way accept or consent to the current proposed wording of section 2.4.

This important clause must be worded to accurately reflect the Crown's constitutional obligations.

(b) Recommendation

The proposed duty of the Minister section should be revised to read:

> **2.4 (1)** When making a decision under this Act, the Minister shall do so in a manner that upholds the protection provided for the rights of the Indigenous peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.
>
> **(2)** The Minister shall take all measures necessary to ensure that the Act is administered in a manner that is consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

6. Revise the decision-making considerations to accurately reflect and inform the exercise of Ministerial discretion, and promote the administration of Act in a manner that better reflects its purposes

(a) Commentary

In our 2016 Brief to FOPO, this Coalition strongly recommended adding a clause that guides the exercise of Ministerial discretion under the Act. Section 2.5 of the Bill proposes to empower the Minister to consider a number of factors when making decisions under the Act. However, unlike other proposed requirements for decision-making under sections 2.4 and 34.1(1), the use of the word "may" in section 2.5 provides the Minister with the statutory discretion to determine whether any one of the factors will be considered. This will introduce legal and practical uncertainty in the administration of the Act. Some of the factors currently listed in section 2.5 must be considered now, and many of the factors listed in section 2.5 are essential and critically important for the Minister to consider when making decisions under the Act. Suggesting that consideration of these already mandatory or critical factors be discretionary defeats the primary intention of this section.

The Royal Society of Canada Expert Panel on Sustaining Canada's Marine Biodiversity reported that "the delegation of absolute discretion to the Minister of Fisheries and Oceans, is certainty out of step with international 'best practices'" and that "Canada's progress in meeting its obligations to sustain marine biodiversity has been impeded by the absolute discretion afforded to the Minister of Fisheries and Oceans… [which] reflects a period of time in Canadian history when Ministers were afforded 'czar-like' powers."[16] The Expert Panel therefore recommended that "Government of

[16] JA Hutchings et al, *Sustaining Canadian Marine Biodiversity: Responding to the Challenges Posed by Climate Change, Fisheries, and Aquaculture: Expert Panel Report prepared for the Royal Society of Canada*, (Ottawa: 2012) at pp 205 and 219.

Canada reduce the discretionary power in fisheries management decisions exercised by the Minister of Fisheries and Oceans."[17]

As noted above, some of the factors listed in section 2.5 are matters that the Minister cannot choose to disregard. For example, with respect to the precautionary approach the courts have held that "the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international law and substantive domestic law."[18] The importance and non-discretionary nature of applying a precautionary approach is also reflected in other federal statutes concerning the protection of the environment and prevention of pollution which establishes a duty to apply the precautionary principle when exercising powers under the Act.[19]

In addition, in order to be consistent with a proposed purpose of conservation, protection and restoration of fish and fish habitat, the Act must recognize the precautionary approach and the use of best information as mandatory considerations.

Similarly, the consideration of Indigenous rights is not discretionary. The constitutional priority for food, social and ceremonial fisheries must be considered by the Minister when making decisions. To not do so is unlawful. The courts have stressed the imperative of considering the Indigenous perspective on the nature of the rights at stake[20] and on correctly applying the constitutional priority for food, social and ceremonial fisheries.[21] Therefore, considerations of traditional knowledge and priority of allocations must also be mandatory in decision-making under the Act in order to meet existing constitutional obligations and support the imperative of reconciliation.

(b) Recommendation

The proposed decision-making considerations section should be revised to read:

> **2.5** Except as otherwise provided in this Act, when making a decision under this Act, the Minister shall consider, among other things,
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> **(a)** the application of a precautionary approach and an ecosystem approach;
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> **(b)** the sustainability of fisheries;
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> **(c)** scientific information;
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> **(d)** traditional knowledge of the Indigenous peoples of Canada, as prescribed by regulation[22], that has been provided to the Minister;

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[17] *Ibid* at p 219.

