

VUNTUT GWITCHIN GOVERNMENT

Government of Vuntut Gwitchin First Nation



Department of Natural Resources

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VIA EMAIL – Fopo@parl.gc.ca

Standing Committee on Fisheries and Oceans
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, Ontario
K1A 0A6
Canada

Attention: Nancy Vohl, Clerk of the Standing Committee

Dear Members of the Standing Committee:

RE: Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence* ("Bill C-68")

We write to you with respect to Bill C-68 which was referred to your Standing Committee following its passage of second reading by Parliament on April 16, 2018.

We appreciate the opportunity to express our views to you. Please find enclosed to this letter for your review and consideration a written brief setting out recommended amendments to Bill C-68 on behalf of the Vuntut Gwitchin Government.

Yours truly,

A handwritten signature in blue ink that reads "Will-Josie". The signature is stylized and cursive.

William Josie, Director of Natural Resources
Vuntut Gwitchin Government



VUNTUT GWITCHIN GOVERNMENT
Government of Vuntut Gwitchin First Nation
Brief to the House of Commons Standing Committee on
Fisheries and Oceans regarding Bill C-68, *An Act to amend the*
***Fisheries Act and other Acts in consequence* (“Bill C-68”)**

May 3, 2018

1.0 About the Vuntut Gwitchin Government

Vuntut Gwitchin Government (“VGG”) is the official government of the Vuntut Gwitchin First Nation (“VGFN”) with the seat of government situated in the unincorporated community of Old Crow, Yukon approximately 80 miles north of the Arctic Circle. VGFN entered into the *Vuntut Gwitchin First Nation Final Agreement* and *Vuntut Gwitchin Self-Government Agreement* with Canada and Yukon effective February 14, 1995. Large populations of freshwater fish and salmon play a central role in the culture and economy of VGFN. VGFN conducts local fisheries throughout our Traditional Territory for primarily Whitefish, Grayling, and Salmon (Chinook, Chum and Coho). Chapter 16 of the *Vuntut Gwitchin First Nation Final Agreement* establishes a number of objectives, rights and responsibilities for the co-management of VGFN fisheries which are protected by their recognition and affirmation under section 35 of the *Constitution Act, 1982*.

2.0 Summary of Recommended Amendments

As detailed in this Brief, VGG recommends that the following amendments be made to Bill C-68:

- Amend the definition of fish habitat to address protections for water quality, quantity and rate of flow.
- Amend the purpose section to include rebuilding of fish populations, restoration of fish habitat, reconciliation with Indigenous peoples, and respect for modern treaty rights.
- Amend the non-abrogation and derogation section to reflect Parliament's positive intention to uphold and protect modern treaty rights.
- Amend the duty of the Minister section to address the entire scope of existing obligations and commitments to Indigenous peoples.
- Amend the decision-making considerations to reduce excessive Ministerial discretion, address climate change, and improve interjurisdictional management of transboundary fisheries.
- Amend the fish stocks' limit reference point section to reduce discretion and promote a precautionary approach.
- Amend the factors for consideration when making authorizations to properly reflect the hierarchy of mitigation.
- Amend the traditional knowledge sections to better respect and protect Gwich'in knowledge systems and intellectual property rights.

- Amend the habitat banking provisions to enable Indigenous governments to participate in and benefit from habitat banking.
- Amend the public registry provisions to address its shortcomings.

3.0 Recommended Amendments

3.1. Amend the definition of fish habitat to address protections for water quality, quantity and rate of flow.

Maintaining adequate quality, quantity and rates of flow of water is essential to sustaining a balanced ecosystem and supporting healthy fish populations and fish habitat. The importance of water quality, quantity and rate of flow and its protection is reflected in Chapter 14 (Water Management) of the *Vuntut Gwitchin First Nation Final Agreement*. Pursuant to 14.8.1 of the *Vuntut Gwitchin First Nation Final Agreement*, VGFN “has the right to have Water which is on or flowing through or adjacent to its Settlement Land remain substantially unaltered as to quantity, quality and rate of flow, including seasonal rate of flow.”

Despite the importance of protecting quality, quantity and rates of flow, there are inadequate protections both in the *Fisheries Act* and in amendments proposed in Bill C-68. DFO’s Canadian Science Advisory Secretariat has come to a similar conclusion: “The fact that there is no existing national framework to set environmental flow standards has led to a situation where fisheries resources, fish habitat and the supporting freshwater ecosystems may not be consistently protected across Canada. With increasing water demand, and potentially changing background levels in water availability (as predicted from current consensus on the long-term effects of global climate change; IPCC 2007), there is an urgent need to establish such an environmental flows framework in Canada.”¹

A straightforward approach to ensuring that water quality, quantity and rates of flow are adequately protected for the benefit of fish and fish habitat in the management of fisheries would be to incorporate them into the definition of fish habitat. This will ensure that not only are the physical areas of water that fish depend upon considered in decision-making and prior to authorizations, but so too will the water quality, quantity and rates of flow required to support the life processes of the fish populations that frequent those physical areas of water.

