



May 29, 2018

The Honourable Dominic LeBlanc
Department of Fisheries, Oceans and the Canadian Coast Guard (DFO)
200 Kent Street
Station 15N100
Ottawa, Ontario K1A 0E6

BY EMAIL - dominic.leblanc@parl.gc.ca

Dear Minister LeBlanc:

RE: Bill C-68 and the review of the *Fisheries Act* and associated regulations, policies, programs and operational procedures

The First Nations Fisheries Council of British Columbia (“FNFC”) was established in 2007 as an organization that works with British Columbia First Nations to support, protect, reconcile, and advance First Nations Title and Rights as they relate to fisheries and the health, management and protection of aquatic resources. Recently we have worked in collaboration with First Nation regional organizations in British Columbia (“Coalition”) to provide our views to the Government of Canada on the review of the *Fisheries Act*. The regional First Nation 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.

Given the important opportunity provided by your mandate and the Government of Canada’s current and ongoing review of the *Fisheries Act*, and its associated programs and policies, we formed this Coalition to bring forward collective recommendations on practical, achievable solutions 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 Government of Canada’s domestic and international obligations and commitments to Indigenous peoples. Given the strength and breadth of our Coalition, and our strong desire to find solutions, please give this work your attention.

Coalition members have actively participated in Government of Canada’s regulatory review process. The Coalition submitted a Brief to Standing Committee on Fisheries and Oceans (“FOPO”) in its review of changes made in 2012 to the Act. Brenda Gaertner, an advisor to the Coalition, also appeared as an expert witness before FOPO and provided evidence on behalf of Coalition members. The Coalition also provided recommendations directly to you regarding the necessary reforms to the Act and to existing DFO policies and programs.

We applaud many of the positive moves forward found in Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence* (“Bill C-68”). Most recently, this Coalition submitted a Brief to FOPO to provide recommended revisions to Bill C-68. We enclose a copy of our recent Brief for your immediate review. We ask that you take this Brief seriously as our Coalition has worked hard to

provide very specific recommendations so we can collaboratively work with you to find the best route forward to amend a statute which has for over 100 years stood in the way of sound fisheries management and respectful Crown-Indigenous relations.

As Bill C-68 proceeds through the Parliamentary process, we are providing the following comments directly to you.

Improving Bill C-68

Bill C-68 represents a historic opportunity to modernize fisheries governance and management in a manner that protects, conserves, and restores fish and fish habitat and supports reconciliation with Indigenous peoples. In this regard, there are areas in Bill C-68 that can and must be improved upon.

We have 8 specific revisions we are strongly recommending to Bill C-68 that build upon the proposed amendments Government of Canada has offered in Bill C-68. Our recommendations are achievable and support your Government's commitment to Indigenous peoples, to the full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"), and to the precious and vulnerable ecosystems on which fish, fish habitat and fisheries rely. You will find a summary of our recommendations attached to this letter as Schedule A.

We are calling on your leadership to genuinely consider these recommendations and to promote and adopt the very specific improvements to Bill C-68 we have provided. As Minister Wilson-Raybould has often said, we must and can do better. Now is the time to get it right.

Collaborative Development of Regulations

Given the complexity of fisheries governance and management, Bill C-68 defers a lot of necessary and important work that is required for meaningful implementation to the development and amendment of existing and new regulations. It also proposes to establish new and additional regulation-making powers within the *Fisheries Act*.

In accordance with Article 19 of *UNDRIP*, First Nations in British Columbia must be full participants and jointly involved in the development and amendment of regulations that have the potential to affect us. A preliminary and non-exhaustive list of regulations that must be developed collaboratively is attached to this letter as Schedule B. Please advise immediately how you are intending to partner with First Nations in British Columbia, and in particular this Coalition, in completing this work.

Collaborative Reform of Policies, Programs and Operational Procedures

Transformative reforms at the policy, program and operational level are fundamentally required to ensure that the *Fisheries Act* is administered in a manner that recognizes and respects Indigenous peoples' inherent and constitutional rights and responsibilities, and that conforms with Government of Canada's domestic and international obligations and commitments to Indigenous peoples. On their own, the legislative reforms proposed in Bill C-68 are not enough. In a submission dated August 31, 2017, this Coalition provided specific recommendations to you with detailed rationale with respect to the required collaborative reform of policies, programs and operational procedures. A summary of our recommendations is attached to this letter as Schedule C.

We are ready, willing and capable of working with you and your staff to forge a new and meaningful relationship that is founded on recognition and respect. Your leadership can and will make a difference if you reach out and work together with us to find a respectful, collaborative path forward in the review and amendment of the *Fisheries Act* and its associated regulations, policies, programs and operational procedures.

