THE MALISEET NATION OF NEW BRUNSWICK

Submission to the Standing Committee on Fisheries and Oceans

November 30, 2016

Highlights

- The Maliseet Nation of New Brunswick consists of Kingsclear First Nation, Madawaska Maliseet First Nation, Oromocto First Nation, St. Mary's First Nation, Tobique First Nation and Woodstock First Nation. Our communities and members share a common territory, history, culture, language, as well as Aboriginal and treaty rights.

- We are concerned with how the *Fisheries Act*[1] Review process is unfolding. The accelerated timeline and poor communication has not allowed us to prepare full submissions or consult with our members. The process is failing to meet the legal standards required by section 35[2] and the *United Nations Declaration on the Rights of Indigenous Peoples*.[3] We provide these recommendations with that significant caveat.

- We recommend reinstating the Harmful, Alteration, Disruption or Destruction ("HADD") prohibition, and removing the recently introduced prohibitions against serious harm to commercial, recreational and Aboriginal fisheries (including the term and definition for "serious harm"). As an extension of the HADD prohibition, we recommend that clear and defined enforceable criteria for determination of HADD offenses are incorporated into the *Act*.

- We recommend that the *Act* be changed so that *all* fish and fish habitat are protected, not just those that make up or support a commercial, recreational or Aboriginal fishery.

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[1] R.S.C., 1985, c. F-14 (the "*Act*")
[2] Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982 ("*Constitution*")
[3] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly,* 2 October 2007, A/RES/61/295 ("UNDRIP")

- There needs to be a limit to the discretion of the Minister and Governor in Council in making these regulations and at the very least, requirements for what the Minister and Governor in Council are required to consider in making such regulations.

- We recommend that environmental assessments be done for all works that require authorization and have the potential to affect fish and fish habitat.

- The definition of Aboriginal in relation to fishery should be amended to capture commercial fisheries. Commercial fishing is a proven Aboriginal or treaty right for some Indigenous people. Maliseet treaty rights to fish commercially for a "moderate livelihood" were recognized by the Supreme Court of Canada in *R v Marshall*[4] and are protected by section 35 of the Constitution. These rights should have the same protections under the *Act* as other Aboriginal and treaty rights.

- The *Act* needs to explicitly require the consideration and protection of Aboriginal and treaty rights as an overall purpose of the *Act* as well as require the consideration of traditional knowledge.

- We recommend that the *Act* be amended to provide for co-management and collaborative decision making with Indigenous people. Both the federal Minister and affected Indigenous nations must have an opportunity to approve and consent to any project affecting fish or fish habitat.

- We recommend that s. 4.1(1) (or its equivalent) of the *Act* be expanded to promote agreements with Indigenous peoples.

- We recommend that the *Act* provide for the identification, with Indigenous peoples, of Essential Fish Habitat where no HADD could be authorized, in order to protect areas of vital importance.

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[4] *R v Marshall*, [1999] SCJ No 55 ("*Marshall*"). *Marshall* held that the Peace and Friendship Treaties granted the Mi'kmaq and Maliseet the right to fish for a "moderate livelihood."

- Cumulative effects to fish and fish habitat should be managed in an effective way under the *Act*. For example, one method could be to require that a federal environmental assessment that addresses cumulative impacts is triggered when HADD is likely to occur.

- The *Act* should include provisions for improved monitoring of transparent fisheries management and fish habitat decision making with data stored in publicly available databases. Especially if data are collected and analyzed at regional scales, publicly available data could facilitate rapid and accurate assessment of the potential for cumulative effects to occur.

- More monitoring and enforcement powers needs to be allocated to Indigenous groups and resources/capacity support needs to be provided for Indigenous people to effectively participate in monitoring and enforcing the *Act*.

- There should be a public database for authorizations, applications and decisions for works, undertakings and activities seeking authorization. This will make the process more transparent and allow public engagement.

- The *Act* should be amended so that Indigenous groups whose Aboriginal and treaty rights are, or likely will be, affected are notified by the Minister of works that cause or are likely to cause a serious harm to fish and fish habitat.

- The *Act* should be amended so that a fair portion of the Environmental Damages Fund proceeds go to Indigenous peoples when Aboriginal and treaty rights are affected.

- The authorization process should require authorizations for all projects that are likely to cause HADD to fish and fish habitat. It should not be left up to the proponent to determine whether this is likely to occur.

- We recommend that “environmental flows” be included in the definition of fish habitat to address the many disruptive flow regimes associated with human alterations of rivers and streams.

- The *Act* should mandate fish population recovery targets for depleted or over-fished fish stocks such that those stocks or species do not fall into greater threat and collapse into the regime of the *Species at Risk Act*.

