

# FISHERIES ACT BRIEF

# PROCESS GAINS

By Nikki Skuce, Director, Northern Confluence Initiative | January 2021

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In general, changes in Bill C-68 go a long way to restoring lost protections and introducing modern safeguards. We want to ensure that these protections for fish and fish habitat are implemented and regulations developed to meaningfully enact the legislative gains made. In addition, the new *Fisheries Act* outlines several process pieces that have yet to be utilized or clarified. These include the power for the Minister to establish advisory panels, factors to be considered in decision-making and regulatory development, and a five-year review of the *Fisheries Act*.

### A. ADVISORY PANELS

#### I. THE ISSUE

The process around Bill C-68 confirmed that there is significant knowledge, expertise and experience outside the Government of Canada that is highly relevant to the effective design and implementation of regulations under the amended *Fisheries Act*. If public participation in regulatory development is limited to submitting comments on DFO documents, opportunities for more deliberative dialogues and broadly informed and supported outcomes will be missed.

Comment periods alone do not suffice as meaningful public participation. Engagement falls on a spectrum from informing at the low end, to consulting, involving and finally collaborating at the high end. Opportunities for deliberative, reciprocal dialogue are key to securing meaningful engagement and new government policy and regulations can be strengthened.

#### II. THE LEGISLATIVE CHANGE

In the new *Fisheries Act*, the **Minister may establish advisory panels – Section 4, sub-section 4.01 (1-3)**. The Act also includes provisions for ensuring that participants are compensated so that costs are not a barrier to participation.<sup>1</sup>

#### III. THE OPPORTUNITY

Expert panels can allow for deeper external stakeholder engagement in identifying key issues and values, and in providing guidance on technical aspects of implementing the Act. Within an expert panel, information-sharing and dialogue among diverse representatives can help establish common ground. DFO has previously relied on expert panels, including the Fisheries Research Council of Canada; the National MPA Standards Panel<sup>2</sup>, and the Aquaculture Science Advisory Panel to obtain advice from a diverse range of interests on difficult issues facing the government in achieving its mandate. Additional examples from other federal departments include the Multi-Interest Advisory

1. *Fisheries Act* C68. Section 4. **(2)** Members of an advisory panel established under sub-section (1) are to be paid any amount that is fixed by the Governor in Council for each day that they attend any of the advisory panel's meetings. **(3)** The members are also entitled to be reimbursed, in accordance with Treasury Board directives, for the travel, living and other expenses incurred in connection with their work for the panel while absent from their ordinary place of work, in the case of full-time members, or from their ordinary place of residence, in the case of part-time members.

2. National Advisory Panel on Marine Protected Area Standards. <https://www.dfo-mpo.gc.ca/oceans/conservation/advisorypanel-comite-conseil/index-eng.html>

Committee for the Impact Assessment Act<sup>3</sup> and the Species At Risk Advisory Committee<sup>4</sup> for the Species At Risk Act implementation. Both of these committees have a broad, clearly identified membership with specific terms of appointment and detailed terms of reference.

#### IV. KEY CONSIDERATIONS

Advisory panels should be struck according to the issue that needs to be resolved and members should represent diverse perspectives regarding the issue at hand. The purpose of the panel should be clearly defined and secretariat support should be considered. In all cases, an Advisory Panel should include a representative from the conservation and environmental community. Indigenous representatives should also be included in all panels, however panels should not be considered fulfilling the “duty to consult” prerogative or nation to nation negotiations.

Given the likely diversity of *Fisheries Act* issues to be addressed, ensuring representation from the environmental or conservation community would be important in helping with analyses, identifying biodiversity and conservation values, and, often, bringing a broad regional scope. Selecting representatives to the Advisory Panel could be done by the sector itself.

The frequency with which the Advisory Panel would meet would depend on the scope and pace of the regulatory or policy process and could be set out at the first meeting. It’s also important that DFO engage committee members in the development of the terms of reference and agenda. A collaborative approach to agenda-setting can ensure that the most pertinent issues are discussed.

It would be important for DFO to publicly post the terms of reference, advice and recommendations received from the Advisory Panels, and a fulsome response<sup>5</sup> and time bound commitment from the Minister or relevant department.

#### V. NEXT STEPS

The Fish and Fish Habitat branch at Fisheries and Oceans appears to be interested in expanding its public engagement as it moves forward with its priorities.<sup>6</sup> This is an important step. At the same time, the Minister should establish Advisory Panels within the next few months on important *Fisheries Act* implementation measures, with a view to avoiding crises and being proactive on implementation of key provisions of the Act.

