Policy and Practice Report
Legislative Framework Overview

November 1, 2010

Table of Contents

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 environment[3] (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 jurisdiction[10] (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 waters[11]

---

[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 (Minster 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 fish[12]
- fish packing[13]
- finfish aquaculture[14]

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 Agency[46]) 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 regulations[59] 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.

COMMISSION OF INQUIRY INTO THE DECLINE OF THE SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a Commission to issue under Part 1 of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of the sockeye Salmon in the Fraser River

---

WRITTEN SUBMISSIONS OF THE GOVERNMENT OF CANADA IN RESPONSE TO THE POLICY AND PRACTICE REPORT ENTITLED "LEGISLATIVE FRAMEWORK OVERVIEW" OCTOBER 19, 2010

Counsel for the Government of Canada:

Mitchell Taylor, Q.C.
Tim Timberg
Hugh MacAulay

Department of Justice
900 – 840 Howe Street
Vancouver, B.C.
V6Z 2S9

Telephone: (604) 666-2324, (604) 666-8966 or (604) 666-7779
Fax: (604) 666-2710
Email: mitch.taylor@justice.gc.ca
tim.timberg@justice.gc.ca
hugh.macaulay@justice.gc.ca

I. INTRODUCTION

1. Understanding the legal framework that underlies the Fraser River sockeye fishery is critical to understanding the fishery. That framework is founded on constitutional provisions, statutory and regulatory provisions, and the common law.

2. The Commission's Policy and Practice Report titled *"Legislative Framework Overview"* (the "Paper") provides an overview of part of that legal framework – the legislative framework. The Commission's Policy and Practice Report titled "*The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery*" provides an overview of another important part of the legal framework. It is important to recognize, however, that there are other important parts of the legal framework, such as arrangements between the Government of Canada ("Canada") and the Government of British Columbia, that are not addressed in this Paper.

3. Generally, the Paper provides a good overview of the legislative framework that underlies the Fraser River sockeye fishery but there are statements and references in the Paper that, Canada submits, are unclear, incomplete or inaccurate. In these submissions, Canada offers its views regarding those statements and references.

II. CONSTITUTIONAL JURISDICTION OVER FISHERIES

Division of Powers

4. In paragraph 5, the Paper states that Canada "has jurisdiction over the related areas of marine pollution and the environment". Canada submits that this statement is potentially misleading and that it would be more accurate to refer to Canada having jurisdiction over some matters associated with the protection of the marine and freshwater environment.

The Public Right to Fish

5. Canada submits that, when considering the public right to fish, it is important to

recognize that the exercise of this right in Canada is subject to, and limited by, the *Fisheries Act* and regulations made under that Act and other federal fisheries legislation. This point was made by the British Columbia Court of Appeal in *R v. Kapp.*[1] In discussing what he referred to as the "common law right to fish" emanating from Magna Carta, Lowe J. A. stated at para. 19:

> The common law right to fish in Canada has been substantially limited by the *Fisheries Act*. That statute and the regulations passed pursuant to it control fishing. A right to fish in waters to which the statute has application does not exist in law unless authorized under that statute usually by licence.

6. Paragraphs 4 and 14 of the Paper refer to the public right to fish applying in tidal and "navigable non-tidal waters". Canada submits that this statement is incorrect. Gerard V. La Forest, Q.C., and Associates, *Water Law in Canada: The Atlantic Provinces,* (Ottawa: Department of Regional Economic Expansion, 1973), states at 196:

> While it is clear in England that the public right of fishing is limited to tidal waters,[167] there is some Canadian authority for the view that the public right of fishing also exists in waters that are navigable though not tidal.[168] If this were so the restriction in Magna Charta against the granting of several fisheries by the Crown would be inapplicable, that restriction being limited to tidal waters.[169] In any event the weight of authority is very clearly against the existence of a general public right of fishing in non-tidal waters.[170] There are some statements, however, that a public right of fishing exists in non-tidal waters where the bed is owned by the Crown,[171] but while fishing may be public in the sense that it is provincial property and the province may permit the public to fish there, it is not public in the sense that a general right exists in the public. [emphasis added]
>
> [167] See *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153; *Attorney-General of Canada v. Attorney-General of Quebec*, [1921] 1 A.C. 413.
> [168] *Gage v. Bates* (1858), 7 U.C.C.P. 116; *Reg. v. Robertson* (1882), 6 S.C.R. 52, *per* Strong J.; Moffatt *v. Roddy* (1889), 4 Ont. Cas. Law Dig. 7323; *Re Provincial Fisheries* (1895), 26 S.C.R.444, *per* Strong C.J. and Girouard J.
> 169 *Re Provincial Fisheries* (1895), 26 S.C.R. 444, *per* Strong J.; *Moffatt v. Roddy* (1889), 4 Ont. Cas. Law Dig. 7323.
> [170] *Steadman v. Robertson* (1879), 18 N.B.R. 580; *Reg. v. Robertson* (1882), 6 S.C.R. 52, *per* Ritche C.J.; *Re Provincial Fisheries* (1895), 26 S.C.R. 444; *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184; *R. v. Harron* (1912), 21 O.W.R 951; Attorney-General *of British Columbia v. Attorney-General of Canada* [1914] A.C. 153; *Barber v. Andrews* (1921), 20 O.W.N. 239; *Rice Lake Fur Co. v. McAllister*, [1925] 2 D.L.R. 506
> [171] See *Robertson v. Steadman* (1876), 16 N.B.R. 621 (the court, however, reversed this view in the later case of *Steadman v. Robertson*, (1879), 18 N.B.R. 580); R*e Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184, *per* Dennistoun J.; *McDonald v. Linton* (1926), 53 N.B.R. 107, *per* Barry C.J.

7. It is also important to recognize that, in describing the public right to fish in its decision in *R. v. Gladstone*[2], the Supreme Court of Canada referred to the right applying only in tidal waters:

---

[1] 2006 BCCA 277
[2] [1996] 2 S.C.R. 723.

67 It should also be noted that the aboriginal rights recognized and affirmed by s. 35(1) exist within a legal context in which, 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:

> . . . the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike.
>
> . . .
>
> [I]t has been unquestioned law that since Magna Charta [*sic*] no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation.

(*Attorney-General of British Columbia v. Attorney General of Canada*, [1914] A.C. 153 (J.C.P.C.), at pp. 169-70, *per* Viscount Haldane.)