Introduction

The *Act* is vital legislation for the management of Canadian fisheries and protection of the habitat that supports them. It is essential for conserving the sustainability of fisheries. Amendments to the *Act* have threatened its effectiveness in achieving this purpose. As such, the Minister of Fisheries, Oceans and the Canadian Coast Guard has asked the Standing Committee on Fisheries and Oceans ("Committee") to review the *Act* to determine how to restore lost protections and introduce modern safeguards to the *Act* ("Review"). Public engagement has been stated to be at the core of this Review. Specifically, the Government of Canada has stated that engagement with Indigenous groups is of the utmost importance as part of their commitment to renewing relationships with Indigenous peoples

We, the Maliseet Nation, have decided to undertake this Review in unity. The Maliseet Nation of New Brunswick consists of Kingsclear First Nation, Madawaska Maliseet First Nation, Oromocto First Nation, St. Mary's First Nation, Tobique First Nation and Woodstock First Nation. Our communities and members share a common territory, history, culture, language, as well as Aboriginal and treaty rights. We share a deep relationship with our traditional territory and have embraced the duty of protecting it and ensuring that its use is in keeping with the values and beliefs of our ancestors and in the best interest of future generations.

Concerns with the Review Process

While we acknowledge that the schedule for the Review is being fast tracked to ensure that the legislation and regulations are amended quickly, we are very concerned with how this process is unfolding. The Review, overall, is a positive step. It has the potential, if done right, to be a once in a lifetime opportunity to engage with Indigenous people to create a system that finally respects Indigenous rights, perspectives and jurisdiction and when the Review began, we were hopeful. However, we are steadily losing faith that this will not be the case. These process

problems are more than a surface concern—they may critically undermine the Review unless steps are taken to amend the process.

It is no secret that the amendments to the *Act* were ill-conceived and led to the loss of public confidence. A key shortcoming of the amendments was the rushed way in which they were done and the lack of proper public and Indigenous engagement. The amendments could not be legitimate on the basis of that process. Although a step in the right direction, the Review seems to be on the same path to repeating this history and squandering the opportunity to ensure that a proper Review is done.

From the start, this whole process has been unorganized and rushed, with decisions being thrust upon us with very little communication or consultation. For example, the deadline for written submissions to the Committee was made without any announcement or notification to us. It was also made before any decision on funding was made. We only just received confirmation of funding, allowing us only a short time to prepare these submissions. We have not even had time to have meetings to discuss the *Act* with our communities and gather feedback. The accelerated timeline has created barriers to our participation and for these submissions specifically, minimized our available time to prepare.

It is our understanding that as part of the Government of Canada's commitment to renewing its relationship with Indigenous peoples, the Department of Fisheries and Oceans Canada ("DFO") will work directly with Indigenous groups to ensure that their concerns are heard and taken into account in preparation for the Government's response to the Committee's recommendations. At this point we are not even sure if consultation on the specifics of any draft legislation will happen. We feel that Canada will continue its pattern of informing us last minute and not providing us adequate time to prepare or meaningfully engage. The result will unavoidably be that legislation that continually affects our rights will be left without real input or feedback from us and likely do little to respect our rights, perspectives and jurisdiction.

Beyond these logistical problems created by the accelerated timeline and inadequate communication, the way in which this Review is unfolding does not meet the legal standards of consultation as laid down in caselaw, or the principles of UNDRIP. If it continues on the same

path, it will be open to challenges. In fact, UNDRIP explicitly states at Article 19 that "States shall consult and cooperate in good faith with the [I]ndigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

The Government of Canada has stated that it is committed to directly engaging with Indigenous peoples. It has claimed that it is time for a renewed nation-to-nation relationship with Indigenous peoples, based on recognition of rights, respect, co-operation and partnership. In November 2015, the Minister of Indigenous and Northern Affairs Canada announced that the Government would implement UNDRIP. The Prime Minister has also stated that the federal government will act on the recommendations of the Truth and Reconciliation Commission to implement UNDRIP.

We ask that these words be supported by action. If the Government of Canada is truly committed to engaging with Indigenous peoples and to renewing the nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, co-operation and partnership, then it needs to both ensure its legislation fully protects section 35 rights and the rights guaranteed by UNDRIP and it needs to undertake such amendments properly and in accordance with the expanding law in support of respectful relationships with Indigenous peoples.

Background: The Maliseet Nation, Our Waters, and Fishing

The Maliseet or Wolastoqiyik (people of the Beautiful or Bountiful River) have occupied the lands and waters of what is now called New Brunswick since time immemorial. The Saint John River basin or the Wolastoq (Beautiful or Bountiful River), specifically, has long been, and continues to be, of central significance to the Maliseet people. It is a key part of our traditional homeland and culture. We are physically and culturally connected to it. Our name, "Wolastoqiyik", expresses this connection at the heart of our identity: we are the people of the Beautiful River.

