Legislative Summary LS-551E

BILL C-45: AN ACT RESPECTING THE SUSTAINABLE DEVELOPMENT OF CANADA'S SEACOAST AND INLAND FISHERIES

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LEGISLATIVE HISTORY OF BILL C-45

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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

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BILL C-45: AN ACT RESPECTING THE SUSTAINABLE DEVELOPMENT OF CANADA'S SEACOAST AND INLAND FISHERIES[*]

BACKGROUND

Bill C-45, an Act respecting the sustainable development of Canada's seacoast and inland fisheries, was tabled in the House of Commons on 13 December 2006. The bill repeals the current *Fisheries Act*, which has not undergone any significant overhaul since it came into force in 1868[(1)] and is thus one of the oldest statutes still in use. The *Fisheries Act* primarily deals with the proper management and control of fisheries, the conservation and protection of fish, the protection of fish habitat and the prevention of pollution.

In its 2005-2010 Strategic Plan,[(2)] Fisheries and Oceans Canada (DFO) states that one of its priorities over the next five years is "to develop a new governance model for fisheries management, including proposals to modernize the *Fisheries Act*." One of the five stated goals of DFO's Fisheries Renewal Initiative (which is part of the Strategic Plan) is to establish conservation and sustainable use of the fishery.[(3)] Many of the changes sought through the Fisheries Renewal Initiative may be facilitated by Bill C-45.

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) The *Fisheries Act* has, however, been amended on several occasions over the years to adapt to evolving management of fisheries and to rectify problems in the Act.

(2) Fisheries and Oceans Canada, *2005-2010 Strategic Plan: Our Waters, Our Future*, Ottawa, 2005, http://www.dfo-mpo.gc.ca/dfo-mpo/plan_e.htm#5a3 (accessed on 20 February 2007).

(3) The other goals are to: promote the economic viability of the fishery; provide greater stability and transparency respecting access and allocation; improve fisheries management decision-making processes; and manage the fishery consistent with Aboriginal and treaty rights.

There has been at least one previous legislative attempt to rewrite the *Fisheries Act*. In October 1996, the then Minister of Fisheries and Oceans, the Honourable Fred Mifflin, introduced Bill C-62. The bill was criticized for potentially promoting "privatization" of fisheries through the establishment of partnering agreements, and it died on the *Order Paper* when the 1997 general election was called.

With Bill C-45, the government intends to modernize fisheries management and enshrine in law principles such as the conservation and protection of fish and fish habitat, and the stability of access to fisheries resources. While the bill introduces important new provisions, such as those dealing with the creation of the Canada Fisheries Tribunal, it retains many of the provisions of the existing *Fisheries Act*.

Bill C-45 specifies the legal basis for the federal government to enter into fisheries management agreements with organizations representing licence holders or other groups of people to develop conservation programs and harvesting plans, manage capacity, licensing and compliance, and set up funding arrangements. The bill also updates the legal basis for the protection of fish habitat, and gives the Minister the authority to conclude agreements with provinces in several areas covered by the Act.

DESCRIPTION AND ANALYSIS

Bill C-45, which may be cited as the *Fisheries Act, 2007* (clause 1), is organized into seven parts. Part 1 deals with the management and control of fisheries. It allows the Minister to stabilize access and allocation in fisheries, issue licences, conclude agreements with groups for the purpose of fisheries management, and issue fisheries management orders. Part 2 provides for the conservation and protection of fish and fish habitat. Part 3 provides for the control and management of aquatic invasive species. Part 4 deals with administration and enforcement of the statute. Part 5 establishes the Canada Fisheries Tribunal (Tribunal) and sets out a system of sanctions for fisheries violations to be administered by that Tribunal, which will also consider appeals of licence decisions. Part 6 provides for regulations and other related matters required for the administration of the statute. Part 7 sets out transitional provisions, consequential and coordinating amendments, and repeals certain other statutes.

A. Introductory Clauses

1. Preamble

As is increasingly the case with modern legislation, the bill opens with a preamble. The preamble to Bill C-45:

- sets out Parliament's commitment to:
  - conserving and protecting fish habitat,
  - managing fisheries in a sustainable manner, and
  - maintaining the public character of the management of fisheries and fish habitat;
- states the intent of Parliament to provide a predictable, effective, and transparent legislative framework that is applied in cooperation with the provinces and bodies established under land claims agreements and is consistent with Canada's international rights and obligations;
- recognizes the importance of stable access to fisheries resources to ensure the economic viability and well-being of fishing enterprises and the communities that depend on fisheries;
- recognizes that fishers (or fishermen)[*] – Aboriginal, commercial or recreational, and their organizations – as well as others should participate more directly in decisions that affect the management of their fishery and the future of fisheries in Canada;
- recognizes the constitutional protection of existing Aboriginal and treaty rights and the importance of fisheries to many Aboriginal communities; and finally
- recognizes the necessity of deterring illegal fishing.

2. Purpose (Clause 2)

The purpose of the bill is "to provide for the sustainable development of Canada's seacoast and inland fisheries, through the conservation and protection of fish and fish habitat and the proper management and control of fisheries."

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[*] The bill uses the word "fisher" rather than "fisherman" despite the widespread use of the latter. The *Oxford American Dictionary of Current English* and the *Oxford English Dictionary* define "fisher" as an archaic form of the word "fisherman." Fisher primarily describes the marten, an animal that catches fish for food. For the remainder of this document, the words "fisherman" or "fishermen" will be used.

