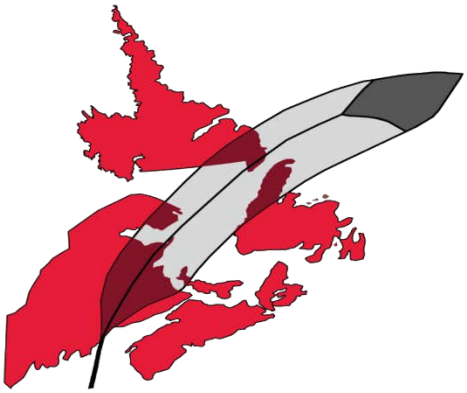
WRITTEN SUBMISSIONS TO THE STANDING COMMITTEE ON FISHERIES AND OCEANS ON BILL C-68

11 May 2018

SUBMITTED ON BEHALF OF THE



ATLANTIC POLICY CONGRESS
OF FIRST NATIONS CHIEFS SECRETARIAT
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WHO WE ARE

The Atlantic Policy Congress (APC) of First Nations' Chiefs Secretariat was federally incorporated in 1995 and is a policy research and advocacy Secretariat for 30 Mi'kmaq, Maliseet, Passamaquoddy and Innu Chiefs, Nations and Communities. APC is governed by a board of directors comprised of the Chiefs.

With the support of the First Nation communities in the Atlantic/Gaspé region, APC Secretariat follows a relationship vision that concentrates on partnership and cooperation; government to government relationships; dialogue and advocacy; quality of life; and self-determination in First Nations Communities. To accomplish this, the APC works closely with community leadership and members by providing all necessary information to enble First Nations Chiefs to make informed decisions.

HOW APC COMMUNITIES ARE AFFECTED

Atlantic/Gaspé First Nation communities have important Aboriginal and Treaty rights that have the potential to be impacted by development, energy regulation and the regulation of navigable waterways. APC member communities hold Aboriginal title in the Atlantic Provinces and the Gaspé Peninsula. They are all either signatories of Peace and Friendship Treaties 1725-1779 which did not surrender land or water or they have never signed Treaties with the Crown. These communities are entitled to have a say in matters affecting their lands, waters and rights. Many of the changes proposed by Bill C-69 will affect First Nations in the Atlantic Provinces and the Gaspé Region because of the unique nature of their inherent rights and treaties, and jurisdictional issues that are specific to the Atlantic/Gaspé region.

APC ANALYSIS OF THE PROPOSED AMENDMENTS

A. Broad strokes: Issues applying across Bill C-68

1. Inherent and Treaty Rights protected by section 35

Bill C-68 does not appear to meet the current threshold requirements for the protection of section 35 rights under the Constitution because s.2.4 of the Act only requires the Minister to "consider the adverse impacts" on inherent and treaty rights protected by section 35. The Act should require some form of mandatory response to eliminate or mitigate "adverse impacts" and not just require the Minister to "consider".

There is no requirement or duty under the Act to comply with the test in *R. v. Sparrow*[1] for minimal impairment or justification for proven rights, nor to accommodate impacts on asserted section 35

[1] [1990] 1 SCR 1075.

rights as required by *Haida Nation v. British Columbia (Minister of Forests)*[2]. Neither does the non-derogation clause in s. 2.3 include any requirement to uphold or protect section 35 rights – which the government is already obligated to do under the law.

It is concerning that while the *Fisheries Act* has been amended to be fully consistent with various Supreme Court of Canada decisions, that is not the case for the obligations with respect to s. 35.

While the Act cannot create a system that "opts-out" of the requirements under s. 35, it is problematic that it effectively codifies an incomplete and lesser version of the existing obligations under the law. In APC's view this runs the risk of communicating the wrong message to officials, proponents, and the courts about what the obligations are under s. 35. For instance, even if there is evolution in the law of the duty to consult and accommodate, unless the law changes entirely, *accommodation*, where required, is still very much part of the legal duty, as is the duty to *minimally impair* proven rights.

APC asks the Standing Committee to consider the need for the proposed legislation to be consistent with the Crown's constitutional obligations under the law.

2. Priority of rights after conservation

In order for the *Fisheries Act* to be consistent with the obligations of the Crown, the Act must respect the obligation of priority for First Nations of their inherent and treaty rights protected by s. 35. Bill C-68 does not include any mention of the need to consider or respect the obligations of priority for First Nation fishing rights after conservation, as is required under the law.

