



FIRST NATIONS FISHERIES COUNCIL of British Columbia

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January 31, 2017

The Honourable Dominic LeBlanc
Minister of Fisheries, Oceans and the Canadian Coast Guard
200 Kent St. 15th Floor
Ottawa, ON K1A 0E6

VIA EMAIL ATTACHMENT: min@dfo-mpo.gc.ca and FPP-PPP.XNCR@dfo-mpo.gc.ca

RE: *Fisheries Act* review, restoring lost protections and modern safeguards

Dear Minister LeBlanc:

The First Nations Fisheries Council of BC (FNFC) welcomed this government's commitment to review the changes made in 2012 to the *Fisheries Act* and to restore lost protections and incorporate modern safeguards into the Act. First Nations in BC have high expectations regarding the outcomes of this review, which provides an opportunity for this government to demonstrate real action on several of its major commitments, namely:

- Building a renewed nation-to-nation relationship with Indigenous Peoples;
- Implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); and
- Co-management with First Nations and other levels of government.

Background

The First Nations Fisheries Council of BC was established in 2008 to work with First Nations in British Columbia on fisheries and aquatic resource management issues. The council is comprised of fourteen First Nations delegates from the diverse geographic regions of the province. It is not a holder of Aboriginal rights but works to identify and address issues of common interest to First Nations.

One needs only to look at First Nations' oral history, art, songs and ceremonies to see that fisheries and aquatic resources are integral to the nutritional, social, economic and cultural well-being of our communities. Even the location of our communities across BC shows the inextricable bond between our people and the lakes, rivers, streams and sea—the waters from which we feed our bodies and spirits alike.

As First Nations, we have always honoured, protected and relied upon aquatic resources, and we have managed them according to our traditional laws and governance structures. Fisheries and related

activities have been the foundation of our economy—first through trade with other nations and early settlers, and in more recent times, through participation in commercial fisheries and community fishing enterprises. Fishing activities also form the social fabric of our communities. The inter-generational sharing of knowledge about fishing methods, food preparation and preservation, and the dynamic landscape and waterscape of our territories has strengthened family and community relationships for as long as our people have lived on this land.

Today, we are seeing unprecedented pressures on fish stocks and habitats. Competing fisheries interests like the commercial and recreational sectors, as well as cumulative impacts from industrial development and extractive resource activities, have impinged on our inherent right to access and manage our resources. Meanwhile, we've observed significant changes in government approaches to consultation and engagement with First Nations as governments become more and more focused on economic growth at the cost of environmental protection. It is crucial, now more than ever, that BC First Nations and our government partners work together to protect the lands, waters and resources that we hold dear, and to ensure a future for our fisheries.

Overview of FNFC Submission to the Standing Committee on Fisheries and Oceans (FOPO)

The FNFC, in collaboration with numerous regional First Nations fisheries organizations across BC, provided a detailed submission regarding the changes to the *Fisheries Act* to the Standing Committee on Fisheries and Oceans (FOPO). The FNFC and its partner organizations invested significant time and resources in developing that comprehensive submission, and we believe our recommendations will assist this government in delivering on its mandate with respect to responsible resource management, environmental stewardship and relationship between the Crown and First Nations.

The FNFC recognizes, however, that changes to the *Fisheries Act* will not, by themselves, be sufficient to achieve this government's goals or to support the aspirations of BC First Nations with regard to the governance, management and conservation of fish, fish habitat and fisheries. To that end, we have taken this opportunity to highlight several high level policy and management topics that require ministerial attention in order to support the required changes to the Act. We hope that these recommendations assist your office in overseeing much-needed changes to the management of fisheries and aquatic resources in the Pacific Region.

Restoring Lost Protections:

Recently, the FOPO heard clearly from many witnesses that the 2012 changes to the *Fisheries Act* forced into law by the previous Conservative government, coupled with reduced operating budgets and the downsizing of Fisheries and Oceans Canada (DFO) personnel, have resulted in less protection and increased vulnerability of fish and fish habitat in British Columbia. The loss of these protections for already depressed fish populations, concurrent with significant changes to ecosystems from climate change, resource extraction and human pressures, has caused significant concern in First Nation communities throughout BC.