Since time immemorial and prior to first contact, the Maliseet people have engaged in a variety of activities within our traditional territory, including fishing. We have proven rights to hunt, trap, fish, and engage in other harvesting and traditional practices within this territory. The fish and fish habitat of our traditional waters have long been, and continue to be, of central significance to our people. Not only for subsistence and economic purposes, but also for sacred purposes. We also have asserted treaty and Aboriginal rights to our lands, waters and resources, including Aboriginal title. None of these rights were ever surrendered.

In New Brunswick, Peace and Friendship Treaties were entered into with the Maliseet, Mi'kmaq and Passamaquoddy First Nations prior to 1779. Specifically, the Maliseet entered into the 1749, 1752, 1760/61 Treaties. These Peace and Friendship Treaties encouraged peaceful relations between the parties. Their sole purpose was to end hostilities and encourage cooperation between the British and First Nations. Our Treaties did not involve or purport to involve the ceding or surrendering of our rights to lands or resources that were traditionally used or occupied. Our Peace and Friendship treaties do, however, recognize the right of the Maliseet to "not be molested in their persons, Hunting, Fishing and Planting Grounds nor in any other Lawful Occasions".

These rights are constitutionally guaranteed though section 35 of the *Constitution* and have been strengthened by the Supreme Court of Canada's decisions in *R v Sparrow,*[5] *Marshall*[6] and *Tsilhqot'in Nation v British Columbia*.[7]

Despite widespread legal support for Indigenous rights to fish, hunt and gather for food, social and ceremonial purposes,[8] and the Supreme Court of Canada having confirmed the Maliseet right to commercially fish,[9] we continue to face issues with practicing these rights. Our lands, water and resources have been increasingly exploited to the point that they are in serious danger. Our lands, waters and resources have been and continue to be heavily impacted

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[5] *R v Sparrow*, [1990]1 SCR 1075 ("*Sparrow*")
[6] *Marshall, supra* note 4 held that the Peace and Friendship Treaties granted the Mi'kmaq and Maliseet the right to fish for a "moderate livelihood."
[7] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 ("*Tsilhqot'in*")
[8] e.g., see *Sparrow*, *supra* note 5
[9] *Marshall*, *supra* note 4

through settlement, resource extraction such as forestry, fishing and agriculture, environmental degradation, and highly restrictive government regulations.

As a result of the cumulative effects of these projects and activities in our traditional territory, there are few accessible areas remaining for traditional uses and valued resources. This has caused significant challenges to the Maliseet people, our economy and our culture. Fish stocks, specifically, have dwindled and our culture and traditions have suffered a severe blow.

For example, the Saint John River has been closed for Atlantic Salmon fisheries since 1996. The Maliseet people are culturally connected to Atlantic Salmon and it has been a staple in our diets since time immemorial. However, we are no longer legally able to harvest it as a result of ecosystem pressures due to few accessible areas remaining for traditional uses and valued resources and impacts from hydroelectric dams (Grand Falls, Tobique, Aroostock, Beechwood and Mactaquac). The mismanagement and closure of this fishery has a serious and unfair impact on us and impairs our rights.

In fact, the Maliseet have faced the threat of salmon fishery closure since 1841, when a comment by Moses Perley (provincial commissioner of Indian Affairs) stated (regarding the Maliseet at Tobique), "The destruction of the Salmon Fishery would perhaps induce the Indians to adopt more settled habits of industry, and pay more attention to the cultivation of the soil than they do at present."[10]

To add to this issue, the Maliseet are now facing a number of further potential resource development projects, which will further degrade the Saint John River and its watershed. The projects include, but are not limited to: the Sisson Project (a tungsten and molybdenum mine which will require a fish offset plan), the Energy East Project (a pipeline that will include transecting multiple water crossings in our traditional territory) and the Mactaquac Project (a review of the existing Mactaquac Dam, which will require, at the least, an upgraded fish passageway). All of these potential major projects will be located within traditional Maliseet territory.

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[10] Andrea Bear Nicholas. The Role of Colonial Artists in the Dispossession and Displacement of the Maliseet, 1790s-1850s. Journal of Canadian studies, 49:2, pg. 25-86

If these resources pressures continue, we will no longer be able to viably exercise our Aboriginal and treaty rights.

