

**Policy and Practice Report
Legislative Framework Overview**

November 1, 2010

Table of Contents

Introduction	3
Constitutional jurisdiction over the fisheries	3
Applicable federal legislation.....	6
The Fisheries Act and its related regulations.....	7
The Oceans Act.....	9
The Species at Risk Act.....	9
Environmental legislation.....	10
Applicable provincial legislation.....	11
Summary of attempts to modernize the Fisheries Act.....	12
Bill C-62, “An Act Respecting Fisheries” – 1996.....	12
Bill C-45, “An Act Respecting the Sustainable Development of Canada’s Seacoast and Inland Fisheries” – 2006	13
Bill C-32, “An Act Respecting the Sustainable Development of Canada’s Seacoast and Inland Fisheries” – 2007	14

Note

This policy and practice report contains the following corrections to the version originally circulated to participants:

- Paragraph 32 has been edited to clarify the status of the Parks Canada Agency.
- Paragraph 34 has been amended to indicate that the *Law List Regulations* have not been updated to reflect amendments to the *Navigable Waters Protection Act*.
- Paragraph 38 has been corrected to state that the British Columbia Ministry of Environment administers the BC *Environmental Management Act*.
- Paragraph 39 has been corrected by removing the reference to “streamflow protection licences” as the relevant provision of the BC *Fish Protection Act* is not currently in force.

Introduction

- 1 This policy and practice report provides an overview of the legislative framework under which the Department of Fisheries and Oceans (DFO) operates, and which governs the Fraser River sockeye salmon fishery and its fish. This report also reviews attempts to modernize the federal *Fisheries Act* since 1995.
- 2 This report does not offer an opinion about the legislative framework and does not analyze the case authorities or statutes to which reference is made. The report’s purpose is simply to provide basic background information to the Commissioner as he embarks on the evidentiary hearings.

Constitutional jurisdiction over the fisheries

- 3 Sections 91 and 92 of the *Constitution Act, 1867* (“the Constitution”) divide the subject areas over which the federal and provincial governments have control: under section 91(12), the federal government has jurisdiction over “sea coast and inland fisheries;” under section 92(13), the provincial legislature has exclusive power over “property and civil rights in the province.” When the colony of British Columbia joined Confederation in 1871, it ceded jurisdiction over its fisheries to Canada.
- 4 Canada’s fisheries are a common property resource belonging to all Canadians.¹ The right to fish in tidal and navigable non-tidal waters is a public right, not dependent on proprietary title. Since the time of the *Magna Carta*, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation.² Federal regulation of fisheries commenced in 1868 with

¹ *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 at para. 37.

² *Attorney General of British Columbia v. Attorney General of Canada*, [1914] A.C. 153 (P.C.) at 169-170; *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 67.

the enactment of the first *Fisheries Act* (now R.S.C. 1985, c. F-14) (“the *Fisheries Act*”).

- 5 Canada also has jurisdiction over the related areas of marine pollution and the environment³ (although the environment is a subject matter which touches on several of the heads of power assigned to both the federal and provincial governments under sections 91 and 92 of the Constitution).
- 6 The federal legislative capacity over fisheries in tidal and navigable non-tidal waters conferred by section 91 extends to regulation only, however far regulation might proceed.⁴ Courts have repeatedly distinguished between federal legislative jurisdiction over fisheries, on the one hand, and proprietary rights in relation to fisheries, on the other.⁵ When legislative jurisdiction was conferred under section 91(12), there was no disruption to whatever proprietary rights previously vested in private individuals or the provincial Crown.⁶
- 7 The scope of the federal fisheries power was considered by the Supreme Court of Canada in its 2002 decision in *Ward v. Canada (Attorney General)*.⁷ The Court interpreted the power of section 91(12) expansively and held that the federal power over fisheries is not confined to conserving fish stocks, but extends more broadly to the maintenance and preservation of the fishery as a whole, including its economic value.⁸ Writing for the Court, Chief Justice McLachlin also endorsed the view that the federal fisheries power extends beyond the management of fisheries in their natural state and does not necessarily terminate prior to the point of sale.⁹ Aspects of sale that are necessarily incidental to the exercise of the fisheries power fall within federal jurisdiction¹⁰ (the rationale being that Parliament may limit sales in order to prevent injurious exploitation of the resource).
- 8 In addition to the broad scope of section 91(12) set out in *Ward*, the following fishery-related subjects have specifically been held to fall under the section 91(12) federal power:
 - recreational fishing in tidal waters¹¹