While the elevation of common law aboriginal rights to constitutional status obviously has an impact on the public's common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s. 35(1), those common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed. As was contemplated by *Sparrow*, in the occasional years where conservation concerns drastically limit the availability of fish, satisfying aboriginal rights to fish for food, social and ceremonial purposes may involve, in that year, abrogating the common law right of public access to the fishery; however, it was not contemplated by *Sparrow* that the recognition and affirmation of aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an aboriginal right to sell fish commercially. As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery. [emphasis added]

Federal Jurisdiction in Respect of Fisheries in Non-Tidal Waters

8. The Paper suggests in paragraph 6 that federal jurisdiction in respect of fisheries in non-tidal waters applies only to navigable waters. This is incorrect. Federal jurisdiction in respect of fisheries in inland, non-tidal, waters is not limited to navigable waters. In *Attorney General for British Columbia v. Attorney General of Canada,*[3] the Judicial Committee of the Privy Council held as follows at 173:

> So far as the waters are tidal, the right of fishing in them is a public right, subject only to regulation by the Dominion Parliament. So far as the waters are not tidal, they are matters of private property, and all these proprietary rights passed with the grant of the railway belt, and became vested in the Crown in right of the Dominion. The question whether non-tidal waters are navigable or not has no bearing on the question. The fishing in navigable non-tidal waters is the subject of property, and, according to English law, must have an owner, and cannot be vested in the public generally. [emphasis added]

[3] [1914] A.C. 158

9. Federal jurisdiction in respect of fisheries in non-tidal waters, whether navigable or not, includes the jurisdiction to conserve and protect those fisheries. Federal jurisdiction in respect of fisheries in non-tidal waters was affirmed by the Judicial Committee of the Privy Council in *Attorney General for the Dominion v. the Attorneys General for the Provinces*,[4] at pages 712-713:

> ...Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment [that is, s.91(12)]. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights, could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character and scope of such legislation is left entirely to the Dominion legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. [emphasis added]

10. The above passage from the decision of the Judicial Committee of the Privy Council in *Attorney General for Canada v. the Attorneys General for the Provinces* was cited with approval by the Ontario Court of Appeal in *Re: Peralta et al. and the Queen in right of Ontario et al.*,[5] affirmed by the Supreme Court of Canada.[6]

11. Paragraph 12 refers to "provincially-owned fisheries". Canada submits that a more accurate description of such fisheries is "fisheries in non-tidal waters over provincial Crown land".

12. In paragraphs 12 and 14, the Paper refers to "waters owned by a province or private individuals". Canada submits that it is not ownership of waters but rather the ownership of the solum under the waters that gives rise to fishing rights in non-tidal waters. In *Attorney General for British Columbia v. Attorney General of Canada*,[7] the Judicial Committee of the Privy Council stated as follows at page 167:

---

[4] [1898] A.C. 700
[5] (1985) 16 D.L.R. (4th) 259
[6] [1988] 2 S.C.R. 1045
[7] *supra* note 3.

> It remains to consider the consequences as regards fishing rights. These are, in their Lordships' opinion, the same as in the ordinary case of ownership of a lake or riverbed. The general principle is that fisheries are in their nature mere profits of the soil over which the water flows and that the title to a fishery arises from the right to the solum. A fishery may of course be severed from the solum, and it then becomes a profit à prendre in alieno solo and an incorporeal hereditament.
> [emphasis added]

13. In paragraph 13, "docks" are referred to as "natural resources". Canada submits that docks should not be considered to be natural resources.

14. Paragraph 13 uses oysters as an example of "marine resources attached to the seabed". The use of oysters as an example highlights one of the limitations of the Paper that is noted above – *i.e.* that it does not describe the various arrangements made by Canada and the Government of British Columbia to cooperatively address issues arising from the governments' respective jurisdictions relating to fisheries. The oyster fishery in British Columbia was the subject of a 1912 agreement between Canada and the Government of British Columbia that was described by Mr. Justice Hinkson in *Morton v. British Columbia (Agriculture and Lands)* ("*Morton*"):[8]

> [175] What then of the provincial Crown's jurisdiction over agriculture? In ***Water Law in Canada – The Atlantic Provinces*** by Gerard V. La Forest., Q.C., *et al.* (Ottawa: Department of Regional Economic Expansion, 1973) at 40, the authors state:
>
> > It is obvious nonetheless, that in most cases, at least, development of provincially owned fisheries will require the co-operation of the federal and provincial authorities. For example, where fishing, such as lobster fishing, requires use of subsoil belonging to the province, provincial permission will be required even though a Dominion licence has been granted. Only in the case of ordinary fishing in tidal waters may the Dominion completely ignore provincial ownership of fisheries. That is because there has from immemorial antiquity been a right in the public to fish in tidal waters that overrides the usual exclusive common law right of the landowner to fish on his land. This right being a public, not a proprietary, right comes within the federal power to legislate respecting fisheries, and since the public right overrides the private right, there is nothing left for the provinces to legislate upon. It would require a federal statute to give an exclusive right or fishery in tidal waters. The public right of fishing, it should be repeated, is limited to ordinary fishing. It does not include fishing by weirs or other methods involving the use of the soil.
>
> [176] The Oyster Fisheries Agreement from 1912 provided that the Province was, subject to the Fishery Regulations of Canada, authorized by the agreement to:
>
> > ...grant leases from time to time of such areas of the sea coast, bays, inlets, harbours, creeks, rivers and estuaries of said Province as the Government of the said Province may consider suitable for the cultivation and production of oysters and the lessees of said Province shall, subject, however, to the Fishery Regulations of Canada, have the exclusive right to the oysters produced or found on the beds within the limits of their respective leases.

[8] 2009 BCSC 136

> Provided, however, that in respect of Public Harbours, this agreement shall not prejudice the right or title of the Dominion of Canada to enjoy and use the same for any purpose other than the cultivation and production of oysters. [emphasis added.] [Footnotes omitted.]

15. Paragraph 13 of the Paper notes that some solum under tidal waters in British Columbia is Provincial Crown land. As is highlighted in paragraph 14, regardless of the ownership of the solum under tidal waters, the public right to fish will apply.

16. Canada submits that it is also important to recognize that the public right to fish includes the right of fishing on the shore between the high and low water marks. S.A. Moore & H.S. Moore, *The History and Law of Fisheries* (London: Stevens and Haynes Law Publishers), at 96:

> As incident to the right of public fishery in tidal water there exists the right of fishing over the foreshore when it is not within the limits of a several fishery, and of laying lines, drawing nets (not being of the nature of fixed engines) over it, and presumably of drawing nets on the beach above ordinary high water mark in the act of fishing. It does not extend to the right of fixing stakes or fixed engines on the foreshore nor of drawing up boats above high water mark (except in case of peril and necessity) and leaving them there for future use[i].
>
> [i] *Ward v. Creswell*, (1741) Willes, 265; *Ilchester v. Raishleigh*, (1889); 61 L.T.N.S. 477; *Att.-Gen. v. Wright*, [1897] 2 Q.B. 318.

17. Paragraph 13 of the Paper refers to provincial jurisdiction over "sailing in the straits" and "mooring in a bay". Pursuant to section 91(10) of the *Constitution Act*,[9] the federal government has exclusive legislative jurisdiction with regard to navigation and shipping which, Canada submits, includes regulation of sailing or mooring in all navigable waters.

18. Paragraph 14 of the Paper states that whether solum under waters in which the public right to fish exists is provincial Crown land is "irrelevant". Canada submits that whether such solum is provincial Crown land *is* relevant with respect to, for example, the granting of tenures for aquaculture purposes.

[9] 1867, 30 & 31 Victoria, c. 3. (U.K.), [Reprinted in R.S.C. 1985, App. II, No. 5]

Federal Legislation

19. Paragraph 16 of the Paper describes DFO's mandate and objectives as "originating" in various statutes. One of the statutes cited is the *Canadian Environmental Protection Act* ("*CEPA*").[10] However, that statute is administered by the Department of the Environment. One statute that is relevant to DFO's mandate and objectives, and potentially relevant to the Cohen Commission is the *Coastal Fisheries Protection Act.*[11] That statute applies to fishing by foreign fishing vessels in Canadian waters. Another statute that may be potentially relevant to the Cohen Commission is the federal *Fish Inspection Act*[12] which is administered by Canadian Food Inspection Agency.