Despite these challenges, we the Maliseet are strong and resilient and our culture, traditions and way of life, have persisted into the present. We continue to have a deep spiritual connection to our territory and continue to hunt, trap, fish, and engage in other harvesting and traditional practices in our traditional territory. But, rather than protect our rights and fisheries, the *Act* only appears to make our problems worse.

The Fisheries Act

The Maliseet have lived in the valley of the Saint John River and its tributaries since time immemorial. The river has sustained us through thousands of years by providing Atlantic Salmon, Sturgeon, Striped Bass, American Eel, Gaspereau, Brook Trout and Yellow Perch as well as other fish and wildlife species. The Saint John River and its tributaries also provided a river highway system throughout our lands (something that is no longer available, since the construction of the dams).

After the settlement of Europeans in our territory, in what is now called New Brunswick, the river underwent a large amount of change. There are now several dams that are barriers to fish movements and human navigation. There are large towns and cities and many industries that use the Saint John River, resulting in changes to fish. Extensive logging since the 1700s and later land clearing for agriculture have changed the landscape and affected the water quality of the Saint John River. Still, the Maliseet use the river and work toward improving it for future generations of Maliseet and other people.[11]

The *Act* is important to the Maliseet because it is the foundation for the protection of fish and fish habitat in the river system. Without consultation with the Maliseet, or scientists within DFO,[12] the federal government in 2012 and 2013 changed the *Act* and removed 'protection

[11] Kidd, S.D., R.A. Curry and K.R. Munkittrick, Eds. 2011. The Saint John River: A State of the Environment Report. Canadian Rivers Institute, University of New Brunswick Fredericton, New Brunswick, Canada. 8 + 175p

[12] Hutchings, J.A. and J.R. Post. 2013. Gutting Canada's Fisheries Act: No Fishery; No Fish Habitat Protection. Fisheries 38: 497 – 501 ("Hutchings & Post")

from harm' for many species of fish and their habitats. This Review is an opportunity for the Maliseet to contribute to legislation that directly affects their lives and livelihoods.

The *Act* needs to be completely overhauled. The amendments to the *Act* completely reduced the scope of protection for fish and fish habitat so that there is virtually none.

We never gave up our rights to our lands, waters and resources. We continue to have a deep relationship with our lands, waters and resources. Our culture, traditions and way of life have persisted into the present and we continue to exercise our Aboriginal and treaty rights over and engage in traditional practices on our traditional territory. However, the exercise of our Aboriginal and treaty rights and the persistence of our culture, traditions and way of life into the future depends on the continued existence of an intact land base that we can access. Our lands, water and resources have experienced considerable impacts and are in serious danger. We are being left with less and less territory over which to exercise and assert our Aboriginal and treaty rights. Without protections for fish and fish habitat, the lands, waters and resources that we depend on to exercise and assert our Aboriginal and treaty rights will continue to diminish until we are eventually left with nothing.

The *Act* needs to be amended to better protect our Aboriginal and treaty rights. The *Act* needs to reflect the importance and strength of our Aboriginal and treaty rights and the significance of potential impacts of further development on these rights.

Not only do current provisions need to be amended, but modern safeguards need to be added to improve and ensure fish and fish habitat protection throughout Canada. However, given the limit of time and funding we were provided to review and provide written submissions on the *Act*, we cannot focus on every amendment that is needed. Instead, we have chosen to focus on those amendments that are most important to the Maliseet, such as we can identify them now. Below are our recommended amendments to improve fish and fish habitat protection throughout our traditional territory, which are outlined at a high level. We expect in the coming weeks to meet with DFO to directly engage on recommendations. We trust that DFO will honour its constitutional obligation to meaningfully consult with Indigenous peoples prior to making any legislative changes.

Recommendations

Bring Back Prohibition on Harmful Alteration, Disruption or Destruction of Fish Habitat

Section 2(2) of the *Act* prohibits "serious harm to fish" which is defined as "the death of fish or any permanent alteration to, or destruction of, fish habitat." Before the amendments, section 35(1) of the *Act* prohibited "any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat" ("HADD").

The new term "serious harm" and its description as "the death of fish or any permanent alterations to fish habitat, or destruction of fish habitat" was a significant change to the *Act.* This is because both detrimental effects on fish that are not fatal, or any temporary and/or reversible alteration of fish habitat (even after decades) is not considered serious harm. This could include several small but cumulative impacts to fish and fish habitat which taken together, could have serious effects on fisheries.[13]

In section 6 of the *Act*, factors are listed that must be taken into account in the formulation of regulations under section 35, in the exercise of power outlined in the *Act*, or with regards to harm to fish. One of these factors is the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries.[14]