³ *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

⁴ *Quebec Fisheries (Re)*, [1921] 1 A.C. 413 (P.C.) at para. 5.

⁵ *BC Fisheries Reference*, *supra* note 2; *Reference re: British North America Act, 1867, s. 108 (Can.)*, [1898] A.C. 700 (P.C.) [*Provincial Fisheries Reference*]; *Quebec Fisheries (Re)*, *supra* note 4; *Fowler v. The Queen*, [1980] 2 S.C.R. 213.

⁶ *Provincial Fisheries Reference*, *supra* note 5 at 712-713.

⁷ [2002] 1 S.C.R. 569 [*Ward*].

⁸ *Ibid.* at para. 41; see also *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93 (C.A.), leave to appeal to SCC refused, [1987] S.C.C.A. No. 97 (QL).

⁹ *Ward*, *supra* note 7 at paras. 40-48.

¹⁰ *Ibid.*, citing *R. v. N.T.C. Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158 (C.A.); *R. v. Saul* (1984), 10 D.L.R. (4th) 736 (B.C.S.C.); *R. v. Twin* (1985), 23 C.C.C. (3d) 33 (Alta. C.A.).

¹¹ *R. v. Breault* (2001), 198 D.L.R. (4th) 669 (N.B.C.A.).

- the export of fish¹²
- fish packing¹³
- finfish aquaculture¹⁴

9 Although broad, the fisheries power is not unlimited.¹⁵ As the Supreme Court held in *Ward*:

10 While Parliament must respect the provincial power over property and civil rights, the approach to be adopted is not simply drawing a line between federal and provincial powers on the basis of conservation or sale. The issue is rather whether the matter regulated is essentially connected — related in pith and substance — to the federal fisheries power, or to the provincial power over property and civil rights.¹⁶

11 Trade processes by which fish are converted into a commodity suitable for the market are part of section 92(13) and are not within the scope of “sea coast and inland fisheries”¹⁷ under section 91(12). Section 91(12) also does not provide the authority to regulate labour relations within a province.¹⁸

12 Although the enactment of fisheries regulations is within the exclusive competence of Parliament, the provinces have the jurisdiction to make commercial fishing regulations in respect of provincially-owned fisheries where there is no public right to fish (i.e. in waters that are non-tidal and non-navigable), although any provincial regulations are subject to overriding federal legislation.¹⁹ For example, a province may, by legislation enacted under section 92(5) (management and sale of public lands) or by contract, grant fishing rights and stipulate the terms and conditions upon which those rights are to be exercised. Accordingly, in waters owned by a province or private individuals and in which the province possesses the fishing rights, legislative jurisdiction is essentially concurrent (although subject to the rule of federal paramountcy); British Columbia can regulate the grant of fishing rights and other

¹² *R. v. Prince Rupert Fishermen’s Co-operative Assn.* (1988), 22 B.C.L.R. (2d) 82 (S.C.).

¹³ *R. v. Bodmer* (1981), 120 D.L.R. (3d) 699 (B.C.S.C.).

¹⁴ *Morton v. British Columbia (Minister of Agriculture and Lands)*, 2009 BCSC 136 at paras. 183-185 [*Morton*]; see also *Morton v. Marine Harvest Canada Inc.*, 2009 BCCA 481. The Supreme Court declined to make a finding with respect to aquaculture of marine plants.