Yours truly,



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President, First Nations Fisheries Council of BC
Co-Chair, Lower Fraser Fisheries Alliance



Sally Hope,
Co-Chair, Lower Fraser Fisheries Alliance



Gord Sterritt
Executive Director, Upper Fraser Fisheries
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Robert Grodecki
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Stu Barnes
Chair, Skeena Fisheries Commission



Dr. Judith Sayers,
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Jordan Point
Executive Director, First Nations Fisheries
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CC:

BC First Nations

BC Assembly of First Nations

Assembly of First Nations of Canada

First Nations Summit

Union of BC Indian Chiefs

Fin Donnelly, Member of Parliament (Port Moody – Coquitlam)

Todd Doherty, Member of Parliament (Cariboo – Prince George)

Elizabeth May, Member of Parliament (Saanich – Gulf Islands)

Rebecca Reid, Regional Director General, Department of Fisheries and Oceans

Nicholas Winfield, Director General, Department of Fisheries and Oceans

SCHEDULE A
SUMMARY OF COALITION RECOMMENDATIONS TO IMPROVE BILL C-68

1. **Revise the definition of fish habitat to include environmental flows.** 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. So much direct and cumulative use of waters is challenging water flows. DFO scientists recommend this protection. It can and should be added to the *Fisheries Act* so there is no question that fish habitat includes water flows.
2. **Revise the purpose section to include restoration of fish and fish habitat and reconciliation with Indigenous peoples, including respect for Indigenous rights.** The purposes proposed in section 3 of the Bill do nothing more than codify the status quo. We can and must do better than that so that the Act can provide the necessary modern protections. 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. We can no longer simply conserve and protect, we must restore. We can no longer deny that the *Fisheries Act* has trampled on Indigenous rights. We must turn the corner of history. Your mandate allows you to take this step and we strongly encourage your leadership in this regard.
3. **Revise the non-abrogation and derogation section to reflect Parliament's positive intention to uphold and protect Indigenous rights.** Section 2.3 of the Bill, as worded, is inadequate and inconsequential to upholding and protecting Indigenous rights. Section 2.3 should be revised to adopt the language recommended by the Standing Senate Committee on Legal and Constitutional Affairs in 2007 which promoted wording that is clear about Parliament's positive intention to uphold and protect Indigenous rights.
4. **Revise the duty of the Minister section to address existing obligations and commitments to Indigenous peoples.** Section 2.4 of the Bill, as worded, 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 to Indigenous peoples in the administration of the Act. Section 2.4 must be revised to correctly address the entire scope of the Minister's duties in relation to Indigenous peoples. Failing to do so, leaves the amendments open to legal challenge and further uncertainty. We ask that you take active steps to avoid this.
5. **Revise the decision-making considerations to clarify the exercise of Ministerial discretion in a manner consistent with international and Canadian law and standards.** As tabled, Section 2.5 of the Bill creates avoidable problems by providing too much scope for the exercise of Ministerial discretion in decision-making under the Act. The use of "may" is not legally or operationally accurate for DFO's management of fish, fish habitat and fisheries under the Act. Some of the factors currently listed in section 2.5 are legally and operationally required in order to meet the very purpose of the Act (to protect, conserve and restore). Many of the factors listed in section 2.5 are essential and critical for decision making under the Act. Suggesting these mandatory factors are discretionary defeats the primary intention of this section. We provide very clear revisions to Section 2.5 that will provide the clarity and transparency DFO so clearly needs to avoid a myriad of legal and operational problems and introduce modern safeguards.

6. **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.** Section 6.1 of the Bill is too discretionary to promote meaningful implementation of measures to rebuild fish stocks and restore fish habitat. 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. 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. Section 6.1 should be revised so that the cautious status zone, rather than the limit reference point, triggers Ministerial consideration.
7. **Revise the factors for consideration to prioritize avoidance and promote greater transparency.** To help set real modern safeguards, Section 34.1(1) of the Bill needs to prioritize avoiding death to fish or the harmful alteration, disruption or destruction of fish habitat, over measures and standards that seek to mitigate or offset. It also needs to promote transparency in decision-making that has the potential to cause serious harm or death, and significant adverse effects to Indigenous rights. Section 34.1(1) should be revised to prioritize avoidance and require written reasons.
8. **Revise the traditional knowledge sections to better respect and protect Indigenous peoples' knowledge systems and intellectual property rights.** The provisions of the Bill in relation to the traditional knowledge of Indigenous peoples do not adequately respect and protect Indigenous peoples' knowledge and the intellectual property to that knowledge. The definition of traditional knowledge and processes and practices for how it shall be respectfully considered in decision-making under the Act must be developed in regulations in collaboration with Indigenous peoples. In addition, revisions to the Bill are needed to remove inappropriate and unnecessary exceptions to protecting confidential traditional knowledge and to protect the intellectual property rights of Indigenous peoples.

We also stress the importance and urgency of revising existing regulations to support the repeal of the definition of "Indigenous" (in relation to a fishery). As we have detailed in our Briefs to FOPO and correspondence to you, this unilaterally imposed definition and the standards for fish and fish habitat protection and conservation that it supports are deeply problematic. Retaining the definition and the standards it supports, even on a transitional basis, is of great concern to us. Focused efforts should be made to support its repeal as soon as practicable

SCHEDULE B
REGULATIONS IDENTIFIED FOR COLLABORATIVE DEVELOPMENT

The following regulations have been preliminarily identified as those that should be collaboratively developed with First Nations in British Columbia. This is not intended to be an exhaustive list. The scope of collaborative development of regulations should be jointly developed and confirmed.