20. The last sentence in paragraph 16 suggests, perhaps inadvertently, that the precautionary principle cannot be applied in respect of the authorities set out in the *Fisheries Act.*[13] Canada submits that the precautionary principle can be applied in respect of the authorities in the *Fisheries Act.*

21. Paragraph 16 of the Paper also makes reference to the precautionary principle in relation to the *Canadian Environmental Assessment Act* ("*CEAA*"),[14] the *CEPA*[15], the *Oceans Act*[16], and the *Species at Risk Act* ("*SARA*")[17]. It further provides a general indication of what is meant by the precautionary principle, *i.e.* "it is preferable to err on the side of caution even if the scientific evidence is not readily available". Canada submits that this description of the precautionary principle does not accurately reflect the relevant provisions of the statutes referred to[18]. The definition of "precaution" in the *CEPA* is [19]

> where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation

---

[10] S.C. 1999, c. 33
[11] R.S.C. 1985, c. C-33
[12] R.S.C. 1985, c. F-12
[13] R.S.C. 1985, c. F-14
[14] S.C. 1992, c. 37
[15] *supra*, note 10
[16] S.C. 1996, c. 31
[17] S.C. 2002, c. 29
[18] There is no definition of precaution in *CEAA*.
[19] *supra*, note 10

A similar formulation is found in the *SARA*[20]:

> 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

The definition under the *Oceans Act* is:

> erring on the side of caution

22. The Paper places considerable emphasis on the precautionary principle - and not on other important principles that can be reflected in federal fisheries-related statutes, or in the application of those statutes: See, for example, the principles set out in the preamble of the *Oceans Act*[21] and the principles set out in the preamble of *SARA*[22].

23. Paragraph 17 refers to the *Fisheries Act*[23] and regulations providing authority for "the management and regulation of fisheries and the protection of fish habitat". Canada submits that it would be more accurate to describe the Act and regulations as providing authority for the management and regulation of fisheries and the conservation and protection of fish and fish habitat".

24. Paragraph 18 of the Paper describes the discretion of the Minister of Fisheries and Oceans with respect to issuing licences under the *Fisheries Act*[24]. What is not described in paragraph 18 is that the Minister's discretion is subject to:

- express limitations in the *Fisheries Act* and other statutes;
- requirements of administrative law, which provide that the Minister must exercise her discretion in good faith, and must base her decisions on relevant considerations and avoid arbitrariness; and
- other obligations arising from the *Constitution Act*; land claims agreements; and case law.

---

[20] *supra*, note 17
[21] *supra* note 16
[22] *supra*, note 17
[23] *supra* note 13
[24] *supra* note 13

25. Paragraph 19 inaccurately states that "the licensing power includes... variation orders". The authority to make variation orders under the *Fishery (General) Regulations*[25] is, Canada submits, separate from the "licensing power".

26. Paragraphs 20, 21, and 22 cite some of the key habitat protection provisions in the *Fisheries Act*[26]. Other habitat protection provisions in the *Act* include those that deal with obstructions[27] and ensuring adequate flows of water[28].

27. Paragraph 22 of the Paper refers to section 36 of the *Fisheries Act*[29]. It is important to recognize that this section of the *Act* (and the pollution-related regulations described in paragraph 26 of the Paper), is administered by the Department of the Environment.

28. Paragraph 24 refers to the *Fishery (General) Regulations*[30] as governing "the economic operation of the fisheries". Canada submits that this statement is inaccurate. The *Fishery (General) Regulations*[31] pertain to many aspects of various fisheries, including non-commercial fisheries, and also include provisions relating to, *inter alia*, fish habitat and enforcement matters.

29. Canada submits that, in accordance with the decision of the Supreme Court of British Columbia in *Morton*,[32] the reference in paragraph 27 to "aquaculture operations in the country" should be to *finfish* aquaculture operations *in British Columbia*. Further, Canada submits that it is important to recognize that the Government of British Columbia will remain responsible for issuing tenures and other matters related to aquaculture.

30. Paragraph 29 of the Paper refers to section 35 of the *Fisheries Act*[33] applying to "localized works, usually streamside or at the shoreline". Canada submits that it is important to

---

[25] SOR/93-53
[26] *supra* note 13
[27] *supra*, note 13, at section 20
[28] *supra*, note 13, at section 22
[29] *supra* note 13
[30] *supra* note 25
[31] *supra* note 25
[32] *supra* note 8
[33] *supra* note 13

recognize that section 35 applies to "any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat", and that fish habitat is defined to mean "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 ", in both marine and freshwater environments.

31. Paragraph 32 of the Paper mischaracterizes, in several respects, DFO's roles and responsibilities with respect to the *SARA*[34]. Paragraph 32 should be revised as follows:

> The DFO is one of three federal government departments charged with SARA's implementation (the others being the Department of the Environment and the Parks Canada Agency) and it is responsible for protecting aquatic species at risk (other than individuals in or on federal lands administered by the Parks Canada Agency) and their critical habitat. The DFO's area of responsibility includes the legal 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~~ of listed endangered or threatened species and of listed extirpated species if a recovery strategy has recommended their reintroduction into the wild in Canada; and to ~~conduct consultations~~ satisfy cooperation and consultation requirements within specified timelines. DFO is also responsible for enforcing automatic prohibitions, as well as the prohibition with respect to the destruction of critical habitat where the critical habitat is located in a marine protected area and where an order has been made by the Minister of Fisheries and Oceans triggering the prohibition on destruction of critical habitat in respect of the critical habitat (or portion of it) identified in the order.

32. Paragraph 33 of the Paper describes the application of *CEAA*[35], but that description is incomplete and somewhat inaccurate. The reference to "environmental assessment of projects or prescribed activities which involve a decision by the federal government" should instead be to "environmental assessment of projects, i.e. physical works or prescribed activities, which require certain decisions by the federal government". Paragraph 33 describes the need for environmental assessment of certain activities set out in Part VII of the *Inclusion List Regulations*[36]. DFO is also required to conduct environmental assessments of physical works for which it may issue various authorizations.

33. Paragraph 34 of the Paper refers to the *Navigable Waters Protection Act*[37]. It is important to recognize that that Act is administered by the Department of Transport.

---

[34] *supra* note 17
[35] *supra* note 14
[36] SOR/94-637
[37] R.S.C. 1985, c. N-22

III. APPLICABLE PROVINCIAL LEGISLATION

34. Canada submits that the description of "applicable provincial legislation" in paragraphs 36 to 40 is incomplete. The Government of British Columbia has jurisdiction over a wide range of matters, such as forestry, mining agriculture and water licences, which have the potential to affect Fraser sockeye. Accordingly, reference to provincial statutes such as the *Water Act*[38] and the *Forest Range and Practices Act*[39] should be added to the Paper.