¹⁵ *Ward*, *supra* note 7 at para. 42.

¹⁶ *Ward*, *supra* note 7 at para. 48.

¹⁷ *Reference re: Fisheries Act, 1914 (Can.)*, [1930] A.C. 111 (P.C.) at paras. 20 and 25.

¹⁸ *Ward*, *supra* note 7 at paras. 44 and 46; *Mark Fishing Co. v. United Fishermen & Allied Workers’ Union* (1972), 24 D.L.R. (3d) 585 (B.C.C.A.); *British Columbia Packers Ltd. v. Canada (Labour Relations Board)*, [1974] 2 F.C. 913 (T.D.), *aff’d* [1976] 1 F.C. 375 (C.A.), *aff’d* but on different grounds [1978] 2 S.C.R. 97; but see *Beothuk Data Systems Ltd., Seawatch Division v. Dean*, [1996] 1 F.C. 451 (T.D.) – Parliament has jurisdiction over labour relations governing river guardians because their work is essential to the enforcement provisions of the *Fisheries Act*. This holding was based on a finding that under the doctrine of interjurisdictional immunity, the work of river guardians was vital, essential or integral to the core federal undertaking of regulation of the fisheries, and therefore the work of river guardians is an exception to the general rule that labour relations are a provincial matter.

¹⁹ *Peralta v. Ontario*, [1988] 2 S.C.R. 1045 at para. 1.

proprietary aspects, and Canada can regulate the times and manner and all other aspects of fishing.

- 13 The Province of British Columbia owns the waters and submerged lands of the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait and Queen Charlotte Strait and the waters and submerged lands between major headlands (bays, estuaries and fjords).²⁰ This ownership includes natural resources (for example, the sea bed and docks), the marine resources attached to the seabed (for example, oysters) and all subsurface resources. Therefore, provincial laws apply to activities on the seashore, sailing in the straits, mooring in a bay, building a marina or a dock, or raising oysters, in the same way that provincial laws apply to activities on dry land.
- 14 However, where there is a public right to fish (i.e. in tidal waters and navigable non-tidal waters), provincial ownership of the water bed is irrelevant since provincial legislatures cannot grant exclusive rights to fish in these waters or otherwise regulate fishing.²¹

Applicable federal legislation

- 15 The Minister of Fisheries and Oceans exercises his or her responsibility for Canadian fisheries through the activities of the DFO. Although the DFO has existed in some form since 1868, the *Department of Fisheries and Oceans Act*²² was first enacted in 1978. This legislation sets out the powers, duties and functions of the Minister and empowers the Minister to enter into agreements with any province (or provincial agency) regarding fisheries programs — the exact wording is “respecting the carrying out of programs for which the Minister is responsible.”
- 16 The DFO’s mandate and objectives originate in various federal statutes and accompanying regulations. For the purposes of this commission’s work, the pertinent statutes are the *Fisheries Act*,²³ the *Oceans Act*,²⁴ the *Species at Risk Act*,²⁵ the *Canadian Environmental Assessment Act*²⁶ and the *Canadian Environmental Protection Act*.²⁷ The *Fisheries Act* enables regulation respecting the conservation and protection of fish,²⁸ while the precautionary principle (generally speaking, the principle that it is preferable to err on the side of caution even if the scientific evidence is not readily available) arises under the more recently enacted legislation (*Canadian Environmental Protection Act*, *Oceans Act*, *Species at Risk Act* and *Canadian Environmental Assessment Act*).

²⁰ Reference re: *Ownership of the bed of the Strait of Georgia and related areas*, [1984] 1 S.C.R. 388.

²¹ *BC Fisheries Reference*, *supra* note 2.

²² R.S.C. 1985, c. F-15.

²³ R.S.C. 1985, c. F-14.

²⁴ S.C. 1996, c. 31.

