FIRST NATIONS FISHERIES COUNCIL
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Submission to Standing Committee on Fisheries and Oceans
on Review of Changes to the *Fisheries Act*

Submitted on behalf of First Nations Fisheries Council[1]

November 29, 2016

[1] This submission was a collaborative effort led by the First Nations Fisheries Council working with, Lower Fraser First Nations Alliance, Upper Fraser Fisheries Conservation Alliance, Island Marine Aquatic Working Group, Coastal First Nations/Great Bear Initiative, ("Regional Organizations") and Mandell Pinder LLP.

CONTENTS

1. ABOUT FIRST NATIONS FISHERIES COUNCIL ("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. The FNFC works to identify, address and promote the resolution of issues of common interest to First Nations with respect to fisheries and aquatic resources, including Indigenous rights and responsibilities Aboriginal title and rights and Treaty rights concerns, building community capacity, and moving toward a more robust and responsive system of co-management. The FNFC is comprised of First Nations delegates from the diverse geographic regions of British Columbia. The FNFC and the Regional Organizations are not holders of Aboriginal rights as defined in s. 35 of the *Constitution Act, 1982*, and therefore the comments submitted below do not fulfill the Crown's duty to consult directly with rights and title holders.

2. CONTEXT

Fish, fish habitat and fisheries are the lifeblood for First Nations in British Columbia. Since time immemorial, First Nations have relied on the once-abundant fisheries and thriving habitats within their territories to support their way of life, including their spiritual, social, cultural and economic well-being. Indigenous inherent rights, and s. 35(1) Aboriginal and Treaty rights, including Aboriginal title, have and will always include the rights and responsibilities of First Nations to govern and manage the fish, fish habitat (fresh and marine), and fisheries, and be stewards of the rivers and coastal waters in their territories. First Nations in British Columbia hold and exercise sacred responsibilities, on behalf of past, present and future generations to govern and manage fish, fish habitat, and fisheries, which include the ecosystems and natural balance on which they rely.

The colonial relationship between First Nations and the Crown, in particular the Minister of Fisheries and Oceans ("Minister") and the Department of Fisheries and Oceans ("DFO"), as it relates to fish, fish habitat and fisheries, has been troubled from the very outset. Since 1982, and the constitutional protection provided to existing Aboriginal and Treaty rights, First Nations in British Columbia are consistently engaging at both the negotiating tables (inside and outside of the British Columbia Treaty Commission process) and the Courts to better ensure the required nation-to-nation relationship regarding the governance, management and conservation of fish, fish habitat and fisheries, and the proper respect for s. 35(1) Aboriginal and Treaty rights. The historic and present struggles between First Nations in British Columbia and DFO are well demonstrated by the body of case law that has emerged from the province and shaped the Canadian legal landscape on fisheries management.[2]

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[2] See for example: *Jack et al. v. The Queen*, [1980] 1 SCR 294; *R. v. Sparrow*, [1990] 1 SCR 1075; *R. v. Van der Peet*, [1996] 2 SCR 507 ["*Van der Peet*"]; *R. v. Gladstone*, [1996] 2 SCR 723 ["*Gladstone*"]; *R. v. Lewis*, [1996] 1 SCR 921; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 SCR 672; *R. v. Nikal*, [1996] 1 SCR 1013; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56; *Saanichton Marina Ltd. v. Claxton (1987)*, 18 BCLR (2d) 217 (SC), aff'd (1989), 36 BCLR (2d) 79 (BCCA) ["Saanichton"]; *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283; *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2013 BCCA 300; *Quipp v. Her Majesty the Queen*, 2011 BCCA 235; *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2014 FC 197; *Haida Nation v. Canada (Fisheries and Oceans)*, 2015 FC 290.

As a result of section 35(1) of the *Constitution Act, 1982*, numerous cases since 1982 have confirmed Aboriginal title to the land and resources of the territory, Aboriginal and Treaty rights to fish, the continuing rights of self-government, and the constitutional imperative for reconciliation. This legal landscape must inform the current review of the *Fisheries Act*, R.S.C. 1985, c. F-14 ("Act").

This Federal government has committed to a renewed, nation-to-nation relationship with Indigenous peoples, based on recognition of rights, respect, co-operation, and partnership and to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"). In the spirit of reconciliation, a more collaborative, coordinated and efficient approach to the management of fisheries and oceans, including co-management and associated economic opportunities, must be forged. The proposals set out in this submission have that honourable intention.

The Minister has been mandated to review the 2012/2013 changes to the Act ("2012/2013 Changes"), restore lost protections, and incorporate modern safeguards.[3] The Standing Committee on Fisheries and Oceans ("FOPO") has been tasked with conducting this review.