3. Definitions (Clause 3)

Many definitions from the current *Fisheries Act* are retained, either intact or partially modified, in Bill C-45. A few additional definitions that reflect the new elements of the bill are also included. The term "holder" is now defined to mean "any of the following that holds a licence: (*a*) a person; (*b*) a fishing vessel [including the owner or charterer of the vessel]; or (*c*) an organization." It should be noted that the term "organization" is not further defined.

The definition of "fish" has been slightly altered, but still encompasses all marine animals, including mammals such as seals and whales.(4)

4. Her Majesty (Clause 4)

The bill is binding on Her Majesty in right of Canada or a province, which means that the federal and provincial governments are subject to the provisions of the legislation.

5. Territorial Operation (Clause 5)

Clause 5 establishes that the bill applies not only in Canada but also to Canada's exclusive economic zone (EEZ) and to Canadian fishing vessels and Canadian citizens on any area of the sea except for the territorial sea or internal waters of another state. This clause differs from the territorial operation clause of Bill C-62, which extended the application of the bill to sedentary species residing on Canada's continental shelf.

6. Application Principles (Clause 6)

The bill prescribes seven principles to which every person who is engaged in the administration of the statute and regulations must adhere. These principles must therefore be applied to all decisions and administrative actions taken under the authority of the Act by all persons including the Minister, DFO officials, staff from other federal departments such as Environment Canada, as well as provincial ministers responsible for fisheries and their staff. Persons engaged in the administration of the statute and the regulations must:

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(4) The inclusion of seals within the category of "fish" stems from a long tradition, possibly explained by the ruling of the Church of Newfoundland that seals were fish, "so that even the most pious Newfoundlander can eat seal meat on Friday or during Lent." See D. M. Lavigne and K. M. Kovacs, *Harps and Hoods: Ice-Breeding Seals of the Northwest Atlantic*, University of Waterloo Press, Waterloo, 1988, p. 104.

- take into account the principles of sustainable development and seek to apply an ecosystem approach in fisheries management and in the conservation and protection of fish and fish habitat;

- seek to apply a precautionary approach for the conservation and protection of fish or fish habitat;

- take into account scientific information in the management of fisheries and in the conservation and protection of fish and fish habitat;

- seek to manage fisheries and conserve and protect fish and fish habitat in a manner consistent with the constitutional protection for existing Aboriginal and treaty rights;

- consider traditional knowledge, to the extent that it has been shared, in the management of fisheries and the conservation and protection of fish and fish habitat;

- endeavour to cooperate with other governments and with bodies created under land claims agreements; and

- encourage Canadians' participation in decision-making that affects the management of fisheries and the conservation and protection of fish or fish habitat.

With respect to the "precautionary approach," clause 6(*b*) states that the Minister and every person engaged in the administration of this Act or the regulations must "seek to apply a precautionary approach such that, if there is both high scientific uncertainty and a risk of serious harm, they will not use a lack of adequate scientific information as a reason for failing to take, or for postponing, cost-effective measures for the conservation or protection of fish or fish habitat that they consider proportional to the potential severity of the risk." The terms "precautionary approach" or "precautionary principle" have been used in other statutes such as the *Oceans Act*(5) and the *Canadian Environmental Protection Act, 1999*.(6) The preamble to the *Oceans Act* acknowledges that "Canada promotes the wide application of the precautionary approach to the conservation, management and exploitation of marine resources in order to protect these resources and preserve the marine environment," and describes the approach as "erring on the side of caution."(7) In its preamble, the *Canadian Environmental Protection Act, 1999* acknowledges Canada's commitment "to implementing the precautionary principle that,

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(5) S.C. 1996, c. 31.

(6) S.C. 1999, c. 33.

(7) *Oceans Act*, section 30(c).

where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

7. Federal-Provincial Arrangements

Parliament has exclusive legislative authority to make laws regarding seacoast and inland fisheries on the basis of section 91(12) of the *Constitution Act, 1867*, while provincial legislatures have exclusive authority to make laws in relation to property and civil rights in the province pursuant to section 92(13). The federal power over fisheries is broad but must be "construed to respect the provinces' power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*."(8) In order to achieve certain objectives, it is possible for governments to transcend the traditional constitutional division of legislative powers through various federal-provincial arrangements.

Currently, the federal government has various arrangements with the provinces, including intergovernmental agreements and administrative delegation, on matters related to fisheries. For instance, the federal government and the Province of British Columbia share responsibility for regulating aquaculture under the Canada/British Columbia Memorandum of Understanding on Aquaculture Development, signed on 6 September 1988. Similarly, the federal government has delegated administrative responsibilities to provinces such as Alberta, Ontario and Quebec for fisheries within their jurisdiction.(9) Bill C-45 provides an overarching legal framework for such intergovernmental arrangements.

a. Agreements with Provinces (Clauses 7-10)

Clause 7 authorizes the Minister to conclude agreements with provinces to "further the purpose of this Act." As discussed earlier, the purpose of the bill as set out in clause 2 is to provide for the sustainable development of Canada's seacoast and inland fisheries, through conservation and other means. The Minister, therefore, has authority to conclude agreements with provinces in a number of areas covered by the bill, including fisheries management.

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(8) *Ward* v. *Canada (Attorney General)*, [2002] 1 S.C.R. 569, para. 42.

