

**Indigenous Gender-Based Issues in Fish and Fish Habitat
Protection and Conservation**

**Discussion Paper
Extended**

December 2020

Contents

Summary	3
About NWAC	3
<i>Fisheries Act</i> and the Fish and Fish Habitat Protection Provisions	4
<i>Fisheries Act</i> Purposes and Considerations	4
Fish and Fish Habitat Protection	5
Section 34.1 Factors: Application.....	5
Measures and Standards to Offset Harm	8
<i>Fisheries Act</i> Regulations	8
Aboriginal Communal Fishing License Regulations.....	9
Authorizations Concerning FFHP Regulations.....	10
Northwest Territories Fishery Regulations	11
Fisheries (General) Regulations	11
Indigenous Fishing Rights and the Constitution	12
Division of Powers.....	12
Cooperative Federalism and Indigenous Self-governance	13
Indigenous Fishing Rights and Section 35.....	13
Indigenous Fisheries and the Right to a Moderate Livelihood	14
Indigenous Rights and Gender Equality	15
Indigenous Gender-based Fisheries Issues	15
Indigenous Women and Commercial Fisheries	15
Indigenous Women and Traditional Fisheries	16
Climate Change Impacts on Seafood Harvesting.....	16
Erosion of Cultural Harvesting Traditions	17
Indigenous Fish and Fish Habitat Conservation Traditions.....	17
Conclusion.....	18

Summary

This discussion paper introduces the *Fisheries Act's* fish and fish habitat protection (FFHP) provisions through an Indigenous gender-based lens. This document also reviews Canadian case law respecting Indigenous fishing rights, with a short discussion on Indigenous women and 2SLGBTQQIA persons' concerns respecting Indigenous fisheries.

The purpose of this document is to provide background information on Indigenous gender-based concerns and interests respecting the FFHP provisions and to request written submission via NWAC's FFHP Platform on these matters.

Discussion questions are included throughout this document; however, there is no requirement that these specific questions be answered.

About NWAC

Founded in 1974, the Native Women's Association of Canada (NWAC) is a National Indigenous Organization (NIO) representing Indigenous women, girls and gender-diverse people in Canada, inclusive of First Nations on and off reserve, status and non-status, disenfranchised, Métis, and Inuit. NWAC engages in national and international advocacy for policy reforms, promoting equality for Indigenous women, girls, and gender diverse people.

NWAC was founded on the collective goal to enhance, promote, and foster the social, economic, cultural, and political well-being of Indigenous women within their respective communities and Canada societies.

Through advocacy, policy, and legislative analysis, NWAC works to preserve Indigenous culture and advance the well-being of all Indigenous women, girls and gender diverse people, as well as their families and communities.

NWAC works on a variety of issues such as employment, labour and business, health, violence prevention and safety, justice and human rights, environment, early learning childcare and international affairs. To develop our policy reports and recommendations, we consult with Indigenous women through in-person/electronic engagements across the country. However, due to the COVID-19 pandemic and the resulting restrictions, NWAC must incorporate physical distancing into our engagement model. Indigenous women's needs do not stop in a global pandemic: our continued advocacy is essential.

NWAC is a national voice representing Indigenous women, girls, gender diverse and Two Spirit people in Canada. NWAC has long supported environmental sustainability, climate action and conservation in its efforts to advocate and protect the natural environment.

Fisheries Act and the Fish and Fish Habitat Protection Provisions

Fisheries Act Purposes and Considerations

The *Fisheries Act* regulates fishing and other activities that can affect fish and fish habitat in Canada. The legislation's purpose is to manage fisheries and conserve and protect fish and fish habitat.¹

In 2019, Parliament amended the *Fisheries Act* through Bill C-68 to add new factors the government must or may consider when making decisions under the Act.² These amendments re-introduced prohibitions on certain works, undertakings and activities ("activities") that cause fish deaths or harm fish habitats. These prohibitions existed under the Act prior to 2012³.

The Minister may consider the following factors when making decisions under all parts of the *Fisheries Act*:

- Indigenous knowledge provided to the Minister;
- Cooperation with Indigenous governing bodies;
- Social, economic and cultural factors; and
- The intersection of sex and gender with other identity factors.⁴

These factors apply to decisions under every part of the Act, including FFHP provisions. Section 34.1(1) sets out additional factors the Minister *must* consider before making decisions under several FFHP provisions.⁵ These include:

- Impacts on fisheries productivity;
- Mitigation and avoidance measures;
- Cumulative effects;
- Fish habitat conservation banks;
- Offset measures; and
- Indigenous knowledge.⁶

Under the Act, the Minister may work with Indigenous Governing Bodies (IGBs) to facilitate cooperation, exchange information, and hold public consultations.⁷ These important sections make room for Indigenous fisheries governance.

¹ *Fisheries Act*, RSC, 1985, c F-14, at s 2.1.

² Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, 1st Sess, 42nd Parl (Royal Assent 21 June 2019) [Bill C-68] at cl 3; Bill C-68, at cl 21

³ Bill C-68.