[18] *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 at para 43 [citing *114957 Canada Ltée (Spraytech Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 30-32].

[19] *Canadian Environmental Protection Act, 1999,* SC 1999, c 33, s 2(1)(a).

[20] *Clyde River*, *supra* note 13 at paras 43-45.

[21] *Sparrow*, *supra* note 12 at p 1112.

[22] See below the recommendation to revise the traditional knowledge sections to better respect and protect Indigenous peoples' knowledge systems and intellectual property rights.

(e) agreements with any government of a province, any Indigenous governing body and any body — including a co-management body — established under a land claims agreement;

(f) the intersection of sex and gender with other identity factors;

(g) the priority for the exercise of the fishing rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;

(h) climate change impacts; and

(i) the conservation of biological diversity.

2.6 Except as otherwise provided in this Act, when making a decision under this Act, the Minister may consider, among other things,

(a) community knowledge;

(b) social, economic and cultural factors in the management of fisheries; and

(c) the preservation or promotion of the independence of licence holders in commercial inshore fisheries.

7. Revise the fish stocks' limit reference point section to reduce discretion and promote a precautionary approach for required protection and restoration of fish and fish habitat

(a) Commentary

While this Coalition strongly supports the inclusion of measures intended to facilitate the restoration of fish and fish habitat, section 6.1 of the Bill is too discretionary to promote meaningful implementation.

By setting the trigger for the Ministers consideration at the point where a fish stock is already at or below the limit reference point is waiting too late for required proactive steps and is inconsistent with a precautionary approach. This trigger also relies on the condition precedent of a limit reference point actually being established. There are only a few fish stocks in Canada that actually have a limit reference point developed, and many which do not have the required data and information base to create accurate limit reference points. Given this practical reality, setting the trigger to the limit reference point leaves way too many populations of fish and aquatic resources in low abundance unprotected, and falling through the regulatory cracks.

(b) Recommendation

The proposed limit point reference section should be revised to read:

6.1 In the management of fisheries, if a fish population or sub-population that have declined to its cautious status zone would be impacted, the Minister shall take into account

(a) whether there are measures in place that are aimed at rebuilding the population or sub-population; and

(b) if he or she is of the opinion that the loss or degradation of that stock's fish habitat has contributed to the population or sub-population decline, whether there are measures in place aimed at restoring that fish habitat.

6.2 In the management of fisheries, if a fish population or sub-population that has declined to its critical status zone would be impacted, the Minister shall prepare a plan that establishes

(a) measures aimed at rebuilding the population or sub-population; and

(b) if he or she is of the opinion that the loss or degradation of that population or sub-population's fish habitat has contributed to the population or sub-population's decline, measures aimed at restoring that fish habitat.

…

43(1)(b.1) respecting the rebuilding of a fish population or sub-population.

8. Revise the factors for consideration to prioritize avoidance and promote greater transparency

(a) Commentary

In order to protect, conserve and restore fish and fish habitat, this Coalition recommends that the Act should prioritize and give preference to measures and standards that are intended to *avoid* death to fish or the harmful alteration, disruption or destruction of fish habitat over measures and standards that seek to mitigate or offset. It is important that the Act be clear that the priority is to avoid death and harmful alteration, not simply to mitigate or offset. Failure to provide clarity on this would create otherwise avoidable confusion in the implementation of the Act.

In addition, the Coalition recommends that transparent and intelligible written reasons should be provided for under authorizations where there are likely potential adverse effects on Indigenous rights and potential to cause death to fish or the harmful alteration, disruption or destruction of fish habitat. As the Supreme Court of Canada recently affirmed, written reasons "foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed", "[are] a sign of respect" and "promote better decision making."[23]

(b) Recommendation

The proposed factors for consideration section should be revised to read:

34.1(1) Before recommending to the Governor in Council that a regulation be made in respect of section 34.4, 35 or 35.1 or under subsection 35.2(10), 36(5) or (5.1), paragraph 43(1)(b.2) or subsection 43(5) or before exercising any power under