(9) Fisheries and Oceans Canada, *Elements of a New Fisheries Act: Discussion Document*, 2006, http://www.dfo-mpo.gc.ca/far-rlp/table_e.htm (accessed on 16 February 2007).

The bill provides that regulations may be made to establish the conditions under which the Minister can enter into or renew an agreement made pursuant to clause 7. The agreements made under clause 7 must be published by the Minister. Such agreements terminate after five years unless they are renewed by the parties. Either party may terminate the agreement before five years by giving at least three months' notice.

If a federal-provincial agreement states that a provincial law is equivalent to a federal regulation on the same matter, the Governor in Council may, on the recommendation of the Minister, declare that the federal regulation does not apply in that province. Such a declaration may, however, be revoked under certain circumstances (clause 9).

The bill provides that the Minister must present an annual report to Parliament regarding the administration of clauses 7 to 9 of the bill (clause 10).

b. Delegation of Power to the Provincial Minister (Clauses 23-24)

Pursuant to clause 23, the Governor in Council may delegate certain ministerial powers to a provincial minister who is responsible for fisheries. The powers conferred on the Minister under the following provisions of the bill, as well as regulations made under these provisions, may be delegated to the provincial minister:

- Part 1 (Fisheries Management and Conservation and Protection of Fish);
- Part 3 (Aquatic Invasive Species); and
- clauses 15-18 (provision of information and the establishing of certain fees).

8. Programs and Projects (Clauses 11-13)

Clauses 11-13 allow the Minister to provide funding or other forms of financial assistance for initiatives such as:

- supporting business management, harvest management, training and mentoring;
- improving the economic viability of a fishery or the aquaculture sector;
- restoring, improving or conserving fish habitat.

9. Advisory Panels (Clause 14)

The bill gives the Minister the power to establish advisory committees for any purpose of the bill or the regulations made under it. These panels could be standing advisory or occasional *ad hoc* bodies.(10) Clause 14 enshrines an already existing practice into law. Examples of existing panels are the Fisheries Resource Conservation Council (FRCC) on the east coast and the Pacific Fisheries Resource Conservation Council (PFRCC) on the west coast.

10. Information (Clause 15)

Currently, the Minister has the authority to collect information related only to fisheries management issues. The bill expands the power to collect information over and above what is currently required from licence holders, and covers information that the Minister considers is relevant to:

- the conservation and protection of fish and fish habitat;
- the proper management and control of fisheries, and the sustainable development of aquaculture; or
- the prevention of pollution in waters frequented by fish.

11. Fees (Clauses 16-21)

The fee-setting provisions of Bill C-45 mimic those of the *Oceans Act*. They authorize the Minister to set fees for services, the use of a facility, products, rights and privileges (e.g., licences), or regulatory processes or approvals (e.g., harmful alteration, disruption or destruction (HADD) authorization) provided under the bill. These provisions are subject to the *User Fees Act*.(11)

B. Part 1 – Fisheries Management and Conservation and Protection of Fish (Clauses 25-55)

1. Considerations (Clause 25)

In addition to the application principles in clause 6, Bill C-45 also introduces guiding principles that the Minister must take into account in the exercise of his or her licensing powers. They are the following:

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(10) *Ibid*.

(11) *Ibid*. See also S.C. 2004, c. 6.

- the need to conserve and protect fish and fish habitat;
- the compliance of fishermen with the requirements of the Act and the regulations; and
- the importance to fishermen of secure access to fishery resources and of allocation stability.

Clause 25(2) also lists the following optional principles that the Minister may take into account:

- fairness to individuals, between communities and between regions;
- fishermen's adjacency to the fishery;
- fishermen's historical participation in the fishery;
- economic viability in the fishery;
- the best use of fish to fulfil the fishery's economic, social and cultural potential;
- the importance of maintaining public access to the fishery; and
- any other consideration that the Minister considers relevant.

Many of these principles were discussed by the Independent Panel on Access Criteria (IPAC) in 2002. The IPAC, which had been tasked to prioritize access criteria for new fisheries, had explicitly advised that conservation apply to all decisions regarding access. It had also recognized the importance of equity, adjacency, historical dependence and economic viability, which are all included in the bill.

2. Licences and Leases (Clauses 26-36)

Licensing provisions constitute perhaps the section of the bill that makes the most important changes to the current fisheries management regime. Unlike section 7(1) of the *Fisheries Act*, Bill C-45 no longer gives the Minister absolute discretion in issuing licences. Instead, the Minister may make regulations for the application and issuance of licences, including eligibility criteria. Currently, the *Fisheries Act* does not distinguish between the role of the Minister in deciding access to fisheries resources and setting licensing policies, and the routine business of licence administration. The licensing process envisaged in the bill ensures more transparency and accountability, and may also address the complaint that ministerial decisions on licensing and allocations are potentially susceptible to political considerations.

DFO has stated that, under Bill C-45, some licensing policies may become licensing regulations.(12) The department has often used licensing policy to provide directions and guidelines for the exercise of the ministerial discretionary power to issue fishing licences. Some examples of current licensing policies are:

- Owner-operator and Fleet Separation policies in Atlantic commercial fisheries;
- policies for the issuance of communal licences to Aboriginal organizations in coastal fisheries; and
- Area licensing policy in the Pacific commercial salmon fishery.