This is a significant problem because of the long failure of DFO to consistently implement *Sparrow*. Often First Nations find that their fishing rights, despite being protected by treaty, come third in priority after non-First Nation commercial fishing and recreational fishing rights.

First Nations commercial fishing rights, such as those recognized by the Peace and Friendship Treaty of 1760, are s. 35 protected fishing rights that must be given priority. The courts have reaffirmed this principle in the *Marshall* decision,[3] and the recent *Ahousaht* decision.[4]

APC asks the Standing Committee to consider how the obligations under the law to respect the priority of First Nations Aboriginal and treaty fishing rights can be reflected in the *Fisheries Act*.

3. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

In addition, the Act makes no mention of the obligations in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), despite Canada's specific commitments to implement

[2] [2004] 3 SCR 511.
[3] *R. v. Marshall*, [1999] 3 SCR 456.
[4] *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCSC 633 at 917.

UNDRIP. It is difficult to see how the commitment to UNDRIP, and especially the goal of free, prior, and informed consent, will be achieved without a specific and clear mechanism to do so.

The current obligations under s. 35 to consult and accommodate, especially as applied by the federal government, do not come close to meeting the commitments of the government to UNDRIP.

APC asks the Standing Committee to consider the precise mechanism in Bill C-68 needed to meet the obligations under UNDRIP.

4. Indigenous Knowledge

Bill-68 includes provisions to consider the "traditional knowledge of the Indigenous peoples of Canada" in s. 2.5(d) and s. 34.1(1)(g).

While the inclusion of the consideration of "traditional knowledge" is a positive step, the current wording of the provisions raises some concerns.

a. Term "traditional knowledge" is uncertain

The term "traditional knowledge" is not defined in the Act. Some federal legislation does provide a definition of "traditional knowledge", such as the *Yukon Environmental and Socio-economic Assessment Act*.[5]

We understand that the federal government may have a desire to have consistency among federal legislation. If that is the intent, it is not clear why Bill C-68 does not use the same definition or refer to the definition used in other federal Acts. The lack of a definition in the Act itself creates unnecessary uncertainty.

The Act also does not use the terminology of Indigenous Knowledge Systems (IKS), which better captures the nature of Indigenous Knowledge and makes clearer the distinction between "use" and "knowledge": "use" being data about locations of current or historical resource harvesting etc., vs. "knowledge" which includes principles, *e.g*. knowledge about sensitivities of animals or plants at particular times of the year.

The use of the term "traditional" raises the concern that the "knowledge" being considered could be interpreted to be frozen in time, and that it could exclude the evolution of Indigenous Knowledge that occurs over time in response to new circumstances and changes in the environment.

Given that it will take time to develop an appropriate definition for Indigenous Knowledge that respects the perspectives of First Nations, Inuit, and Métis groups, APC suggests that the Standing Committee consider whether the Act should include provision for the power to make regulations that would define "Indigenous Knowledge" to allow time to develop an appropriate definition.

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[5] *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7, s. 2.

b. No power to make regulations with respect to how Indigenous Knowledge is considered

Bill C-68 does not provide any direction for the process and manner in which Indigenous Knowledge would be considered under the Act, nor does it provide the power to make regulations on that issue. This is a concern given that different Nations (not to mention the Inuit, Métis, and First Nations) will have different requirements for the handling of Indigenous Knowledge.

c. Failure to recognize intellectual property rights of First Nations in their knowledge

One of the ongoing problems for First Nations and other Indigenous groups is the appropriation of our knowledge by individuals, companies, and academics for their own gain. This can often lead to significant harm to First Nations. There are many examples of a First Nation disclosing, in the context of a regulatory proceeding, the location of a special medicine, for instance, for the purposes of protecting that medicine, only to then have an outside entity use that information for profit, to the determinant of the identified medicine and the First Nation.

Indigenous Knowledge belongs to those who are the guardians of it, be it the Nation or individuals within a Nation, and an attempt to include Indigenous Knowledge in regulatory processes should not have the unintended consequence of widespread theft of that knowledge.

We also note that Article 31 of UNDRIP explicitly protects the rights of Indigenous peoples to control their Indigenous Knowledge and to protect their intellectual property rights in that knowledge.

d. Indigenous Knowledge that is disclosed should only be used for that regulatory process

First Nations in the Atlantic/Gaspé have direct experience of disclosing Indigenous Knowledge or use information in the context of a regulatory proceeding only to have that information used against them by the provincial or federal governments. This is completely inappropriate.

Indigenous Knowledge provided to the government should only be used for the protection of procedural fairness and natural justice in relation to the specific regulatory decision for which the Indigenous Knowledge is provided to the Minister.