3.2. Amend the purpose section to include rebuilding of fish populations, restoration of fish habitat, reconciliation with Indigenous peoples, and respect for modern treaty rights.

Given the complexities of modern fisheries management, it is fundamental that the *Fisheries Act* includes a robust purpose section that can effectively guide its administration and application. To this end, we believe that the proposed purpose section in Bill C-68 does not go far enough. While “proper management and control of fisheries” and “conservation and protection of fish and fish habitat” are important purposes, they must be expanded upon to address two of the most pressing items in fisheries management: (1) restoration of fish populations and rebuilding fish habitat; and

¹ Canada, Department of Fisheries and Oceans Canada, *Review of approaches and methods to assess Environmental Flows across Canada and internationally*, DFO Can Sci Advis Sec Res Doc 2012/039 at p 1.

(2) reconciliation with Indigenous peoples and respect for modern treaty rights. The proposed purpose section in Bill C-68 should be expanded to include these items.

3.3. *Amend the non-abrogation and derogation section to reflect Parliament's positive intention to uphold and protect modern treaty rights.*

The proposed wording of the non-abrogation and derogation provision in Bill C-68 related to the protection of existing Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982* is wholly inadequate. In the 2007 Senate Standing Committee on Legal and Constitutional Affairs report *Taking Section 35 Rights Seriously: Non-Derogation Clauses Relating to Aboriginal and Treaty Rights: Final Report of the Standing Senate Committee on Legal and Constitutional Affairs*, the identical wording now proposed in Bill C-68 was studied and rejected in favour of alternative wording that would actually reflect Parliament's positive intention to uphold and protect existing Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.² For the same reasons provided by the Senate Standing Committee, this alternative wording should be used instead of the wording of the non-abrogation and derogation provision currently proposed in Bill C-68.

3.4. *Amend the duty of the Minister section to address the entire scope of existing obligations and commitments to Indigenous peoples.*

The proposed statutory duty of the Minister under Bill C-68 to consider adverse effects to existing Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982* when making a decision under the Act is a reflection of the scope and nature of Minister's constitutional duty to consult as it currently exists under the common law.³ However, this proposed provision is most notable for the existing duties and commitments of the Government of Canada that are omitted. For example, the common law duty to consult requires the Minister to not only consider potential adverse effects on Aboriginal and treaty rights but also to demonstrably integrate the views of the affected rights-holding Indigenous peoples into the proposed decision.⁴ Where Aboriginal and treaty rights have been recognized by Government of Canada, such as through the *Vuntut Gwitchin First Nation Final Agreement*, the Minister also has duties arising from its fiduciary relationship with VGFN requiring him or her, among other things, to ensure that any management actions that might infringe upon our modern treaty rights are designed to be minimally impairing.⁵

In addition to the Minister's existing duties under the common law, the Government of Canada's commitment to fully adopting and implementing the *United Nations Declaration on the Rights of Indigenous Peoples* gives rise to other considerations, including but not limited to, the free, prior of

² Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, *Taking Section 35 Rights Seriously: Non-Derogation Clauses Relating to Aboriginal and Treaty Rights: Final Report of the Standing Senate Committee on Legal and Constitutional Affairs*, 39th Parl, 2nd Sess, No 3 (6 December 2007) (Chair: Joan Fraser).

³ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40.

⁴ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 64.

⁵ *R v Sparrow*, [1990] 1 SCR 1075 at pp 1110-1119, Dickson CJ; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 77-92

informed consent of Indigenous peoples regarding any administrative or legislative actions that may affect us.⁶

The duty of the Minister provision should be revised in order to more accurately reflect the Minister's existing duties and commitments to Indigenous peoples under the common law and *UNDRIP*. Along with other measures, such as the *Cabinet Directive on the Federal Approach to Modern Treaty Implementation*, this will help promote respect for modern treaty rights in the administration of the Act.

3.5. Amend the decision-making considerations to reduce excessive Ministerial discretion, address climate change, and improve interjurisdictional management of transboundary fisheries.

The proposed decision-making considerations provision of Bill C-68, while introducing important considerations, affords the Minister with excessive discretion on whether or not these considerations will actually be taken into account from one decision to the next. While it is acknowledged that the Minister requires flexibility in the management of complex fisheries, reducing the excessive discretion of the Minister by making considerations in decision-making mandatory will not unnecessarily or unduly impede the orderly management of fisheries and will bring the *Fisheries Act* into conformity with a precautionary approach and international best practices.⁷

VGG also recommends that climate change and transboundary fisheries be included as additional decision-making considerations in Bill C-68. Both climate change and transboundary fisheries in the State of Alaska have profound implications on VGFN local fisheries and the ability of present and future generations of VGFN citizens to meaningfully exercise our modern treaty rights.