III. SUMMARY OF PROPOSALS TO MODERNIZE THE FISHERIES ACT

35. Canada submits that the bills described in the paper should appropriately be referred to as proposals rather than "attempts".

36. Paragraph 41 of the Paper refers to one of the goals of the bills being "the delegation of management responsibility to the fisheries users themselves". Canada submits that this is a mischaracterization and that the bills instead aimed to provide an increased role for fisheries users in the management of the fisheries.

37. Paragraph 59 of the Paper refers to decisions being "potentially susceptible to political considerations". Considerations taken into account by Canada's elected political representatives are, by definition, "political considerations". Canada submits that it is inappropriate to suggest that such considerations are not an appropriate part of the decision-making process. Further, paragraph 59 does not make it clear that Bill C-45[40] envisioned that "decisions concerning the development of licensing policies" would continue to be made by the Minister.

38. Paragraph 60 of the Paper states that Bill C-45 "would have transferred, again through FMAs, some control and responsibility for fisheries management to the resource users themselves". Canada submits that a more accurate description of this aspect of Bill C-45 would

---

[38] R.S.B.C. 1996, c. 483
[39] S.B.C. 2002, c. 69
[40] *An Act respecting the Sustainable Development of Canada's Seacoast and Inland Fisheries*, First Sess., 39th Parl., 2006.

be that it envisioned sharing some decision making with respect to the fisheries management with the resource users themselves.

39. Canada points out that Bill C-45 (and Bill C-32) did not include the concept of delegation of habitat responsibilities to provinces that was included in Bill C-62[41].

IV. CONCLUSION

40. Generally, the Paper provides a good overview of the legislative framework that underlies the Fraser River sockeye fishery but, as described above, there are statements and references in the Paper that are unclear, incomplete or inaccurate. Canada offers these submissions to assist the Cohen Commission in understanding the legislative framework - a fundamental part of the legal framework - that underlies the Fraser River sockeye fishery.

Dated at the City of Vancouver, BC, this 26th day of October 2010.

Mitchell Taylor, Q.C.
Tim Timberg
Hugh MacAulay
Counsel for the Participant the Government of Canada

[41] *An Act Respecting Fisheries*, Second Sess., 35th Parl., 1996.

COMMISSION OF INQUIRY INTO THE DECLINE OF SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of the sockeye salmon in the Fraser River.

SUBMISSION OF THE PROVINCE OF BRITISH COLUMBIA ON THE COMMISSION'S OCTOBER 19, 2010 PAPER ENTITLED "POLICY AND PRACTICE REPORT: LEGISLATIVE FRAMEWORK OVERVIEW"

Counsel for the Province of British Columbia

Nancy E. Brown
D. Clifton Prowse Q.C.
Boris W. Tyzuk Q.C.

Ministry of Attorney General
Legal Services Branch
1301 865 Hornby St.
Vancouver, BC
V6Z 2G3

Telephone (604) 660-3090
Fax (604) 660-2636
Email: clifton.prowse@gov.bc.ca
boris.tyzuk@gov.bc.ca

1. The Policy and Practice Report, Legislative Framework Overview outlines various issues relating to the applicable legislative regimes relating to the inquiry; however, the Province does not agree with everything in the Report and sets out some of its concerns below. In addition, some aspects of the potentially applicable provincial legislation have not been identified. Further, the Province says the matters noted below may be of significance to the issues identified to be dealt with during the course of the inquiry by the June 3, 2010 Discussion Paper.

Constitutional Framework (para 3-14)

2. Federal constitutional legislative jurisdiction for matters relevant to the commission of inquiry arises under s. 91, including the POGG powers, as well as s. 91(10) Navigation and Shipping and s. 91(12) Sea Coast and Inland fisheries.

3. The legislative jurisdiction of the Province to legislate is found in ss. 92 and 92A of the *Constitution Act, 1867,* including*, inter alia:*

> (5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
>
> (10) Local Works and Undertakings
>
> (13) Property and Civil Rights in the Province.
>
> (16) Generally all Matters of a merely local or private Nature in the Province.
>
> 92A. Non-Renewable Natural Resources, Forestry Resources and Electrical Energy.[1]

4. The federal government's fisheries power does not arise from any proprietary interest, but rather from its exclusive legislative jurisdiction to regulate, preserve and manage the fisheries of Canada for the public benefit under s. 91(12). [2]

5. The provincial legislative jurisdiction over property and civil rights pursuant to s. 92(13) of the *Constitution Act* allows the province to regulate some aspects of the "business of fishing". In particular, the province has been found to have the power to regulate fish processing and labour relations applicable to the fishing industry. It may also generally regulate the sale or disposition of fish once caught. [3]

6. The Province can also legislate with respect to workers' safety on fishing vessels.[4]

---

[1] Added by *Constitution Act, 1981*

[2] ***The Queen v. Robertson*** (1882), 6 S.C.R. 52 (S.C.C.), page 120-121 and 123, and ***Ward v Canada (Attorney General)***, [2002] 1 S.C.R. 569

[3] ***Re United Fishermen & Allied Workers Union and British Columbia Packers Ltd. et al.*** (1975), 64 D.L.R. (3d) 522, page 529 (appeal dismissed by SCC on other grounds (1977) S.C.J. No. 116 (S.C.C.)), ***504578 Ontario Ltd.* v. *Great Lakes Fisherman & Allied Workers Union***, [1990] O.J. No. 39, and ***Mark Fishing Co. Ltd. et al. v. United Fishermen & Allied Workers' Union et al.***, [1972] 24 D.L.R. (3d) 585.

[4] ***R. v. Mersey Seafoods Ltd.***, 2008 NSCA 67, and ***Jim Pattison Enterprises v. Workers' Compensation Board***, 2009 BCSC 88 (appeal under reserve)

7. Perhaps more significant when looking at the issues identified by the Commission is the province's legislative jurisdiction relating to land use and issues relating to its ownership of land, both discussed, *infra*.

8. However, in considering issues before the Commission, the Province says it is necessary to be cognizant of certain principles of constitutional interpretation, including the concept of cooperative federalism, and not treat the provisions of ss. 91 and 92 as "watertight compartments."

9. Any notion that there are federal "enclaves" completely immune from provincial jurisdiction has been clearly rejected by the Supreme Court of Canada.[5]

10. It is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament and *vice versa*. [6]

Cooperative Federalism and the Coordination of Provincial, Municipal and Federal legislative regimes

11. On May 31, 2007, the Supreme Court of Canada released two companion cases, *Canadian Western Bank*[7] and *Lafarge*[8], which dealt with division of powers analysis, including interjurisdictional immunity. These two cases ushered in a significant change in the approach to division of powers analysis which the courts are to undertake.[9]

12. In both cases, the Supreme Court of Canada addressed the principle of federalism, and in particular identified that the current tide of constitutional analysis favoured "co-operative federalism".

> As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management **of the inevitable overlaps in rules made at the two levels of legislative power,** while recognizing the need to preserve sufficient predictability in the operation of the division of powers. . . . **Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court had called "co-operative federalism"** . . . [emphasis added][10]

---

[5] ***Westbank First Nation* v. *British Columbia Hydro Power Authority***, [1999] 3 S.C.R. 134 at para 18, ***Air Canada* v. *British Columbia***, [1989] 1 S.C.R. 1161 at 1191-1192 (para. 47), and ***Bell Canada v. Quebec***, [1988] 1 S.C.R. 749, para. 20

[6] ***Paul v. British Columbia (Forest Appeals Commission)***, [2003] 2 S.C.R. 585, 2003 SCC 55, at para. 14.