²⁵ S.C. 2002, c. 29.

²⁶ S.C. 1992, c. 37.

²⁷ S.C. 1999, c. 33.

²⁸ *Supra* note 23, s. 43(b).

The Fisheries Act and its related regulations

- 17 The *Fisheries Act*²⁹ and its regulations provide the legislative authority for the management and regulation of fisheries and the protection of fish habitat. The *Fisheries Act* sets out the powers to regulate access to fisheries, to control the conditions of harvesting fish, and the development, implementation and enforcement of related regulations.
- 18 Under section 7(1) of the *Fisheries Act*, the Minister has “absolute discretion” to issue or authorize to be issued, licences and leases for fisheries or fishing.
- 19 Section 43 of the *Fisheries Act* affords the Governor-in-Council broad authority to make regulations for carrying out the purposes and provisions of the *Fisheries Act*, which includes: the conservation and management of fish; the conservation and protection of spawning grounds; the use of fishing gear and equipment; the operation of fishing vessels; and issues relating to licensing. On this last point, the licensing power includes licence conditions (fish licences may contain “Conditions of Licence” stipulating requirements for conservation and management of the fishery, pertaining to the commercial fishing fleets) and variation orders (used to set openings and closures for fisheries; when variation orders are issued, Fishery Notices publicly announce the detail of the order and advise affected fishers of, for example, openings and closings in a particular fishery).
- 20 Section 32 of the *Fisheries Act* expressly prohibits the unauthorized destruction of fish by means other than fishing.
- 21 The *Fisheries Act* also prohibits the unauthorized “harmful alteration, disruption or destruction of fish habitat” (“HADD”) in section 35. “Fish habitat” is defined in section 34(1) as “spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.”
- 22 Pollution is addressed under s. 36 of the *Fisheries Act* which prohibits persons, except as authorized by regulation, from depositing or permitting the deposit of deleterious substances of any type “in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.”
- 23 The *Fisheries Act* regulations which apply to Fraser River sockeye are the *Fishery (General) Regulations*,³⁰ the *Pacific Fishery Regulations, 1993*,³¹ the *Pacific Fishery*

²⁹ *Supra* note 23.

³⁰ SOR/93-53.

³¹ SOR/93-54.

Management Area Regulations, 2007,³² the *British Columbia Sport Fishing Regulations, 1996*,³³ and the *Aboriginal Communal Fishing Licences Regulations*.³⁴

- 24 The *Fishery (General) Regulations* govern the economic operation of the fisheries and apply to all fisheries (commercial, recreational and aboriginal communal fisheries). They contain provisions regarding the establishment and variation of fishery closures, fishing quotas and fish size and weight limits; licences and registration; identification of fishing vessels and fishing gear; and fishery observers. These regulations also contain provisions that set out the requirements to assist DFO personnel engaged in the enforcement or administration of the *Fisheries Act*.
- 25 The *Pacific Fishery Regulations, 1993* apply to commercial fisheries, and Part VI governs the salmon fishery. The *Pacific Fishery Management Area Regulations, 2007* describe the surf line and divide the Canadian fisheries waters of the Pacific Ocean into Management Areas and Subareas (which in turn are referenced when describing fishery openings and closures). The *British Columbia Sport Fishing Regulations, 1996* apply to sport fishing in Canadian fisheries waters of the Pacific Ocean and of British Columbia, setting close times, fishing quotas and size limits for all sport fisheries in B.C. The *Aboriginal Communal Fishing Licences Regulations* cover the issuance of communal licences to aboriginal organizations, and the conditions of those licences are used to regulate communal fishing activities.
- 26 In addition, there are several regulations governing the discharge of effluents which could impact Fraser River sockeye: the *Chlor-Alkali Mercury Liquid Effluent Regulations*,³⁵ the *Meat and Poultry Products Plant Liquid Effluent Regulations*,³⁶ the *Metal Mining Effluent Regulations*,³⁷ the *Petroleum Refinery Liquid Effluent Regulations*,³⁸ the *Potato Processing Plant Liquid Effluent Regulations*³⁹ and the *Pulp and Paper Effluent Regulations*.⁴⁰ The DFO Regional Director-General (RDG) is authorized by the *Management of Contaminated Fisheries Regulations*⁴¹ to close any fishery if the RDG has reason to believe that fish in that area are contaminated.
- 27 Finally, as of December 18, 2010, the federal government will be responsible for aquaculture operations in the country.⁴² The proposed *Pacific Aquaculture*