3.6. Amend the fish stocks' limit reference point section to reduce discretion and promote a precautionary approach.

The proposed provisions intended to promote the rebuilding of vulnerable fish populations and the restoration of degraded or lost fish habitat are a necessary and important legislative tool to ensure the long-term sustainability of fisheries for the benefit of present and future generations. However, the proposed provisions afford the Minister too much discretion, unnecessarily constrain fish population rebuilding efforts to the stock level, and establish a threshold that is inconsistent with a precautionary approach. These proposed provisions should be amended in a manner that reduces Ministerial discretion, enables rebuilding efforts to be focused on sub-populations of fish stocks, and establishes the cautious status zone rather than the limit reference point as the threshold.

⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No. 49, UN Doc A/RES/61/295, Art 19 (2 October 2007) [*UNDRIP*].

⁷ JA Hutchings et al, *Sustaining Canadian Marine Biodiversity: Responding to the Challenges Posed by Climate Change, Fisheries, and Aquaculture: Expert Panel Report prepared for the Royal Society of Canada*, (Ottawa: 2012) at p 205.

3.7. *Amend the factors for consideration when making authorizations to properly reflect the hierarchy of mitigation.*

The proposed factors that must be considered before authorizing works, undertakings or activities that result in the death of fish or the harmful alteration, disruption or destruction of fish habitat do not adequately prioritize measures and standards that would avoid or mitigate over those that would offset. The proposed factors should be amended to promote and uphold the hierarchy of mitigation: avoidance > mitigation > offsetting.

3.8. *Amend the traditional knowledge sections to better respect and protect Gwich'in knowledge and intellectual property rights.*

The proposed provisions for the consideration and protection of traditional knowledge must be strengthened to better respect and protect Gwich'in knowledge and the intellectual property rights that may be held individually or collectively to Gwich'in knowledge. Specifically, there are three primary concerns respecting traditional knowledge that need to be addressed in Bill C-68: (1) what, when and how traditional knowledge is to be considered; (2) how confidential traditional knowledge is protected from unnecessary disclosure; and (3) how intellectual property rights will be protected.

As recommended above, the consideration of traditional knowledge in decision-making should be mandatory. However, the scope and nature of traditional knowledge that will be considered as well as processes and practices for how that traditional knowledge will be meaningfully and respectfully considered and integrated into the decision-making of the Minister requires clarity. This should be addressed through the collaborative development of regulations concerning traditional knowledge.

Traditional knowledge that is confidential and provided to the Minister must also be better protected from unnecessary disclosures. Bill C-68 proposes broad and unnecessary exceptions for when confidential traditional knowledge may be disclosed to others which have the potential to deter it being shared with the Minister in the first instance and undermine the benefits traditional knowledge can provide to fisheries management. While disclosing traditional knowledge already in the public domain or for compliance with natural justice requirements are justifiable exceptions, the exceptions for use in legal proceedings broadly and for a yet undefined set of circumstances to be determined by regulations are not necessary and should be removed.

There are currently no proposed provisions in Bill C-68 to ensure the intellectual property Indigenous peoples hold to their traditional knowledge is protected when it is shared with the Minister. This is inconsistent with the inherent rights of Indigenous peoples to maintain, control and protect their intellectual property over traditional knowledge, and the obligation of Canada to take measures necessary to protect these intellectual property rights.⁸ Provisions must be added to ensure that in no circumstances the disclosure of traditional knowledge waive the intellectual property rights of the Indigenous peoples who provide such traditional knowledge to the Minister.

⁸ UNDRIP, *supra* note 6 at Art 31.

3.9. Amend the habitat banking provisions to enable Indigenous governments to participate in and benefit from habitat banking.

The proposed habitat banking provisions restrict the participation in habitat banking initiatives to proponents and only in relation to areas where that proponent is involved in works and activities. This precludes the participation of third parties in habitat banking and forgoes “the much greater ecological and economic benefits and opportunities that could be opened up by a well-conceived third party banking system.”⁹ We recommend that the habitat banking provisions be amended so as to allow enable Indigenous governments, such as VGG, to participate and benefit from habitat banking. This would further support the two items we have recommended above to be included in the proposed purpose section: (1) restoration of fish populations and fish habitat; and (2) reconciliation with Indigenous peoples and respect for modern treaty rights.

3.10. Amend the public registry provisions to address its shortcomings.

The proposed provisions to establish a public registry for documents only applies to authorizations of works, undertakings or activities that result in the death of fish or the harmful alteration, disruption, or destruction of fish habitat. This represents a major gap for the many smaller scale works, undertakings or activities that do not require such authorizations. With the support of a more comprehensive public registry, Indigenous governments must be enabled to effectively monitor and track cumulative impacts within their territories. The public registry provisions should be amended to extend beyond authorizations to include referrals, requests for and responses to letters of advice, and notices which we understand will be required by standards and codes of practice.

⁹ Dave Poulton, “Disappointment at the Bank: The Fish Habitat Banking Provisions of Bill C-68” (17 April, 2018) at p 5, online: ABLawg, http://ablawg.ca/wpcontent/uploads/2018/04/Blog_DP_Fish_Habitat_Banking.pdf.