[7] ***Canadian Western Bank v Alberta***, [2007] 2 S.C.R. 3, 2007 SCC 22.

[8] ***British Columbia (Attorney General) v. Lafarge Canada Inc.***, [2007] 2 S.C.R. 86, 2007 SCC 23.

[9] In ***Chatterjee***, the Court applied the principles of federalism affirmed in ***Canadian Western Bank*** and ***Lafarge***.

[10] ***Canadian Western Bank***, *supra*, at para. 24.

13. This emphasis on co-operative federalism was a significant change in the Court's approach to division of powers analysis. Before *Canadian Western Bank* and *Lafarge* the courts placed greater emphasis on the "exclusivity" of the respective jurisdictions of the two levels of government. These cases have instructed that "co-operative federalism" demands a different approach.

14. The doctrine of interjurisdictional immunity follows a line of reasoning which attributes a "basic, minimum and unassailable content" immune from the application of legislation enacted by the other level of government, to each of the classes of subjects in ss. 91 and 92 of the Constitution.

15. Further, the Supreme Court of Canada specifically notes in *Lafarge* that interjurisdictional immunity should not be used where the legislative subject matter (in *Lafarge*, waterfront development) has a double aspect and both federal and provincial authorities have a compelling interest.[11]

16. Under the *Canadian Western Bank* and *Lafarge* tests, the doctrine of interjurisdictional immunity will only protect against intrusions which "impair" the actual "core" of the subject matter falling within jurisdiction of the other level of government. It is not enough for the provincial legislation to merely "affect" an area of federal jurisdiction. This restriction of the doctrine of interjurisdictional immunity was a significant change from the previous jurisprudence.[12]

17. The recent decisions of the Supreme Court of Canada in *Canadian Western Bank*, *Lafarge* and *Chatterjee*[13] stress that where there is both a legitimate federal and provincial interest in a matter, the federal and provincial regulatory regimes must be made to work in harmony, if at all possible.

18. Examples of cooperative federalism in action that potentially impact the fishery or the fishing industry include:

a. Protection of Riparian Habitat

19. The provincial legislative regime attempts to protect streamside habitat from development, and operates in conjunction with federal legislative authority over fisheries and municipal controls over development.

> *. . . .The FPA and the RAR are not concerned with riparian rights of streamside owners, but with the protection and enhancement of streamside lands which may be close enough to the water that development upon them can exert an influence on fish habitat*."[14]

---

[11] ***Lafarge***, *supra*, para 4.
[12] ***Canadian Western Bank***, para. 48.
[13] ***Chatterjee v. Ontario (Attorney General)***, 2009 SCC 19; see also ***Quebec (Attorney General)* v. *Lacombe***, 2010 SCC38, para. 109-110, 118 (Deschamps, J. in dissent).
[14] ***Yanke v. Salmon Arm***, 2010 BCSC 814, para.15, 20, 23

20. The *RAR*, and its parent statute, the *Fish Protection Act*, are provincial legislation concerned generally with protecting fish and fish habitat in the Province. Among other things, the *Fish Protection Act* precludes the construction of new dams on protected rivers, and restricts the removal of water from streams designated as sensitive.[15]

21. One purpose of the *RAR* is to coordinate provincial, federal and local government protection of "riparian areas" from potential damage from new residential, commercial, or industrial development, so that these areas "can provide natural features, functions and conditions that support fish life processes". Development on private land near fish habitat is an activity that engages several levels of government, requiring a coordinated approach in order for regulation to be effective and respectful of jurisdictional divisions.[16]

22. The Legislature has granted local governments authority over planning and land use management under Part 26 of the *Local Government Act*, R.S.B.C. 1996, c. 323. Such land use management has the potential to adversely impact riparian habitat; the *RAR* imposes controls on what developments a local government can approve that potentially impact riparian habitat.

23. DFO, MOE and Union of British Columbia Municipalities entered into an Intergovernmental Cooperation Agreement on July 16, 2008, enabling cooperation and coordination between the three levels of government to the end of protection of riparian habitat.

b. Workers Compensation in relation to fishing vessels

24. The Workers' Compensation Board and their Federal counterpart have entered into memoranda of understanding for the cooperation, promotion, coordination and regulation of occupation health and safety on fishing vessels.

25. Federal/provincial cooperation in such matters is not unconstitutional, it is essential. The federal government has not contested the provincial government's right to legislate with respect to occupational health and safety of workers on fishing vessels.[17]

c. Aquaculture

26. Before the court in *Morton* struck down the provincial aquaculture legislative, intergovernmental agreements between Canada and BC regarding aquaculture recognized the then understanding of legislative jurisdiction of both levels of government.

Environment

27. It is uncontroversial that the environment is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial.

---

[15] ***Fish Protection Act***, S.B.C. 1997, c. 21, as amended, and ***Riparian Areas Regulation***, B.C. Reg. 376/2004, as amended ("*RAR*")

[16] ***RAR*, s.2 (a),** and ***Fish Protection Act***, s. 12(1) and (4)

[17] ***R. v. Mersey Seafoods Ltd.***, 2008 NSCA 67, and ***Jim Pattison Enterprises v. Workers' Compensation Board***, 2009 BCSC 88 (appeal under reserve)

> In considering how the question of the constitutional validity of a legislative enactment relating to the environment should be approached, this Court in *Oldman River*, supra, made it clear that the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. As it was put there, "the *Constitution Act, 1867* has not assigned the matter of 'environment' sui generis to either the provinces or Parliament" (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, prohibit pollution, and the like. In assessing the constitutional validity of a provision relating to the environment, therefore, what must first be done is to look at the catalogue of legislative powers listed in the *Constitution Act, 1867* to see if the provision falls within one or more of the powers assigned to the body (whether Parliament or a provincial legislature) that enacted the legislation (ibid. at p. 65). If the provision in essence, in pith and substance, falls within the parameters of any such power, then it is constitutionally valid.[18]

28. The constitutional balance achieved by the courts in interpreting environmental legislation must be "alive to the need for cooperation *and coordination between th*e federal and provincial authorities." [19]

> It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty. [20]

29. Provincial legislation deals with environmental issues both directly and through control of, for example, land use.[21]

Public Right to Fish and Public Right to Navigation

30. In *Constitutional Law* of Canada, Professor Hogg summarized the public right to fish:

> At both common law and civil law, the right to fish belongs to the owner of the water bed (or solum). The owner of the bed may grant this right to fish to another, thereby severing the right to fish from the bed. The right to fish is recognized as a property right (it is a *profit a prendre*), which may be disposed of separately from the bed.