³² SOR/2007-77.

³³ SOR/96-137.

³⁴ SOR/93-332.

³⁵ C.R.C., c. 811.

³⁶ C.R.C., c. 818.

³⁷ SOR/2002-222.

³⁸ C.R.C., c. 828.

³⁹ C.R.C., c. 829.

⁴⁰ SOR/92-269.

⁴¹ SOR/90-351.

⁴² *Morton, supra* note 14. The provincial aquaculture regulatory scheme was held to be *ultra vires* the Province of British Columbia and invalid. However, it was allowed to continue to operate for a period of 12 months from the date of the judgment in order to allow for the federal government to consider replacement legislation, a deadline which has since been extended to December 18, 2010.

*Regulations*⁴³ are currently undergoing review and are intended to enter into force by that date.

The Oceans Act

28 Under the *Oceans Act*,⁴⁴ the Minister shall lead and facilitate the development and implementation of “a national strategy for the management of estuarine, coastal and marine ecosystems” in Canada’s oceans (section 29) and of “plans for the integrated management of all activities or measures in or affecting” Canada’s oceans (section 31). The *Oceans Act* mandates three principles upon which the national strategy is based: sustainable development, integrated management, and the precautionary approach (section 30).

29 In 2002, the DFO released “Canada’s Oceans Strategy” which “defines an oceans-centred planning framework” that combines the three principles articulated in section 30. While the *Oceans Act* and the *Fisheries Act* complement each other, section 35 of the *Fisheries Act* is applied to localized works, usually streamside or at the shoreline, which could impact fish habitat. The *Oceans Act* focuses more on the integrated management of marine resources and large-scale conservation measures such as Marine Protected Areas.

The Species at Risk Act

30 The purposes of the *Species at Risk Act (SARA)*⁴⁵ are “to prevent wildlife [including aquatic] species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened” (section 6).

31 Like the *Oceans Act*, *SARA* endorses the precautionary principle as stated in its preamble: “the Government of Canada is committed to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.”

32 The DFO is one of three federal government departments or agencies charged with *SARA*’s implementation (the others being the Department of the Environment and the Parks Canada Agency⁴⁶) and it is responsible for protecting aquatic species at risk and their habitat. The DFO’s area of responsibility includes the legal

⁴³ Canada Gazette, Part I, vol. 144, no. 28, July 10, 2010.

⁴⁴ *Supra* note 24.

⁴⁵ *Supra* note 25.

⁴⁶ Note that the Parks Canada Agency itself currently falls under the responsibility of the Department of the Environment; see *Parks Canada Agency Act*, S.C. 1998, c. 31, s. 2.

requirements to enforce automatic prohibitions; to develop recovery strategies, management plans and action plans within specified timelines; to identify and protect the critical habitat for endangered or threatened species; and to conduct consultations within specified timelines.

