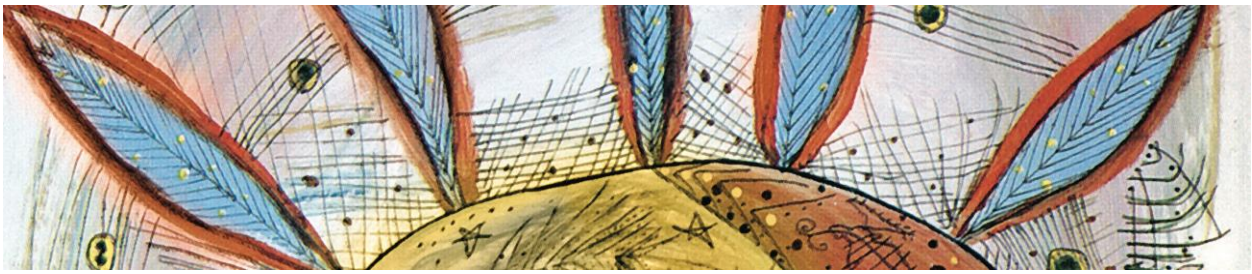
Assembly of Nova Scotia Mi'kmaq Chiefs



Brief to Standing Senate Committee on Fisheries and Oceans

An Act to amend the Fisheries Act and other Acts in consequence

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Submitted by:
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Please accept this as the submission of the Assembly of Nova Scotia Mi'kmaq Chiefs (ANSMC) on Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*.

The ANSMC is an unincorporated association consisting of all 13 Chiefs of the 13 Mi'kmaw First Nation communities in Nova Scotia. It meets on a monthly basis to deliberate on issues common to all 13 Mi'kmaw communities, and is the aggregate governance institution for the Mi'kmaq in the Province. Its work includes providing direction to the Mi'kmaw Negotiating Team in the "Made-in-Nova Scotia" negotiation process concerning Mi'kmaw Aboriginal and treaty rights governed by the Framework Agreement entered into by Canada, Nova Scotia and the Mi'kmaq on February 23, 2007. The Assembly also has delegated authority from 11 of 13 Chiefs and Councils to conduct formal consultation with the Crowns under the Terms of Reference for a Consultation Process entered into by Canada, the Province and the Mi'kmaq on August 31, 2010. The Assembly has a developed a portfolio system and the Lead Chief for Fisheries is Chief Terrance Paul of Membertou.

In 2012, the *Fisheries Act*, R.S.C. 1985, c.F-14 was amended in two omnibus bills, now the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c.19 and the *Jobs and Growth Act*, 2012, S.C. 2012, c.31. The legislation removed many of the protections for fish and fish habitat and also created a narrow and confining definition of what constitutes an Aboriginal fishery.

Many individuals and organizations have spoken of the measures in Bill C-68 to re-enact provisions for fish protection and enhanced habitat rehabilitation and protection removed in 2012. We commend our colleagues such as the Coalition of First Nations Fisheries Councils for their able and cogent comments and we support their position.[1]

This submission makes three principal points:

1. Canada through Crown-Indigenous Relations and Northern Affairs Canada ("CIRNAC") and the Department of Fisheries, Oceans and the Canadian Coast Guard ("DFO") are

[1] See: Coalition, "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," 2018-04-20. Available – under name First Nations Fisheries Council: http://www.ourcommons.ca/Committees/en/FOPO/StudyActivity?studyActivityId=10051939#DT20180524FOPOMEE103ID10051939

negotiating a Fisheries Rights Reconciliation Arrangement ("RRA") with the Mi'kmaq of Nova Scotia (and other Indigenous nations in the Maritimes and Gaspe) which is not recognized or protected in Bill C-68. Such RRAs need statutory protection, and this is the opportunity to provide that.