Bill C-45 emphasizes in clause 30(1) that "A licence confers privileges and not any right of property, and may not be transferred." Under the new regime, licences will be issued by licence officers, designated by the Minister, in accordance with regulations. The licence officers can refuse to issue a licence to an applicant who otherwise meets the eligibility criteria, when he/she has:

- failed to submit required information;
- entered into agreements intended to bypass licensing regulations;
- failed to provide evidence that all the amounts that are required to be paid under a fisheries management agreement have been paid; or
- failed to pay fines, fees or penalties under certain provisions of the bill.

In case of licence denial, the applicant has a statutory right of appeal to the Canada Fisheries Tribunal established by the bill.

According to clause 33, licensing officers can attach certain conditions to the licences that they issue. Such conditions must, however, belong to a class of conditions established by the regulations. The most common classes of conditions could be: the species that may be fished, the fishing zone, the fishing period, the amount that may be fished ("quota"), the gear that may be used, and the reports that must be submitted. The bill makes it a statutory requirement that holders of fishing licences comply with any terms or conditions attached to those licences (clause 33(5)), with the effect that failure to do so constitutes a violation.

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(12) *Ibid*.

The bill addresses at least two long-standing issues under the current fisheries regime. First, under the bill, "trust agreements"[13] can be dealt with by denying a licence to an applicant who has entered into an agreement whose purpose is contrary to the regulations or interim orders (clause 31(*b*)). Further, a license holder who enters into such an agreement after the issuance of his/her licence may be found to contravene the regulations.

Second, the Standing Joint Committee on Scrutiny of Regulations had resolved in a March 2005 Disallowance Report (Report 75) that subsection 36(2) of the *Ontario Fishery Regulations* (OFR) under the *Fisheries Act* be revoked as it "trespasses unduly on the rights and liberties of the subject and makes an unusual and unexpected use of the powers conferred by Parliament." According to the Committee, this provision of the OFR was not authorized by the *Fisheries Act*. Subsection 36(2) of the OFR states: "No holder of a commercial fishing licence shall violate any of the terms or conditions of the licence." The Committee had already presented a report (Report 66) in March 2000 in which it had drawn the attention of the Houses to section 36(2) of the OFR. Bill C-45 addresses the Committee's concerns through a new provision (clause 33(5)) on compliance with the conditions of a licence.

3. Allocations (Clause 37)

Clause 37, pertaining to allocations, is consistent with the bill's recognition, in its preamble, of the importance of stable access to fisheries resources. While retaining the authority to decide access and allocations in coastal fisheries, the Minister will have the power to allocate, for up to 15 years, shares of fish to fleets or groups in commercial, recreational and Aboriginal fisheries. Allocation orders must be published, and they are subject to the principles stated in clause 25. Thus, the Minister will be required to take into account the need to conserve and protect fish and fish habitat, fishermen's compliance with the bill, and the importance to fishermen of secure access to the fishery and of allocation stability. It is important to note that

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(13) "Trust agreements," which are entered into between the licence holder and a processor or other third party, separate the legal title to fishing licences from their beneficial use. Typically, eligible fish harvesters wishing to acquire a licence would approach fish processors for the financing. The processor would agree to finance the purchase on the condition that a trust agreement be drawn up between the two parties whereby the fish harvester would legally transfer to the processor the "beneficial interest" in the fishing licence. These trust agreements are essentially contracts that allow the use and title of the licence to be separated, such that the beneficial interest would be transferred to the processor or any other investor, while the legal title would remain with the fish harvester. In this way, the trust agreement transaction is not illegal because the legal title has not been transferred, only the use. These private contracts are legal instruments, which bind the parties that sign them.

shares are expressed as fractions of the Total Allowable Catch (TAC) and that, while the allocated shares will be stable, the Minister will have the ability to modify the TAC for the fishery.

4. Fisheries Management Orders (Clauses 38-42)

Bill C-45 streamlines the management of fisheries by giving the Minister the power to issue "fisheries management orders." These orders will, with respect to any species of fish or marine plant in any area specified, set close times, fish size and weight limits. Every person to whom the fisheries management orders apply will have to comply.

This direct approach of using ministerial orders replaces "variation orders" in the existing *Fisheries Act*, and is expected to make the process of managing the fisheries more responsive to changing conservation requirements. DFO hopes that it will also allow the current 2,000 pages of federal fisheries regulations to be cut to 300 pages.

5. Fisheries Management Agreements (Clauses 43-46)

The bill enables the Minister to enter into a variety of legally binding arrangements with organizations representing licence holders or other groups of people, for purposes such as furthering the protection and conservation of fish or participating in management decisions. Such agreements increase the role of resource users and their organizations in the management of coastal fisheries (shared stewardship). The agreements could specify:

- the persons to whom the agreement applies;
- harvesting rules;
- supporting programs and services, e.g., scientific research;
- monitoring and other activities to be undertaken by other parties;
- planning structures and processes;
- funding arrangements; and
- provisions to allocate fish to the organization, to fund activities under the agreement.(14)

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(14) Fisheries and Oceans Canada, *Elements of a New Fisheries Act: Discussion Document*.