Environmental legislation

- 33 The *Canadian Environmental Assessment Act*⁴⁷ (CEAA) requires environmental assessment of projects or prescribed activities which involve a decision by the federal government. Included activities are prescribed by the *Inclusion List Regulations*.⁴⁸ Part VII (Fisheries) of these regulations mandates that there be an environmental assessment of activities requiring authorization under sections 32, 35 or 36 of the *Fisheries Act* (i.e., activities that destroy fish (by means other than fishing); that harmfully alter, disrupt or destroy fish habitat; or that result in the deposit of deleterious substances in water frequented by fish). Potential impacts on salmon habitat are an important element of environmental assessments under the CEAA.
- 34 Section 5(1) of the *Navigable Waters Protection Act*⁴⁹ (NWPA) provides that no work “shall be built or placed in, on, over, through or across any navigable water” without authorization. Prior to amendment of the NWPA in 2009, this requirement for authorization was contained in section 5(1)(a), a section which no longer exists. While the *Law List Regulations*⁵⁰ prescribe that an authorization under the former section 5(1)(a) of the NWPA triggers an environmental assessment under the CEAA, the *Law List Regulations* have not been updated to reflect the change in the relevant section of the NWPA.
- 35 The *Canadian Environmental Protection Act*⁵¹ contains a commitment to the precautionary principle and it empowers the Minister of the Environment to issue environmental objectives and to release guidelines and codes of practice to prevent and reduce marine pollution from land-based sources (section 121). Section 127 enables the Minister to issue permits authorizing disposal of waste or other matter, subject to any conditions that the Minister considers necessary for the protection of marine life (section 129). Persons disposing of substances pursuant to a permit, or on an emergency basis pursuant to section 130, are not subject to section 36(3) of the *Fisheries Act* (deposit of deleterious substance prohibited).

⁴⁷ *Supra* note 26.

⁴⁸ SOR/94-637.

⁴⁹ R.S.C. 1985, c. N-22.

⁵⁰ SOR/94-636.

⁵¹ *Supra* note 27.

Applicable provincial legislation

- 36 While most of the activities related to Fraser River sockeye salmon fall under regulation by federal legislation, some provincial legislation applies to the management of the fishery.
- 37 The British Columbia *Fisheries Act*⁵² chiefly provides for the licensing and regulatory control of activities associated with commercial fisheries, including licensing of commercial fishers, fish processing plants and fish buying stations; it also provides for licensing of aquaculture facilities. While section 26(2)(a) purports to authorize the Lieutenant Governor in Council to make regulations for “safe and orderly aquaculture”, this section was held in *Morton* to be *ultra vires* the Province of British Columbia insofar as it applies to finfish aquaculture.⁵³ On the other hand, the sections allowing for licensing of aquaculture (sections 13(5) and 14) were upheld on the basis that their dominant purpose is to produce revenue based on the licensing of the business of fishing.⁵⁴
- 38 The British Columbia *Wildlife Act*⁵⁵ governs the interaction of people and provincially managed wildlife, which includes fish. The British Columbia *Environmental Management Act*⁵⁶ provides the British Columbia Ministry of Environment with the authority to manage, protect and enhance the environment.
- 39 The British Columbia *Fish Protection Act*⁵⁷ provides protection to fish and fish habitat by prohibiting bank-to-bank dams on “protected rivers;” establishing special rules in relation to water licences on “sensitive streams” where the sustainability of a population of fish is at risk because of inadequate flow or degradation of habitat; providing for the development of recovery plans for “sensitive streams;” authorizing temporary reduction in water-use rights during periods where drought threatens the survival of a fish population; and allowing the provincial government to establish directives for local governments in preserving streamside areas.
- 40 The British Columbia *Fish Inspection Act*⁵⁸ provides the authority to regulate activities concerning the handling, processing, storing, grading, packaging, marking, transporting, marketing and inspection of fish and fish products. The regulations⁵⁹ ensure that fish processed and sold within British Columbia have met specified requirements.

⁵² R.S.B.C. 1996, c. 149.

⁵³ *Morton*, *supra* note 14.

⁵⁴ *Morton*, *supra* note 14. Also found invalid with respect to finfish aquaculture were sections 1(h) and 2(1) of the *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131 and the *Aquaculture Regulation*, B.C. Reg. 78/2002. The *Finfish Aquaculture Waste Control Regulation*, B.C. Reg. 256/2002 was found invalid in its entirety. This decision is to take effect on December 18, 2010.