⁴ *Fisheries Act*, s 2.5

⁵ *Fisheries Act*, s 34.1(1).

⁶ *Fisheries Act*, s 34.1(1)(a), (c), (d), (e), (f), and (g), respectively.

⁷ *Fisheries Act*, s 4.1(1).

Fish and Fish Habitat Protection

The FFHP rules are found in the *Fisheries Act* sections 34 to 42.1. The *Fisheries Act* FFHP sections are designed to protect fish and fish habitat from human-related harms.

Bill C-68 made many changes to the *Fisheries Act* in 2019. For example, the Bill prohibits fishing cetaceans (such as whales and dolphins) for captivity, and importing or exporting these animals and their reproductive components.⁸

The Minister (or person/entity with the Minister's authority) must consider the following when making FFHP decisions:

- (a) Fisheries productivity;
- (b) Fisheries management objectives;
- (c) Measures to avoid harm to fish and fish habitat;
- (d) Cumulative effects on fish and fish habitat;
- (e) Effects on fish habitat conservation banks;
- (f) Indigenous knowledge; and
- (g) Any other factor that the Minister considers relevant.⁹

These factors are listed in section 34.1, and apply only to the FFHP sections. The specific sections to which the section 34.1 considerations apply are set out below.

Section 34.1 Factors: Application

This backgrounder focuses on the Department of Fisheries and Ocean's regulation-making and administrative decision-making powers under the *Fisheries Act*, but not the FFHP decision-making process related to releasing of harmful substances. Those rules fall under the Minister of the Environment's authority.¹⁰

The following segment of this backgrounder covers situations where section 34.1 factors are at play.

Recommending Cabinet Regulations

The Governor in Council (Cabinet) has the authority to make regulations, on the recommendation of the Minister (s. 43.1), for carrying out the purposes and provisions of the *Fisheries Act*, including the below regulations. Before the Minister can make recommendations for such regulations, they must consider the section 34.1 factors.

- The restoration of fish habitat (s. 43(1)(b.2));
- The conservation and protection of fish habitat (s. 43(1)(i));

⁸ *Bill C-68*, at cl 15; *Fisheries Act*, ss 23.1 and 23.2.

⁹ *Fisheries Act*, s 34.1(1).

¹⁰ *Order Designating the Minister of the Environment as the Minister Responsible for the Administration and Enforcement of Subsections 36(3) to (6) of the Fisheries Act*, SI/2014-21.

- Listing activities that might cause harm to fish or fish habitat but are permitted (s. 43(1)(i.1) in relation to ss. 34.4(2)(a) and 35(2)(a));
- Listing waters and conditions that where activities that can cause harm to fish or fish habitat may be carried on (s. 43(1)(i.1) in relation to ss. 34.4(2)(a) and 35(2)(a));
- Setting processes for issuing authorizations to carry on activities that can harm fish or fish habitat s. 43(1)(i.11) in relation to ss. 34.4(2)(b) or (c) and 35(2)(b) or (c));
- Listing documents required when applying for authorizations to carry on activities that can harm fish or fish habitat (s. 43(1)(i.2) in relation to ss. 34.4(2)(b) or (c) and 35(2)(b) or (c));
- Listing persons or entities who can authorize activities that can harm fish or fish habitat (s. 43(1)(i.21) in relation to ss. 34.4(2)(c) and 35(2)(c));
- Listing the conditions that must be met before activities that can harm fish or fish habitat may be authorized (s. 43(1)(i.3) in relation to ss. 34.4(2)(c) and 35(2)(c));
- Listing the conditions that must, may or must not be imposed on an authorization to carry on activities that can harm fish or fish habitat (s. 43(1)(i.31) in relation to ss. 34.4(2)(c) and 35(2)(c));
- Setting time limits for issuing authorizations to carry on activities that can harm fish or fish habitat (s. 43(1)(i.4) in relation to ss. 34.4(2)(b) or (c) and 35(2)(b) or (c));
- Setting time limits for issuing authorizations to carry on activities that are part of certain types of projects and that are likely to result in harm to fish or fish habitat (s. 43(1)(i.4) in relation to ss. 34.4(2)(b) or (c) and 35(2)(b) or (c));
- Listing projects and types of projects as “*designated projects*” that are likely to affect fish or fish habitat (s. 43(1)(i.5) in relation to s. 35(1));
- Setting timelines and circumstances that the Minister may amend authorizations to carry on activities that can harm fish or fish habitat (s. 43(1)(i.6) in relation to ss. 34.4(5) and 35(5) or 35.1(5));
- Setting timelines and circumstances that other government actors may amend authorizations to carry on activities that can harm fish or fish habitat (s. 43(1)(i.7) in relation to ss. 34.4(6) and 35(6));
- Setting the process for a person to request the Minister or another government actor to amend an authorization to carry on activities that result in harm to fish and fish habitat (s. 43(1)(i.8) in relation to ss. 34.4(5) and (6) or 35(5) and (6));
- Listing the circumstances where confidential Indigenous knowledge provided to the Minister under the Act may be disclosed without written consent (s. 43(1)(j.1));
- Listing waters as exempt from orders by the Minister related to obstructions and prohibitions on activities that cause harm to fish and fish habitat (s. 43(5) in relation to ss. 34.3, 34.4 and 35);
- Listing waters as exempt from the duty to notify DFO of harm to fish or fish habitat (s. 43(5) in relation to ss. 38(4) and (4.1)).