To restore some of these lost protections to the Act, we call for:



- a) Restoration of the prohibition against HADD (the harmful alteration, disruption or destruction of fish habitat) and against the killing of fish by means other than fishing.
 - We also recommended that the prohibition apply to any “work, undertaking or activity that results *or is likely to result* in the harmful alteration or disruption, or the destruction, of fish habitat.” This would incorporate the precautionary principle into the standard for protection.
- b) Repeal of the definitions of ‘Aboriginal’ and ‘Commercial’ fisheries.
 - These definitions served to limit the scope of protections under the Act to specific populations that were actively being fished.
 - The definitions are also inconsistent with Canadian law and the scope of existing Aboriginal rights related to fishing.
- c) Reduction in discretion and the elimination of certain regulatory authority.
 - The 2012 changes to the Act created additional means by which the Conservative government could bypass sound ecological standards and scientific data in favour of politically-motivated decision-making in relation to fisheries and habitat protection.
- d) Restoration of Environmental Assessment Triggers Impacts on Fish and Fish Habitat.
 - The removal of environmental assessments for authorizations under the Act was 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.
 - Restoration of Environmental Assessment triggers is required to ensure the effects, including cumulative effects, of projects and activities on fish and fish habitat are assessed, understood, and avoided.

Incorporating Modern Safeguards:

Beyond restoring lost protections, the FNFC made three overarching recommendations aimed at incorporating modern safeguards into the *Fisheries Act*. As we noted in our submission to FOPO, no other Confederation-era legislation has had a greater role in controlling the lives and well-being of First Nations in British Columbia. Modernization of this Act must therefore rise to the constitutional imperative of reconciliation with Indigenous peoples. In practical terms, this means that every aspect of governance and fisheries management, from decision-making to enforcement, needs to be re-constituted with First Nations as partners. Specifically, we recommend the following changes to incorporate modern safeguards into the Act:

- a) Include a purpose section.
 - The *Fisheries Act* is the compass that orients a wide range of regulatory and management activities. A purpose section helps identify the direction of that compass.
 - A modernized *Fisheries Act* should clearly state its purpose in relation to the sustainability of fisheries and habitats, the restoration of depleted stocks, precautionary ecosystem-based management and reconciliation with Indigenous peoples.



- b) Enable collaborative governance and management agreements with First Nations.
- A modernized Act must provide the Minister the tools required to recognize and respect the requirement of First Nations' free, prior and informed consent and First Nations' rightful place as decision makers in the governance and management of fish, fish habitat, and fisheries.
 - This requires legislative language that empowers the Minister to reach collaborative governance and management agreements with First Nation governments.
- c) Update the standards and objectives for guiding decision-making.
- The existing Section 6 factors in the Act are too vague and apply to only certain exercises of discretion.
 - Factors that should be considered to guide decision making under the Act should include compliance with UNDRIP, consistency with international standards and marine governance commitments, the precautionary principle, best available information, cumulative effects, climate change, First Nations management objectives, and offsetting with an avoidance priority.
- d) Mandate rebuilding for stocks below healthy levels.
- Although not included in our submission to FOPO, upon reviewing the submissions of other witnesses to the FOPO process, we have recognized the importance of including mandatory rebuilding of depressed fish populations in a modernized *Fisheries Act*.
 - Only approximately one quarter of Canada's fish stocks can be confidently considered as healthy, and Canada lags behind other countries in not legally requiring rebuilding plans.
 - In the Pacific region, multiple salmon populations and other fish species, most notably herring and eulachon populations, have been assessed by DFO as being stocks of concern or are at low abundance. Declines in salmon and other fish populations across the Pacific region have led to serious conflicts over access to diminishing resources and have warranted several inquiries, reviews and assessments into stock status over the past 20 years, with little directed effort to protect, conserve and rebuild populations.

Relationship between the Crown and First Nations

The relationship between First Nations and the Crown, in particular the Minister of Fisheries, Oceans and Canadian Coast Guard (DFO) as it relates to fish, fish habitat and fisheries, has been troubled from the 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 BC Treaty 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 and shaped the Canadian legal landscape on fisheries management.

