Assembly of First Nations

Submission on Amendments to the *Fisheries Act* (Bill C-68)

Prepared for the

Senate Standing Committee on Fisheries and Oceans

May 7, 2019
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Background

The Assembly of First Nations (AFN) is the national, political organization of First Nations governments and their citizens, including those living on and off reserve. Every Chief in Canada is entitled to be a member of the AFN, and the National Chief is elected by the Chiefs in Canada, who in turn are elected by their citizens. The AFN has 634 member First Nations within its assembly. The role and function of the AFN is to serve as a nationally delegated forum for determining and harmonizing effective, collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action, and to advance the aspirations of First Nations.

The AFN acts as a key institution in supporting First Nations by coordinating, facilitating and advocating for policy change, while the leaders of this change are the First Nations themselves. Chiefs, and the First Nations they represent, must be an integral part of meeting the challenge of sustainable, transformative policy change.

The AFN is mandated by Resolutions 21/2017, Respecting Inherent Rights-Based Fisheries in Parallel with the Review of Canada’s Fisheries Act; and 04/2018, First Nations Role in Changes to the Fisheries Act. The mandates identify the distinction of the review of the Fisheries Act apart from the ongoing environmental regulatory review; though they are linked they are separately together.

Context

This submission will consider what the legislation actually says and requires, not what the current government describes as the “spirit” of the Act which it will implement through policy. In its current form, the Act relies on a broad number of discretionary powers, including, but not limited to, determining: whether a project is required, what the scope of factors to be considered is, when substitution of “equivalent” provincial processes will occur. For First Nations, laws must be written in anticipation of future governments that may be hostile to our rights, jurisdiction, and authority. In this context, legislation must constrain and/or require those governments to respect what has been written in the legislation.

The AFN acknowledges the importance of work in the legislative amendments phase of the Fisheries Act; however, the implication of getting it right to create the space necessary to properly address First Nations rights in accompanying regulations and policies to the Act is of the utmost most importance.
Requested Amendments

1. The United Nations’ Declaration on the Rights of Indigenous Peoples as a Reconciliation Framework

Background
In May 2016, Canada announced its full and unqualified support for the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration). First adopted by the UN General Assembly in 2007, the UN Declaration enshrines the rights that “constitute the minimum standards for the survival, dignity, and well-being of the Indigenous Peoples of the World”. This means that the inclusion of the UN Declaration must be understood as the floor, not the ceiling, with which to begin crafting a process that respects and reaffirms the inherent or pre-existing collective human rights of First Nations as well as the human rights of First Nations individuals.

Incorporation of the UN Declaration means that the principles and obligations within should be woven throughout the fabric of the entire Fisheries Act: from treating Indigenous peoples as another order of government, to including Indigenous peoples in decision-making in accordance with their own laws and customs, to imposing a requirement that Indigenous peoples’ consent must be sought before an approval is given under the Fisheries Act that could impact s. 35 rights.

Despite the Prime Minister, and his cabinet Ministers’ repeatedly confirming that the government has endorsed the UN Declaration “without qualification”, Bill C-68 does not make any mention of the UN Declaration.

Recommendation
The AFN recommends that the Fisheries Act is amended to use the minimum standards outlined in the UN Declaration as a guiding framework for the legislation, and eventual implementation of several procedural guarantees such as free, prior and informed consent, within the Act.

Proposed Amendment

<table>
<thead>
<tr>
<th>Preamble</th>
<th>Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples</th>
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<tr>
<td>Preamble</td>
<td>Whereas the Government of Canada is committed to achieving reconciliation with Indigenous peoples through a legislative framework that recognizes their societies, and legal traditions, consistent with universal declarations of human rights and the core international human rights instruments adopted by Canada (for example, the United Nations Declaration on the Rights of Indigenous Peoples - UN Declaration).</td>
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Proposed Amendment

Duty of the Minister and Governor-General in Council, s.2.4

Section 2.4 should be amended to read:

When making a decision or creating regulations under this Act, the Minister, or Governor in Council as the case may be, shall:

(1) do so in a manner consistent with the protection of the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982;

(2) ensure that the Act is applied in a manner consistent with the United Nations Declaration on the Rights of Indigenous Peoples and the goal of Canada’s positive role towards reconciliation;