- agreements with Indigenous governing bodies [section 4.1(1)]
- traditional knowledge of Indigenous peoples [s. 43(1)(j.1)];
- ecologically significant areas [ss. 35.2(2) and 35.2(10)];
- proper management and control of the seacoast and inland fisheries, including for social, economic or cultural purposes [s. 43(1)(a)];
- fish habitat banks [s. 42.04];
- rebuilding fish stocks and restoring fish habitat, including development of rebuilding and restoration plans [ss. 43(1)(b.1) and 43(1)(b.2)]
- circumstances when the holder of a licence or the operator named in the licence is required to personally carry on the activity authorized by the licence and the exceptions to that requirement [s. 43(1)(d.1)];
- use and control of the rights and privileges under a lease or licence issued under the Act [s. 43(1)(g.01)];
- designation of persons who may fish and the fishing vessels that may be used under the licence and any other matter relating to designations [s. 43(1)(g.02)];
- designating projects or classes of projects that may result in the death of fish or the harmful alteration, disruption or destruction of fish habitat [s. 43(1)(i.5)];
- aquatic invasive species [ss. 43(1)(n.1) and 43(1)(o)];
- conservation and protection of marine biodiversity in Canadian fisheries waters [s. 43.3(1)]; and
- alternative measures [s. 86.95].

SCHEDULE C
COLLABORATIVE REFORM OF POLICIES, PROGRAMS AND OPERATIONAL PROCEDURES

In a submission dated August 31, 2017, this Coalition provided specific recommendations to you with detailed rationale on the following approach to tackle the required changes in policy, program and operational procedures:

1. **Collaboratively draft a Recognition and Respect Policy.** Government of Canada and First Nations in British Columbia must collaboratively draft a new overarching Recognition and Respect Policy for British Columbia which enables, facilitates and supports the proper recognition and respect for First Nations' inherent and constitutional rights and responsibilities. This policy would apply to all aspects of the governance and management of fish, fish habitat and fisheries, thereby take the step to provide a comprehensive tool that promote the underlying purpose of reconciliation.
2. **Recognize rights and responsibilities.** The overarching Recognition and Respect Policy would recognize Indigenous Peoples' inherent and constitutional rights and responsibilities to fish, fish habitat and fisheries.
3. **Restructure and streamline fisheries governance and management.** The overarching Recognition and Respect Policy would provide the policy guidance necessary to promote and support the restructuring and streamlining of DFO's current approach to integrated fisheries management, including planning and operations in order to provide for a consent-based model of joint decision-making.
4. **Remove structural barriers to fair and transparent access and allocation decisions.** DFO must make necessary changes to immediately remove existing structural barriers to fair and transparent access and allocation decisions, including rescinding DFO's Coastwide Framework and the Endpoint Directive and removing it from DFO's operations. These steps are required to release modern barriers to a respectful relationship with Indigenous peoples.
5. **Develop policy guidance for respectful access and allocation.** Recognition and Respect Policy should provide policy guidance necessary to ensure that First Nations' rights and responsibilities are properly respected in determining access and allocations.
6. **Develop policy guidance for monitoring, compliance and enforcement.** Recognition and Respect Policy should provide policy guidance necessary to facilitate and support First Nations' monitoring, compliance and enforcement activities.
7. **Develop policy guidance for habitat protection, restoration and enhancement.** Recognition and Respect Policy provide policy guidance necessary to facilitate and support First Nations' habitat protection, restoration and enhancement activities.
8. **Collaboratively develop an updated Wild Salmon Policy Implementation Plan.** DFO and First Nations in British Columbia collaboratively draft an updated implementation plan for the Policy Framework for Conservation of Wild Pacific Salmon (2004) on a priority basis.
9. **Collaboration regarding science and other information gathering.** The Recognition and Respect Policy should adopt a consent-based model of joint decision-making over the collection and

refinement of baseline and other information required in the governance and management of fish, fish habitat and fisheries, including science, traditional knowledge and socio-economic assessments.

10. **Collaboratively develop policy guidance on aquaculture.** We recommend that First Nations in British Columbia, Government of Canada and the Province of British Columbia collaboratively develop policy guidance in support of the joint governance and management of aquaculture at the Tier 2 and Tripartite levels;
11. **Implement key policy statements as an interim measure.** While the work is being done to complete the Recognition and Respect Policy, DFO adopt key policy statements to be effective immediately until the collaborative drafting of a new overarching Recognition and Respect Policy is completed.
12. **Harmonize federal processes and outcomes.** Government of Canada work with First Nations to develop and adopt a common understanding of collaborative governance and management based on consent-based joint decision-making that would apply to and help harmonize ongoing and pending federal processes and outcomes.