As a result of section 35(1) of the Constitution, numerous cases since 1982 have confirmed Aboriginal title to the land and resources of the territory, Aboriginal and Treaty rights related to fishing, continuing



rights of self-government, and the constitutional imperative for reconciliation. First Nations are not mere stakeholders. First Nations are Indigenous communities with constitutionally protected rights. The honour of the Crown is always at stake in its dealing with First Nations, and the Crown-First Nations relationship is fiduciary in nature. This legal landscape must inform the current review of the *Fisheries Act*.

As the exercise of Aboriginal Title and Rights and Treaty Rights related to fish and fish habitat is the lifeblood of our communities and integral to our cultural and food security, your review of the *Fisheries Act* must be undertaken in a manner that upholds the Crown's constitutional obligations and achieves the underlying goal of reconciliation reflected in the whole-of-government mandate "for a renewed nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, cooperation, and partnership." We also remind you of Canada's commitment to adopt and implement *UNDRIP* which includes the obligation to obtain First Nations' free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Fundamentally, restoring lost protections and modernizing the *Fisheries Act* requires nothing less than a reimagining of Confederation-era legislation which has served to undermine our livelihoods and cause conflict on the water for over a century. Not unlike the *Indian Act*, simply tweaking the *Fisheries Act* in a piecemeal approach will only prolong rather than remedy an unsustainable status quo. It is within this review and at this moment in our relationship that we have an opportunity to create a new legacy where our rightful place in the governance and management of fish, fish habitat and fisheries is enabled. In a rapidly changing environment which threatens biodiversity and the long-term sustainability of fisheries, our traditional knowledge and laws working together with science provides the best path forward for all Canadians.

Managing for the Constitutional Priority of Aboriginal Fisheries

As determined by the Supreme Court of Canada in 1990 (*Sparrow*), First Nations' rights to fish for food, social and ceremonial (FSC) purposes take priority, after conservation, over all other uses of the resource. DFO is constitutionally obliged to demonstrate that both the process of allocating the resource and the actual allocation reflect this priority of Aboriginal rights holders in the fishery.

While there is variation amongst First Nations in their ability to access adequate FSC fish from year to year, the FNFC has consistently heard that DFO is still not managing the resource to ensure that FSC access and allocations are prioritized after conservation. First Nations in BC need to see DFO approach the management of fisheries according to the Prime Minister's statement that "the constitutionally guaranteed rights of First Nations in Canada are not an inconvenience but rather a sacred obligation." As we continue to see fisheries resources decline and FSC needs unmet with increasing frequency in many parts of the Pacific region, upholding this sacred obligation will require deep engagement with affected First Nations communities as well as difficult management decisions that reflect the *Sparrow* priority. The Supreme Court of Canada was very clear in *Sparrow* that First Nations may be required to be alone in the fishery in times of scarcity where there are not enough fisheries resources to meet First Nations' reasonable FSC needs.



Enabling Effective Co-Management

As noted above, we call for changing the *Fisheries Act* to provide the Minister the tools needed to reach collaborative governance and management agreements with First Nations. Many First Nations in BC seek increased co-governance of natural resources in their territories, and there are positive examples to build on throughout the province. Beyond the words of the Act, what is required is a commitment to move beyond a system of consultation with First Nations that remains, in many cases, based largely on information exchange and toward an approach that reflects the standard of free, prior and informed consent. First Nations and DFO need to be engaged in the long-term planning needed to establish effective co-management regimes. The FNFC remains committed to working with First Nations and DFO to develop meaningful and effective collaborative governance arrangements that allow for a new model of shared decision-making in fisheries management. This, in turn, requires strengthening relationships, appropriate funding and resources, and clear commitment.

Systemic Change:

The FNFC is well aware that these positive 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. The Act itself must be focused in the right place so that policies and day-to-day governance and management decisions regarding fisheries are properly aligned. However, a corresponding commitment to the activities and programs required to ensure the delivery of fish and habitat protection is required if positive changes to the Act are to have the intended effect. DFO needs to evaluate its national and regional management priorities and to develop and align its policies and management activities to achieve protection, conservation and responsible management of fish, fisheries and fish habitat. First Nations have expressed their willingness to participate in collaborative governance processes with DFO to develop policies that respect and accommodate the Aboriginal and Treaty rights of First Nations in BC.