Agreements with the Minister

The AFN strongly supports the proposed changes to s. 4.1 that would allow for Indigenous governing bodies to enter into agreements with the Minister. While other changes are needed for the Act to be in compliance with the UN Declaration, the amendments to s. 4.1 are a step in the right direction.
2. Protections of First Nations’ inherent and constitutionally-protected s. 35 rights

Duty of the Minister
The current wording of s. 2.4 “Duty of the Minister” is not sufficient to protect the s. 35 rights of First Nations, as it does not even meet the requirements of the constitutional duties in Sparrow or Haida. There is no requirement or duty under the Act to comply with the test in Sparrow for minimal impairment or justification for proven rights or the test under Haida to accommodate impacts on asserted rights. Finally, the inclusion of non-derogation clauses in the legislation in s. 2.3 is likely to be neutral in effect, given the broad nature of that clause.

Recommendation
The AFN recommends that the provisions the Fisheries Act dealing with s. 35 rights be strengthened to ensure that the Minister and Governor-in-Council must uphold or protect s. 35 rights in decision-making under the Act and where making regulations or orders under the Act. Further, the AFN recommends that the current definition of rights be expanded to include the inherent rights that First Nations hold, as well as those recognized and affirmed in international agreements.

Proposed Amendment

Indigenous Peoples of Canada has the meaning assigned by the definition aboriginal peoples of Canada in subsection 35(2) of the Constitution Act, 1982.

s. 2(3) For greater certainty, this Act shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under section 35 of the Constitution Act, 1982, and not to abrogate or derogate from them.

Non-derogation clause (formally the Rights of Indigenous Peoples), s. 2.3

For greater certainty, this Act shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under section 35 of the Constitution Act, 1982, and not to abrogate or derogate from them.

Canada has described the purpose of non-derogation clauses in legislation as simply a reminder that s. 35 rights exist. 1

The sections in Bill C-68 dealing with s. 35 rights under the Constitution are insufficient to protect the s. 35 rights of First Nations.

Bill C-68 includes two provisions directed at protecting s. 35 rights:

2.3 For greater certainty, nothing in this Act is to be construed as abrogating or derogating from the protection provided for the rights of the Indigenous peoples of Canada by the recognition and affirmation of those rights in section 35 of the Constitution Act, 1982.

2.4 When making a decision under this Act, the Minister must consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982.
While these provisions are an improvement over the current version of the Act, they still fall far below any actual protection of s. 35 rights. Nor do they provide any direction to those administering the Act about priority for s. 35 rights after conservation objectives have been met. The term “consider” in s. 2.4 is inadequate. Given the broad discretion in the clause, a court is very unlikely to interpret the Act as preventing provisions in the Act from negatively impacting or infringing s. 35 rights. In addition, Canada has described the purpose of non-derogation clauses in legislation as simply a reminder that s. 35 rights exist.¹

Neither of these provisions indicate that the Minister should uphold or protect s. 35 rights in making decisions under the Act. There is also no mention of the UN Declaration or the principle of free, prior, and informed consent anywhere in the Act.

Proposed Amendment

To address these issues, the provisions could be amended to state:

2.3 For greater certainty, this Act shall be construed to uphold and protect the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982.

2.4 (1) When making a decision under this Act, the Minister shall do so in a manner consistent with the protection of the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982.

(2) The Minister shall take all measures necessary to ensure that the Act is consistent with the United Nations Declaration on the Rights of Indigenous Peoples in the administration of the Act.

We would also suggest the addition of a factor to be considered in making decisions under the Act or in recommending regulations under the Act in sections 2.5 and s. 34.1(1):

( ) the priority of s. 35 rights held by Indigenous peoples of Canada, after conservation objectives are met.

Priority for s. 35 rights

There has been a consistent failure of Department of Fisheries and Oceans Canada (DFO) to implement Supreme Court of Canada decisions, and in particular the requirements of the Sparrow decision that “top priority” be given to s. 35 rights over all other uses, after conservation objections are met.² The Sparrow decision was in 1990, and yet almost 30 years later First Nations are still waiting for priority to be consistently applied to DFO’s decision-making.

AFN, therefore, recommends that an additional factor be added in s. 2.5 that requires the consideration of whether priority has been given to s. 35 rights after conservation objectives have been considered.