---

[18] ***R. v. Hydro-Quebec***, [1997] 3 S.C.R. 213 at para 112.
[19] S*upra*, para 153-154.
[20] ***Friends of the Oldman River Society* v. *Canada*** , [1992] 1 S.C.R. 3, para. 86 ["***Oldman River***"] (Upholding regulation requiring environmental assessment when federal regulatory approval necessary for project) at p. 42.
[21] See e.g. Section 46 of *Forest and Range Practices Act* which prohibits activities that damage the environment (except under certain defined circumstances), *Riparian Area Regulation*, discussed *infra*, *Environmental Management Act.*

> Tidal waters are an exception to the general rule that ownership of the bed carries with it the exclusive right to fish. Tidal waters are waters affected by the tide, for example, the sea and its bays, estuaries and the mouths of rivers. In tidal waters, there is a public right to fish. This public right overrides the proprietary right of the owner of the bed. The owner has no exclusive right to fish, and accordingly cannot grant any exclusive right to fish.[22]

31. In *Attorney-General for British Columbia v. Attorney General of Canada (No. 2)*, [1913] 15 D.L.R. 308, the Privy Council determined that the province had no competency to grant a right to fish in navigable, tidal and marine waters, nor can it derogate from the public right to fish. This was because, while the province may own the title to the bed below, any proprietary right in the fishery above was displaced by "the paramount title which is prima facie in the public."[23]

32. The law of navigation in Canada has two fundamental dimensions: the ancient common law public right of navigation, and the constitutional authority over the subject matter of navigation.

33. There is no doubt that the provinces are constitutionally incapable of enacting legislation authorizing an interference with navigation because Parliament has exclusive jurisdiction to legislate respecting navigation.[24]

34. In Canada the distinction between tidal and non-tidal waters was abandoned long ago; see ***In Re Provincial Fisheries***[25]. The rule is that if waters are navigable – in fact, whether or not the waters are tidal or non-tidal – the public right of navigation exists.[26]

Land Ownership and Legislative Jurisdiction over Lands/ Riparian Rights

35. Ownership of the seabed varies depending on location, but the following cases set out some of the principles in determination at any particular location.

36. The foreshore, being the land between the high and low water marks was allocated to the province of British Columbia by the terms of the *Constitution Act, 1867*. There are some exceptions in that private persons have acquired ownership in some locations by Crown Grant, and Canada owns the foreshore in British Columbia's public harbours by virtue of the Six Harbours Agreement.

37. In *Reference re Ownership of Offshore Mineral Rights*[27], the Supreme Court held that the territorial sea adjacent to British Columbia and the continental shelf (i.e. the seabed and subsoil

---

[22] Peter W. Hogg, *Constitutional Law of Canada*, 5th edition supplemented, pages 30-13- 30-14.
[23] ***Attorney-General for British Columbia v. Attorney General of Canada (No. 2)***, *supra*, page 314- 315, ***Attorney-General for Canada v. Attorney-General for Quebec*** (1920), 56 D.L.R. 358, page 367, and ***R. v. Breault***, [2001] N.B.J. No. 64 (N.B.C.A.) at paras. 28-42.
[24] ***Friends of the Oldman River Society v. Canada (Minister of Transport***), [1992] 1 S.C.R. 3, para. 71, citing ***Queddy River Driving Boom Co. v. Davidson*** (1883), 10 S.C.R. 222, DBA, Tab 23
[25] (1896), 26 S.C.R. 444.
[26] ***Oldman River***, *supra*, para. 68-70
[27] [1967] S.C.R. 792.

seaward from the low water mark) off the coast of the mainland and several islands of British Columbia were the property of Canada. The court determined that British Columbia owned the seabed underneath "inland" waters, often described as "within the jaws of the land" (*intra fauces terrae*).

38. The ownership of the seabed under the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait and Queen Charlotte Strait was considered in the *Georgia Strait Reference*, where the court concluded that the Pacific Ocean boundary of the province was formed by the western coast of Vancouver Island.

39. The Province of British Columbia, as owner of the soil of the seabed in locations noted above, has the exclusive jurisdiction to authorize structures to be fixed to the soil by anchors and other means. Since facilities such as those utilized in aquaculture are often so attached, the province continues to have a legislative role, even though Canada has exclusive legislative jurisdiction over fisheries.[28]

40. In the recent decision of *Morton v. British Columbia (Agriculture and Lands)*[29], the court grappled with application of the division of powers analysis in relation to the provincial legislative regime over aquaculture. Ultimately the court determined that the regulatory scheme regulated a fishery and hence was invalid as being within an area of exclusive federal legislative jurisdiction. However, the fish pens in the facilities were anchored to the seabed, which was owned by the Province. Even though the court struck down the provincial regulatory regime because it infringed unconstitutionally on federal fisheries powers, the court recognized that the Province continued to have jurisdiction over issuing of tenures:

> [167] I recognize that the land beneath the fish farms is the property of the provincial government: see ***B.C. Fisheries Reference*** at D.L.R. 317-318. The fish farms are thus anchored to provincial land, but I am unable to accept that the jurisdiction of the Province over the management of land is sufficient to permit it to legislate the fish farming activities taking place above provincial land that it purports to have regulated. To conclude otherwise would be contrary to ***British Columbia (Attorney General) v. Lafarge***, 2007 SCC 23, [2007] 2 S.C.R. 86 [***Lafarge***].
>
> [168] In ***Lafarge***, the court held that British Columbia could validly regulate land within a Province, even if the activities taking place on the land were subject to federal jurisdiction. In this case, that gives the Province the jurisdiction to grant land tenures pursuant to the ***Land Act***. The petitioners have not challenged that jurisdiction. What is challenged is the Province's regulation of the activities taking place above that land.

41. It is clear from the *Morton* decision that the province retains jurisdiction over land tenure, even if such tenure deals with an activity otherwise federally regulated, such as under the *Fisheries Act.*

---

[28] ***Re Attorney-General of Canada and Attorney-General of British Columbia***, [1984] 1 S.C.R. 388 (Strait of Georgia Reference)

[29] 2009 BCSC 136 (matter appealed and remitted back to trial judge on other grounds. See 2009 BCCA 378, 2009 BCCA 481, 2010 BCSC 100).

42. Further, the province, even with respect to privately held non-federal lands, has exclusive legislative jurisdiction to deal with land use, which land use may have impact on the issues before the Commission.

Miscellaneous Issues

43. The *Species at Risk Act (SARA)* is only applicable to federal lands (s. 34(1)), absent an order under s. 34(2) to the effect that the Minister is of the opinion that the laws of the province do not effectively protect the species, etc. (Para. 30-32).

44. Although the precautionary principle (para 16, 28, 31) is codified in several pieces of federal legislation[30], the principle is not specifically recognized in provincial legislation.