From a scientific perspective, it is much easier and more defensible to identify, quantify, and summarize fish use of different habitat types (in line with the previous HADD approach) than it is to estimate productivity of open and/or migratory populations of fish. For example, little is known about the at-sea life of Atlantic Salmon; estimated abundance is based on escapement and return data, which often are mismatched. Even estimating the productivity for a single species in a small lake is difficult, and is unlikely to be undertaken by an industrial proponent in a scientifically rigorous way because there are too many confounding variables. The requirement to consider species-specific contributions to the productivity of commercial, recreational or Aboriginal fisheries similarly places a high burden of proof on DFO and

[13] Hutchings & Post, *supra* note 12

[14] DFO (Fisheries and Oceans Canada). 2013. Fisheries Protection Policy Statement. Ecosystems Programs Policy. Ottawa, On

regulators, and may have contributed, along with recent reductions in DFO staff, to a lack of enforcement actions being taken.[15]

West Coast Environmental Law ("WCEL")[16] has additionally argued that there are over 40 years of case law supporting decisions on HADD, while there is none to guide judicial decisions based on the new *Act*. In contrast to measures of productivity, quantitative measures of fish habitat provide a solid foundation against which future measures can be compared to evaluate impact. For these reasons, restoration of the HADD provisions in a new *Act* is fundamental to the effective protection of all fish and fish habitats**.**

- **We recommend reinstating the HADD prohibition, and removing the recently introduced prohibitions against serious harm to commercial, recreational and Aboriginal fisheries (including the term and definition for "serious harm"). As an extension of the HADD prohibition, we recommend that clear and defined enforceable criteria for determination of HADD offenses are incorporated into the *Act*.**

Protect All Fish and Fish Habitat, Not Just Ones that Support a Current Fishery

Section 35(1) of the *Act* provides that "[n]o person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery". The *Act* only prohibits serious harm to fish that are part of, or support, a commercial, recreational or Aboriginal fishery.

The change to limit prevention of serious harm only to fish species that make up a commercial, recreational or Aboriginal fishery and fish that directly support those fisheries has resulted in the removal of protections for many fish species. Hutchings & Post[17] estimate that 80% of the 71 groups of freshwater fish listed in the *Species at Risk Act* ("SARA") registry as being 'at risk of

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[15] Hutchings & Post, 2013, *supra* note 12; West Coast Environmental Law and Forum for Leadership on Water. 2016b. Habitat 2.0; a new approach to Canada's Fisheries Act. Linda Nowlan and seven assistants. 35p. Brief to the Parliamentary Standing Committee on Fisheries and Oceans, November 2016. Available at: www.WCEL.org ("WCEL 2016b)

[16] WCEL 2016b, *supra* note 15

[17] *supra* note 12

extinction' in Canada would not be considered species that constitute commercial, recreational or Aboriginal fisheries or fish that support commercial, recreational or Aboriginal fisheries.

In addition, these selective protections mean that management of fisheries and aquatic resources will not be based on a more inclusive ecosystem approach, but instead on site-specific and species-specific requirements, including for non-native species, where they support a commercial, recreational or Aboriginal fishery. A fish that is protected in an area where a fishery is present may not be protected if it moves to an area where no fishery is present.[18] Protecting fish habitat only where there is already a commercial or Aboriginal fishery for those particular species (and the species they depend on) is far too limited. Areas where there is no commercial fishing happening today, or no current Aboriginal harvesting, will not be protected. Also, only the species currently being harvested (or those they depend on) are protected. For Indigenous people, this means that fishing rights are 'frozen in time'.

- **We recommend that the *Act* be changed so that *all* fish and fish habitat are protected, not just those that make up or support a commercial, recreational or Aboriginal fishery.**

Limit the Minister and Governor in Council`s Discretionary and Regulatory Powers

Under the *Act*, the Minister has unfettered discretion. Sections 35 and 36 of the *Act* permit the Minister and Governor in Council to create regulations exempting works, undertakings, activities, deleterious substances and water bodies from the protections of the prohibition against serious harm to fish. There is no guidance on how the Minister and Governor in Council will exercise this discretion and what factors need to be considered in exempting certain works, undertakings, activities, deleterious substances and water bodies from serious harm to fish.

- **There needs to be a limit to the discretion of the Minister and Governor in Council in making these regulations and at the very least, requirements for what the Minister and Governor in Council are required to consider in making such regulations.**

[18] Hutchings & Post, *supra* note 12

Bring Back Environmental Assessment Triggers

Before the changes to the *Act*, environmental assessments were triggered by authorizations under the *Act*.[19] The updated *Act* should include triggers for an environmental assessment when authorization is required under (the new equivalents of) sections 32, 35 or 36 of the *Act*.