[23] *Clyde River* at para 41.

subsection 34.3(2) or (3), paragraph 34.4(2)(b) or (c), subsection 34.4(4), paragraph 35(2)(b) or (c) or subsection 35(4), 35.1(2), 35.2(7) or 36(5.2), or under subsection 37(2) with regard to an offence under subsection 40(1), the Minister, prescribed person or prescribed entity, as the case may be, shall consider and provide written reasons detailing the consideration of the following factors:

(a) the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected;

(b) fisheries management objectives;

(c) whether there are measures and standards

(i) that give priority to avoiding the death of fish over measures and standards to mitigate the extent of their death or offset their death, or

(ii) that give priority to avoiding the harmful alteration, disruption or destruction of fish habitat over measures and standards to mitigate or offset the harmful alteration, disruption or destruction of fish habitat;

(d) the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat;

(e) any fish habitat banks, as defined in section 42.01, that may be affected;

(f) whether any measures and standards to offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat;

(g) traditional knowledge of the Indigenous peoples of Canada, as prescribed by regulation, that has been provided to the Minister; and

(h) any other factor that the Minister considers relevant.

9. Revise the traditional knowledge sections to better respect and protect Indigenous peoples' knowledge systems and intellectual property rights

(a) Commentary

Fisheries management in Canada will greatly benefit from integrating the vast and diverse knowledge of Indigenous peoples and the Indigenous legal and governance systems that underpin the transmission and application of such knowledge. However, Indigenous knowledge and the processes for respectfully and meaningfully engaging with it must be clearly understood in order to prevent it from being misinterpreted, incorrectly used, or exploited. In this regard, this Coalition

welcomes the proposed addition of traditional knowledge as a factor to be considered in decision-making under the Act and have recommended above that it be a mandatory consideration rather than a discretionary one under section 2.5. However, there are a number of concerns with the traditional knowledge provisions in the Bill that must be addressed in order to better respect and protect Indigenous peoples' knowledge systems and intellectual property rights.

First, both the use of the descriptor "traditional" and the lack of a defined term for "traditional knowledge" raises concerns with respect to the nature and scope of knowledge that the Minister will consider. It is a common refrain in Indigenous communities that "Traditionally we are contemporary peoples." Our knowledge, like our culture, is not frozen in time. Further, it is not strictly knowledge related to the environment or particular species. This is already understood at a federal policy level where it is acknowledged that "ATK [aboriginal traditional knowledge] is cumulative and dynamic. It builds upon the historic experiences of a people and adapts to social, economic, environmental, spiritual and political change. While those involved in EA [environmental assessment] will likely be most interested in traditional knowledge about the environment (or, traditional ecological knowledge), it must be understood to form a part of a larger body of knowledge which encompasses knowledge about cultural, environmental, economic, political and spiritual inter-relationships."[24] The full breadth and definition of the knowledge of Indigenous peoples must be respected and this should be achieved through regulations developed in collaboration with Indigenous peoples.

Second, the Bill proposes to include broad exceptions to the protection of traditional knowledge provided to the Minister in confidence and fails to establish any measures to protect the intellectual property rights that Indigenous peoples may individually and collectively hold over the traditional knowledge they provide to the Minister. These exceptions and the consequent lack of protections are likely to create a significant chilling effect and result in Indigenous peoples being unwilling to share information needed to inform important decisions. In addition, the current approach is inconsistent with the inherent rights of Indigenous peoples to maintain, control and protect traditional knowledge and their intellectual property over such traditional knowledge, and the reciprocal international obligation of Canada to protect these rights.[25]

While we accept that confidentially may be waived to traditional knowledge that is already in the public domain and that the Minister may be required to disclose some elements of traditional knowledge shared in confidence for the purposes of procedural fairness and natural justice, there should be no other statutory exceptions for disclosing traditional knowledge provided in confidence. Indigenous people entrust their own representative institutions with traditional knowledge which can be both individual and collective in nature often with conditions addressing intellectual property rights and circumscribing limited purposes for which they consent to it being put to use. In these circumstances Indigenous people rightfully expect their representative institutions to adhere to the agreed to conditions and prevent its unauthorized disclosure or misuse. The statutory regime must be carefully considered and structured to respect these realities.