Given the fundamental importance of fish, fish habitat and fisheries to First Nations and s. 35(1) of the *Constitution Act, 1982*, Canada must ensure a robust consultation process is used to complete the work required to change the Act. Many First Nations in British Columbia have raised numerous concerns with the process currently underway. The inadequate communication of the parallel tracks (i.e., FOPO's review and Minister's review), the late arrival of insufficient funding, and the difficulties securing opportunities to appear before FOPO are just some of the challenges currently facing this review.

While restoring lost protections for fish and fish habitat under the Act and modernizing the Act are necessary improvements, the difficulties plaguing Canada's current fisheries management regime will not be solved simply by changing the Act. Systemic reform that takes us beyond the status quo of an Act nearly as old as Confederation is also required in order to modernize fisheries management in a manner that recognizes and respects Aboriginal and Treaty rights within the meaning of section 35(1) of the *Constitution Act, 1982* and the UNDRIP. Canada must be committed to building nation-to-nation government and management agreements with First Nations and provincial governments so that the complexity of fish, fish habitat, fisheries and the ecosystems on which they rely, advance forward in a manner that meets sacred, constitutional and international commitments. The Act must empower a change in how we together govern and manage fish, fish habitat and fisheries, including providing adequate regulatory frameworks for generating long-term sustainability.

The next part of this submission outlines how the lost protections under the 2012/2013 Changes ought to be remedied. This is followed by submissions addressing how the Act ought to be modernized. Recommended wording for amendments to the Act (where applicable) are attached to these submissions as Appendix A for consideration.

[3] Rt. Hon. Justin Trudeau, Letter to Minister re: "Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter" (November 2015) ["Trudeau Letter].

3. RESTORING LOST PROTECTIONS

The 2012/2013 Changes have been well-documented for FOPO's consideration. These changes were put into place without any consultation with First Nations, and in a manner that offended Crown-First Nation relations.

While the full on-the-ground impacts of the 2012/2013 Changes would require more time to experience and document, which FNFC definitely does not promote, it is a matter of fact that the changes coupled with the previous Federal government's downsizing of DFO, has resulted in less protection and increased vulnerability of fish and fish habitat in British Columbia. The Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River ("Cohen Commission") found that "[t]he amendments collectively appear to narrow the focus of the Act from protecting fish habitat to protecting fisheries."[4] The Federal Court of Appeal also concluded that the 2012/2013 Changes "clearly increases the risk of harm to fish."[5]

The loss of protections to fish and fish habitat undermines, diminishes and threatens the ability to meaningfully exercise Aboriginal and Treaty rights and obligations related to fish. These are serious and irreversible impacts which threaten the food security and cultural security of present and future generations. The loss of these protections at the same time First Nations are experiencing significant changes to ecosystems from climate change, the increased pressure on habitat from human activities, and diminishing fisheries and aquatic resources has caused significant concerns in First Nation communities throughout British Columbia.

FNFC makes the following recommendations to address the narrowed focus on fisheries and increased risk to fish and fish habitat:

(a) Restore HADD and Prohibition on Killing Fish by Means Other than Fishing

Canada has an obligation to protect fish habitat that First Nations rely on for the meaningful exercise of Aboriginal and Treaty rights to fish.[6] Canada is currently failing to fulfill this obligation due to the abdication of protections for fish habitat under the standard of "serious harm to fish" and the reliance on an incomplete understanding of Aboriginal fisheries under the 2012/2013 Changes. First Nations hold inherent rights and responsibilities that require stewardship and protection for all of life within their territories, not to certain fish and fisheries that currently happen to be in sufficient abundance to support fisheries. These rights and responsibilities are a sacred obligation in place to ensure that future generations are not deprived of enjoying the lands and waters as their ancestors have before them.

To restore lost protections for fish habitat, the previous standard of "harmful alteration or disruption, or the destruction of fish habitat" ("HADD") must be restored immediately with the recent inclusion of "activity" under the 2012/2013 Changes maintained. In addition, the phrase "that are part of a commercial, recreational or Aboriginal fishery" introduced by the 2012/2013

[4] Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (Canada), and Bruce I. Cohen. *The Uncertain Future of Fraser River Sockeye: The Sockeye Fishery,* 2012 ["Cohen Commission Report"] Volume 3 at Chapter 3, p. 78.
[5] *Courtoreille v. Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244 at para. 104.
[6] See for example: *Saanichton, supra Note 2*; UNDRIP Article 29(1).

Changes must be removed as it has the potential to limit protections to only fisheries that are currently fished (see below). The previous HADD standard without this phrase, in contrast, protected fish habitats generally.

In addition, s. 35(1) of the Act must be changed to state "No person shall carry on any work, undertaking or activity that results or is likely to result in the harmful alteration or disruption, or the destruction, of fish habitat."[7] This addition responds to the limitations inherent in scientific inquiry, incorporates the precautionary principle into the standard for protection and better reflects the level of protection necessary to ensure sustainable fish, fish habitat and fisheries for future generations.