Exercising Powers

The Minister must consider section 34.1 factors before exercising any of the following powers:

Ministerial Orders Concerning Obstructions (s. 34.3(2)): The Minister has the authority to order any person who owns or controls obstructions and other objects that harm fish or fish habitat to take actions that protect fish or fish habitat. These orders can include removing the obstruction or other objects, constructing fishways, installing devices to divert or block fish, maintain water flow, or maintain

other water characteristics. The Minister may also order the relevant person to operate and maintain fish obstruction mitigation measures and to modify or repair those things.

Ministerial Orders Concerning Maintenance and Modification of Fish Obstruction Mitigations (s.

34.3(3)): The Minister may order any person who has ownership or control over obstructions and other objects that are detrimental to fish or fish habitat to take measures to ensure the passage of fish and protection of fish and fish habitat when undertaking measures related to a ministerial order concerning obstructions under subsection 34.3(2).

Ministerial Regulations Respecting Water Flow (s. 34.3(7)): The Minister may make regulations governing the minimum water flow that must be maintained to ensure the free passage of fish or the protection of fish or fish habitat.

Ministerial Authorizations to Carry on Activities that Result in the Death of Fish (s. 34.4(2)(b)-(c)): The Minister may authorize activities that result in fish deaths, but only if they are carried on in accordance with set conditions.

Authorizations by Prescribed Persons to Carry on Activities that Result in the Death of Fish (s. 34.4(2)(c)): Cabinet, by regulations, list persons or entities (s. 43(1)(i.21)) who may authorize the carrying on of activities that result in the death of fish if they are carried on in accordance with set conditions.

Ministerial Regulations Respecting Authorized Classes of Activities that Result in the Death of Fish (s. 34.4(4)): The Minister may make regulations authorizing types of activities that may cause harm to fish or fish habitat.

Ministerial Authorizations to Carry on Activities Affecting Fish Habitat (s. 35(2)(b)): The Minister may authorize the carrying on of activities that harmfully alter, disrupt or destroy fish habitat, but only if they are carried on in accordance with set conditions.

Authorizations by Prescribed Persons to Carry on Activities Affecting Fish Habitat (s. 35(2)(c)): Cabinet may, by regulations, list persons or entities (s. 43(1)(i.21)) who may authorize the carrying on of activities that harm fish or fish habitat if they are carried on in accordance with set conditions.

Ministerial Regulations Respecting Classes of Activities that May Cause Adverse Impacts on Fish Habitat (s. 35(2)(a), 35(4)): The Minister may, by regulation, list types of activities that harm fish or fish habitat that may be carried on.

Ministerial Permits to Carry on Activities Associated With Designated Projects (s. 35.1(3)): Cabinet may make regulations that designate projects (or classes of projects) that are likely to affect fish or fish habitat (s. 43(1)(i.5)). The Minister must designate any activity as subject to the FFHP prohibitions if they are part of a “designated project” and the Minister considers those activities to be likely to harm fish or fish habitat (s. 35.1(2)). The Minister may also, however, issue a permit to carry on those works, undertakings or activities they designate as part of a “designated project” and attach any conditions to the permit (s. 35.1(3)).

Ministerial Authorizations to Undertake Activities in Ecologically Significant Areas (s. 35.2(7)): Cabinet may make regulations, on the recommendation of the Minister, designating ecologically significant areas (s. 35.2(2)) where certain activities designated by Cabinet (s. 35.2(10(a))) may *not* be carried on (s. 35.2(1)). The Minister may, however, authorize these designated activities in ecologically significant

areas if: 1- Cabinet has not made regulations to constrain the Minister's authority to make such authorizations and 2- the Minister is satisfied that appropriate avoidance and mitigation measures may be implemented to conserve and protect the relevant fish and fish habitat (35.2(7)).

Ministerial Orders Respecting Activities Affecting Fish and Fish Habitat (s. 37(2)): If the Minister determines an activity is likely to constitute a *Fisheries Act* offence under subsection 40(1) (such as, fish death (s. 34.4(1)) or to fish habitat (s. 35(1))), the Minister may order: (a) modifications or additions to the activity; or (b) restrictions on the carrying on of the activity, including the closing or pausing of the activity (s 37(2)).

Measures and Standards to Offset Harm

As noted above, when deciding whether to issue an authorization to cause harm to fish or fish habitat, one of the factors that the Minister must take into consideration is whether there are measures in place to avoid or mitigate harm to fish or fish habitat (s. 34.1(1)(c)). Consideration of this factor, however, should take into account the fact that certified habitat credits can be used to offset harms within the same service area of the activity. In other words, habitat bank measures to offset harms must take place in the same area as the activity causing the harms (s. 42.03).