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[24] Canada, Canadian Environmental Assessment Agency, *Considering Aboriginal traditional knowledge in environmental assessments conducted under the Canadian Environmental Assessment Act, 2012* (Ottawa: Canadian Environmental Assessment Agency, 2015) at 1.

[25] *UNDRIP*, *supra* note 14 at art 31.

The proposed exception that would allow Canada to use traditional knowledge shared in confidence with the Minister in legal proceedings is redundant and unnecessary. Canada has the right to request the disclosure of relevant traditional knowledge from any Indigenous peoples it is parties to a legal proceeding with. Any refusal to produce requested information would be the subject of a Crown motion and the court would be required to determine if the traditional knowledge must be produced, in consideration of the broader public interest in maintaining confidentiality. This case-by-case consideration for the production of confidential traditional knowledge is a much more appropriate venue to determine whether the disclosure of confidential traditional knowledge is appropriate in legal proceedings. There is also a broader public interest in maintaining the confidentiality of traditional knowledge in legal proceedings that the Bill undermines. Indigenous peoples have a reciprocal duty to express their interests and concerns regarding potential adverse effects on their Indigenous rights and consult with the Crown in good faith. In this regard, the courts have recently found that information shared by Indigenous people with their representative institutions is privileged and does not have to be produced in litigation (subject to some exceptions) because of the public interest in protecting consultation processes and avoiding harm to the functioning of reconciliation.[26]

(b) Recommendation

In addition to the revisions to the consideration of traditional knowledge under sections 2.5 and 34.1(1) recommend above, the traditional knowledge sections should be revised to read:

> **43(1)(j.1)** prescribing the defintion of the traditional knowledge of the Indigenous peoples of Canada and processes and practicies for its consideration under the Act, after consultation with the Indigenous peoples of Canada.
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> …
>
> **61.2(1)** Any traditional knowledge of the Indigenous peoples of Canada that is provided to the Minister under this Act in confidence is confidential and shall not knowingly be, or be permitted to be, disclosed without written consent.
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> **(2)** Despite subsection (1), the traditional knowledge referred to in that subsection may be disclosed if
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> **(a)** it is publicly available; or
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> **(b)** the disclosure is necessary for the purposes of procedural fairness and natural justice.
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> **(3)** The Minister shall, after consultation with the affected Indigenous peoples of Canada, impose conditions with respect to the disclosure of traditional knowledge by any person to whom it is disclosed under paragraph (2)(b) for the purposes of procedural fairness and natural justice.

[26] *Yahey v British Columbia,* 2018 BCSC 123 at para 24

(3.1) The Minister shall permit the withdrawal of traditional knowledge prior to being disclosed under paragraph 2(b) where the affected Indigenous peoples of Canada request a withdrawal in writing.

(4) The person referred to in subsection (3) shall comply with any conditions imposed by the Minister under that subsection.

(5) Despite any other Act of Parliament, civil or criminal proceedings shall not be brought against Her Majesty in right of Canada, the Minister and any person acting on behalf of or under the direction of the Minister for the full or partial disclosure of the traditional knowledge referred to in subsection (1) made in good faith under this Act or for any consequences of the disclosure.

(6) Any traditional knowledge of the Indigenous peoples of Canada that is provided to the Minister under this Act is and remains the intellectual property of the affected Indigenous peoples.

(6.1) No disclosure under subsection (2) shall be deemed to be a waiver of the intellectual property rights of the affected Indigenous peoples.