Funding arrangements may include, among other things, the assignment of a quantity of fish to an organization to defray the cost of its role in the management of the fishery, and the amounts that the persons to whom the agreement applies are required to pay to the organization.(15) In allowing funding arrangements to be covered by fisheries management agreements, the bill addresses issues raised by at least one recent court case. In *Larocque* v. *Minister of Fisheries and Oceans*,(16) the Federal Court of Appeal found that the Minister of Fisheries and Oceans did not have the power to finance DFO's scientific research activities by issuing licences to fish and sell snow crab.(17)

Fisheries management agreements will be negotiated between the Minister and organizations considered to be representative of a class of persons or licence holders. Such agreements will then be ratified by all fishermen to whom the agreement would apply, not just the members of the organization that negotiated the agreement. Compliance with the agreement will become a condition of the licence. Regulations made under clause 55 of the bill will set out the process for entering into fisheries management agreements, including their ratification. The bill requires the Minister to publish every new fisheries management agreement, thus ensuring that such agreements can be reviewed by other fleets and Canadians in general.

Bill C-45 provides the statutory framework that articulates what arrangements such as Integrated Fisheries Management Plans and Joint Project Agreements currently do. The fisheries currently managed by inland provinces under existing delegation arrangements will not be the subject of fisheries management agreements.

6. Nisga'a Annual Fishing Plan (Clause 47)

Clause 47 concerns the Nisga'a annual fishing plan, as defined in the Fisheries Chapter of the Nisga'a Final Agreement. The Nisga'a First Nation is located in the Pacific Northwest of British Columbia along the Nass River, which is the third-largest salmon-producing river in British Columbia. The Nisga'a Final Agreement, initialled in 1998, recognizes the Nisga'a right to self-government. The agreement also determines the Nisga'a salmon allocation in the northern salmon fishery.

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(15) *Ibid*.

(16) 270 D.L.R. (4th) 552 (Federal Court of Appeal, 23 June 2006).

(17) *Ibid*., para. 27.

7. Prohibitions (Clauses 48-54)

The following activities are prohibited under the bill:

- killing fish by means other than fishing;
- fishing or setting fishing gear in areas where an aquaculture lease has been issued;
- obstructing the navigation of boats and vessels with fishing gear or equipment;
- destroying, damaging or interfering with fishing gear or equipment that is lawfully set;
- setting or leaving fishing gear or equipment in waters that are to be left open in the main channel of a stream;
- setting, using or leaving fishing gear or equipment that unduly obstructs the free passage of fish;
- fishing within 25 metres upstream or downstream from the upper or lower entrance, respectively, to any fishway, canal, obstruction or leap; and
- purchasing, selling or possessing fish caught and retained in contravention of this bill or the regulations.

8. Regulations (Clause 55)

Clause 55 of the bill empowers the Governor in Council to make regulations regarding Part 1, including regulations:

- respecting the proper management or control of fisheries;
- respecting the conservation or protection of fish;
- prohibiting certain activities without a licence;
- establishing classes of licences;
- establishing the classes of conditions that may be attached to a licence; and
- respecting the entering into of fisheries management agreements, including their ratification.

C. Part 2 – Conservation and Protection of Fish and Fish Habitat, and Pollution Prevention (Clauses 56-68)

Part 2 of Bill C-45 provides the tools to protect fish habitat from adverse physical and chemical alterations. Part 2 is primarily a restatement of existing provisions and does not represent any major changes from the current *Fisheries Act*. Under the current fisheries management regime, the administration of the habitat protection and pollution prevention provisions is split between DFO and Environment Canada. For the most part, the bill still allows the government to deal with the administration of habitat protection and pollution prevention separately.

The general prohibition on the harmful alteration, disruption or destruction (HADD) of fish habitat will remain the cornerstone of DFO's fish habitat protection program. Under clause 59 of the bill, carrying on a work or undertaking that results in HADD will continue to be prohibited. Under the current *Fisheries Act*, this prohibition is generally known as the "Section 35" prohibition. The bill also clarifies that an "alteration" or "disruption" must be harmful for the prohibition to apply. Moreover, persons will continue to be found not guilty of contravening the HADD of fish habitat if they were operating in accordance with the regulations or on the Minister's authorization in accordance with the established conditions. Bill C-45 simplifies the process by which the Minister can take measures to remedy non-compliance with the conditions of HADD authorizations (i.e., compensation, mitigation measures and monitoring – clause 61(3)) and makes such non-compliance an offence (clause 66(1)(*b*)).

HADD authorization (clause 59(2)(*a*)) will continue to trigger assessments under the *Canadian Environmental Assessment Act*.(18) Under clause 59(2)(*b*), HADD of fish habitat is permitted when the work or undertaking is done in accordance with the conditions set out in the regulations or when an authorization is issued under the bill (for example, when fishing under a licence), and thus will not trigger an environmental assessment.

Bill C-45 does not make significant changes to the pollution prevention provisions of the current Act, which are currently known as "Section 36" provisions. Clause 60 will thus regulate the deposit of deleterious substances in waters frequented by fish. There is, however, a new definition of "deleterious substance," which is included in a "definitions" clause specific to this part of the bill (clause 56).

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(18) Fisheries and Oceans Canada, *Elements of a New Fisheries Act: Discussion Document*.

The duty to notify (clause 62) has been expanded to cover HADD. Clause 63 of the bill sets out the scope of regulations that may be made by Cabinet for the conservation and protection of fish and fish habitat and the prevention of the obstruction or pollution of any waters frequented by fish. This clause expands the current regulation-making powers for conservation and protection of fish and fish habitat. Regulations may be made regarding classes of works and undertakings that may be subject to conditions referred to in clause 59(2)(*b*).