2. The definition of "Indigenous fishery" does not recognize and protect **all** fisheries unique to Indigenous people. That severely undermines the reconciliatory purpose of Bill C-68.
3. The wording of section 2.3 in reference to the rights of Indigenous Peoples differs from the wording of both s. 2.4 of Bill C-68 and ss. 25 and 35 of the *Constitution Act, 1982* for no apparent reason. Why?

Our Mi'kmaw people have recognized constitutionally protected Aboriginal and treaty rights and we have asserted our title to all the lands and waters in and off Nova Scotia. We are traditionally a people of the water and we continue to rely on fish for Food, Social and Ceremonial purposes and to provide us with the moderate livelihood promised in the treaties of 1760-1761 – as yet unimplemented almost 20 years after the decision in *R*. v. *Marshall*.[2] Consequently, any legislation, regulation or policy which regulates fisheries, fish and fish habitat is of grave concern to us.

Defining "Indigenous Fishery"

Of great significance to Mi'kmaw people is their constitutionally protected Treaty right to earn a moderate livelihood. In 1999, the Supreme Court in *R*. v. *Marshall*[3] affirmed that the Treaties of Peace and Friendship, signed in 1760-1761, provide Mi'kmaq, Wolastoqiyik and Peskotomuhkati with the Treaty right to earn a moderate livelihood from harvesting, including fish:

> In my view, the treaty rights are limited to securing "necessaries" (which I construe in the modern context, as the equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. The rights thus construed, however, are, in my opinion, treaty rights within the meaning of s.35 of the *Constitution Act, 1982*...[4]

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[2] *R*. v. *Marshall*, [1999] 3 SCR 456, 1999 CanLII 665 (SCC), http://canlii.ca/t/1fqkq.

[3] *Marshall*, *supra.*

[4] [1999] 3 SCR 456, p.470, para.7.

Bill C-68[5] removes the narrow definition of "Aboriginal fishery" only to replace it with incomplete wording for "Indigenous fishery" that does not recognize Indigenous fisheries conducted for the purpose of earning a moderate livelihood.

Of equal importance is the second limitation in the definition of Indigenous fishery: that is, "fish ... harvested by an Indigenous organization or any of its members for purposes set out in a land claims agreement entered into with the Indigenous organization." Here in Nova Scotia the Mi'kmaq are negotiating a Fisheries Rights Reconciliation Arrangement ("Fish RRA") with DFO and CIRNAC. An RRA is an arrangement developed between the Crown and the Mi'kmaq of Nova Scotia and other Indigenous groups to elevate and enhance Mi'kmaw governance, stewardship, and resource management and use in Nova Scotia. An RRA contains the mutual promises of the Crown and the Mi'kmaq, including species-specific harvest plans, yet the definition of Indigenous Fishery — which will be in place for some indefinite length of time — will not recognize and given statutory force to these rights-based Nation-to-Nation agreements.

To repeat, the *Fisheries Act* will recognize fisheries under Land Claim Agreements (aka Comprehensive Claims Agreements). It must also recognize agreements under Canada's RRA process. There must be mechanisms to give statutory authority to the RRAs. If Land Claim Agreements are to be specifically referenced in the definition of Indigenous Fisheries, RRAs must also be included in the definition of Indigenous fishery.

We question why the *Fisheries Act* requires a definition of either an Aboriginal or an Indigenous fishery. If a definition *is* required, then that definition must be broad enough to encompass the full range of protected Aboriginal rights, Aboriginal title and treaty rights as well as the mechanisms to implement those rights. We respectfully submit that the Crown may not 'pick and choose' the protected Aboriginal and treaty rights and implementation measures it will recognize in legislation. The amendment is simple:

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[5] See Bill C-68: s.2(1) amends the English version of the Act by adding:

> *Indigenous*, in relation to a fishery, means that fish is harvested by an Indigenous organization or any of its members for the purpose of using the fish as food, for social or ceremonial purposes or for purposes set out in a land claims agreement entered into with the Indigenous organization; (autochtone).