Disclosure of Indigenous Knowledge to the Crown should not open a First Nation up to having that information used against them in any future legal proceeding by the Crown or a third party.

e. Proposed confidentiality provisions are completely inadequate.

Bill C-68 provides for nominal protection of the confidentiality of “traditional knowledge” in s. 61.2. However, the Act allows for disclosure if it “is authorized in the prescribed circumstances.” This allows any future government to decide to disclose Indigenous Knowledge without consent for potentially any reason. This provides no certainty to First Nations that the information they provide will be

treated respectfully or appropriately. Many, if not all First Nations, will simply choose not to provide Indigenous Knowledge if they know there is a significant risk that the information won't be protected.

This is a separate and distinct concern from the issue with respect to the *scope* of procedural fairness disclosure in s. 61(2)(b). Any legitimate concerns that require the "balancing" of the protection of confidentiality with the transparency interests of other parties can be effectively accomplished through an appropriately worded s. 61(2)(b).

f. Limited Scope of the use of Indigenous Knowledge in the *Fisheries Act*

Finally, there are significant concerns about the restriction on the consideration of Indigenous Knowledge. Indigenous Knowledge like western science should be considered in any decision under the Act.

Consideration of Indigenous Knowledge arises in two places in Bill C-68: in a discretionary provision applying to all decisions of the Minister (s. 2.5), and as a mandatory consideration prior to making specified decisions and recommendations for regulations under the Act (s. 34.1).

While these changes are positive because they explicitly recognize the value of Indigenous Knowledge, there is no good reason why Indigenous Knowledge should not be considered in making any decision under the Act, or in any case where regulations are being proposed. The Indigenous Knowledge of the First Nations in the Atlantic/Gaspé flows from thousands of years of effective and sustainable management of the fisheries. It is difficult to understand how proper management of the fisheries can occur if highly relevant and useful information and principles are not required in all decision-making about fisheries management.

For instance, there is no requirement to consider Indigenous Knowledge in any of the fish stock rebuilding provisions (s. 6.1 and s. 43(1)(b.1)) or fishery management orders (s. 9.1). These both seem to areas where the consideration of Indigenous Knowledge is critical to the proper management of the fisheries. There is also no requirement to consider Indigenous Knowledge in the development of standards and codes of practice under s. 34.2.

5. Ministerial Discretion and Transparency

While APC recognizes that some degree of ministerial discretion is necessary, this discretion should not be unlimited or exercised without guidance. There is an extensive amount of discretion in the Act, and APC suggests that the Standing Committee consider whether in some areas this discretion should be narrowed and more clearly guided by specific principles. For instance, it seems illogical that in a situation where there is relevant Indigenous Knowledge or western scientific information before the Minister, that the Minister could arbitrarily decide not to consider that information, as is the implication of s. 2.5. This does not seem consistent with proper management of the fisheries.

The unguided "absolute discretion" of the Minister under s. 7 of the Act is also very problematic. While the Minister may require flexibility from time to time, there is little justification that "absolute"

discretion without any guidance promotes the proper management of the fisheries or the protection of s. 35 rights.
Ministerial discretion has frequently been used in the past to favour short-term economic interests to the detriment of First Nation rights and the sustainability of the fisheries as a whole. APC is concerned that the continued broad discretion under the Act could perpetuate this pattern if there is not some guidance on how the Minister should exercise his or her discretion.

There are other examples of ministerial discretion where the discretion seems simply unnecessary, *e.g.* s. 34.2, where the Minister *may* establish standards and guidelines (1), the standards and codes *may* specify procedures, practices or standards (2), and before establishing these codes the Minister *may* consult with any Indigenous governing body. It is not clear what the rationale is in this case for there to be so much discretion within this provision.

Finally, in any situation in which the Minister is exercising discretion, transparency is essential so that the reasons for the decision are clear. First Nations and the public should know how the Minister weighed different factors in making a decision.

For these reasons, APC asks the Standing Committee to review the whole of the Act from the perspective of reducing any unnecessarily broad discretion, and providing more guidance to the Minister when discretion is exercised, as well as the need for the Minister to be transparent in decision-making.

6. Cumulative Impacts

Cumulative impacts are a major concern for First Nations. The accumulated stress on fish and fish habitat are, as the Cohen Commission report noted, one of the biggest threats to the fisheries, including the s. 35 fishing rights of First Nations.