A provision on civil liability is included in this part of the bill (clause 64). The bill provides that certain persons, including those who had control of the work or undertaking in question or of the deleterious substance, are liable for certain costs including those associated with the corrective measures. Loss of income can also now be claimed by any person who can establish that the loss has been suffered as a result of a HADD or a deposit of a deleterious substance. Moreover, under clause 64(9) the period to initiate civil liability proceedings has been extended to five years to take into account the time that it might take for the cumulative effect of HADD or pollution events to manifest.

Finally, as under the current *Fisheries Act*, the Minister must table in Parliament an annual report on the administration and enforcement of the provisions of the bill relating to fish habitat protection and pollution prevention for that year (clause 68).

D. Part 3 – Aquatic Invasive Species (Clauses 69-72)

Part 3 of Bill C-45 concerns the prohibition of the export, import and transportation of aquatic invasive species. This part of the bill also deals with the destruction of these species. Aquatic invasive species are aquatic species or subspecies introduced outside their normal distribution, and whose establishment and spread threaten ecosystems, habitats or species with environmental harm.

These provisions were introduced in part in response to the May 2003 Report of the Standing Committee on Fisheries and Oceans, *Aquatic Invasive Species: Uninvited Guests*,(19) which recommended that the government take immediate action to counter the threat of alien species in Canadian aquatic ecosystems.(20) The Committee had also recommended that

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(19) House of Commons, Standing Committee on Fisheries and Oceans, *Aquatic Invasive Species: Uninvited Guests,* May 2003, http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=3292&Lang=1&SourceId=37581.

(20) Fisheries and Oceans Canada, *Elements of a New Fisheries Act: Discussion Document*.

DFO consolidate and streamline regulations applicable to aquatic invasive species within a comprehensive set of federal regulations and, in particular, issue regulations prohibiting the sale and trade of live Asian carp in Canada.

For the purposes of conservation or protection of fish or fish habitat, clause 71 permits the Governor in Council to make regulations specific to aquatic invasive species. This includes the power to make regulations defining the term "aquatic invasive species." The Governor in Council may also make regulations to control such species, including regulations:

- preventing their spread;
- governing their import, export, and transportation;
- respecting their release; and
- regarding the conditions that the Minister may impose on a person authorized to destroy aquatic invasive species.

E. Part 4 – Administration and Enforcement (Clauses 73-148)

Part 4 of Bill C-45 is based largely on the administration and enforcement provisions of the existing *Fisheries Act*. Fishery officers will continue to be responsible for most of the administration and enforcement (clauses 73-75 and 78). Enforcement provisions that are no longer used will be removed, and other provisions will be added or modernized to reflect current practices. For example, fishery officers and habitat inspectors will be protected from being prosecuted for violation of the Act when they perform undercover activities such as buying fish that has been caught illegally (clause 111). In addition, search and inspection provisions have been modernized to include references to computers and electronic data (e.g., clauses 78(3)(*e*) and (*h*), and 78(4)).

The bill also contains provisions dealing with:

- the authority to make seizures while executing a search warrant (clause 81(2)(*b*));
- the requirement that certain persons must provide assistance to officers conducting the search (clause 80); and
- the authority to stop vehicles and the ability to direct that they be moved to areas where inspections can be done safely (clause 78(5)).

The powers of inspectors will be modernized to reflect those in the *Canadian Environmental Protection Act*, *1999* and will be made consistent with the renewed habitat protection provisions found in Part 2 (clause 78(2)).

The bill contains provisions that deal with alternative measures agreements between the Attorney General and a person who is alleged to have committed an offence under certain provisions of the bill. These provisions provide a less expensive alternative to judicial proceedings (clauses 130-143).

F. Part 5 – Canada Fisheries Tribunal (Clauses 149-206)

Part 5 of the bill provides for the establishment of the Canada Fisheries Tribunal. The Tribunal is empowered to deal with certain fisheries violations as well as licensing appeals.

1. Establishment, Composition and Staffing of the Tribunal (Clauses 149-159)

Clause 149 of the bill establishes the Tribunal, which consists of a Chairperson, a Vice-chairperson and other part-time members appointed by the Governor in Council on the recommendation of the Minister (clause 150). The Chairperson, who is the chief executive officer, supervises the work of the Tribunal (clause 151(1)). The Tribunal members hold office for a term not exceeding five years but can be reappointed. They can be removed by the Governor in Council at any time for cause (clause 152). Only persons who are knowledgeable about Canada's fisheries resources or about administrative decision-making are eligible to be appointed to the Tribunal (clause 153). Persons who are engaged in fishing enterprises or hold memberships or offices in fishing organizations are not eligible to be appointed, or to continue as Tribunal members. A Tribunal member who becomes engaged in a fishing enterprise through will or succession must become disengaged from the enterprise within 90 days (clause 154).

The secretary and other staff of the Tribunal must be appointed in accordance with the *Public Service Employment Act*. The Tribunal may also engage technical experts to provide assistance or advice on any matter (clause 158).

2. Information Sharing with the Minister and Annual Report (Clause 160-161)

At the request of the Minister, the Tribunal must provide information about licensing appeals and proceedings with respect to violations (clause 160).

After the end of each fiscal year, the Tribunal must prepare an annual report, to be presented in Parliament through the Minister, on the administration of Part 5 and the regulations made under it (clause 161).