To ensure that adequate safeguards against harm to fish are also maintained alongside fish habitat, the objective prohibition against the killing of fish by means other than fishing in s. 32 must be restored. While these measures alone are no panacea for the protection of fish and fish habitat, together they better reflect the value and importance of fish, fish habitat, fisheries and Canada's obligations to First Nations.

(b) Repeal Definitions of Fisheries

The effect of the inclusion of "Aboriginal fishery", along with "commercial" and "recreational" fisheries, in the 2012/2013 Changes was to reduce the scope of protection to fisheries under the Act rather than protecting fish and fish habitat generally or recognized Aboriginal rights. As noted above, HADD must be restored without such a limitation by simply removing the phrase "that are part of a commercial, recreational or Aboriginal fishery." This would remove any need for the definitions of "Aboriginal fishery," "commercial fishery" or "recreational fishery" within the Act. For this reason, once HADD is restored, all three definitions must be removed.

However, if "Aboriginal fishery" is to be maintained in the Act going forward, the unilaterally imposed definition resulting from the 2012/2013 Changes is an impoverished and inaccurate understanding of Aboriginal and Treaty rights. Any definition would require a robust consultation process with First Nations and their informed consent. The definition ignores existing case law, ignores the Aboriginal perspective, and limits the protection of fish habitat. Through the definition of Aboriginal fisheries, Canada relies on a flawed notion that Aboriginal and Treaty rights to fish are mere rights of harvest for limited purposes, and that such rights need only focus on the species that are currently fished.

Contrary to the definition of Aboriginal fishery currently found in the Act, First Nations' inherent, Aboriginal and Treaty rights and responsibilities to fish are not based simply on what they currently are harvesting. More than harvest, Aboriginal fisheries are a relationship that includes governance, ownership, management, and stewardship for a myriad of living purposes, including spiritual, cultural, social and economic purposes. The First Nations coalition participating in the Cohen Commission expressed an understanding of the right to fish, which was summarized by Commissioner Cohen 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

[7] For an example of a standard that includes "is likely to," see *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth) Part 3 [Australia].

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."[8] Fish are our relatives and reflect a way of life. First Nations are required to look after them.

Further, the use of "sale, trade or barter" in the definition of commercial fisheries is constitutionally inaccurate. Some First Nations have already established sale, trade or barter as part of their Aboriginal fishing right,[9] and others exercise and rely upon traditional trade or barter practices as part of their food, social and ceremonial rights and do not consider these important food exchanges as commercial in nature. Deeming any Aboriginal fishery for sale, trade or barter purposes as a commercial fishery and not part of an Aboriginal fishery is inconsistent with pre-contact, post-contact, historical and modern fisheries conducted by many First Nations.

The definition of Aboriginal fishery (and recreational and commercial fishery) restricts protection to fisheries where "fish is harvested" (i.e., current use). This restriction of protection under the Act, conflicts with inherent and Aboriginal fishing rights and responsibilities. It has the potential of significantly reducing protection of fish and fish habitat for fish that cannot be harvested for historical reasons (e.g., over-fished at previous times) or current conservation purposes (e.g., weak stock or conservation unit that is struggling to adapt to cumulative impacts, including climate change). It precludes habitat protection for fish which are rebuilding (e.g., spawning gravel of small stocks), limits habitat protection to only currently abundant fish. Such a focus could allow managers to ignore the importance of biodiversity. This approach to fisheries management is dangerous and short-sighted. It is inconsistent with Indigenous laws and responsibilities, international commitments to biodiversity, and Canada's Wild Salmon Policy.[10]

In practice, for example, First Nations regularly make management decisions based on their own Indigenous legal traditions to not exercise their rights to harvest fish stocks for food, social and ceremonial purposes when the specific fish stocks are scarce and vulnerable. The management decision to hold off harvest in order to meet conservation and stewardship objectives must not affect whether those fisheries are an Aboriginal fishery, and whether the fisheries are protected under the Act.

The goal of the Act must be to ensure the tools for long-term sustainable fisheries. To do so it is necessary to protect biologically diverse fish and fish habitat, thereby increasing the ability for fish to adapt and evolve over time and changing ecological conditions. Only protecting the habitat of fish that are presently being harvested is insufficient. The Cohen Commission recognized this in considering the 2012/2013 Changes, with Commissioner Cohen affirming that, "if the focus of the legislative amendments is to protect only habitat linked to a current fishery, such limited protection could actually jeopardize future fisheries by undermining precautionary protections for biodiversity" and "if the Act protects only fish that are part of a fishery, then the careful balance between conservation and fisheries would tip toward fisheries at the expense of conservation."[11]

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[8] Cohen Commission Report, *supra* Note 4, Volume 1, at Chapter 2, p. 22.

[9] See for example: *Van der Peet*, *supra* Note 2; *Gladstone*, *supra* Note 2; *Ahousaht*, *supra* Note 2.