Conservation-based projects can be eligible for conservation status only if they are “a work, undertaking or activity that is carried on by a proponent for the purpose of creating, restoring or enhancing fish habitat within a service area in order to acquire habitat credits.” (s. 42.01).

When considering whether there are avoidance or mitigation measures relevant to an application for an authorization to cause harm to fish or fish habitat, the Minister must take into account limitations on the availability of offset measures, such as the requirement that habitat banks be in the same area as the harm-causing activities and that it is the proponent, themselves, that undertake the conservation activities.

Fisheries Act Regulations

When FFHP-related regulations, authorizations or exemptions affect the fish or fish habitats under an Aboriginal Communal Fishing License, these actions may affect constitutionally-protected Indigenous fishing rights.

The courts have consistently held that governments may regulate constitutionally-protected Indigenous fishing rights if such laws prove these limits have valid legislative purposes and are consistent with the honour of the Crown.¹¹

This means the government can regulate fisheries in a manner that infringes on Indigenous rights. A court will analyze whether the infringement is justified by assessing the Act's objectives, the honour of the Crown, minimal impairment and the duty to consult and accommodate.¹²

¹¹ *R v Sparrow*, [1990] 1 SCR 1075, at 1113 to 1114.

¹² *R v Sparrow*, [1990] 1 SCR 1075, at 1119; *R v Badger*, [1996] 1 SCR 771 at para 97; *R v Marshall*, [1999] 3 SCR 533 at para 32.

The following *Fisheries Act* regulations are relevant to Indigenous fishing rights as well as conservation and protection measures that may affect those rights.

Aboriginal Communal Fishing License Regulations

Aboriginal fishing licenses issued under these regulations are unique because they are communal licenses, meaning they are only issued to territorially-based Indigenous communities and organizations, who hold them collectively.¹³ This collective and land-based license ownership is the cornerstone of federally-regulated Indigenous fishing rights.

These licenses designate the persons and vessels that may engage in fishing activities¹⁴. If the Minister does not designate such persons, the Indigenous community or organization to whom the license is issued may designate those persons¹⁵.

The Minister may specify license conditions that aim to conserve and protect fish. These conditions can include specifying species and quantities of catch, fishing methods, and planned fishing location and time information to be reported.¹⁶

While these regulations may be justified infringements on Indigenous fishing rights, they cannot unnecessarily impair those rights or fail to uphold the honour of the Crown.

Government decision-makers and affected Indigenous peoples should consider the following when analyzing decisions that infringe Indigenous rights:

- Identify the affected Indigenous rights.
- How does the specific regulation or decision affect and/or infringe these rights?
- Does the regulation or decision work toward the conservation or protection of fish or fish habitat, or another valid legislative objective?
- How deeply does the regulation or decision infringe the right and how might it be minimized?
- Was the affected community/organization properly consulted and accommodated?
- Were Indigenous women and 2SLGBTQIA persons engaged with in the consultation process or were gender-based issues sufficiently taken into account?

Discussion Questions:

- What other considerations should be taken into account when analyzing whether government decision-making under the *Aboriginal Communal Fishing Licenses Regulations* unjustifiably infringes on Indigenous fishing rights?
- Aboriginal Communal Fishing Licenses may be issued only to Aboriginal organizations, including “Indian” bands, band councils, tribal council and territorially-based aboriginal community organizations. Do Indigenous women who have been removed/expelled from their communities

¹³ *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, at s 2.

¹⁴ *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, at s 4(2).

¹⁵ *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, at s 4(3).

¹⁶ *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, at s 5(1).

due to colonial laws, policies and programs (i.e., *Indian Act* registration provisions) face a disadvantage in accessing Aboriginal Communal Fishing Licenses due to the limited definition of “Aboriginal organizations” under the Regulations?

- The Regulations allow the Minister to specify conditions in an Aboriginal Communal Fishing License for the purposes of management and conservation, including the species and quantities of fish that may be taken; methods, locations and times at which fishing is permitted; and types, sizes and quantities of fishing gear that may be used.¹⁷ How might conditions specified in these licenses affect Indigenous fishing practices and rights?

Authorizations Concerning FFHP Regulations

The Minister¹⁸ may recommend Cabinet make regulations respecting the issuance of authorizations to carry on activities that result in harm to fish or fish habitat¹⁹ and specify what documentation must accompany applications for such authorizations²⁰.

Applications for authorizations must include prescribed information and documents as well as a non-revocable letter of credit (or another equivalent financial guarantee) to cover the costs of an offsetting plan.²¹ The information that must be included in authorization applications, set out in Schedule 1 of the regulations, includes a description and the results of any consultations with Indigenous communities or groups and the public relating to the proposed activity including consultations.²² The application for an authorization must also detail the harmful impacts on fish and fish habitat,²³ any proposed use of habitat credits, and any offsetting plan to offset those impacts²⁴.

Discussion Questions:

- What measures should a project proponent take to ensure women and 2SLGBTQQIA persons are meaningfully consulted in the authorization application process?
- What challenges do Indigenous women and 2SLGBTQQIA persons face in accessing economic opportunities related to fish and fish habitat protection and offset projects and how can proponents help address these challenges?