3. Procedural Matters (Clauses 162-168)

Parties to a proceeding before the Tribunal have a right to appear before it either in person or through a representative (clause 163). The Tribunal has the authority to summon witnesses before it (clause 164(1)). Such a summons or an order of the Tribunal can be made a summons or an order of the Federal Court or the superior court of a province, and is enforceable as an order of that court (clause 165(1)). The decisions and orders made by the Tribunal must be published (clause 166(1)).

4. Licence Appeals (Clause 169)

Pursuant to clause 32, an applicant who has been denied a licence, or has not been issued one within a reasonable period of time, may appeal to the Tribunal within the prescribed period. When such an appeal is made, the Tribunal may both allow the appeal and direct the licensing officer to issue the licence, or it may dismiss the appeal.

5. Violations (Clauses 170-205)

The Tribunal is empowered to deal with fisheries violations, which may be classified as either major or minor, depending on the regulations prescribed under clause 206. The provisions of the bill dealing with violations are applicable to licence holders as well as other persons who are authorized to fish under the authority of such licences.

According to clauses 173 and 174, both major and minor violations can involve a contravention of:

- prescribed provisions of the Act or regulations;
- a condition of a licence as prescribed by regulations; or
- fisheries management orders as prescribed by regulations.

A major violation can also occur where a licence holder contravenes an order of the Tribunal made under clauses 198(1) or 199, or where a case presentation officer (DFO employees designated as such by the Minister) elects to treat a minor violation as a major

violation. The option to raise the violation from the minor to the major class is available if the licence holder was liable for at least two other violations during the previous five years or if, in the opinion of the case presentation officer and under circumstances prescribed in the regulations, the violation is sufficiently serious with regard to its effect or potential effect on the fisheries resource (clause 182).

The Governor in Council is empowered to make regulations prescribing what contraventions of the Act or regulations constitute a major violation (clause 206(1)(*c*)(i)) or minor violation (clause 206(1)(*d*)(i)) for certain licences or classes of licence. The Governor in Council may also make regulations prescribing the classes of contraventions of a fisheries management order that constitute a major (clause 206(1)(*c*)(ii)) or minor violation (clause 206(1)(*d*)(ii)).

Pursuant to clause 175, a violation is not an offence. A holder of a licence may be directly and vicariously liable for a violation on the basis of clause 176. A person who establishes that he or she exercised all due diligence to prevent the commission of a violation, is not liable for the violation. Similarly, a person is not liable for a violation if he or she establishes that they reasonably and honestly believed in the existence of certain facts which, if true, would make their conduct innocent (clause 178).

A decision made by the Tribunal is final and binding on the parties (clause 197).

Both major and minor violations are initiated by serving a notice of violation on the party. However, a notice of a major or minor violation may not be served later than two years after the day on which the evidence of the violation came to the attention of a fishery officer or fishery guardian (clause 177).

a. Minor Violation

A fishery officer or fishery guardian who has reasonable grounds to believe that a minor violation has been committed may complete a notice of minor violation containing an assessment of a monetary penalty and have it served on the person (clause 184).

Minor violations may result in financial penalties of up to $3,000. The amounts of monetary penalties for minor violations may be prescribed by regulations (clause 206(1)(*f*)). Licence holders can contest the assessment of the monetary penalty to the Tribunal. If they choose to pay the penalty without contest, they need to pay only one half of the penalty (clause 185(1)).

b. Major Violation

A major violation proceeding can be initiated by a case presentation officer who has reasonable grounds to believe that such a violation has been committed. The officer must complete a notice of violation and have it served on the person and sent to the Tribunal (clause 181). A case presentation officer has the legal burden of establishing, on a balance of probabilities, that a person is liable for a violation (clause 194).

The Tribunal has a broad range of sanctions, including financial penalties up to $30,000 (clauses 198 and 199). It has the authority to revoke or suspend a licence or to prohibit the violator from applying for any licence for any period that it considers appropriate. The Tribunal also has the authority to vary or rescind the conditions of existing licences, including conditions regarding the number or quantity of fish that may be caught. The Tribunal may establish conditions to be included in future licences, including conditions regarding fishing quotas or the fishing gear or equipment that may be used.

The Tribunal can order the payment of reasonable costs incurred in the seizure, detention, maintenance or disposition of any fish, aquatic plant or other thing seized in relation to a violation. The Tribunal can direct a person to take any action to prevent or remedy any harm to any fish or fishery, or to fish habitat, that resulted or might result from the commission of the violation. The Tribunal may also order an assessment of an additional monetary penalty on a person who, it is satisfied, benefited from the commission of the violation.

6. Regulations under Part 5 (Clause 206)

The Governor in Council may make various regulations for the purposes of Part 5, including those:

- prescribing the circumstances when a minor violation can be treated as a major violation;
- prescribing licences or classes of licences for the purposes of various provisions of the Act;
- prescribing, for certain licences or classes of licences, provisions of the Act or regulations the contravention of which constitutes either a major or a minor violation; and
- prescribing monetary penalties not exceeding $3,000 for minor violations.

G. Part 6 – Regulations and Related Matters (Clauses 207-210)

Clause 207 allows the Governor in Council to make regulations with respect to a number of subjects under the Act. The bill also provides that certain materials may be incorporated by reference into the regulations (clauses 208 and 209). Such materials include technical or explanatory material (such as standards and specifications) produced by the Minister; materials produced by an international body, a government or a government agency; and materials produced jointly by the Minister and a government or government agency for certain purposes. The regulations would thus incorporate these materials without having to repeat the provisions.