[10] *Convention on Biological Diversity* (1992); Canada. *Canada's Policy for Conservation of Wild Pacific Salmon*. Fisheries and Oceans Canada (2005) at pp. 9-12.

[11] Cohen Commission Report, *supra* Note 4, Volume 1, at Chapter 4, pp. 80-81.

British Columbia's history has shown that the salmon species that are robust now may not be the salmon species that adapt and thrive in the future. Maintaining a commitment to biologically diverse species (i.e., both strong and weak stocks) is the required approach to encourage sustainable fisheries for present and future generations.

Finally, it is useful to note that Commissioner Cohen recommended that only after extensive consultation should DFO articulate a working definition of food, social and ceremonial fishing.[12] While this recommendation was made in the context of guiding DFO allocations, it demonstrates that the unilaterally imposed definition of Aboriginal fishery in the Act ought to be rejected. The definition of Aboriginal fishery must be repealed. If, as part of the modernization of the Act, a definition of Aboriginal fisheries becomes useful, there must be a robust consultation process so it can be redefined on a Nation-to-Nation basis in accordance with the free, prior and informed consent of First Nations.

(c) Reduce Discretion and Eliminate Certain Regulatory Authority

The 2012/2013 Changes provided the Minister with new regulation-making powers which has resulted in increased flexibility in fisheries management decision-making overall, including increased discretion resting with the Minister and Cabinet as to whether or not to protect fish and fish habitat.[13] This is in direct contrast to the Royal Society of Canada Expert Panel on Sustaining Canada's Marine Biodiversity which found that, even prior to the 2012/2013 Changes, "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."[14] Accordingly, the Expert Panel recommended that Canada "reduce the discretionary power in fisheries management decisions exercised by the Minister of Fisheries and Oceans."[15] Therefore, in order to better conserve and protect fish and fish habitat, the Act must be amended in a manner that eliminates Ministerial or Cabinet discretionary power to rely upon social or economic interests to avoid fish or fish habitat protections. If fish and fish habitat are left to wrestle with political interpretations of public interest, history has shown that current economic interests too quickly over-power ecological interests.

The Act must also be amended to ensure the Minister's discretion is structured in a manner that it does not infringe upon Aboriginal and Treaty rights. To achieve this, the new regulatory authorities under the 2012/2013 Changes to exclude certain fisheries from protection pursuant to s. 43(1)(i.01) of the Act and to exempt certain Canadian fisheries waters from protections pursuant to s. 43(5) of the Act must be repealed. Additionally, more prescriptive measures must be introduced to the Act that the Minister must adhere to when exercising discretion. As outlined in greater detail in section 4 of these submissions, the prescribed factors the Minister must consider when exercising

[12] Cohen Commission Report, *supra* Note 4, Volume 3, at Chapter 2, p. 38.
[13] As a result of the 2013/2013 Changes, ss. 6, 6.1, 35, 36, 37 and 43 of the Act increase the Minister's discretion.
[14] Royal Society of Canada. *An Expert Panel Report on Sustaining Canadian Marine Biodiversity: Responding to the Challenges Posed by Climate Change, Fisheries, and Aquaculture*. February 2012 ["RSC Expert Panel Report"] at Chapter 13, p. 219.
[15] *Ibid.*

regulation-making powers pursuant to s. 6 of the Act must be repealed and replaced in order to better guide and reduce the exercise of ministerial discretion overall.

(d) Restore Environmental Assessment Triggers for Impacts on Fish and Fish Habitat

In addition to the review of the Act, the Federal government is currently undertaking a review of environmental assessment processes with the stated goal to "develop new, fair processes that are robust, incorporate scientific evidence, protect our environment, respect the rights of Indigenous peoples, and support economic growth."[16] The 2012/2013 Changes that weakened the Act also weakened environmental assessment processes which had provided oversight of fish habitat protections. The removal of environmental assessments for authorizations under the Act is inconsistent with Canada's international obligations under the *Law of the Sea Convention* (1982) which requires Canada to assess the potential effects of activities that may cause "substantial pollution of or significant and harmful changes" to the marine environment.[17]

The environmental assessment triggers that previously existed for authorizations under ss. 32, 35 and 36 must be restored under the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, c. 52 to ensure that the impacts and cumulative effects of works, undertakings and activities on fish and fish habitat are assessed, understood and avoided before projects are approved.

4. MODERNIZING THE FISHERIES ACT

Modernizing the Act must rise to the constitutional imperative of reconciliation with Indigenous peoples. Besides the *Indian Act*, R.S.C. 1985, c. I-5, no other Confederation-era legislation has had a greater role in controlling the lives and well-being of First Nations in British Columbia and undermining First Nations constitutionally protected rights than the Act.