APC is concerned that the Act does not deal robustly enough with cumulative impacts. There are a number of different areas in the Act, where the Act fails to address issues that bear heavily on monitoring and active management of cumulative impacts.

For instance, the Act does not deal explicitly with climate change or the risks of invasive species (which are already being exacerbated by climate change). Nor is there a mechanism that provides for the joint identification and management of those challenges with First Nations, including but not limited to the key role of Indigenous Knowledge Systems.

Another example is the failure of the Act to address some of the more recent threats of cumulative impacts such as the growing threat of microfibers and plastics, which is a particularly severe threat in the Atlantic/Gaspé Region.[6] For example, the death of fish and pollution provisions do not address the threat to fish of this issue because of the failure to deal with long-term harms to fish that may harm but not kill the fish.

[6] Wieczorek et al, "Frequency of Microplastics in Mesopelagic Fishes from the Northwest Atlantic" 2018 *Front. Mar. Sci*. 5:39, online:<doi: 10.3389/fmars.2018.00039>.

7. Specific Atlantic/Gaspé Issues

The introduction of commercial communal license to enable First Nation communities and fishers to participate in the commercial fishery was a welcome consequence of the *Marshall* decision. Nevertheless, this limited access is seen by the rightsholders as too restrictive as the few commercial licenses issued fail to address the First Nations in the region.

The Court in *Marshall* found that First Nations peoples that came under that Treaty had a right to fish commercially for a "moderate livelihood".

The APC asks the Standing Committee to consider how this right to fish commercially for a moderate livelihood can be reflective in the Fisheries Act.

B. Analysis of Specific Sections of Bill C-68

1. Purpose – s. 2.1

The new purpose clause essentially codifies the common law on the Minister's duty to manage the fisheries. Given the concerns raised about the protection of s. 35 rights, APC asks the Standing Committee to consider the role of the purpose of the Act in fostering reconciliation with Indigenous peoples.

2. Fish habitat definition – s. 2

APC is of the view that a robust definition of fish habitat is necessary to ensure proper protection of fish habitat. It is important that in concert with other provisions of the Act, that all fish and fish habitat be protected regardless of whether they are fished or not.

Given that sufficient environmental flows are needed to maintain a healthy fishery, APC asks the Standing Committee to consider whether a fish habitat definition that includes the concept of environment flows would be more consistent with the stated purposes of the Act for proper management of the fisheries and conservation and protection of fish and fish habitat.

3. Definition of "Indigenous" in relation to a fishery—s. 2

The amendments to the *Fisheries Act* in 2012 were passed without any consultation with First Nations and with no regard for how those changes would harm our inherent and treaty rights in the fisheries.

One of the most concerning examples of this was the definition of an Aboriginal fishery without any consultation or input from First Nations, which led to the current definition. This is constitutionally unsound and completely out of line with the current constitutional obligations as set out by the Supreme Court of Canada.

It is therefore worrisome to APC that this flawed definition has been carried over in Bill C-68. While DFO has informed us this provision is temporary, its continued inclusion in the Act is deeply troubling

nevertheless because the provision is so completely out of line with the caselaw and reality. The definition is overly narrow and restricts an Indigenous fishery to current harvesting and for FSC harvesting. This completely ignores First Nation rights to fish for sale or barter protected by treaty or that have been affirmed through court victories.

APC asks the Standing Committee to consider whether this provision is consistent with the Crown's obligations under section 35 and the requirements to respect First Nations governance and treaties under UNDRIP.

3. Consideration of protections for commercial inshore fishers—s. 2.5(h)

As a number of First Nations' commercial fishers are independent licence holders, the ability of the Minister to consider the independence of licence holders in commercial inshore fisheries should support independent inshore licence holders and ensure the entrenchment of the current policies to promote economic benefits being kept locally.

The commercial fishing operations of First Nations in the Atlantic/Gaspé region support jobs in the community and benefit the economies of Atlantic Canada the Gaspé as a whole. Measures which will support First Nations commercial fishing will have increasing social and economic benefits.

4. Agreements with Indigenous governing bodies – s. 4.1

Moving toward a system of true cooperation and recognition First Nations' jurisdiction over their fisheries is critical if Canada is to fulfill its commitment to implement UNDRIP. The proposed amendments s. 4.1-4.2 create space for First Nations jurisdiction in fisheries matters.

5. Fish stock rebuilding provisions—s. 6.1

The rebuilding of depleted fish stocks and the restoration of fish habitat are critical to sustainability in fish. Many fish stocks are under severe stress, and an ongoing issue is that DFO does not have complete or accurate data on the state of many depleted and threated fish stocks in Canada.[7] Nor are there plans in place to deal with even some of high-profile stocks. The use of limit reference points is also not consistent with a precautionary approach for rebuilding.