- **We recommend that environmental assessments be done for all works that require authorization and have the potential to affect fish and fish habitat.**

Change the Definition of Aboriginal Fishery to Include Commercial Fishing

The amendments changed the definition of Aboriginal in relation to fishery so that it is now defined as fish "harvested by an Aboriginal 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 Aboriginal organization."[20] This definition narrows the definition of Aboriginal fishery to a food, social and ceremonial fishery or one recognized in a modern land claims agreement and explicitly excludes commercial fisheries. This means that Aboriginal commercial fisheries will not be protected by the *Act*'s prohibition on harming fish habitat.

- **The definition of Aboriginal in relation to fishery should be amended to capture commercial fisheries. Commercial fishing is a proven Aboriginal or treaty right for some Indigenous people. Maliseet treaty rights to fish commercially for a "moderate livelihood" were recognized by the Supreme Court of Canada in *Marshall*[21] *I* and are protected by section 35 of the *Constitution*. These rights should have the same protections under the *Act* as other Aboriginal and treaty rights.**

Create a Purpose to the Act that Includes Consideration of Aboriginal and Treaty Rights

The existing and previous versions of the *Act* have no defined purpose, a feature usually found in legislation. The only thing close to a purpose is section 6 of the *Act,* which sets out a list of

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[19] *Canadian Environmental Assessment Act*, SC 1992, s 5(1)(d)
[20] *Act*, *supra* note 1 section 2(1)
[21] *Marshall*, *supra* note 4

factors that must be considered before certain powers are exercised under the *Act*. The factors that need to be considered are: contribution of relevant fish to the ongoing productivity of commercial, recreational and Aboriginal fisheries; fisheries management objective; measures or standards to avoid, mitigate or offset serious harm to fish; and the public interest. These factors are only to be considered once it is determined a regulation will be made or Ministerial power will be exercised. In other words, the factors only need to be considered in *certain* cases. Further, although the factors make mention of Aboriginal fisheries, there is nothing substantive requiring decision makers to consider Aboriginal and treaty rights.

Several suggestions toward a purpose for the *Act*, made by interested parties, include endorsement of sustainability principles, such as the ecosystem approach, the precautionary principle, ecosystem-based management, conservation, transparency and accountability, scientific evidence-based decision making, and the potential impact of fishing on the ecosystems that support fisheries.[22] We support these recommendations to provide a fundamental set of purposes for a new *Act* and also suggest that the purpose include the consideration of Aboriginal and treaty rights.

The protection of Aboriginal and treaty rights in the *Act* is wholly inadequate. The *Act* currently has nothing directing that the exercise of discretion be executed in a manner that gives due consideration and allows for full expression of Aboriginal and treaty rights. As a result, Aboriginal and treaty rights are vulnerable to infringement.

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[22] West Coast Environmental Law. 2016a. Scaling up the Fisheries Act: restoring lost protections and incorporating modern safeguards. Brief to the Parliamentary Standing Committee on Fisheries and Oceans, November 2016 ("WCEL 2016a"); Linda Nowlan and Anna Johnston, authors. 15p. Available at: www.WCEL.org; World Wildlife Fund Canada. 2016. Elizabeth Hendriks, Brief to the Parliamentary Standing Committee on Fisheries and Oceans, November 2016. Available from the author at www.wwf.ca; Ecology Action Centre. 2016. Briefing on Fisheries Act modernization and including modern safeguards, with a focus on stock recovery and population rebuilding. 9p. Ecology Action Centre, 2705 Fern Lane, Halifax, NS. Brief to the Parliamentary Standing Committee on Fisheries and Oceans. November 2016. Available at: www.ecologyaction.ca

- **The *Act* needs to explicitly require the consideration and protection of Aboriginal and treaty rights as an overall purpose of the *Act* as well as require the consideration of traditional knowledge.**

Provide for Co-Management with Indigenous Peoples

The right to self-government, or sovereignty, is an inherent right that is part of our identity as Maliseet. Before the coming of Europeans, we were organized as self-governing societies. We did not give up our right to self-government. One way in which Indigenous peoples may exercise jurisdiction over their lands and resources is through co-management arrangements relating to land and resource management. In order to have the respectful relationships necessary for the ongoing project of reconciliation, and to reflect the principle of free, prior and informed consent found in UNDRIP, Indigenous people need to be partners with Canada in the decision-making stage of projects.

There is an opportunity under the *Act* to recognize the laws of Indigenous peoples and Indigenous decision-making. A framework that promotes reconciliation is one that will explicitly allow for jurisdiction to be shared over the protection of lands and waters with Indigenous peoples. This can be done through co-management and collaborative decision-making with Indigenous peoples. This needs to be based on nation-to-nation relationship, reconciliation and free, prior and informed consent.