Indigenous, Aboriginal and Treaty rights and responsibilities to fish, fish habitat and fisheries require nation-to-nation, government-to-government, collaborative agreements. We must move from the status quo of treating First Nations as a mere stakeholder or sector in fisheries management and towards reconciling the pre-existing sovereignty of First Nations with the assumed sovereignty of the Crown. In practical terms, this means every aspect of governance and management of fisheries, from decision-making to enforcement, needs to be re-constituted with First Nations as partners.

This will not only help the Federal government to achieve its mandate commitments in relation to the Act, but also implement the Truth and Reconciliation Commission's ("TRC") Call to Action 47 which calls upon Canada "to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and terra nullius, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts."[18]

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[16] Government of Canada. *About the Review of Environmental Assessment Processes*. Available online at: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html>.

[17] *Law of the Sea Convention*, Article 206.

[18] Truth and Reconciliation Commission of Canada. *Calls to Action* (2015), Call to Action 47. Available online at: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf>.

However, it is important to emphasize that restoring lost protections in the Act to the status quo under the previous Act is simply not adequate to ensure the long-term sustainability of fisheries. The Royal Society of Canada Expert Panel on Sustaining Canada's Marine Biodiversity noted:

> The need to modernize Canada's *Fisheries Act* (1868) in light of sustainability principles such as the ecosystem approach, precaution, and community-based management has been emphasized repeatedly […]
>
> If Canada is to attain an international leadership position in ocean governance, and if the nation takes its marine biodiversity commitments seriously, placing a high political priority on *Fisheries Act* modernization seems essential. The present lack of legislative guidance on fisheries management objectives, principles, and procedures, and the delegation of absolute discretion to the Minister of Fisheries and Oceans, is certainty out of step with international 'best practices.'[19]

Similarly, following his empirical analysis of the 2012/2013 Changes, Martin Olsynski concluded that "it is clear that the 2012 changes have undermined the protection of fish habitat in Canada. It is also clear, however, that the previous habitat regime was badly inadequate well before those changes came into force."[20]

FNFC makes the following recommendations to modernize the Act so it includes required tools to better ensure the protection of fish, fish habitat and long-term sustainable fisheries:

(a) Include Purpose Section

The Act lacks a purpose section to guide the overall interpretation and implementation of the Act. Further, the complete absence of sustainability principles such as conservation, protection, precaution, biodiversity and ecosystem-based management as guiding principles within the Act is wholly inadequate and an abdication of DFO's core mandate for responsible management of Canada's oceans, fish and aquatic resources.

A purpose section should be included in the Act which clearly sets out that its purpose is to ensure the protection of fish, fish habitat and the long-term sustainability of fisheries through precautionary ecosystem-based management, protection, conservation, and restoration of fish and fish habitat, conserving biological diversity, and reconciliation with Indigenous peoples. This type of purpose section is consistent with purpose sections in fisheries legislation in other jurisdictions.[21] Attached at Appendix A is proposed wording.

(b) Meaningful Collaborative Governance and Management Agreements

As outlined above, given the constitutional imperative of reconciliation now upon us, modernizing the Act must ensure that both the Minister and DFO have the tools required to recognize and

[19] RSC Expert Panel Report, *supra* Note 14, Chapter 12, p. 205.

[20] Martin Olsynski, "From 'Badly Wrong' to Worse: An Empirical Analysis of Canada's New Approach to Fish Habitat Protection Laws" (2015) 28 J. Env. L. & Prac. 1. ["Olsynski"]

[21] See e.g. *Nature Diversity Act* 19 June 2009 nr. 100 § 1 [Norway]; *The Magnuson-Stevens Fishery Conservation and Management Act*, 16 U.S.C. 1801 § 2 [United States]; and *Fisheries Act* 1996 §8-10 [New Zealand].

respect the requirement of First Nations' free, prior and informed consent and our rightful place as decision makers in the governance and management of fish, fish habitat and fisheries. This is consistent with both s. 35(1) of the *Constitution* Act, *1982* and UNDRIP, which the Federal government has committed to implement. Both the Minister and First Nations bring to fish, fish habitat and fisheries management, governance and management responsibilities and authorities. The Minister and DFO require modern legislative tools to respect and uphold collaborative governance and management agreements with First Nation governments. Respecting First Nations' rights, responsibilities and authorities through collaborative governance and management regimes is a necessary part of reconciliation.

This Federal government has also affirmed in its mandate that "It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership."[22] To meet this mandate, the *Act* must be amended to promote collaborative governance and management arrangements with First Nations.

Given the diversity of fish, fish habitat, fisheries and First Nations, adequate space and flexibility in the legislative framework for different mechanisms for meaningful co-management is required. To foster this space and flexibility, amendments to that Act can be made which explicitly empower the Minister to reach collaborative governance and management agreements with First Nations governments. This type of legislative space would allow Canada and First Nations, together with the Province where appropriate, to create joint decision making bodies.