As part of the priorities and as part of implementing the new *Fisheries Act*, Ministerial Advisory Panels could be established in the next few months on topics such as:

- Climate change adaptation and nature-based solutions (bringing together Indigenous and non-Indigenous science)
- Fisheries rebuilding provisions and alignment with the Species At Risk Act
- Habitat offsetting and banking policies

Membership of these committees can have different people, be timebound, and help the Minister move forward with her mandate to implement the new *Fisheries Act*.

3. From West Coast Environmental Law Blog. <https://www.wcel.org/blog/review-review-reviews-participants-guide-federal-ea-review>

4. <https://www.canada.ca/en/environment-climate-change/corporate/appointments/species-at-risk-advisory-committee-membership.html>

5. Government should avoid a partial response to panel recommendations.

6. From DFO webinar July 2020. 2020-2021 Topics for engagement: Codes of practice; Fisheries Act registry; Habitat offsetting and banking policies; Prescribed works and waters regulation; Cumulative effects; Engagement framework.

Next steps: Managing death of fish; Ecologically significant areas; Existing facilities; Risk management principles.

## ACCOUNTABILITY AND TRANSPARENCY IN IMPLEMENTING THE ACT

Bill C-68 added a clause to the *Fisheries Act* making the “protection and conservation of fish and fish habitat” an overarching purpose for the law (2.1). It also highlights specific considerations and statutorily mandates certain factors be considered in decision making under the law, including cumulative effects and Indigenous knowledge. We want to ensure that both the considerations for decision making (Section 2.5) and the factors outlined in Section 34.1(1) are applied in a meaningful and transparent manner in the creation of regulatory packages and other mechanisms such as Codes of Practice, and designated projects, particularly those relating to fish habitat protection

## B. PURPOSE AND CONSIDERATIONS TO GUIDE DECISION-MAKING

### I. THE ISSUE

The overarching purpose of the *Fisheries Act* confirms that conservation and protection of fish and fish habitat are the foundation for decision-making and regulations in relation to fisheries. Without fish abundance, there are no fisheries to manage. The law further includes key sustainability principles such as the precautionary principle and an ecosystem approach in the considerations for decision-making (Section 2.5) and factors to consider when developing regulations that reflect key sustainability principles (S. 34.1).

### II. THE LEGISLATIVE CHANGE

Bill C-68 adds a specific clause to the *Fisheries Act* establishing an overarching purpose for the law that highlights the “conservation and protection of fish and fish habitat”<sup>7</sup>. It further introduces a set of factors and considerations to guide decision making under the law, including cumulative effects, Indigenous knowledge, science, sustainability of fisheries and others<sup>8</sup>.

### III. THE OPPORTUNITY

Unlike the factors to be considered in s. 34.1(1), the list of overarching considerations in s. 2.5 was not made mandatory in decision-making. In fact, the Minister may *not* consider scientific information, Indigenous knowledge or the precautionary approach when making a decision. However, the inclusion of these factors by Parliament underlines their importance, and creates a public expectation about transparency in Ministerial decision-making and in developing regulations. There is an opportunity for sharing specific, publicly available guidance about the incorporation of these factors in decision-making by the Minister.

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7. **Purpose of Act : 2.1** The purpose of this Act is to provide a framework for

- (a) the proper management and control of fisheries; and
- (b) the conservation and protection of fish and fish habitat, including by preventing pollution.

8. **Considerations for decision making**

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

- (a) the application of a precautionary approach and an ecosystem approach;
- (b) the sustainability of fisheries;
- (c) scientific information;
- (d) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister;
- (e) community knowledge;
- (f) cooperation with any government of a province, any Indigenous governing body and any body - including a co-management body — established under a land claims agreement;
- (g) social, economic and cultural factors in the management of fisheries;

## IV. KEY CONSIDERATIONS

Explicit guidance is needed to ensure that the Purpose and Considerations are embedded in decision-making, and that outcomes both reflect the intent of the Act and accord with Supreme Court jurisprudence which has made clear that conservation of the resource is the Minister's primary obligation under the *Fisheries Act*.<sup>9</sup> This would also ensure Canada is consistent with international conventions and agreements, including the Northwest Atlantic Fisheries Organization (NAFO) Amended Convention and the United Nations Fish Stocks Agreement (UNFSA) (Annex II).<sup>10</sup>

## V. NEXT STEPS

There are several new regulations and policies that need follow-up since the *Fisheries Act* was enacted. It is important for the Department of Fisheries and Oceans to develop policy guidance on how Factors and Considerations are applied consistently in practice and reflected in decision-making and the development of regulations.