¹⁷ *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, at s 5(1) with reference to matters set out under the *Fisheries (General) Regulations*, ss 22(1)(b) to (z.1).

¹⁸ *Fisheries Act*, s 43.1

¹⁹ *Fisheries Act*, s 43(1)(i.11).

²⁰ *Fisheries Act*, s 43(1)(i.2)/

²¹ *Authorizations Concerning Fish and Fish Habitat Protection Regulations*, SOR/2019-286, at s 2(1).

²² *Authorizations Concerning Fish and Fish Habitat Protection Regulations*, SOR/2019-286, at Schedule 1, s 7.

²³ *Authorizations Concerning Fish and Fish Habitat Protection Regulations*, SOR/2019-286, at Schedule 1, ss 13 and 14.

²⁴ *Authorizations Concerning Fish and Fish Habitat Protection Regulations*, SOR/2019-286, at Schedule 1, ss 15 and 16.

Northwest Territories Fishery Regulations

These Regulations also protect “Indian”, Inuit and “mixed blood” persons’ right to fish with out a license, using prescribed methods, in waters adjacent to the Northwest Territories and tidal waters in Ontario and Manitoba²⁵ (Hudson Bay).²⁶

The Regulations do, however, restrict some Indigenous fishing activities, including prohibitions on giving fish to non-Indigenous persons.²⁷ The regulations allow some commercial fishing activities for Indigenous fishers without a license, including trade with other beneficiaries under the *Western Arctic (Inuvialuit) Claims Settlement Act*²⁸ and selling fish by-products to any person²⁹.

These regulations continue to apply to fisheries in Nunavut until the *Nunavut Fishery Regulations* is brought into force.³⁰

Discussion Questions:

- These regulations limit Indigenous fishing without a license, including angling, gill nets, set lines, spears, snares or dip nets. What are the benefits and risks associated with government regulations governing Indigenous fishing methods?
- Can you discuss the importance of fish and fishing to the diet, culture and economic condition of Indigenous women and 2SLGBTQQIA persons in your community?

Fisheries (General) Regulations

Under these Regulations, the Minister can specify conditions to properly manage and control fisheries to conserve and protect fish in a fishing license, including Aboriginal Communal Fishing Licenses.³¹

These conditions may include:

- fish species, quantities, ages and size
- waters that may be fished,
- fishing vessels types ,
- the gear that may be used and how, and
- when fishing may occur.³²

²⁵ *Northwest Territories Fishery Regulations*, CRC, c 847, at s 3(1) and ss 5(1) and 7(1).

²⁶ *Northwest Territories Fishery Regulations*, CRC, c 847, at s 22(1).

²⁷ *Northwest Territories Fishery Regulations*, CRC, c 847, at s 22(1) and (2).

²⁸ *Northwest Territories Fishery Regulations*, CRC, c 847, at s 322.1(2)(a).

²⁹ *Northwest Territories Fishery Regulations*, CRC, c 847, at s 322.1(2)(b).

³⁰ DFO, “Consultation on Nunavut Fishery Regulations, Canada, (02/08/2019) < <https://www.dfo-mpo.gc.ca/fisheries-peches/consultation/nunavut-eng.html> >.

³¹ *Fisheries (General) Regulations*, SOR/93-53, at s 22(1).

³² *Ibid*, at s 22(1).

Should a licensee not comply with the conditions imposed on a license, the Minister may suspend or cancel that license.³³ In this case, the Minister gives written notice with reasons for the suspension, delivered by registered mail or a fishery officer personally delivers notice to the holder.³⁴

The Minister can also issue a license to fish for experimental, scientific, educational, aquatic invasive species control and public display purposes³⁵, to release live fish into fish habitat or to transfer live fish to a fish-rearing facility.³⁶

Discussion Questions:

- When imposing conditions on an Aboriginal Communal Fishing License for the purposes of fish conservation and protection, what consultation requirements need to be satisfied with the affected Indigenous fishers respecting Indigenous fishing and conservation practices?
- What role can a license for experimental, scientific, educational, aquatic invasive species control or public display fishing have in your community?
- What role can a license to release live fish to fish habitat or to transfer live fish to a fish rearing facility have in your community?

Indigenous Fishing Rights and the Constitution

Division of Powers

Under the *Constitution Act, 1867*, both federal and provincial governments have jurisdiction over matters that can affect fish and fish habitat and Indigenous rights with respect to the fisheries. The federal government has jurisdiction over navigation and shipping, seacoasts and inland fisheries, and Indigenous peoples and lands reserved for them.³⁷ The provinces have jurisdiction over local works and undertakings, matters of local or private nature within the province, development, conservation and management of non-renewable resources and forestry, and the development and management of electrical energy generation³⁸.

Where these areas appear to overlap for fishing-related concerns, the courts have adopted an interpretation of the constitution that allows for “cooperative federalism”.³⁹

³³ *Fisheries Act*, at s 9(1)(a).