The 2012/2013 Changes introducing ss. 4.1 and 4.2 of the Act provided for this as it relates to Provincial governments and laws. While ss. 4.1 and 4.2 of the Act could be viewed as steps towards improved collaborative governance with the Province, the amendments are silent on the much needed co-management agreements with First Nations whose Aboriginal and Treaty rights and responsibilities require increased collaboration in the governance and management of fisheries. Although there is an ongoing and increasing need for partnership and collaboration between DFO and First Nation governing authorities, there are no parallel provisions for First Nation orders of government.

The amendments we are proposing would allow the Minster to enter into agreements which share aspects of Federal decision-making authority with jointly authorized boards. Providing clear statutory authority for DFO to create and rely upon jointly authorized management bodies is a necessary tool for Nation to Nation relationships. Providing clear statutory authority for DFO to create and rely upon jointly authorized management bodies is a necessary tool for Nation to Nation relationships, including decision-making. The Minister would significantly benefit from the statutory clarity that this amendment would bring as it would facilitate real options for First Nations and DFO to pursue collaborative governance and management solutions. The amendment would promote reconciliation and certainty in the management of fisheries. It would streamline management, help to reduce and avoid duplication of efforts and could significantly reduce conflicts. The Act must be amended so that the Minister is empowered to reach collaborative governance and management agreements with First Nation governments in order to facilitate cooperation and joint action on areas of common interest, such as conservation, stewardship, restoration and habitat protection, harvest planning and management, and monitoring and

[22] Trudeau Letter, *supra* Note 3.

compliance. Regulations must be created to structure the exercise of the Minister's discretion as it relates to fish, fish habitat, fisheries and aboriginal and treaty rights, including conditions which require the Minister to enter into agreements. This approach of providing specific guiding criteria on how Aboriginal and Treaty rights will be accommodated for in discretionary decision-making under the Act is consistent with the Supreme Court of Canada's direction over 20 years ago; with the failure to do so representing an infringement of those rights.[23]

(c) Mandatory Standards and Objectives for Guiding Decision-Making

The *Act* and Regulations should explicitly acknowledge that the exercise of Ministerial discretion must be consistent with s. 35(1) of the *Constitution Act, 1982*. This will assist in the day-to-day implementation of the Act and help to transparently confirm that any public interest assessments must be consistent with Aboriginal and Treaty rights.

Reducing Ministerial discretion in order to strengthen the protection of fish, fish habitat and sustainable fisheries requires better standards and objectives to be prescribed for guiding decision-making under the Act. The s. 6 factors for consideration of the Minister are too broad and vague to effectively guide decision-making, and only apply to certain exercises of discretion.[24] These factors must be repealed and replaced with refined factors made applicable to all exercises of Ministerial discretion under the Act in order to align with constitutional obligations, international best practices and provide adequate guidance on fisheries management objectives, principles, and procedures. The Act must provide for the requirement for the Minister to consider the following factors when exercising discretion under the Act:

(i) Compliance with s. 35(1) of the Constitution Act and UNDRIP

UNDRIP sets out "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[25] As Canada has provided its support for UNDRIP, compliance with these minimum standards must be adopted in amending and implementing the Act. In particular, UNDRIP requires the free, prior and informed consent of Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.[26]

(ii) Consistency with International Standards and Commitments on Marine Governance

Canada must ensure that its decision-making under the Act is consistent with the many international standards on marine governance it has committed to meeting, in

[23] *R. v. Adams*, [1996] 3 SCR 101 at para. 54.

[24] The s. 6 factors are: (a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries; (b) fisheries management objectives; (c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and (d) the public interest.

[25] UNDRIP, Article 43.

[26] UNDRIP, Article 19.

particular as they relate to sustainable development, ecosystem-based management, precautionary approach and protecting marine biodiversity. These standards are found in many international instruments, including: *Law of the Sea Convention* (1982), *United Nations Agreement on Straddling and Highly Migratory Fish Stocks* (1999), *Convention on Biological Diversity* (1992) and *Rio Declaration of Environment and Development* (1992).

(iii) Precautionary Principle

The precautionary principle is a cornerstone principle for responsible resource management and must guide decision-making under the Act, particularly so given the current systemic data gaps related to fish, fish habitat and fisheries.

(iv) Best Available Information

The Minister must be obligated to transparently consider and follow the best available scientific and technical information, including traditional knowledge, at all times when exercising discretion under the Act.

(v) Cumulative Impacts and Effects

The Act and its policies must provide effective tools for assessing and addressing cumulative impacts and effects to fish and fish habitat. Commissioner Cohen recognized that "DFO needs to manage this incremental harm that, over time, could have a substantial effect on Fraser River sockeye habitat productivity."[27] The need for protection from cumulative impacts and effects extends to all fish and fish habitat.

Many of our recommendations would provide for more effective tools to address cumulative impacts, such as restoring environmental assessment triggers, increasing capacity for monitoring and enforcement, and prescribing better standards and objectives for guiding decision-making.