This is particularly true for the Maliseet, who assert Aboriginal title. The Supreme Court of Canada in *Tsilhqot'in*[23] has stated that the right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain consent of Aboriginal title holders and that projects begun without such consent risk being cancelled. This needs to be recognized by Canada.

Those working with the Maliseet need to understand how the Maliseet, the decision-maker representing the traditional territory of the Maliseet in New Brunswick, engages in decision-making that will impact future generations.

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[23] *Tsilhqot'in, supra* note 7

This approach necessarily means that the revised *Act* will be required to re-direct some of the decision-making authority to Indigenous peoples. It is the Maliseet and other Indigenous peoples that should hold jurisdiction to consent to projects within our territories which or could significantly affect our Aboriginal and treaty rights.

Currently, the Maliseet have Aboriginal Fisheries Strategy ("AFS") Agreements which are intended to provide a framework for management of fishing by Indigenous groups for food, ceremonial and social purposes. They are intended to provide opportunities for Indigenous groups to participate in the management of fisheries. They can also contain opportunities for co-operative management. They are supposed to set out jointly developed fishing plans. But, the AFS Agreements are to manage programs designed by DFO. They lay out such things as the conditions of commercial and communal licences and set out the location, date and times where the fishing is to take place, the species to be fished, the fishing gear to be used. More is needed and we need to be actual partners in decisions related to fish and fish habitat.

- **We recommend that the *Act* be amended to provide for co-management and collaborative decision making with Indigenous people. Both the federal Minister and affected Indigenous nations must have an opportunity to approve and consent to any project affecting fish or fish habitat.**

One way to promote collaboration through the *Act* is via section 4.1(1). Section 4.1(1), which allow for the Minister to enter into agreements with the province to further the purpose of the *Act* and to facilitate co-operation (joint action in areas of common interest, reducing overlay between respective programs and harmonisations); facilitate enhanced communication between parties, including exchange of scientific and other information; and facilitate public consultation or entry into arrangements with third party stakeholders. This section could be expanded to allow for similar agreements with Indigenous peoples.

- **We recommend that s. 4.1(1) (or its equivalent) be expanded to promote agreements with Indigenous peoples.**

Provide for Essential Fish Habitat that Cannot be Destroyed

There should be in the *Act*, some provision for the identification of "Essential Fish Habitat"; areas that are of vital importance to certain ecosystem components or fish communities or individual fish species where no HADD could be authorized. This would protect some habitats that are extremely important to the success or failure of some fish species and/or marine mammals. There should be specific processes for Indigenous peoples to be involved in the identification of an "Essential Fish Habitat".

- **We recommend that the *Act* provide for the identification, with Indigenous peoples, of Essential Fish Habitat where no HADD could be authorized, in order to protect areas of vital importance.**

Consider Cumulative Effects

Cumulative effects are not mentioned at all in the *Act.* Assessment of cumulative effects is extremely important, if not the most important. Not only do project-level concerns of individual works need to be looked at, but the bigger picture also needs to be looked at. Reviews need to look at all factors that involve fish and fish habitat and how the project interacts with and will add to the already existing impacts from already existing projects and activities in the area. Reviews also need to look at how the project fits into the projects currently being developed in the area and how will it fit into future projects developed in the area. There also needs to be regional land use planning that respects Indigenous jurisdiction, knowledge and values. Indigenous groups need to be involved in the development of both of these.

This is all the more serious when it comes to the Maliseet. We never ceded or surrendered any of our rights to lands or resources, as stated previously. But, due to the cumulative effects of projects and activities in our traditional territory, there are few accessible areas remaining for traditional uses and valued resources. This has caused significant challenges to the Maliseet by effecting our economy and culture.

Our use of lands and resources and our culture, traditions and way of life continues to be threatened due to a very large number of existing land fragments. However, despite our

Aboriginal title and the continual threats to our lands and resources, cumulative effects are rarely assessed, or not assessed at the adequate level.

By not taking cumulative effects more seriously, decisions are being made without acknowledging overall project impacts. This is allowing piecemeal infringement and ultimately, extinguishment of Aboriginal and treaty rights.

- **Cumulative effects to fish and fish habitat should be managed in an effective way under the *Act*. For example, one method could be to require that a federal environmental assessment that addresses cumulative impacts is triggered when HADD is likely to occur.**

- **The *Act* should include provision for improved monitoring of transparent fisheries management and fish habitat decision making with data stored in publicly available databases. Especially if data are collected and analyzed at regional scales, publicly available data could facilitate rapid and accurate assessment of the potential for cumulative effects to occur.**

Provide for Better Enforcement and Monitoring

The monitoring and enforcement under the *Act* is wholly inadequate. The amendments to the *Act* included significant reductions in the funding available for fish science, monitoring and enforcement. Under the AFS agreements, some of our communities have provisions for the Guardian Program as well as Monitoring and Enforcement Protocol. However, the programs under the AFS agreements do not provide the communities with any actual say or authority and the monitoring and enforcement under the *Act* falters in the monitoring of fish and fish habitat.