³⁴ *Fisheries (General) Regulations*, SOR/93-53, at s 24(1) and (2).

³⁵ *Ibid*, at s 52.

³⁶ *Ibid*, at s 54.

³⁷ *Constitution Act, 1867*, (UK), 30 and 31 Vict, c 3, at s 91.

³⁸ *Ibid*, at s 92.

³⁹ *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 161 at pg 190.

If a province's laws replicate federal jurisdiction, there may be a "double aspect" of the law. When this happens, the doctrine of cooperative federalism permits those overlaps so long as they are not significant nor serious intrusions on the other government's jurisdiction.⁴⁰

Both levels of government may legislate matters affecting the fisheries and fish habitat so long as they do not significantly or seriously intrude on the jurisdiction of the other level of government.

Cooperative Federalism and Indigenous Self-governance

The constitutional division of powers applies only between the federal and provincial levels of government, but section 35 of the *Constitution Act, 1982* recognizes and affirms Indigenous and treaty rights, as discussed below. Where Indigenous rights falling within section 35 relate to fish and fish habitat management, a modern interpretation of Canadian federalism may provide an important opportunity to recognize Indigenous governing bodies that exercise their jurisdiction to legislate with respect to these matters.

How the Indigenous right to self-governance fits in to Canada's cooperative federalism is particularly important in matters related to Indigenous fisheries. On 14 February 2018, the Department of Justice published Canada's policy concerning the federal government's relationship with Indigenous peoples. In this policy the Justice department includes a principle recognizing Indigenous self-government as part of Canada's evolving system of cooperative federalism.⁴¹

Discussion Question:

- What are the primary challenges Indigenous Governing Bodies face when making laws and regulations affecting the fisheries and fish and fish habitat conservation? What are the solutions to these challenges?

Indigenous Fishing Rights and Section 35

The Supreme Court of Canada recognized Aboriginal rights stem from their original occupation and use of ancestral lands. These rights include the right to occupy and use their lands as they choose, subject to Crown sovereignty.⁴² This right was recognized in the *Royal Proclamation of 1763*.⁴³ The *Royal Proclamation* prohibits mistreating Indigenous peoples, which includes disrupting their possession and use of lands and resources. One of the ways the Proclamation protects Indigenous land and resource rights is to prohibit the government from taking up or selling these lands to anyone other than the Crown.⁴⁴

⁴⁰ *Quebec (Attorney General) v Canadian Owners and Pilots Association*, [2010] 2 SCR 536, at para 45.

⁴¹ DOJ, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, Canada (14 Feb 2018) < <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html> >.

⁴² *R v Van der Peet*, [1996] 2 SCR 507, at para 36 (Majority) and 114 (Dissent, but not on this point).

⁴³ *R v Sparrow*, [1990] 1 SCR 1075, at 1103.

⁴⁴ Royal Proclamation, King George III of England Issued October 7, 1763. Broadside. Library and Archives Canada, e010778430, AMICUS no. 7468714 PDF file: derived from Clarence S. Brigham, ed., *British Royal Proclamations Relating to America*, Volume 12, Transactions and Collections of the American Antiquarian Society (Worcester,

The Supreme Court of Canada (SCC) has found government laws and regulations may justifiably infringe on Indigenous rights when done in the name of valid conservation measures.⁴⁵ It is important to emphasize that such conservation measures must be *valid*. Where conservation measures impact treaty rights, those measures must be proven to be justified management tools, otherwise a rights holder may escape their application.⁴⁶

Discussion Questions:

- What are your community's cultural, economic, and food security significances of fishing? Do fish and fishing activities have different cultural or economic importance for men, women or 2SLGBTQQIA persons?
- What are the cultural and economic significances of fish and fish habitat conservation for your community?
- How has (or might) federal and provincial laws affect Indigenous rights related to fishing and fish and fish habitat conservation?

Indigenous Fisheries and the Right to a Moderate Livelihood

The *Fisheries (General) Regulations* under the *Fisheries Act* prohibits purchasing, selling, trading, bartering or offering to do so, unless a fishing license (including an Aboriginal Communal Fishing License) authorizes those activities.⁴⁷ Federal regulations governing Aboriginal Communal Fishing Licenses set restrictions on Indigenous fishing activities, including the species and quantities of fish that may be taken and the method of fishing.⁴⁸

While the courts recognize federal and provincial governments may pass laws and regulations that justifiably infringe on Indigenous fishing rights for valid conservation purposes, regulations affecting Indigenous peoples' ability to engage in commercial fishing activities is more controversial and nuanced.

Whether a right to commercial fishing is protected under section 35 will depend on the facts of each case and, in particular, the relevant treaty protecting those rights. While the SCC has interpreted treaty rights to securing "necessaries", for instance, as a right to a "moderate livelihood",⁴⁹ what constitutes a moderate livelihood in the modern context of the fisheries is unclear.