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<td><strong>Considerations for decision making</strong></td>
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<td><strong>2.5</strong> Except as otherwise provided in this Act, when making a decision under this Act, the Minister shall respect…</td>
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<tr>
<td>(j) the priority of the rights of the Indigenous peoples of Canada recognized and affirmed rights recognized and affirmed by section 35 of the <em>Constitution Act, 1982</em>, after conservation objectives.</td>
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Achieving reconciliation through rebuilding of fish stocks, habitat restoration, and protection of habitat

Since the arrival of settlers, the fish and fish habitat that First Nations rely on has been continually decimated by overfishing by settlers. The *Fisheries Act* regime has played a key role in encouraging unsustainable fishing practices. In addition, there is a long history of First Nations being denied access to their own fishing grounds.

In light of the government’s commitment to implement the UN Declaration and to pursue measures to achieve reconciliation, AFN recommends that when the Minister makes a decision in relation to any measure designed to restore or protect habitat or fish stocks that the Minister be required to give priority to fish stocks and fish habitat that are relied on by Indigenous peoples.

Such changes are also in line with the obligations under Article 28 and 29 of the UN Declaration which require redress for harms to resources and affirmative action on the part of the government in the conservation of resources.

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**Proposed Amendments**

**Consideration of priority in rebuilding fish stocks and habitat restoration**

s. 6.2 In the management of fisheries, where the Minister implements measures relating to fish stocks or fish habitat restoration, the Minister shall respect the priority of measures aimed at stocks or habitat relied on by the Indigenous peoples of Canada for the exercise of their rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

**Consideration of priority in establishing Ecologically Significant Areas**

Ecologically significant area:

35.2 (1) No person shall carry on a work, undertaking or activity prescribed under paragraph (10)(a) or that belongs to a prescribed class under that paragraph, in an ecologically significant area except in accordance with an authorization issued under subsection (7).

Designation — ecologically significant area:

(2)(a) The Governor in Council may, on the recommendation of the Minister, make regulations designating ecologically significant areas;

(b) In making regulations designating ecologically significant areas and in making recommendations, the Governor in Council and the Minister, as the case may be, shall prioritize the designation of ecologically significant areas that are relied on by the Indigenous peoples of Canada for the exercise of their rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*. 
3. Proper treatment of cumulative impacts: broadening the public registry

While creation of a public registry under s. 42.2 is positive, the proposed scope of the registry would limit its utility. A public registry could be a powerful and efficient tool for monitoring cumulative impacts. However, the scope of contents of the registry must be sufficient to allow First Nations to effectively participate in monitoring and to track cumulative impacts.

Currently, the only part of the habitat protection process required to be filed in the registry are authorizations, orders, and permits. This is totally inadequate.

In 2010-2011, when the Harmful Alteration, Disruption or Destruction of fish habitat (HADD) standard was still operational, DFO issued only 277 authorizations under s. 35(2). However, DFO reviewed 7,400 development proposals (referrals) and provided advice to proponents on 4,439 occasions in this same period. It makes no sense that this information should not be made available as part of the public registry, especially when DFO is already collecting this information; providing that data is a modest step toward adequate cumulative-effects monitoring.

In addition, the registry should allow for the recording and publication of other relevant data such as the registration of minor works under the Canadian Navigable Waters Acts, as in-water works contribute to cumulative impacts in s. 35 fishing rights even if no HADD occurs.

Finally, it is important that a broadened registry not be treated as a tool for consultation per se. While having a database of information is useful as a resource for long-term monitoring, any online resource is going to be completely inadequate for fulfilling the duty to consult and accommodate and fulfilling Canada’s commitments relating to the UN Declaration in a particular case, especially for remote First Nations.

Proposed Amendments

Public registry

| 42.2 (1) The Minister shall establish a public registry for the purpose of facilitating access to records relating to matters under any of sections 34 to 42.1. |

| (2) The public registry shall not be considered as a means to fulfill any obligation to notify the Indigenous peoples of Canada under s. 35 of the Constitution Act, 1982 |

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4 Ibid.
4. *Reducing Excessive Ministerial Discretion*

While there is value in Ministerial flexibility, First Nations are concerned that the extremely broad discretion of the Minister may enable the avoidance of the protection of inherent and constitutionally protected rights.