III. A SUMMARY OF THE COALITION'S RECOMMENDATIONS

As detailed above, this Coalition makes the following recommended revisions to the Bill:

1. Revise the definition of fish habitat to include environmental flows.
2. Revise the definition of Indigenous (in relation to a fishery) to properly recognize and respect Indigenous rights.
3. Revise the purpose section to include restoration of fish and fish habitat and reconciliation with Indigenous peoples.
4. Revise the non-abrogation and derogation section to reflect Parliament's positive intention to uphold and protect Indigenous rights.
5. Revise the duty of the Minister section to address existing obligations and commitments to Indigenous peoples.
6. Revise the decision-making considerations to reduce excessive Ministerial discretion and promote the administration of Act in a manner that reflects its proposed purposes.
7. Revise the fish stocks' limit reference point section to reduce discretion and promote a precautionary approach in considering measures for restoration of fish and fish habitat.
8. Revise the factors for consideration to prioritize avoidance and promote greater transparency.
9. Revise the traditional knowledge sections to better respect and protect Indigenous peoples' knowledge systems and intellectual property rights.

IV. ABOUT THE COALITION

1. FNFC

FNFC was established in 2008 as an organization that works with First Nations in British Columbia on issues related to fisheries and aquatic resource management. Through the BC First Nations Fisheries Action Plan, BC First Nations have directed the FNFC to support, protect, reconcile and advance Aboriginal and Treaty rights as they relate to fisheries and the health and protection of aquatic resources. In its work, the FNFC has the support of the First Nations Leadership Council which consists of the BC Assembly of First Nations, Union of BC Indian Chiefs and First Nations Summit.

FNFC works to identify, address and promote the resolution of strategic and policy issues of common interest to First Nations with respect to fisheries and aquatic resources, including: Indigenous rights and responsibilities; Aboriginal title, rights and Treaty rights concerns; developing effective governance mechanisms; forming collaborative relationships among First Nations organization; working together to build a cohesive voice on fisheries and aquatic resource matters; and moving toward a more robust and responsive system of co-management.

FNFC is not a holder of Aboriginal title, rights and Treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and therefore this brief must not be relied upon to fulfill the Crown's duty to consult directly with its member First Nations.

2. Lower Fraser Fisheries Alliance (LFFA)

LFFA is a voice for First Nations of the Lower Fraser River on matters related to fish and aquatic resources and works with the 30 independent First Nations communities from Tsawwassen to Yale, British Columbia. The LFFA works collaboratively and holistically to support the management and sustainability of First Nation fisheries and supports cultural and spiritual traditions for future generations. The mission of the LFFA is to promote and support the management of a robust and expanding fishery for the First Nations of the Lower Fraser River.

LFFA is not a holder of Aboriginal title, rights and Treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and therefore this brief must not be relied upon to fulfill the Crown's duty to consult directly with its member First Nations. In addition, the limited time provided to respond on these important matters has precluded the LFFA from reviewing this submission with leadership of its member First Nations.

3. Upper Fraser Fisheries Conservation Alliance (UFFCA)

UFFCA was established in 2005 with the primary objective of furthering the fisheries and aquatic resource related interests of 22 Upper Fraser River First Nations.

UFFCA is not a holder of Aboriginal title, rights and Treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and therefore this brief must not be relied upon to fulfill the Crown's duty to consult directly with its member First Nations.

4. Okanagan Nation Alliance (ONA)

ONA was formed in 1981 as the inaugural First Nations government in the Okanagan which represents the following member communities on areas of common concern: Okanagan Indian Band, Upper Nicola Band, Westbank First Nation, Penticton Indian Band, Osoyoos Indian Band, Lower Similkameen Indian Band, Upper Similkameen Indian Band and the Colville Confederated Tribes. ONA's mandate is to work collectively to advance and assert Okanagan Nation Title and Rights over the Okanagan Nation Territory.