45. In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)***,** [2001] 2 S.C.R. 241**,** at paras. 30-32, L'Heureux-Dubé J., for the majority, noted that the precautionary principle has been accepted internationally and was relevant in the interpretation of domestic statutes. She cited the definition at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

46. However, our Court of Appeal, in *Tsawwassen Residents Against Higher Voltage Overhead Lines Society*, has stated that these comments do not set out a principle of statutory interpretation that applies to every determination by a tribunal or court concerning environmental matters or issues of public interest.[31]

Provincial Legislative Regime touching on matters identified in the June 3, 2010 Paper of Issues that Commission Intends to Investigate (para. 36-40)

47. For ease of reference, we have listed here provincial statutes and associated subordinate regulations which appear to touch on issues identified in the June 3, 2010 paper, as well as those dealing with provincial lands, the environment and the business of fishing:

- *Environmental Assessment Act,* SBC 2002 c. 43;

  Reviewable Projects Regulation, B.C. Reg. 370/2002, O.C. 1156/2002;

[30] Including, as set out in the Report, the ***Oceans Act***, S.C. 1996, c. 31, Preamble (para. 6); ***Canadian Environmental Protection Act***, 1999, S.C. 1999, c. 33, s. 2(1)(a); and the ***Species at Risk Act*** ("SARA"),Preamble.
[31] ***Tsawwassen Residents Against Higher Voltage Overhead Lines Society v. British Columbia (Utilities Commission)***, 2006 BCCA 537, para 41-42

- *Environmental Management Act*, SBC 2003, c. 53[32];

  Land-Based Finfish Waste Control Regulation, B.C. Reg. 68/94, O.C. 276/94;

- *Pesticide Control Act*, R.S.B.C. 1996, c. 360;

  Pesticide Control Act Regulation, B.C. Reg. 319/81;

- *Farming and Fishing Industries Development Act*, RSBC 1996, c. 134;

- *Fish Protection Act*, SBC 1997, c. 21;

  Riparian Areas Regulation, B.C. Reg. 376/2004, O.C. 837/2004;

  Sensitive Streams Designation and Licensing Regulation, B.C. Reg. 89/2000, O.C. 404/2000;

- *Fish Inspection Act*, RSBC 1996, c. 148;

  Fish Inspection Regulations, B.C. Reg. 12/78, O.C. 89/78;

- *Fisheries Act*, R.S.B.C. 1996, c. 149;

  Fisheries Act Regulations, B.C. Reg. 140/76, O.C. 523/76;

- *Forest Act*, the *Forest and Range Practices Act*, S.B.C.2002, c.69, and the *Forest Practices Code of British Columbia Act*, R.S.B.C.1996, c.159 (collectively "the Forestry Legislation");

  Log Salvage Regulation for the Vancouver Log Salvage District, B.C. Reg. 220/81;

- *Land Act*, RSBC 1996, c. 245;

- *Local Government Act*, R.S.B.C. 1996, c. 323;

- *Water Act*, R.S.B.C. 1996, c. 483 (particularly s. 9, which requires approval of works and activities, allows for protection of habitat "in and about a stream");

  Water Regulation, B.C. Reg. 204/88;

  British Columbia Dam Safety Regulation, B.C. Reg. 44/2000;

- *Water Protection Act, R.S.B.C. 1996, c.* 484; and

- *Wildlife Act*, RSBC 1996, c. 488.

[32] *Environmental Management Act* is under the purview of the Ministry of Environment, not the Ministry of Agriculture and Lands as noted in para. 38 of the Report.

COMMISSION OF INQUIRY INTO THE DECLINE OF SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of sockeye salmon in the Fraser River.

SUBMISSIONS IN RESPONSE TO POLICY AND PRACTICE REPORT ON LEGISLATIVE FRAMEWORK OVERVIEW

ON BEHALF OF:

THE CONSERVATION COALITION

Solicitors for the Participants:

T. Leadem, Q.C./Judah Harrison

214- 131 Water Street
Vancouver B.C. V6B 4M3

(ph) 604-685-5618
(fax) 604-685-7813

1. It is understood that the purpose of the Legislative Framework Paper (the "Paper") is to provide general background information to the Commissioner. The Conservation Coalition is generally in agreement with the findings of the paper and commends the authors for bringing these matters to the attention of the Commissioner. The Conservation Coalition makes the following points with respect to specific information contained in the Paper.
2. With respect to paragraph 27 of the Paper, the legislative authority of Parliament over the aquaculture industry applies to the regulation of the industry, but the licensing scheme for finfish farms remains with the Province. [1]
3. With respect to paragraphs 30 through 32 of the Paper that discuss the *Species at Risk Act* ("*SARA*"), the precautionary principle is found at not only in the Preamble to SARA but also within the Act itself at s. 38.[2]
4. With respect to paragraphs 33 and the discussion on the triggering events for the *Canadian Environmental Assessment Act*, SC 1992, c.37 ("*CEAA*"), there are additional sets of regulations that are key to the federal environmental assessment regime. The entire scheme for when a certain project as defined by the *CEAA* would trigger the need for an environmental assessment as defined by the *CEAA* is complicated. The *Inclusion List Regulations* referenced in the Paper provide for triggering events that *may* prompt an environmental assessment based upon physical activities as defined by the *CEAA*. The *Law List Regulations* (SOR/94-636) provides a listing of the provisions of Acts that *require* an environmental assessment. (emphasis added)
5. There is also an *Exclusion List Regulations* (SOR/2007-108) that must be examined to determine if certain projects are exempted from an environmental assessment pursuant to s. 59 (c) (ii) of the *CEAA*.
6. The *Law List Regulations* is a regulation passed pursuant to s. 59 (f) and (g) of the *CEAA* and thus s. 5 (2) (b) of the *CEAA* must be examined for the interplay between that Regulation and the *CEAA*. In contrast the *Inclusion List Regulation* must be examined in light of s, 59 (b) of the *CEAA* and its importance relates back to defining physical activities under s. 2 (1) of the *CEAA*.
7. The *Law List Regulations* provides that section 35(2) of the *Fisheries Act* is the sole trigger for an environmental assessment, not section 36(4) of the *Fisheries Act* as suggested in the Paper. This distinction is key to understanding how DFO regulates fish and fish habitat through use of environmental assessments. Also of importance to the federal environmental assessment is DFO policy of issuing informal "letters of advice" and "referrals" thereby avoiding the issuance of

---

[1] *Morton v. British Columbia*, 2009 BCSC 136 at para 194. Hinkson J,. did not strike down sections 13(5) and 14 of the *B.C. Fisheries Act*, RSBC 1996, c. 149 that provide for the licensing of fish farms.

[2] The Federal Court examined section 38 and the precautionary principle particularly the language with respect to cost effective measures in a decision, *Environmental Defence Canada et al v. Minister of Fisheries and Oceans* 2009 FC 878 http://www.canlii.org/en/ca/fct/doc/2009/2009fc878/2009fc878.html

section 35(2) HADD Authorizations and, thus, in turn, the need to conduct an environmental assessment.

8. Recent changes to the *CEAA* and the *Exclusion List Regulations* were made through the passage of the *Budget Implementation Bill* (C-9) http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4402776&Language=e&Mode=1&File=767#246 during the last sitting of Parliament in the summer, 2010. These provisions need to be examined closely as well to understand the present situation of the *CEAA* and the *Fisheries Act*. Significant exemptions to triggering events for an environmental assessment were enacted through the passage of Bill C-9 (2010).[3]

9. With respect to paragraph 38 of the Paper, the *Environmental Management Act* is an important piece of BC legislation that is highly relevant to this Inquiry. Of particular relevance are Part 2 of the Act that deals with Waste Disposal and Part 3 with Municipal Waste Management. There are numerous regulations, passed pursuant to the *Environmental Management Act*, that allow for permitting of the discharge of wastes into the aquatic environment.