In order to ensure protection for First Nations, laws must be written with a view towards potential future governments that may be hostile to our rights, jurisdiction, and authority. In this context, legislation must constrain and/or require those governments to respect what has been written in the legislation.

AFN recommends some of the factors in s. 2.5 should be mandatory to reflect the importance of those factors in sound decision-making. In addition, the scope of the provisions to which the factors in s. 34.1 applies should be broadened to include the making of regulations under s. 43(1), and the establishment of standards and codes of practice under s. 34.2.

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<td>2.5 Except as otherwise provided in this Act, when making a decision under this Act, the Minister shall consider, among other things,</td>
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5. *Full inclusion and protection of Indigenous Knowledge Systems*
Bill C-68 includes provisions to consider the “Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister” in s. 2.5(d) and s. 34.1(1)(g), as well as measures to address the confidentiality of Indigenous knowledge in s. 61.2.

The argument that Indigenous Knowledge is less reliable than western scientific evidence reflects a profound ignorance about both Indigenous Knowledge and the limits of western scientific knowledge, especially in the fisheries context.  

Indigenous Knowledge is decision-making principles based on thousands of years of detailed observation of specific ecological systems. First Nations were and remain today very careful observers of fish and fish ecosystems – because their very lives and continued existence depend on it.

First Nations monitor these ecosystems to gauge how the systems respond to changes in seasons, the environment, harvesting and other factors; all with the goal of ensuring the resource remains sustainable. When a community has closely watched a specific species of fish in a particular inlet for thousands of years they develop a level of knowledge about the fish and that entire ecosystem that western science simply cannot replicate.

That is not to say that western science is not a very useful tool, but proper management of the fisheries requires an acknowledgement of the limitations of western science. Scientific information is neither revealed truth nor is it infallible. In fact, DFO’s management of the fisheries and overreliance on incomplete data has been criticized over the years by many, including: the Auditor General’s Office⁶, the Cohen Commission,⁷ academic studies,⁸ and this Standing Committee.⁹

This mismanagement occurs in many cases because DFO is overconfident about the science, and because DFO fails to listen to what First Nations have to say. It is not an uncommon situation for DFO to reject the direct, experiential knowledge of First Nation fishers on the basis of DFO’s scientific evidence, only to have the concerns of the First Nation fishers proved correct in time.

For these reasons, AFN strongly supports the inclusion of the consideration of Indigenous Knowledge in Bill C-68. However, in order for Indigenous Knowledge to be properly considered, the definition of what the concept includes must be clear. In addition, Indigenous Knowledge must be properly protected so that First Nations feel safe in providing that information to the government. These issues are discussed in more detail below.

Given the importance of crafting a definition that respects the Aboriginal perspective, AFN

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recommends that the Act should be amended to allow for “Indigenous Knowledge” to be defined by regulation in conjunction with First Nations.

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

Article 31 of the UN Declaration explicitly protects the rights of Indigenous peoples to control their Indigenous Knowledge and to protect their intellectual property rights in that 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 First Nations 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 detriment 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.

2) Indigenous Knowledge that is disclosed should only be used for that specific regulatory process.

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 First Nations up to having that information used against them in any future legal proceeding by the Crown or a third party.

3) Proposed confidentiality provisions are completely inadequate.

Bill C-68 provides for nominal protection of the confidentiality of Indigenous knowledge in s. 61.2(1). The requirement for consultation prior to disclosing information without consent is an improvement to earlier language, however there are concerns this will simply be a notification process, as opposed to any opportunity for First Nations to actually influence the scope of any disclosure.

The Indigenous Knowledge disclosure provisions overall remain deeply problematic and inconsistent with UN Declaration and the obligations to protect s. 35 rights.
**s. 2 - Add definition of “Indigenous Knowledge”**

*Indigenous Knowledge* includes Indigenous Knowledge or information arising from Indigenous Knowledge Systems, as prescribed by regulation.

**s. 2.5 Mandatory consideration of Indigenous Knowledge**

Please turn to the proposed amendments on page 10 in Section 4 of this submission on Reducing Excessive Ministerial Discretion.