⁵⁵ R.S.B.C. 1996, c. 488.

⁵⁶ S.B.C. 2003, c. 53.

⁵⁷ S.B.C. 1997, c. 21.

⁵⁸ R.S.B.C. 1996, c. 148.

⁵⁹ *Fish Inspection Regulations*, B.C. Reg. 12/78.

Summary of attempts to modernize the Fisheries Act

41 Since 1995, there have been three attempts to modernize the *Fisheries Act*. While the specific provisions of each proposed Act differed, all three shared a number of important principles and goals, including: the introduction of a preamble promoting a precautionary approach to conservation; the delegation of management responsibility to the fisheries users themselves; the establishment of a new mechanism for handling violations and appeals; and the strengthening and clarification of the habitat-protection provisions of the existing Act. In general, each proposed *Fisheries Act* sought to create a more transparent, streamlined and inclusive legal framework for managing Canada's fisheries.

Bill C-62, "An Act Respecting Fisheries" – 1996

42 The first attempt at modernization, Bill C-62, *An Act respecting fisheries*⁶⁰ was tabled on October 3, 1996 by the Liberal government under Prime Minister Jean Chrétien. Prompted in part by significant cuts to DFO's budget, Bill C-62 proposed to transfer a large portion of the responsibility and costs of fisheries management to the resource users, thereby creating a less costly but more transparent and inclusive management regime.

43 The preamble to Bill C-62 incorporated principles of sustainable development and promoted the broad application of the precautionary principle to the conservation, management and exploitation of marine resources in order to protect the marine resources and to preserve the marine environment. The proposed preamble also stated that Parliament intended the powers, duties and function of the Minister to be exercised to conserve Canada's fisheries in the interest of present and future generations of Canadians.

44 Sections 10 to 13 of Bill C-62 would have enabled the Minister to issue "fisheries management orders" (FMOs). The use of FMOs was intended to streamline the management of fisheries by reducing the DFO's reliance on the regulatory process. Under proposed section 13, the power to make FMOs could have been delegated to the provinces.

45 Bill C-62, in sections 17 to 21, would have also enabled the Minister to enter into "fisheries management agreements" (FMAs), or long-term partnership agreements with "representative organizations" to manage fisheries. A FMA could have covered harvest limits; conservation and management measures and programs; numbers of licences; licence and lease fees; and obligations, responsibilities and funding arrangements with respect to management of the fishery. A FMA would have prevailed in the event of a conflict between the FMA and a provision of the

⁶⁰ 2d Sess., 35th Parl., 1996.

regulations, but the FMA would not have limited the Minister's power to issue a FMO.

46 Although Bill C-62 did not contain any major changes from the existing fish habitat conservation and protection provisions of the *Fisheries Act*, the proposed section 58 would have delegated certain habitat protection and management responsibilities to interested provinces, a provision designed to eliminate overlaps of federal and provincial processes. This delegation would have been limited to waters within the province (and would not have included prescribed projects that would have remained under federal authority).

47 Among the other major changes proposed by Bill C-62 were the establishment of a new system of sanctions which were to be administered by an Atlantic fishery tribunal and a Pacific fishery tribunal (whose decisions would have been subject to judicial review by the Federal Court), and the incorporation of many of the provisions of the *Coastal Fisheries Protection Act*,⁶¹ thereby providing a single unified piece of legislation that would apply to both Canadian and foreign vessels and fishers.

48 Bill C-62 died on the Order Paper with the call of the 1997 general election.

Bill C-45, "An Act Respecting the Sustainable Development of Canada's Seacoast and Inland Fisheries" – 2006

49 The second attempt to modernize the *Fisheries Act* was Bill C-45, *An Act respecting the sustainable development of Canada's seacoast and inland fisheries*,⁶² tabled on December 13, 2006 by the Conservative government under Prime Minister Stephen Harper. Bill C-45 was the culmination of the Fisheries Renewal Initiative, a program introduced in the DFO's 2005-2010 Strategic Plan, *Our Waters, Our Future*. Bill C-45 aimed to reaffirm and strengthen the goal of conservation and protection of fish and fish habitat, and to improve stability, transparency and predictability in fishery access and allocation.