10. With respect to paragraph 39 of the Paper, the *Riparian Areas Regulation*, BC Reg. 376/2004, is an important statutory instrument that was passed pursuant to the *Fish Protection Act* that is discussed in that paragraph. This Regulation deals with proposed development on the stream banks of several key regional districts that are listed in the regulation.

11. Paragraphs 36 through 40 of the paper discuss Provincial legislation. Also of relevance to the topics that will arise in this Inquiry are the *Hydro and Power Authority Act*, RSBC 1996, c. 212, the *Water Act*, RSBC 1996, c. 483 and the *Water Protection Act*, RSBC 1996, c. 484. The *Water Act* is undergoing significant revisions, the modernization of the *Water Act*, which will likely result in a complete redrafting of the legislation.

All of which is respectfully submitted.

Dated this 26 day of October, 2010.

T. Leadem
Counsel for the Conservation Coalition

---

[3] See Part 20 of the *Jobs and Economic Growth Act,* SC 2010, c. 12.

COMMISSION OF INQUIRY INTO THE DECLINE OF THE SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a Commission to issue under Part 1 of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of the sockeye Salmon in the Fraser River

---

WRITTEN SUBMISSIONS OF THE WEST COAST TROLLERS' (AREA G) ASSOCIATION AND UNITED FISHERMEN AND ALLIED WORKERS UNION - CAW IN RESPONSE TO THE POLICY AND PRACTICE REPORT ENTITLED "LEGISLATIVE FRAMEWORK OVERVIEW", OCTOBER 19, 2010

Counsel for the West Coast Trollers' (Area G) Association and
United Fisherman and Allied Workers Union - CAW:

Christopher Harvey, Q.C.

MacKenzie Fujisawa LLP
Barristers & Solicitors
1600 – 1095 West Pender Street
Vancouver, BC V6E 2M6

Telephone: (604) 443-1202
Email: charvey@maclaw.bc.ca

1. The West Coast Trollers' (Area G) Association and United Fisherman and Allied Workers Union – CAW ("Participants") agree generally with the overview provided by Commission counsel, but wish to correct two errors in it.

2. First, at paragraph 8 it is suggested that constitutional authority over the export of fish is within section 91(12). It is respectfully submitted that there is no jurisprudential basis for this. Generally speaking, all dispositions of fish once caught and removed from the resource are outside s. 91(12) unless, by application of the logic discussed in the final sentence of paragraph 7, they are for the purpose of resource preservation.

3. The purported export power is apparently based on the case noted in footnote 12: *R. v. Prince Rupert Fishermen's Cooperative Assn.* That case, however, was reversed on appeal after it was conceded by counsel for the federal crown that export was beyond the scope of the s. 91(12) fisheries power. See *R. v. Prince Rupert Fishermen's Cooperative Assn.*(1989) 40 BCLR (2d) 229 (copy attached).

4. The second point of error in the paper is the submission in paragraph 19 that the licensing power includes the power to issue variation orders. That is based on an overly broad conception of the licensing power which is evident throughout that paragraph. Licence conditions have been held to be within the licensing power only insofar as they are of an administrative nature, i.e. the application of general rules or policy to particular situations or cases. The licensing power cannot be expanded to embrace legislative acts, i.e. the creation and promulgation of general rules of conduct without reference to particular cases. Variation orders (that open and shut fisheries to all licensed users) fall into the latter category and have been determined to require express legislative authority such as that sub-delegated pursuant to s. 43(m) of the *Fisheries Act* (but not delegated or sub-delegated as a licensing power).

> The establishment of close and open times for fishing is a legislative function which Parliament has delegated, by s. 34 [now 43] of the Fisheries Act, to the Governor in Council and, through the latter, to fishery officers.
>
> *Re Minister of Fisheries & Oceans et al. and Gulf Trollers Association* (1986), 32 D.L.R. (4th) 737, at 744. See also *R. v. Tenale* (1982), 42 BCLR

(2d) 91, at 95 (BCCA) and *Re Peralta and the Queen in right of Ontario* (1985), 49 O.R. (2d) 705, at 729, aff'd *Peralta v. Ontario*, [1988] 2 S.C.R. 1045

5. Both these points of error have a broader significance. The fisheries power in s. 91(12) is subject to a number of limitations, and the power delegated to the Minister by the *Fisheries Act* and regulations is similarly limited. If these limitations are not constantly borne in mind it is easy to fall into the error of thinking that the Minister can essential do whatever he or she pleases. The caselaw demonstrates that the Minister's power - and the s. 91(12) constitutional power - require fishery managers to respect existing common law rights, be they aboriginal or public rights, because those rights are regulated but not created by the exercise of federal constitutional, legislative and administrative power. Any recommendations to the federal government on fisheries management must be grounded on an appreciation of the interaction of common law and statute law in this area. The role of fisheries legislation is to regulate underlying common law rights to fish, not to extinguish and replace them with statutory rights or privileges:

> [R]egulation of the exercise of a right presupposes the existence of the right.
>
> *R. v. Sparrow*, [1987] 2 W.W.R. 577, at 597 (B.C.C.A.).
>
> These permits were simply a manner of controlling the fisheries, not defining underlying rights.
>
> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099.
>
> The purpose of the *Fisheries Act* and Regulations made thereunder, although binding upon all persons, is not to abolish the rights to fish of all persons, but to monitor and regulate, so that the fisheries will provide an adequate supply of fish now, and in the future.
>
> *R. v. Agawa* (1988), 65 O.R. (2d) 505 at 525 (Ont. C.A.), leave to appeal to S.C.C. refused 8 Nov. 1990
>
> It is for the federal government to ensure that all users who are entitled to partake of the salmon harvest have the opportunity to obtain an allotment pursuant to the scheme of priorities set out in *Sparrow*.
>
> *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 102.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia, this 26th day of October, 2010

Christopher Harvey, Q.C.
Counsel for these Participants

R. v. PRINCE RUPERT FISHERMEN'S CO-OPERATIVE ASSOCIATION and FISHERMEN'S CO-OPERATIVE FEDERATION

[Indexed as: **R. v. Prince Rupert Fishermen's Co-op. Assn.**]

Court of Appeal,
Taggart, Southin and Taylor JJ.A.

Judgment – September 8, 1989.

Fish and game – Offences – Exporting sockeye salmon without inspection certificate contrary to regulations under Fisheries Act – Chambers judge concluding regulations not ultra vires Act as being matter of trade and commerce – Appeal allowed by consent and judgment below set aside.

APPEAL from judgment of Hinds J., 22 B.C.L.R. (2d) 82, dismissing appeal from conviction under Pacific Commercial Salmon Fishery Regulations for exporting frozen sockeye salmon without inspection certificate.

C. Harvey, for appellant.
D.R. Kier, Q.C., for respondent.

(Vancouver No. CA008854)

September 8, 1989. Excerpt from the transcript.

TAGGART J.A.: On this appeal counsel have signed a letter addressed to the Court of Appeal Registry which constitutes their agreement as to the basis upon which this appeal should be allowed and the judgment of the Supreme Court of British Columbia [22 B.C.L.R. (2d) 82] set aside. Having regard for that consent which is on file in our registry, the appeal should be allowed and the judgment of the Supreme Court of British Columbia set aside. With costs here and below.

Appeal allowed.