



# **Bills C-68 and C-69: Amendments to the *Fisheries Act* and a new *Impact Assessment Act***

## **Environment in the Courtroom**

**March 3, 2018**

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# Timeline of recent reform initiatives

- 2015 Liberal Campaign promises
- Mandate letters to Minister of Fisheries and Oceans, Transport, Environment and Climate Change:
  - Review 2012 changes with a view to “**restore lost protections** and incorporate modern safeguards.”
- Main Reviews and Reports:
  - Standing Committee on Fisheries and Oceans re: *Fisheries Act* changes
  - Standing Committee on Communities, Transportation, and Infrastructure re: *Navigation Protection Act*
  - Expert Panel on Environmental Assessment: Building Common Ground
  - Expert Panel on NEB Modernization
- Government of Canada’s Discussion Paper (June 2017)
- Bills C-68 (*Fisheries Act*) and C-69 (February 2018)



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# *Fisheries Act*

# *Fisheries Act Report Highlights*

- The Committee recommended:
  - **A return to the prohibition against harmful alteration, disruption or destruction (HADD) of fish habitat (excision of 2012 “serious harm to fish” regime);**
  - **Greater clarity around what constitutes a HADD**, with a view towards certain sectors in particular (municipalities, agriculture);
  - **Increased resources** for project review and enforcement;
  - An **online registry/database** for authorizations and better reporting of the state of fish habitat;

# Gov't of Canada Discussion Paper

Changes made to the Fisheries Act in 2012 shifted the focus away from broad fish habitat protection and toward managing threats to the productivity of Canada's commercial, recreational and Aboriginal fisheries. As part of our commitment to restore lost protections and incorporate modern safeguards in the Fisheries Act, we are considering legislative, regulatory, policy and program changes that would:

## *Partnering with Indigenous peoples*

- Being responsive to **Indigenous rights and jurisdiction**, with space created to enable increased Indigenous involvement, including Indigenous-led assessments and respecting Indigenous decision-making
- Ensure **meaningful and ongoing engagement** and participation in planning and integrated management
- Incorporate **Indigenous knowledge** into decision making

## *Planning and Integrated Management*

- Support **early and broad engagement** in planning and management activities
- Enable proactive identification of **important habitats** and consider these areas in decision making
- Collaborate with partners to identify key **restoration and rebuilding** priorities
- Incorporate modern **resource management and planning** principles such as cumulative effects, the precautionary approach, and ecosystem-based management

## *Partnering and Collaboration*

- Foster partnering for activities that **conserve and enhance fish habitat**
- **Develop scientific expertise** on fish and fish habitat protection
- Establish a **collaborative committee to advise** on fish and fish habitat protection
- **Strengthen federal leadership**, cooperation and communication with all orders of government, in all regions

## *Reporting Back to Canadians*

- Provide Canadians **transparent access to information** about projects and activities impacting fish and fish habitat through:
  - improved reporting from proponents
  - strengthened compliance monitoring
  - timely, relevant and accessible information

"In [the Committee's] opinion, the proposed amendments included in this report reflect the values of ecosystem-based management, sustainable development, the precautionary principle and co-management in addressing fish habitat protection and fisheries management."

*Enhancing The Protection of Fish And Fish Habitat And The Management of Canadian Fisheries*, p. 38



## Fisheries Act

2012, c. 19, s. 133(3), c. 31, s. 175

**1 (1) The definitions *commercial*, *Indigenous* and *recreational* in subsection 2(1) of the *Fisheries Act* are repealed.**



## ■ New definitions:

- Fish habitat: “water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes...”
- “fishery”: “...with respect to any fish, includes, (a) any of its species, populations, assemblages and stocks, whether the fish is fished or not”
- “Indigenous governing body”: “means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people...”

- **New Purpose Clause:**

- To provide a framework for

- (a) the proper management and control of fisheries;  
and

- (b) the conservation and protection of fish and fish habitat, including by preventing pollution.

- This is essentially a codification of existing jurisprudence: see *Ward v. Canada (2004)*, *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at pp 25-26



## Indigenous Peoples of Canada

### Rights of Indigenous peoples of Canada

**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*.



### Duty of Minister

**2.4** When making a decision under this Act, the Minister shall 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*.

