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Guidelines Respecting the Issuance of Licences under the *Aboriginal Communal Fishing Licences Regulations (ACFLR)*

Application

These Guidelines apply where the Minister of Fisheries and Oceans (the "Minister") issues licences under the *ACFLR*. They are to be read in conjunction with the "Policy for the Management of Aboriginal Fishing", and other policies and guidelines of the Department of Fisheries and Oceans ("DFO") respecting the management of fisheries.

These Guidelines confirm the approach that DFO has taken since the *ACFLR* were enacted in June 1993.

Context

Issues related to aboriginal and treaty rights add to the complexity of the management of fisheries. In particular, the Supreme Court of Canada (the "SCC"), in *R. v. Sparrow*¹ and subsequent decisions, set out that where an Aboriginal group establishes a *prima facie* case that it has an aboriginal or treaty right to fish, the government cannot infringe that right, by legislation or other government action, unless the infringement can be justified in accordance with the test set out by the Court. To date, the courts have described such rights as communal in nature.

To manage fisheries in a manner consistent with the *Sparrow* and subsequent decisions, flexibility is required. Whether an Aboriginal group has aboriginal or treaty fishing rights and the nature and scope of those rights, if any, will vary from group to group. Thus, the measures that will be consistent with the *Sparrow* and subsequent decisions will also vary from one Aboriginal group to another. An additional consideration is that DFO does not have the mandate to determine whether an Aboriginal group has aboriginal or treaty rights to fish, or the nature and scope of any such rights.

¹ [1990] 1 S.C.R. 1075

Thus fisheries agreements negotiated under the Aboriginal Fisheries Strategy (AFS) and under the process developed in response to the decision of the SCC in R. v. Marshall² relate to fisheries management. These agreements specifically set out that they are made without prejudice to the positions taken by any party with respect to aboriginal or treaty rights. The issuance of a licence under the *ACFLR* is not a recognition that a particular Aboriginal group has an aboriginal or treaty right to fish, rather it is a tool that assists in the management of the fisheries and the conservation of fisheries resources and helps to promote stability in fisheries.

ACFLR

The *ACFLR* are made under section 43 of the Fisheries Act and authorize the Minister to issue a communal licence to an Aboriginal organization to carry on fishing and related activities. "Aboriginal organization" is defined to include "an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based aboriginal community". The *ACFLR* apply with respect to a myriad of species in various provinces and territories and in various waters. No licence fee is payable with respect to a licence issued under the *ACFLR*.

The *ACFLR* provide the licensing mechanism both for fishing conducted as part of the AFS and as part of DFO's response to the Marshall decision. This includes:

- access to fisheries for food, social and ceremonial purposes;
- access for the pilot sales fisheries in British Columbia; and
- access to commercial fisheries:
 - through the Allocation Transfer Program (ATP) under the AFS,
 - through the Fisheries Access Program as part of DFO's response to the Marshall decision,
 - by the Heiltsuk First Nation in British Columbia for herring spawn-on-kelp for commercial purposes, and
 - other commercial access.

² [1999] 3 S.C.R. 456

The type of fishery to which access is provided is identified through the licence conditions. These conditions include a condition with respect to the disposition (or use) of the fish harvested under the licence. For example, the licence condition may specify that the fish harvested under the licence are for food, social and ceremonial purposes or it may specify that sale of fish harvested under the licence is permitted.

The *ACFLR* provide the authority for conditions that may be included in a communal licence and specifically require that the conditions be for the proper management and control of fisheries and the conservation and protection of fish. Some conditions may involve the participation of the Aboriginal organization. For example, where a fisheries agreement is reached with an Aboriginal organization, licence conditions often provide that the Aboriginal organization designate who can fish under the licence.

In some instances, regulations made under the Fisheries Act contain specific requirements. For example, a regulation may specify the length of net that can be used to harvest a particular species of fish. However, an Aboriginal organization may prefer a net of a different size. If this is acceptable, the Minister may agree to this preference. As well, the Minister may believe that the test set out in the Sparrow and subsequent decisions cannot be met with respect to one or more specific requirements in a regulation. The fact situations will vary widely. Depending on the Aboriginal group involved, discussions held, preferences expressed and other matters, the Minister may need to include licence conditions that are inconsistent with specific regulatory requirements. Under the *ACFLR*, conditions that are inconsistent with requirements in other regulations made under the Fisheries Act can be included in a communal licence. In the event of an inconsistency between a condition in a communal licence and such other regulations, the conditions of the licence prevail to the extent of the inconsistency.³

The *ACFLR* and communal licences issued under those Regulations provide flexible tools to enable DFO to manage fisheries in a manner consistent with the Sparrow and subsequent decisions.

³ *ACFLR*, s. 6

Directives for Licensing

DFO seeks to manage fisheries in a manner consistent with the Sparrow and subsequent decisions. Consistent with the direction provided by the courts and federal government policies that encourage negotiation with Aboriginal groups, DFO consults with various Aboriginal organizations and attempts to reach agreement with them on their fishing effort and the measures to be implemented.

It may not be possible or appropriate to consult with every Aboriginal organization that wishes to be involved in the process. In this regard it should be remembered that DFO does not have a mandate to determine whether an Aboriginal group has aboriginal or treaty rights to fish, or the nature and scope of any such rights. In deciding which are the most appropriate organizations with which to consult, there are a number of factors that should be considered. These factors will include:

- (i) whether the Aboriginal organization is an Indian band or represents one or more Indian bands;
- (ii) whether the Aboriginal organization represents a territorially based Aboriginal community or a group of territorially based Aboriginal communities;
- (iii) what access to fisheries resources is available to the Aboriginal organization;
- (iv) is access to fisheries resources available to the Aboriginal organization or its members through access provided to another Aboriginal organization;
- (v) the likelihood that the particular organization speaks for a community or communities that today best represent Aboriginal societies that may be able to claim Aboriginal or treaty rights to fish; and
- (vi) the likelihood that the particular organization may represent individuals with a connection to a community referred to in (v).

Where an agreement is reached, licences issued will reflect the fisheries access and licence conditions described in the agreement.

Where an agreement is not reached, the Minister will review the consultations held. The Minister will take into account the preferences and concerns expressed by the Aboriginal organization, conservation

requirements and other relevant matters. Licences issued will contain conditions that the Minister believes would meet the requirements of the Sparrow and subsequent decisions. The conditions would be for the proper management and control of fisheries and the conservation and protection of fish.

Where an Aboriginal organization does not participate in consultations with DFO, the Minister will review the efforts made to consult. The Minister will take into account DFO's understanding of the preferences and concerns of the Aboriginal organization, conservation requirements and other relevant matters. Licences issued will contain conditions that the Minister believes would meet the requirements of the Sparrow and subsequent decisions. The conditions would be for the proper management and control of fisheries and the conservation and protection of fish.