50 Bill C-45 opened with a preamble which affirmed the conservation and protection of fish habitat and the protection of waters frequented by fish as essential elements of fisheries management.

51 Section 6 set out a list of "application principles" with which all persons engaged in the administration of the proposed Act or its regulations would have had to comply. Such persons would have been obliged to:

- a. take into account the principles of sustainable development and seek to apply an ecosystem approach;

⁶¹ R.S.C. 1985, c. C-33.

⁶² 1st Sess., 39th Parl., 2006.

- b. seek to apply a precautionary approach such that, if there is both high scientific uncertainty and a risk of serious harm, they will not use a lack of adequate scientific information as a reason for failing to take, or for postponing, cost-effective measures for the conservation or protection of fish or fish habitat that they consider proportional to the potential severity of the risk;
- c. take into account scientific information;
- d. seek to manage in a manner consistent with the constitutional protection afforded to existing aboriginal and treaty rights of Canada's aboriginal peoples;
- e. consider traditional knowledge, to the extent that it has been shared with them;
- f. endeavour to act in cooperation with other governments and with bodies established under land claims agreements; and
- g. encourage the participation of Canadians in the making of decisions that affect the management of fisheries and the conservation or protection of fish or fish habitat.

52 A focus of Bill C-45 was restricting ministerial discretion. Under the existing *Fisheries Act*, there are almost no legal restrictions on the Minister's actions, leaving them potentially susceptible to political considerations. Accordingly, Bill C-45 sought to clearly distinguish between decisions concerning the setting of licensing policies and those concerning the routine business of administering licences.

53 Like Bill C-62 before it, Bill C-45 would have transferred, again through FMAs, some control and responsibility for fisheries management to the resource users themselves. In addition, Bill C-45 would have created a Canada Fisheries Tribunal to deal with certain fisheries violations and licensing appeals, and it would have retained, for the most part, the general prohibition on the harmful alteration, disruption or destruction (HADD) of fish habitat (adding a clarification that an "alteration" or "disruption" must be harmful for the prohibition to apply).

54 Bill C-45 died on the Order Paper when the 1st session of the 39th Parliament was prorogued on June 22, 2007.

Bill C-32, "An Act Respecting the Sustainable Development of Canada's Seacoast and Inland Fisheries" – 2007

55 The third and most recent attempt to modernize the *Fisheries Act* was Bill C-32, *An Act respecting the sustainable development of Canada's seacoast and inland fisheries*.⁶³ Tabled on November 29, 2007, Bill C-32 was nearly identical to Bill C-45

⁶³ 2d Sess., 39th Parl., 2007.

in all but four key areas where the DFO and stakeholders agreed that changes were necessary.

56 First, the preamble in Bill C-32 was modified from Bill C-45 to include a reference to the fisheries as a “common property resource.” Second, the proposed section 25 was modified to make conservation and protection of fish and fish habitat the Minister’s first priority in exercising the powers under section 27 (regulation of licensing and issuing of interim orders) and under section 37 (allocation orders); however, the list of optional considerations which had existed in section 25 of Bill C-45 became obligatory considerations in Bill C-32. Third, section 30(1), which under Bill C-45 read, “A licence confers privileges and not any right of property, and may not be transferred,” was amended to read simply, “A licence does not confer any right of property.” Finally, section 43(2)(g), which dealt with funding arrangements in FMAs, was amended to remove the ability to assign a quota of fish directly to the organization to fund its management activities.

57 Bill C-32 died on the Order Paper with the call of the 2008 general election.