- New Considerations Clause (but discretionary)

- The Minister may \*or may not\* consider:

- (a) the application of a precautionary approach and an ecosystem approach;
    - (b) the sustainability of fisheries;
    - (c) scientific information;
    - (d) traditional knowledge of the Indigenous peoples of Canada that has been provided to the Minister;
    - (e) community knowledge;
    - (f) cooperation with any government of a province, any Indigenous governing body and any body—including a co-management body—established under a land claims agreement;
    - (g) social, economic and cultural factors in the management of fisheries;
    - (h) the preservation or promotion of the independence of licence holders in commercial inshore fisheries; and
    - (i) the intersection of sex and gender with other identity factors.

- Habitat Protection Provisions:
  - Return of the HADD (sections 34 and 35):
    - Prohibition against w/u/a that are likely to result in harmful alteration, disruption, or destruction of fish habitat.
  - Legislation appears to envisage 3 types of w/u/a
    - Minor ones – subject to guidelines and codes of practice;
    - Medium ones – *ad hoc* review, may require authorization or Letter of Advice;
    - Designated projects – listed in regulation, always requiring authorization

- Expanded list of **mandatory considerations** before issuing an authorization:
  - (a) the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected;
  - (b) fisheries management objectives;
  - (c) whether there are measures and standards
    - (i) to avoid the death of fish or to mitigate the extent of their death or offset their death, or
    - (ii) to avoid, mitigate or offset the harmful alteration, disruption or destruction of fish habitat;
  - (d) *the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat;*
  - (e) *any fish habitat banks, as defined in section 42.01, that may be affected;*
  - (f) *whether any measures and standards to offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat;*
  - (g) *traditional knowledge of the Indigenous peoples of Canada that has been provided to the Minister; and*
  - (h) any other factor that the Minister considers relevant.



## Other provisions of note:

### ■ Habitat Banking

- “an area of a fish habitat that has been created, restored or enhanced by the carrying on of one or more conservation projects within a service area and in respect of which area the Minister has certified any habitat credit under paragraph 42.02(1)(b)”.



## Public Registry

**42.2** 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.

### Contents of registry — obligatory

**42.3(1)** The Minister shall publish the following records in the registry:

- (a) any agreements referred to in section 4.1 that are entered into by him or her and that establish the circumstances and manner referred to in paragraph 4.1(2)(h);
- (b) any standards and codes of practice established by him or her under section 34.2;
- (c) any orders made by him or her under sections 34.3 and 37;
- (d) any authorizations given under paragraphs 34.4(2)(b) and (c) and 35(2)(b) and (c) and subsection 35.2(7);
- (e) any permits issued by him or her under section 35.1; and
- (f) any fish habitat restoration plan prepared under subsection 35.2(9).

# Outstanding Concerns?

- No commitment to report on **state of fish and fish habitat** (could be biennial);
- Still largely discretionary, cont'd reliance on “Letters of Advice”;
- Government does not appear to have accepted recommendations for a broadly framed “registration” system:
  - Does not appear to intend to require notifications from proponents relying on codes of practices/guidelines;
  - 2 possible explanations:
    - Erroneous belief that does not have jurisdiction over projects that may avoid impacts to fish habitat (but environmental legislation is supposed to be preventative and anticipatory – see *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52);
    - Concern for regulatory over-reach: bringing previously unregulated sectors into regulatory fold, even with minimal burden (i.e. notification).
- But... overall a good news story for fish and fish habitat in Canada.



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# ***Impact Assessment Act***

- A single agency responsible for all IAs
  - Standard IAs or Panel Reviews
  - NEB/CER & CNSC = panelists on Joint Review Panels (~ pre-2012 regime);
- Planning Phase as Bulked-up Screening Decisions?
- Additional Factors to Consider: Assessment and Decision-Making
  - More factors, more transparency, climate change, sustainability
  - Doubling down on “environmental law as process” paradigm

- Projects on Federal Lands and Outside of Canada
  - Additional transparency
  - Additional regulatory powers to exempt projects
- The Public Registry: Whither Improved Science
  - No real legislative changes



To read the same overview (more or less), see

<https://ablwg.ca/2018/02/15/in-search-of-better-rules-an-overview-of-federal-environmental-bills-c-68-and-c-69/>

**Thank you!**