- **More monitoring and enforcement powers needs to be allocated to Indigenous groups and resources/capacity support needs to be provided for Indigenous people to effectively participate in monitoring and enforcing the *Act*.**

Create a Public Registry

Right now, there is no public registry for works, undertakings and activities that are seeking authorization under the *Act*.

- **There should be a public database for authorizations, applications and decisions for works, undertakings and activities seeking authorization. This will make the process more transparent and allow public engagement.**

Amend the Duty to Notify

Under section 38 of the *Act*, there is a duty to notify an inspector when there is a serious harm to fish that is not authorized under the *Act*, or when there is a serious and imminent danger of such an occurrence. However, there is no requirement for anyone to notify other parties that may be affected by such serious harm, such as Indigenous groups. Yet, it is Indigenous groups that will likely be one of the most affected parties and it is very possible and likely that they will never be notified of serious harm to their Aboriginal and treaty rights.

- **The *Act* should be amended so that Indigenous groups whose Aboriginal and treaty rights are, or likely will be, affected are notified by the Minister of works that cause or are likely to cause a serious harm to fish and fish habitat.**

Amend the Environmental Damages Fund

The changes under the *Act* set up an Environmental Damages Fund, into which fines under the *Act* are deposited. Indigenous peoples have unique rights and responsibilities and are specific resource users with fisheries that may be over looked by fund administrators in favor of larger commercial or recreational fisheries.

- **The *Act* should be amended so that a fair portion of the Environmental Damages Fund proceeds go to Indigenous peoples when Aboriginal and treaty rights are affected.**

Amend the Authorization Process

Right now, under the *Act,* the proponent is responsible for assessing their own case and avoiding and mitigating serious harm to fish that are part of or support commercial, recreational and Aboriginal fisheries. When the proponent self-determines they are unable to completely avoid or mitigate serious harm to fish and fish habitat, only at that point will they require authorization under section 35(2). This self-assessment process lacks rigour and is prone to misuse both intentional and unintentional.

Further, the time limits for authorizations were meant to limit the length of time that a given regulatory environmental review process can take, to benefit proponents, and to ensure that such reviews do not hamper economic growth. It has been shown that there was no evidence that *Act* reviews completed in the 10 years prior to the changes to the *Act* suffered from inordinate delays or backlogs, and that most *Act* reviews during that earlier period were likely completed within the time limits set out in the 2012-2013 changes to the *Act*.[24]

- **The authorization process should require authorizations for all projects that are likely to cause HADD to fish and fish habitat. It should not be left up to the proponent to determine whether this is likely to occur.**

Change the Definition of Fish Habitat

WCEL[25] recommended an updated definition of fish habitat to mean "any area on which fish depend directly or indirectly in order to carry out their life processes, including spawning grounds, nursery areas, rearing areas, food supply areas, migration areas, environmental flows and any other areas on which fish depend directly or indirectly".

- **We concur with the WCEL definition of fish habitat, and with the inclusion of "environmental flows" in the definition to address the many disruptive flow regimes associated with human alterations of rivers and streams.**

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[24] de Kerckhove, D.T., C. K. Minns, and B. J. Shuter. 2013. The length of environmental review in Canada under the Fisheries Act. Canadian Journal of Fisheries and Aquatic Sciences 70: 517–521

[25] WCEL 2016a, *supra* note 21; WCEL 2016b, *supra* note 15

Environmental flows are vital to the natural functioning of riverine ecosystems, and changes to flow regimes are also likely to occur with climate change. Such a definition would therefore address potential impacts from both human activities and the resulting threats to fish, such as climate change.

Create Mandatory Fish Population Recovery Targets

Hutchings & Post[26] review the many management action delays and lack of specific targets that are common under the *Species at Risk Act*. Identifying and managing depleted or over-fished fish populations could and should be linked to permitting requirements under the *Act*. The measures to accomplish this need to be community-based, transparent and congruent with such measures taken by other jurisdictions both within Canada and among those countries that share international fish stocks with Canada.

- **The *Act* should mandate fish population recovery targets for depleted or over-fished fish stocks such that those stocks or species do not fall into greater threat and collapse into the regime of the *Species at Risk Act*.**

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[26] *supra* note 11

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