**s. 43(1) – Power to make regulations with respect to Indigenous Knowledge**

And 43(1) should add a subsection stating that Canada may make regulations:

1. prescribing the definition of Indigenous Knowledge and Indigenous Knowledge Systems, which definition shall be formulated in collaboration with the Indigenous peoples of Canada;
2. respecting any processes or protections for the consideration of Indigenous Knowledge or Indigenous Knowledge Systems, which processes or protections shall be developed in collaboration with such Indigenous peoples;
Proposed Amendments

Improve confidentiality and intellectual property protection for Indigenous Knowledge

Confidentiality

61.2 (1) Any Indigenous Knowledge of the Indigenous peoples of Canada that is provided to the Minister under this Act in confidence shall remain confidential and shall not knowingly be, or be permitted to be, disclosed without written consent.

Exception

(2) Despite subsection (1), the Indigenous Knowledge referred to in that subsection may be disclosed if
   (a) it is publicly available; or
   (b) the disclosure is necessary for the purposes of procedural fairness and natural justice in a legal proceeding regarding the decision for which the Indigenous Knowledge has been provided to the Minister or for use in legal proceedings;
   (c) the disclosure is authorized in the circumstances set out in the regulations made under paragraph 43(l)(j.l).

(2.1) Any disclosure in paragraph (2)(b) shall be only the minimum amount necessary for the purposes of procedural fairness and natural justice, and only for that purpose.

(2.2) Indigenous Knowledge provided to the Minister cannot be used against the entity or person providing that Indigenous Knowledge by any person or entity, including but not limited to any emanation or agency of the provincial or federal Crown.

(2.3) The provision of Indigenous Knowledge to the Minister, or any subsequent disclosure under (2) shall not be deemed to be a waiver of any privilege that may exist with respect to the information provided.

Further disclosure

(3) The Minister may, by any person or entity to whom it is disclosed under paragraph (2)(b) for the purposes of procedural fairness and natural justice.

Duty to comply

(4) The person referred to in subsection (3) shall comply with any conditions imposed by the Minister under that subsection.

(4.1) In the case of a contemplated disclosure under paragraph (2)(b), the Minister, a tribunal, or the court shall permit the withdrawal of the Indigenous Knowledge if the Indigenous governing body is not satisfied with the conditions placed on the contemplated disclosure and requests the withdrawal in writing.

No waiver of intellectual property

(6) Any Indigenous Knowledge provided to the Minister is and remains the intellectual property of the Indigenous governing body, or persons therein if provided under the laws of that Indigenous governing body.
6. Other Issues

(a) Fish habitat definition, Harmful Alteration, Disruption or Destruction of fish habitat (HADD), and environmental flows

AFN supports the expanded fish habitat definition in s. 2 that now includes “quantity, timing, and quality of water flow”. Environmental flows are vital to the proper functioning of freshwater ecosystems, and critical to a healthy fishery.

In addition, AFN also supports amendments to s. 34.3 that would require the maintenance of flows necessary for conservation and protection of fish and fish habitat.

(b) Fish stock rebuilding

As noted above in the section on the protection of s. 35 and inherent rights, AFN also recommends provisions that prioritize the rebuilding for fish stocks relied on by Indigenous peoples and the requirement to consider the factors in s. 34.1 when making regulations regarding fish stock rebuilding.

(c) HADD exceptions should be narrowed and clarified

AFN strongly supports the return of the HADD regime for the protection of fish habitat and the death of fish by means other than fishing. However, the scope of the nature of prescribed works, undertakings, and classes of activities should be clarified to ensure the legislation does not permit medium or serious impact projects to be covered by these regulations.

(d) Mitigation and avoidance should be prioritized over fish habitat banking

Many First Nations are deeply concerned about the new fish habitat banking provisions under s. 42.01 - 42.04. The undefined nature of these amendments could lead to a system that is very destructive for First Nations rights. The fish habitat that First Nations rely on may not be tradable or replaceable. The failure of the proposed scheme to account for the impact of such a scheme on inherent and s. 35 rights vs. environmental impacts alone is a problem.

There is also a concern that the new provisions do not place sufficient priority on avoidance and mitigation over the creation of fish habitat banks. The Act should clearly prioritize avoidance and mitigation over offsetting measures, including any habitat banks. For First Nations, the protection and restoration of existing fish habitat should be the priority, all fish habitat is not created equally and do not support s. 35 rights in the same way.