> *Indigenous*, in relation to a fishery, means fish harvested by an Indigenous organization or any of its members pursuant to the recognition and affirmation of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982* or for any purposes set out in any rights implementation measure as agreed to by the Crown and Indigenous peoples.

Mi'kmaq, Wolastoqiyik and Peskotomuhkati have been waiting since 17 September 1999, almost 20 years for the Crown to implement their rights to a moderate livelihood. Failure to so do, failure to define an Indigenous fishery so as to recognize our rights and our rights implementation measures, is unacceptable.

Governance Bodies and Agreements, Programs and Projects

The *Fisheries Act* will now provide that the Crown may enter into agreements:

> 4.1 (1) The Minister may enter into an agreement with any government of a province, any Indigenous governing body and any body – including a co-management body – established under a land claims agreement, to further the purpose of this Act, including an agreement with respect to one or more of the following...[6]

The specific focus of s.4.1(1) is on (i) "facilitating" cooperation; (ii) facilitating "enhanced" communication with provincial governments and Indigenous governing bodies; and, (iii) facilitating public consultation. The provisions authorizes the Minister to sign an agreement:

> (a) facilitating cooperation between the parties to the agreement, including facilitating joint action in areas of common interest, reducing overlap between their respective programs and otherwise harmonizing those programs;
>
> (b) facilitating enhanced communication between the parties, including the exchange of scientific and other information; and
>
> (c) facilitating public consultation or the entry into arrangements with third-party stakeholders.

[6] C-68, s.4.

The scope of s.4.1(1) is unclear — some may suggest it authorizes Fish RRAs; if that is intended, it should say so.

Protection and Recognition of Indigenous Rights

Bill C-68 adds Sections 2.3 and 2.4 — Rights of Indigenous peoples of Canada — to the Act. The wording of s. 2.3 differs from s. 2.4 and the wording of ss. 35(1) and 25 of the *Constitution Act, 1982*. This is curious and needs explanation. It is a fundamental principles of statutory interpretation that, when different wording is used for something the same or similar, a difference in meaning is intended. What is the difference intended here?

Section 2.3 provides protection against anything in the Act that abrogates or derogates "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".

Section 2.4 speaks to "adverse effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Section 25 uses language that says the *Charter of Rights and Freedoms* "shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada . . . " Section 35 (1) states "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Why does s. 2.3 not follow the format of s. 2.4 and ss. 25 and 35(1) of the *Constitution Act, 1982* by simply stating:

"For greater certainty, nothing in this Act is to be construed as abrogating or derogating from the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Why are the words "the protection provided" used?

Conclusion and Recommendations

We are concerned that in its present form, Bill C-68 continues to limit recognition of the scope and breadth of Aboriginal and treaty rights to food, social and ceremonial harvesting and harvesting rights set out in Land Claims Agreements. In particular our constitutionally protected, Supreme Court-affirmed Mi'kmaw right to a moderate livelihood remains unrecognized in Bill C-68, as does any Fisheries RRA developed with Canada. After the enactment of Bill C-68, the revised *Fisheries Act* will fail to address protection and recognition of our right to fish for a moderate livelihood and will fail to address any rights implementation measures and harvest plans arrived at through Canada's RRA process.

We recommend:

- that Bill C-68 be amended to expand the definition of Indigenous Fishery to fully recognize all fisheries conducted pursuant to Indigenous Aboriginal and treaty rights and title; OR at a minimum recognize Indigenous moderate livelihood fisheries.
- that Bill C-68 be amended to recognize, along with those conducted under comprehensive claims agreements, fisheries conducted pursuant to Rights Reconciliation Arrangements. That is Canada's present and future direction for reconciliation over fisheries.
- that Bill C-68 be amended to provide, simply, that nothing in the *Fisheries Act* shall be construed so as to abrogate or derogate from the rights of Indigenous peoples recognized and affirmed in s. 35 of the *Constitution Act, 1982*.