The considerations also apply to decisions that are made on an annual basis in managing commercial fisheries. It's important for DFO to ensure that decision-making, including factors used to make a final decision, are reported to the public in a transparent and accessible manner. For example, when making a quota decision regarding fish, the Minister could report on the amount of quota and the factors used in coming to that decision. Another example could be in approving HADD requests, and how decisions to allow habitat destruction address the factors in s.34.4(1)– particularly where public infrastructure is the reason for the authorization.

## MECHANISM FOR ONGOING IMPROVEMENT OF THE ACT

Bill C-68 also includes a requirement for a regular review of the provisions and operation of the *Fisheries Act*, which establishes a legislated mechanism for adapting the law over time to reflect changes in environmental, social and economic context. This addition was welcomed as it provides for a regular opportunity to evaluate the implementation of the Act and to consider changes to improve implementation.

## C. FIVE-YEAR REVIEW

### I. THE LEGISLATIVE CHANGE: FIVE-YEAR REVIEW OF ACT

*Every five years beginning on the day on which this section comes into force, the provisions and operation of this Act shall be reviewed by the committee of the Senate, of the House of Commons or of both Houses that is designated or established for that purpose*<sup>11</sup>. (Section 92)

### II. THE OPPORTUNITY

Outcomes from the current work to implement and enforce the new *Fisheries Act* will be the subject of the first five-year review in 2024. In the first year of implementation, it is already clear that there are some improvements that can be made in practice, based on the existing legislation, and that there are other issues that require adjustment to the legislation in 2024.

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9. *R v. Marshall*, [1999] 3 SCR 533 at paragraph 40: "The paramount regulatory objective is the conservation of the resource. This responsibility is placed squarely on the Minister and not on the aboriginal or non-aboriginal users of the resource." See also *Morton v Canada*, 2015 FC 575 at paragraph 56.

10. <https://archive.nafo.int/open/qc/2007/qcdoc07-04.pdf> and [www.un.org/depts/los/convention\\_agreements/texts/fish.../CONF164\\_37.htm](http://www.un.org/depts/los/convention_agreements/texts/fish.../CONF164_37.htm)

11. Section 92 of *Fisheries Act*. <https://laws-lois.justice.gc.ca/eng/acts/f-14/FullText.html>

### III. NEXT STEPS

DFO should begin to identify the process for the five year review and if / how public engagement might factor into the review. In the lead up to a statutory review of the Fisheries Act, an engagement strategy (or Advisory Panel) should be created at least a year in advance (by August 2023).

From an implementation perspective, there are a few key issues that could be addressed in the five-year review to better support the conservation and protection of fish and fish habitat. For example, as highlighted above, s. 2.5 of the *Fisheries Act* should mandate transparency around how the considerations for decision-making are being accounted for in decisions and regulatory processes. An important addition for Section 2.1 considerations should be climate change and its impacts to fish and fish habitat.

The Act includes an Annual report to Parliament on the administration and enforcement of the provisions related to fish and fish habitat protection and pollution prevention (Section 42.1 (1)). An additional report to Parliament should be a systematic assessment of key fish habitats, including changes and trends in ecosystem health, identification of stressors, and management actions, throughout Canada every three to five years. If the report indicates declines and gaps, the Act should require a government response and action plan to address the report's recommendations, and follow-up monitoring of fish habitat. Research into habitat health is a key component to ensuring the protection of fish and fish habitat and fulfilling the purpose of the Act.

DFO currently makes public the information on fish stock population status and this is summarized by ECCC in the Sustainable Development Report. DFO should make more use of its own data to present changes in populations over time, as currently this is largely done by a non-government organization. Ultimately this is not a long-term solution to public accountability regarding our fisheries resources. In the US, the National Oceanographic and Atmospheric Association does an annual report to Congress that is a useful example that could be replicated in Canada, particularly given the number of shared stocks between the two countries,

Finally, the *Fisheries Act* is still without an Administrative Monetary Penalty (AMP) regime. An AMP helps supplement enforcement measures and provides additional tools for Fishery Officers to ensure compliance.