The SCC suggests a moderate livelihood is more than "bare substances" and includes such basics as food, clothing, housing and amenities, but "not the accumulation of wealth"⁵⁰. Unfortunately, this

Massachusetts: American Antiquarian Society, 1911), pp. 212-18, which reproduces the original text of the Proclamation printed by the King's Printer, Mark Baskett, in London in 1763. Government of Canada, Indigenous and Northern Affairs Canada, "250th Anniversary of the Royal Proclamation of 1763", online: <https://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645> [Royal Proclamation, 1763].

⁴⁵ *R v Sparrow*, at pg 1079.

⁴⁶ *R v Marshall*, [1999] 3 SCR 533, at para 21.

⁴⁷ *Fisheries (General) Regulations*, SOR/93-53, at s 35(1).

⁴⁸ *Aboriginal Communal Fishing License Regulations*, SOR/93-332, at s 5(1).

⁴⁹ *R v Marshall*, [1999] 3 SCR 456, at para 7.

⁵⁰ *R v Marshall*, [1999] 3 SCR 456, at para 59.

guidance does not clarify what does or does not amount to a moderate livelihood. The standards for food, clothing, housing and amenities is subjective, varying from region to region, community to community, and profession to profession.

Discussion Questions:

- How can or should a “moderate livelihood” be defined and measured? Against what standards should a “moderate livelihood” in the fisheries be compared?

Indigenous Rights and Gender Equality

Section 35 rights are guaranteed equally to male and female persons. Additionally, the *Charter of Rights and Freedoms* guarantees equal protection and benefit of the law without discrimination on the basis of sex⁵¹. The *Canadian Bill of Rights* (which pre-dates the Charter) also prohibits any Canadian law from discriminating on the basis of sex.⁵²

Indigenous women, therefore, have a right to enjoy their rights as Indigenous peoples equally with Indigenous men. With respect to fisheries and fish and fish habitat conservation activities, it is important Indigenous women’s rights are recognized and respected. The sections below briefly discuss some common gender-based issues reading Indigenous fisheries and fish and fish habitat conservation activities.

Indigenous Gender-based Fisheries Issues

Indigenous Women and Commercial Fisheries

Policy development practices often diminish women’s work in fishing activities. Indeed, women play pivotal roles in fisheries and processing, but policies are often male-oriented or gender-blind. In commercial fishing, women often work in marketing and processing areas while men are responsible for the act of fishing itself. This feeds the misconception men make up most of the fishing industry, while data shows this is not the case.

The United Nations Food and Agricultural Organization reports that women represent approximately 47 percent of the 120 million people currently working in fisheries. Globally, women are extremely important to inland capture fisheries. More women (33 million) than men (28 million) work in post-

⁵¹ *Constitution Act, 1982*, at s 15.

⁵² *Canadian Bill of Rights*, SC 1960, c 44, at s 1.

harvest fish activities.⁵³ In larger-scale commercial fisheries, women are often employed in processing and marketing, accounting for approximately 66 percent of the workforce.⁵⁴ The latest Canadian data in 2006 shows women made up approximately 47 per cent of fisheries workforce.⁵⁵ Fisheries policy development has neglected gendered issues, despite the large number of women participating in this workforce.

Men and women perform different tasks within fish value chains, bringing different assets, skills, experience and knowledge to decision-making roles. However, official fisheries and aquaculture statistics do not measure women's roles, which contributes to women facing discrimination and marginalization within this sector.

Discussion Questions:

- Do Indigenous women have a high rate of participation in fisheries and fisheries-related economic activities in your community or region?
- Are there barriers that Indigenous women face in participating in certain sectors of the fisheries? If so, what are these barriers?

Indigenous Women and Traditional Fisheries

Considerable differences animate Indigenous peoples' political, cultural, institutional, and economic backgrounds, but their traditional practices, heritage, values and spirituality remain vitally important to each community. Their traditional knowledge systems and relationships with their lands, territories and resources are essential because Indigenous peoples are important stewards of sustainability and conservation.

Indigenous women play an integral role in traditional fisheries practices because they have unique connections to food production and waters. Indigenous communities fish for sustenance and return respect through conservation practices.

Climate Change Impacts on Seafood Harvesting

Climate-related stressors impact traditional food systems, including fisheries, affecting fish abundances. A significant decline in fisheries may cause seafood availability decreases. Seafood is a substantial source of important nutrients for many First Nations, Metis, and Inuit communities across Canada. Previous research suggests that naturally sourced fisheries products are less available, leading many Indigenous people to purchase overly-processed foods, high in fats, refined sugars and sodium⁵⁶. An Environment

⁵³ Good Policy Practices to Eliminate Gender Inequalities in Fish Value Chains, UN Food and Agriculture Organization.

⁵⁴ Ibid.

⁵⁵ Statistics Canada 2006.

⁵⁶ Kuhnlein, H. & Receveur, O. (1996). Dietary Change and Traditional Food Systems of Indigenous Peoples. *Annu Rev Nutr.* 16(1): 417–42.

and Climate Change Canada report (2020) indicated environmental conditions and human ocean use directly affects fish stocks abundance and health globally.