Monitoring and Assessment

In particular, we stress the need for Canada to commit to adequate levels of monitoring and assessment of our fisheries resources and aquatic ecosystems, including the collection of baseline data, assessment of fish populations, and assessment of fish habitat. As recently found by the Auditor General of Canada in the fall 2016 report on sustaining Canada's major fish stocks, DFO is "missing key information needed to manage Canada's fish stocks sustainably." First Nations are seriously concerned that the current Act leaves too much assessment and monitoring of project impacts to fish and fish habitat to project proponents. First Nations are well positioned to collaborate with Canada to address these gaps and to undertake robust monitoring and management in their territories which is inclusive of traditional knowledge alongside science, and are eager for modern co-governance agreements that enable these arrangements.

First Nations also continue to raise serious concerns about DFO's allocation of existing monitoring efforts and resources, which focuses heavily on harvest monitoring that varies widely across sectors. While Aboriginal fisheries are heavily monitored, there is very little effective monitoring of harvest in the recreational sector.



While we recognize the reality of limited budgets and government priorities, reliable long-term funding for the management and monitoring of fish, fish habitat, and fisheries is a prerequisite for achieving the mutual goals of First Nations and Canada in relation to our aquatic resources. This must include meaningful and transparent assessment of potential project impacts on fish and fish habitat, as well as a robust and defensible approach to monitoring the recreational fishery.

Capacity

With capacity provided by the Aboriginal Fisheries Strategy (AFS) and Aboriginal Aquatic Resources and Oceans Management (AAROM) program, First Nations are involved in many management activities that relate to their fisheries, but they also have the rights and capacity to collaborate in fisheries management on a much deeper and wider scale. First Nations consistently express to DFO their expectation to be involved in all aspects of fisheries governance and management; however the resources allocated to these programs have not increased over the years. Combined with years of internal funding cuts to DFO which have resulted in gaps in important programs, the funding constraints compromise the department's ability to fulfill its mandate and obligations to First Nations, including adequate consultation.

First Nations have expressed the desire to work collaboratively with DFO to ensure stability for core Aboriginal funding programs, and to align co-management funding under appropriate envelopes. We have been encouraged by recent government announcements to restore science funding to the department; however, increased and permanent resources are needed to achieve protection, conservation and responsible management of fish, fisheries and fish habitat. Looking forward, there may be benefits in initiating inter-departmental dialogue to discuss areas of shared responsibility among the mandates of multiple government departments and their various programs and initiatives, and to identify potential funding support for collaborative management projects that address those mandates and objectives. For example, there is great interest in reviving and expanding the Guardian Program to advocate for the development of a federally funded, Indigenous-led National Indigenous Guardians network that supports development and employment of Indigenous Guardians across Canada. The FNFC supports this direction, as Guardian programs are one concrete avenue by which First Nations can increase their involvement in on-the-ground habitat protection services, improve monitoring, stewardship and management of resources, and build internal capacity.

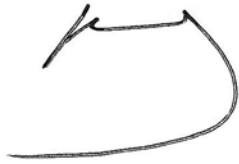
Conclusion

In closing, we wish to reiterate that the FNFC and BC First Nations are eager to see the restoration of lost protections and the incorporation of modern safeguards into the *Fisheries Act*. We welcome the opportunity to work with the Government of Canada to build a renewed nation-to-nation relationship based on recognition of rights, respect, cooperation, and partnership, and request that our government partners bear in mind the fundamental importance of fisheries and aquatic resources to BC First Nations as you undertake this review.

Thank you for your time in reviewing this letter. We look forward to the result of this review, and our continued work together.



Sincerely,

A handwritten signature in black ink, appearing to read 'Ken Malloway'. The signature is fluid and cursive, with a long horizontal stroke at the bottom.

Ken Malloway
President
First Nations Fisheries Council of British Columbia

CC: BC First Nations
BC Assembly of First Nations
First Nations Summit
Union of BC Indian Chiefs
Rebecca Reid, Regional Director General, Fisheries and Oceans Canada
Cathy Gee, Fisheries Protection Policy, Fisheries and Oceans Canada