The proposed fish stock rebuilding provisions are highly discretionary and do not provide guidance about the exercise of that discretion. Further, there is no duty to actually rebuild stocks only to consider whether measures are in place; there is no guidance how to establish the proper threshold limits; there is no guidance about the appropriate timescale on which the rebuilding should take place; and there is no clear tie-in to the protection of fish habitat necessary to support fish stocks.

Finally, there is no duty to place a priority of rebuilding fish stocks that are relied upon by First Nations for the exercise of our inherent and treaty rights. APC asks the Standing Committee to consider whether such a provision would be a helpful means of furthering reconciliation.

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[7] Julia Baum and Susanna Fuller, *Canada's Marine Fisheries: Status, Recovery Potential, and Pathways to Success*. Report, (Victoria: University of Victoria for Oceana Canada, 2016) at 41.

6. Ecologically Significant Areas—s. 35.2

Many First Nations, including some First Nations in the Atlantic/Gaspé such as the Maliseet Nation of New Brunswick, submitted to the Standing Committee previously that there must be areas of priority protection for fish habitat and that First Nations must be involved in the identification of that habitat. The proposed provisions in s. 35.2 are a step toward the goal of protected areas which many First Nations and environmental groups called for, but there remain serious gaps.

First, the ESAs will not be areas in which no harmful alterations, disruptions, or destruction of fish habitat can occur. The ESAs only establish a different permitting regime, and at this stage it is not clear that significantly higher standards of protection will be applied to these areas.

Second, while there is a requirement to consider "traditional knowledge" when designating an ESA, there is no requirement that First Nations be consulted, or that priority for designating areas be given to areas which are relied on by First Nations for the exercise of their inherent and treaty rights.

7. Fish habitat banking—s. 42.01-42.04

First Nations in the Atlantic/Gaspé depend on a healthy and sustainable fishery. However, the fish and therefore fish habitat that First Nations rely upon are often tied to very specific locations. All fish habitat is not created equal. There is a serious concern that the fish habitat banking provisions could lead to fish habitat banks being seen as equally important as avoidance and mitigation measures, and that proponents could destroy habitat critical to a First Nation and then "trade" the destroyed habitat for habitat in an area that is of no value to the First Nation.

For First Nations, habitat banking will not be sufficient to address impacts to rights through habitat destruction. Habitat banking might play a helpful role, but only in a very narrow frame, and only if the habitat banking scheme is co-developed with First Nations to ensure that the risks to inherent and treaty rights are properly managed. APC asks the Standing Committee to consider the risks of an unstructured habitat banking scheme that does not provide sufficient protections for First Nations' rights.

8. Public Registry—s. 42.2

Tracking Cumulative Impacts

While creation of a public registry is positive, the lack of a requirement to record and report data beyond authorizations, permits, and orders is a serious concern. Good baseline data is critical to any effective assessment of cumulative impacts. To be effective, the registry should include a broad base of information.

The need to record and capture basic data about the existence and location of projects (even if they do not trigger a HADD) is essential. A registry that only includes the permits, orders, and the 300 or so authorizations across all of Canada will not be nearly as useful as a registry that includes the thousands of referrals, letters of advice, and operational statements.

While capturing and recording proper baseline data is important, APC is concerned that there be clarity that the any registry is not to be used as a notification system for specific projects.

APC asks the Standing Committee to consider whether the current required contents of the registry as proposed are sufficient to provide adequate tracking and monitoring data.

9. Five year review—s. 92

A legislated five-year review of the *Fisheries Act* by a committee of the Senate or House would be a helpful additional tool to evaluate the effectiveness of the Act in meeting its objectives. However, any review needs to be structured in a way that allows for full engagement and consultation with First Nations on changes that may impact them.

Typically because of the nature of legislative committees, there are serious constraints on the resources and time available for those committees to consider an issue. These constraints are a particular concern where there is a need to have sufficient resources and time for First Nations to prepare and make submissions in the review process.

The lack of resources for First Nations and the short time frame in the Standing Committee's consideration of the *Fisheries Act* last year and the current consideration of Bill C-68 seriously inhibited the ability of many First Nations in the Atlantic/Gaspé to fully participate in the process.

Any review is only as good as the information that review is based on, and a process that does not allow for full, resourced engagement of First Nations will not produce an accurate picture of the current situation.