Traditionally harvested seafood remains fundamental to Indigenous peoples' diet and health across Canada.⁵⁷

Discussion Questions:

- Has climate change impacted traditional or commercial fishing activities in your community or region? If so, what mitigation measures have or should be taken to address those impacts?
- Have other human impacts on the environment affected traditional or commercial fishing activities in your community or region? If so, what are these impacts and what might be done to address them?

Erosion of Cultural Harvesting Traditions

Federal regulations have historically eroded cultural harvesting traditions. These impacts continue to influence Indigenous peoples' dependence on and consumption of fish. Indeed, centralized colonial fisheries regulations that restrict access to traditional foods do not reflect the needs of Indigenous communities across Canada.

Fisheries under Federal jurisdiction have been regulated by a 1992 fisheries strategy that allocates specific amounts of fish, namely salmon, Indigenous communities can harvest for consumption and ceremonial purposes (Aboriginal Fisheries Strategy). First Nations, Metis, and Inuit communities have since argued repeatedly that these allocations do not meet their needs and substantially impact their consumption of, and dependency on, fisheries products. This negatively affects their health and well-being and limits economic opportunity.

Discussion Questions:

- Has the Federal Government's regulation of the fisheries had a negative impact on traditional fishing activities in your community or region? If so, how so?

Indigenous Fish and Fish Habitat Conservation Traditions

Indigenous peoples have long managed, used, governed, and conserved their territories and natural resources using Indigenous knowledge, practices and institutions. Historically, Canadian protected areas often violate Indigenous rights and deny their access to traditional territories and resources.

⁵⁷ Marushka, L., Kenny, T., Batal, M., Cheung, W., Fediuk, K., Golden, C., et al. (2019). Potential impacts of climate-related decline of seafood harvest on nutritional status of coastal First Nations in British Columbia, Canada. PLoS ONE 14(2): 1-30.

Marine management and conservation efforts are uniquely linked to Canadian Indigenous rights.⁵⁸ Indeed, protected marine protection guidelines are locally-specific and essential to the Indigenous communities that rely on marine resources.⁵⁹ Indigenous teachings that embed respect for other living beings into customs guide conservation practices (e.g., take only what you need). Women in Indigenous communities play a central role. They connect to Mother Earth and guide knowledge transfer regarding conservation principles. However, while Indigenous oceans management was once revered, colonization and marginalization have stifled Indigenous traditional knowledge's role in policy management.

Today, traditional Indigenous fisheries practices and activities are allowed in all National Wildlife Areas and Migratory Bird Sanctuaries. Where National Wildlife Areas and Migratory Bird Sanctuaries fall under modern land claims co-management committees allow Indigenous leaders an advisory role. However, ultimate authority remains with the Minister. Indigenous communities expressed concern that advisory boards had little authority and that ultimately decision-making all rested with the Minister.⁶⁰ At this time, Scott Islands (British Columbia) will be the first entirely marine National Wildlife collaboratively managed with the Quatsino and Tlatlasikwala First Nations.

Conclusion

The *Fisheries Act* is the primary law governing Canadian fisheries, governing fishing licenses, fishing activities and fish and fish habitat protection. The Act's FFHP sections give the Minister and other government actors certain authorities related to fish and fish habitat protection as well as authorizations and permits to harm fish and fish habitat.

The FFHP sections establish a conservation and protection framework that includes authorizations and permitting, mitigation requirements, and avoidance and offsetting measures.

Indigenous peoples may have specific and vested interests in all FFHP elements:

- Prohibitions on harms to fish and fish habitat can affect Indigenous traditional activities and economic undertakings;
- Authorizations and permits to cause harm may have disproportionate impacts of Indigenous fisheries or waters; and
- Mitigation, avoidance and offsetting frameworks can provide economic opportunities related to nature conservation activities.

Section 35 of the *Constitution Act, 1982* guarantees Indigenous rights and treaty rights, including the right to fish for a moderate livelihood. Constitutionally protected Indigenous rights to fish must take the highest priority, next to conservation; any infringement on the basis of conservation must meet a high justification standard.

⁵⁸ Ban, N. C., C. Picard, and A. C. J. Vincent. (2008). Moving toward spatial solutions in marine conservation with indigenous communities. *Ecology and Society* 13(1): 32.

⁵⁹ Ibid.

⁶⁰ Stephenson, J., Berkes, F., Turner, N., and Dick, J. (2014). Biocultural conservation of marine ecosystems: examples from New Zealand and Canada. *Indian Journal of Traditional Knowledge*. 13: 257-2.

The *Fisheries Act* fishing licenses regime and the FFHP framework can have significant implications for Indigenous peoples' right to fish. Fishing licenses can affect a community's ability to exercise its right to fish. The application or exemption of FFHP sections that protect, and conserve fish and fish habitat can harm the ecological sustainability on which the fisheries depend.

Indigenous rights are guaranteed equally to men and women. When discussing Indigenous fishing rights and potential impacts on those rights, it is important to apply a gendered lens. This facilitates greater understanding of how rights infringements and adverse human impact on aqueous environments may disproportionately effect Indigenous women and 2SLGBTQQIA persons.