H. Part 7 – Transitional Provisions, Consequential Amendments, Coordinating Amendments, Repeals and Coming Into Force (Clauses 211-253)

Aside from providing for a number of transitional provisions, Bill C-45 amends 21 federal acts,(21) proposes coordinating amendments with the *Canada Shipping Act* (2001) and Bill C-30, Canada's Clean Air Act, and repeals the following acts:

- *Atlantic Fisheries Restructuring Act*
- *Fisheries Act*
- *Fisheries Development Act*
- *Fisheries Improvement Loans Act*
- *Great Lakes Fisheries Convention Act*

Clause 253 provides that the bill, other than clauses 246 and 247 (coordinating amendments), will come into force on a day or days to be fixed by order of the Governor in Council.

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(21) *Access to Information Act*, *Arctic Waters Pollution Prevention Act*, *Canada National Marine Conservation Areas Act*, *Canadian Environmental Protection Act, 1999*, *Coastal Fisheries Protection Act*, *Contraventions Act*, *Criminal Code*, *Energy Efficiency Act*, *Financial Administration Act*, *First Nations Oil and Gas and Moneys Management Act*, *Fishing and Recreational Harbours Act*, *Freshwater Fish Marketing Act*, *Marine Liability Act*, *Northwest Territories Waters Act*, *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, *Precious Metals Marking Act*, *Privacy Act*, *Public Service Superannuation Act*, *Radiation Emitting Devices Act*, *Species at Risk Act*, *Textile Labelling Act*.

COMMENTARY

The current *Fisheries Act*, the main instrument for Canadian fisheries management, is considered outdated in many respects. DFO officials have described the current Act as an enabling statute with substantial power, but lacking in the areas of governing principles, oversight or monitoring, checks and balances, and reference to process. In addition to modernizing the structure and language of the Act, Bill C-45 addresses governance, allocation, licensing, fisheries co-management, administrative sanctions and habitat management.

According to DFO, reforming the *Fisheries Act* is necessary for many reasons. The *Fisheries Act* is characterized by the use of ministerial discretion. This means that decisions such as who gets to fish, how much, where and with what, are left to the Minister. The Act provides almost no legal restrictions on the Minister's actions, making these decisions potentially susceptible to political considerations. Consequently, under the current legislation, fishing effort and allocation of stocks may be less predictable, and over several years the cumulative effect of individual ministerial decisions can create fisheries that do not have optimum economic performance or the best conservation outcomes. The proposed Act will distinguish between decisions about access and the setting of licensing policies, which will remain in the hands of the Minister, and the routine business of administering licences.

Many of the regulatory tools developed under the *Fisheries Act* are said to be outdated and ineffective. As DFO is increasingly moving towards shared stewardship with the resource users, the proposed Act will provide more effective tools, such as the power to negotiate fisheries management agreements. The bill will effectively transfer some control and responsibility for fisheries management to the resource users themselves. More say in management of fisheries and greater security of tenure for fishermen is likely to be met with approval by the fishing industry. At the same time, fishing organizations will be expected to assume more responsibility for the work and financial cost of managing the fishery. While it is likely that many fishermen will welcome the opportunity to have a greater say in the management of fisheries, it is less likely that they will welcome any additional costs related to management.

It should be noted that the Minister is already able to enter into agreements under the existing legislation; however, the provisions regarding fisheries management agreements in Bill C-45 should make the process more transparent, as the Minister will be obliged to advise those likely to be affected that he or she is undertaking negotiations. In addition, the agreement will have to be submitted to a ratification procedure and be made public.

The bill also gives the Minister power to enter into agreements with, as well as delegate some management authority to, provincial fisheries managers, who have long complained of Ottawa's delays in processing their proposed regulations, and who would welcome a move towards establishing more independent management of resource allocation. This aspect of the bill might, however, be perceived by some as the federal government giving up part of its jurisdiction over all fisheries.

DFO claims that, as a result of several court cases, it has lost the ability to impose sanctions on licence holders who violate, sometimes seriously, the terms of their licences. Bill C-45, like Bill C-62 10 years before, creates a new administrative sanctions and licence appeal system that involves an independent tribunal. This tribunal is likely to be welcomed by fishers, as they have often criticized the court system as slow and generally lacking in appreciation of the degree of seriousness of different fisheries violations.

Finally, the proposed Act reflects the growing emphasis of fisheries management strategies worldwide on ecosystem-based management, sustainable development and the use of the precautionary principle. It does so by including a preamble, and principles to guide and to be applied to the management of fisheries as well as to the conservation and protection of fish and fish habitat. The preamble to Bill C-45 also recognizes that stable access to fisheries resources is important to the economic viability of the fishing industry.

Environmental non-government organizations, however, argue that Bill C-45 does not appropriately address concerns over the conservation and protection of marine resources. For example, in making decisions about fisheries management the Minister has only to "take into account" the need to conserve and protect fish and fish habitat. The Minister is not obligated to take action when he or she becomes aware of habitat requiring protection. Environmental organizations fear that fish habitats will remain exposed to destructive fishing practices, as the issuance of any fishing licence will be exempt under the bill from contravening the HADD clause, and therefore not subject to an environmental assessment.