5. Island Marine Aquatic Working Group (IMAWG)

IMAWG is an incorporated not-for-profit society that has been in existence since 2008. IMAWG's purpose is to facilitate regional wide fisheries management meetings between the 54 First Nations on Vancouver Island and DFO to discuss all fisheries matters of interest. IMAWG's ultimate goal is to create a space for engagement for a unified approach to co-management, while empowering First Nations within their local fisheries supported by the most up to date information, technical advice and recommendations. IMAWG is supported by a technical team called the Island Marine Aquatic Technical Working Group who uses both historical and modern science to review data and information to provide the best sound advice to First Nations when engaging in co-management activities with DFO.

IMAWG is not a holder of Aboriginal title, rights and Treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and therefore this brief must not be relied upon to fulfill the Crown's duty to consult directly with its member First Nations.

6. Coastal First Nations/Great Bear Initiative (CFN/GBI)

CFN/GBI is a provincially-incorporated society representing an alliance of First Nations on British Columbia's north and central coast and Haida Gwaii. CFN/GBI's member First Nations are: Wuikinuxv Nation, Heiltsuk, Kitasoo/Xai'Xais, Nuxalk Nation, Gitga'at, Metlakatla, Old Massett, Skidegate and Council of the Haida Nation. CFN/GBI is governed by a board of directors composed of representatives of each member First Nation. CFN/GBI promotes community self-sufficiency and sustainable economic development on British Columbia's north and central coast and Haida Gwaii. CFN/GBI members are working together to build a strong, conservation-based economy that recognizes our Aboriginal Title and Rights, and protects our culture and ecosystems. CFN/GBI's mandate includes participating effectively in the regulatory processes and assisting member First Nations in their participation.

CFN/GBI is not a holder of Aboriginal title, rights and Treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and therefore this brief must not be relied upon to fulfill the Crown's duty to consult directly with its member First Nations.

7. North Coast Skeena First Nations Stewardship Society (NCSFNSS)

NCSFNSS has a mandate to carry out work in the areas of fisheries science, management and policy, marine use planning and implementation. NCSFNSS provides fisheries biology, management and marine planning support and advocacy to the Tsimshian Nations of Kitkatla, Gitga'at, Kitsumkalum,

Kitselas and the Haisla Nation at Kitimat on the North Coast of B.C. and inland within the Skeena Watershed. NCSFNSS is currently engaged in projects which carry out fish habitat restoration and impact mitigation, fisheries monitoring, conservation and biological studies. Our staff participates in advisory bodies which support fisheries policy development and implementation nationally and regionally. NCSFNSS partners with each of its member Nations individually as well as with other Indigenous organizations to participate in processes and projects that build capacity and support First Nations leadership in fisheries science, management and governance.

8. Skeena Fisheries Commission (SFC)

SFC is a 35 year-old Indigenous institution that focuses on fisheries management, science, and conservation. Currently, SFC's member Nations include the Gitxsan, Gitanyow and the Wetsuwet'en. SFC, as directed by its member Nations, responds to management and access priorities relating to the broad Indigenous interest in the fisheries resource, and also provides technical expertise and advice to its member Nations.

SFC is not a holder of Aboriginal title, rights and Treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and therefore this brief must not be relied upon to fulfill the Crown's duty to consult directly with its member First Nations.

9. Uu-a-thluk/Nuu-chah-nulth Tribal Council

Uu-a-thluk is the aquatic resource management department of the Nuu-chah-nulth Tribal Council. The word Uu-a-thluk means "taking care of" in the Nuu-chah-nulth language. Uu-a-thluk works closely with First Nations, governments, communities, businesses, and environmental organizations to promote and support the sustainable management of ocean and freshwater marine resources on the west coast of Vancouver Island.

Uu-a-thluk/ Nuu-chah-nulth Tribal Council is not a holder of Aboriginal title, rights and Treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and therefore this brief must not be relied upon to fulfill the Crown's duty to consult directly with its member First Nations.