(vi) Climate Change

While this submission cannot detail the many concerns, climate change is having far-reaching and complex effects on fish, fish habitat and fisheries. Climate change will continue to be a key stressor on marine and fresh water biodiversity and fisheries management must be responsive to this fact.[28]

(vii) First Nation Management Objectives

Pursuant to UNDRIP and consistent with Aboriginal and Treaty rights to fish, First Nations have the right to "determine and develop priorities and strategies for the

[27] Cohen Commission Report, *supra* Note 4, Volume 3 at Chapter 4, p. 97

[28] RSC Expert Panel Report, *supra* Note 14, Chapters 4 and 7; Cohen Commission Report, *supra* Note 4, Volume 2 at Chapter 5.

development or use of their lands or territories and other resources."[29] The Minister is required to take account of existing First Nation management objectives informed by Indigenous laws, traditional knowledge and western science (e.g., marine and land use plans, water quality standards) and/or management objectives to be developed through co-management agreements. Providing clarity in the Act that this is a required factor in decision-making would strengthen fisheries management and bring increased collaboration and fishery transparency into management.

(viii) Offsetting with Avoidance Priority

To best fulfill the purpose of protecting and conserving fish and fish habitat, the Minister must continue to consider, when issuing authorizations, whether there are measures and standards to avoid, mitigate or offset. However, in establishing conditions for authorizations the Minister must be required to give priority to measures and standards that avoid harm to fisheries habitat. Avoidance is paramount as functional fisheries habitat is both precious and complex, especially when it also serves to support healthy, sustainable First Nation communities.

5. SYSTEMIC CHANGES

Amendments to the *Act* will not be sufficient on their own to ensure adequate protection, conservation and restoration of fish, fish habitat and sustainable fisheries. At the same time as the 2012/13 Changes to the Act, DFO's budget's and capacity were significantly reduced. The reduced capacity has directly impacted on DFO's day to day application, monitoring and enforcement of the *Act*. A full review and documentation of these changes is beyond the scope of this submission.

First Nations continue to raise serious concerns with respect to DFO's institutional bias towards monitoring, compliance and enforcement. These concerns were present under the previous legislative regime and persist and increase under the 2012/2013 Changes, especially in light of decreased funding and capacity within DFO. While scarce DFO capacity and funds continue to focus on the monitoring and compliance of Aboriginal fisheries, there is little to no monitoring of the recreational fisheries in British Columbia, and the current Act, in conjunction with other Acts revised by the Omnibus Act, leaves too much assessment and monitoring of project impacts on fish and fish habitat to industry's self-assessment and compliance. Monitoring compliance of recreational fisheries needs to be drastically improved so it is defensible, transparent and reliable.

Canada's commitment to monitoring and assessing (including collection of baseline data) of fish, fish habitat and fisheries needs to be standardized and undertaken in a robust manner on a consistent basis. DFO's declining capacity, commitment and responsibility for baseline data collection, and monitoring and compliance, has raised serious concerns throughout the marine and freshwater habitats in British Columbia Monitoring of project compliance, independent of proponents, needs to be standardized and undertaken more consistently and within scheduled timeframes.

[29] UNDRIP, Article 32.

Monitoring, compliance and baseline data collection are also obvious areas for First Nation/DFO partnerships. The role of Aboriginal Guardian Programs needs to be promoted. More funding and human resources capacity must be built within DFO and with First Nations in order to ensure robust monitoring and enforcement, and to move away from proponent self-assessments. Creating a more robust monitoring and enforcement regime will necessarily require the elimination of systemic data gaps – data collection and transparency is needed.

Also required is greater collaboration on monitoring and enforcement with First Nations through co-management agreements that enable the collaborative development of frameworks, benchmarks or thresholds. First Nations are well positioned to undertake robust monitoring and enforcement within our territories.

We recommend in addition to the Amendments to the Act, securing Canada's commitment to reliable long term funding for management of fish, fish habitat and fisheries, including collaborative management and the monitoring, compliance and enforcement, including the introduction of standardized base line data collection.

6. SUMMARY OF RECOMMENDATIONS

Recommendation 1: Restore HADD Provisions

Recommendation 2: Restore Prohibition against Killing Fish

Recommendation 3: Repeal Definition of Aboriginal, Recreational and Commercial Fisheries

Recommendation 4: Reduce Discretion and Eliminate Certain Regulatory Authority

Recommendation 5: Restore Environmental Assessment Triggers

Recommendation 6: Include Purpose Section

Recommendation 7: Enable Meaningful Governance and Management Agreements

Recommendation 8: Mandatory Standards and Objectives for Guiding Decision-Making

Recommendation 9: Systemic Changes including Increase Capacity for Monitoring and Enforcement

APPENDIX A: LANGUAGE FOR RESTORING LOST PROTECTIONS AND MODERNIZATION

This Appendix provides recommended language for restoring lost protections to the Act (Recommendation 1 and 2) and modernizing the Act (Recommendation 6, 7 and 9). Any changes to the wording of the Act must be subject to a robust consultation process with First Nations.

1. REVISED LANGUAGE FOR RESTORING LOST PROTECTIONS

Recommendation 1: Restore HADD Provisions

Alteration, disruption or destruction of fish habitat

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

Exception

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

Recommendation 2: Restore Prohibition against Killing Fish

No person shall destroy fish by any means other than fishing except as authorized by the Minister or under regulations made by the Governor in Council under this Act.

2. REVISED LANGUAGE FOR MODERNIZING THE ACT

Recommendation 6: Include Purpose Section

The Purpose of the Act is to ensure the protection of fish, fish habitat and fisheries for present and future generations through the protection, conservation, and restoration of fish, fish habitat, and biological diversity, the application of precaution, ecosystem-based management, and achieving reconciliation with Indigenous peoples.

Recommendation 7: Meaningful Collaborative Governance and Management Agreements

2 (1) In this Act,

…

Aboriginal government means the representative governing body or institution that is authorized to execute and implement agreements entered into under this Act on behalf of one or more Aboriginal peoples.

Minister may enter into agreements

4.1 (1) The Minister may enter into an agreement with a province or Aboriginal government to further the purposes of this Act, including an agreement with respect to one or more of the following:

(a) facilitating cooperation between the parties to the agreement, including facilitating joint action in areas of common interest, reducing overlap between their respective programs and otherwise harmonizing those programs;

(b) facilitating enhanced communication between the parties, including the exchange of scientific and other information; and

(c) facilitating public consultation or the entry into arrangements with third-party stakeholders.

Contents of agreement

(2) An agreement may establish

(a) the roles, powers and functions of the parties;

(b) programs and projects;

(c) principles and objectives of the parties' respective programs and projects;

(d) standards, guidelines and codes of practice to be followed by the parties in the administration of their respective programs and projects;

(e) processes for policy development, operational planning and communication between the parties, including the exchange of scientific and other information;

(f) the administrative structures that will be used to carry out the agreement's objectives;

(g) the power of the parties to create committees and public panels and to conduct public consultations; and

(h) the circumstances and manner in which the province or Aboriginal government is to provide information on the administration and enforcement of a provision of its laws that the agreement provides is equivalent in effect to a provision of the regulations.

Regulations

(3) The Governor in Council may make regulations establishing the conditions under which the Minister may enter into or renew an agreement, including procedures for entering into or renewing the agreement.

Agreements to be published

(4) The Minister shall publish an agreement in the manner that he or she considers appropriate.

Declaration of equivalent provisions

4.2 (1) If an agreement entered into under section 4.1 provides that there is in force a provision or instrument under the laws of the province or Aboriginal government that is equivalent in effect to a provision of the regulations, the Governor in Council may, by order, declare that certain provisions of this Act or of the regulations do not apply in the province or to particular Canadian fisheries waters with respect to the subject matter of the provision or instrument under the laws of the province or Aboriginal government.

Non-application of provisions

(2) Except with respect to Her Majesty in right of Canada, the provisions of this Act or of the regulations that are set out in the order do not apply within that province or to particular Canadian fisheries waters with respect to the subject matter of the provision or instrument under the laws of the province or Aboriginal government.

Revocation

(3) The Governor in Council may revoke the order if the Governor in Council is satisfied that the provision or instrument under the laws of the province or Aboriginal government is no longer equivalent in effect to the provision of the regulations or is not being adequately administered or enforced.

Notice to province or Aboriginal government

(4) The Governor in Council may revoke the order only if the Minister has given notice of the proposed revocation to the province or Aboriginal government.

Order ceases to have effect

(5) The order ceases to have effect either when it is revoked by the Governor in Council or when the agreement to which the order relates terminates or is terminated.

Recommendation 8: Mandatory Standards and Objectives For Guiding Decision-Making

(1) To fulfill the Purpose of the Act the following criteria must guide the Minister when exercising any power under the Act:

> (a) Compliance with s. 35(1) of the *Constitution Act, 1982* and the *United Nations Declaration on the Rights of Indigenous Peoples*;
>
> (b) Consistency with Canada's international obligations related to fish, fish habitat and fisheries and biodiversity;
>
> (c) Precautionary principle;

(d) Best available scientific and technical information, including traditional knowledge and Indigenous laws;

(e) Cumulative impacts and effects;

(f) Climate change;

(g) Measures or standards to avoid, mitigate or offset the killing of fish or the harmful alteration or disruption, or the destruction of fish habitat, with priority to measures or standards that avoid.

(2) The Minister shall publish a record of decision after exercising a power under the Act that details how the criteria in subsection (1) were considered.