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RE: Written Submissions to the Honourable Minister of Fisheries and Oceans Regarding its Review of the *Fisheries Act*

Introduction

The British Columbia Métis Federation ("BC Métis Federation") is a non-profit association that works with Métis communities across British Columbia. Founded in 2011, BC Métis Federation's mandate is to advance the culture and rights of Métis people and to work with Métis communities to ensure the well being of our members. The BC Métis Federation is governed by its President and a board of directors elected by our membership. We currently have 7,500 members across British Columbia.

Much of BC Métis Federation's work is focused on building and maintaining relationships with governments, industry partners and service delivery organizations throughout British Columbia. We work with these organizations to meet the needs of our members, advance their concerns, and ensure that their voice is present. The BC Métis Federation regularly engages with regulatory agencies and other government entities in relation to issues of interest and concern to BC Métis Federation members.

Métis rights are constitutionally enshrined and protected. Our members have important knowledge about the social and economic landscape of the regions they live in, as well as the land and natural environment. They value the integrity and beauty of the natural environment, and are committed to defending, protecting and advancing our rights. The BC Métis Federation is continually engaged in research with our members to ensure the protection and advancement of, and advocacy for, their rights.

Our members favour a balanced and responsible approach to development that is inclusive of our unique voice and perspective. We cannot support the practice of regulatory agencies or the enactment of regulatory processes and procedures that do not incorporate our views. Doing so puts our members' rights and livelihoods at risk.

Fish, fish habitat and fisheries are an important part of Métis culture. Our members rely on fisheries to exercise their rights and support their way of life. Our communities expect to be involved in decision-making processes that have the ability to affect our members' rights, including respecting fisheries.

The Crown's Constitutional Obligations to Indigenous Peoples

The Crown has a constitutional duty to consult and accommodate Indigenous peoples, including the Métis, about the potential effects of proposed projects on their Aboriginal title and rights,[1] and to attempt to justify the potential infringement of these rights.[2] These obligations flow from the rights guaranteed to Indigenous peoples pursuant to section 35(1) of the *Constitution Act, 1982* and the Crown's duty to act honourably in its dealings with Indigenous peoples. To meet its constitutional obligations, the Crown must engage in meaningful consultation with Indigenous peoples, seek to accommodate their concerns and attempt to justify potential infringements.[3] More recently, the Supreme Court of Canada in *Tsilhqot'in* emphasized the importance of obtaining the consent of Indigenous peoples before decisions affecting the lands and resources are made.[4]

Where a proposed legislative amendment has the potential to impact Indigenous peoples' territory or rights, the Crown must consult with them about the proposed amendment.[5] When the federal government amended the *Fisheries Act*, R.S.C. 1985, c. F-14 in 2012 and 2013, it did not fulfill these obligations.

As described in further detail below, the 2012/2013 amendments to the *Fisheries Act* introduced significant changes to the protection of fish and fish habitat and the management of fisheries in Canada. The federal government's lack of consultation at the time meant that our members were unable to communicate concerns about the proposed legislative amendments or provide any input on the extent of their implications for our members before the amendments were enacted.

The Federal Government's Review Process

We understand the current federal government has expressed a renewed commitment to undertake a review the 2012/2013 amendments to the *Fisheries Act* with a view to restoring lost protections and incorporating modern safeguards. The federal government has also committed to working directly with Indigenous peoples to ensure that our views and concerns are heard and taken into account in any further amendments that are to be made to the *Fisheries Act.* In the

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[1] *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida*"), at para. 20.
[2] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 ("*Sparrow*"), at 1110-1112; *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256 ("*Tsilhqot'in*"), at para. 80.
[3] *Haida*, at paras.41-42; *Tsilhqot'in*, at paras.78 and 80; *Sparrow*, at 1110-1112.
[4] *Tsilhqot'in*, at paras.92 and 97.
[5] *Courtoreille v. Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244 (CanLII) at paras. 101 and 103 ("*Courtoreille*").

attached Appendix, we highlight our concerns with the *Fisheries Act* and offer a number of recommendations to address the Act's deficiencies.

The BC Métis Federation provides these submissions to ensure the protection of our members' rights. Going forward, we expect that we will be fully informed and engaged regarding the federal government's review and amendment of the *Fisheries Act* in a manner that is consistent with the honour of the Crown, the Crown's constitutional obligations and the principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*").

Appendix "A"

Concerns Regarding the *Fisheries Act* and Recommendations for Reform

Below we summarize the major deficiencies we have identified with the *Fisheries Act* and propose recommendations to address these shortcomings.

Concern No. 1: ***The 2012/2013 changes to the Fisheries Act resulted in diminished protection and increased vulnerability for fish and fish habitat.***

The following amendments to the *Fisheries Act* served to narrow the protections offered for fish and fish habitat and, as a result, put the exercise and preservation of our constitutionally-protected rights, culture and traditions at risk.

a. Amendment of Section 35: Serious Harm to Fish Prohibition

Key among the 2012/2013 amendments to the *Fisheries Act* was the removal of the prohibition against "harmful alteration or disruption, or the destruction of fish habitat" ("HADD"). The HADD prohibition was replaced with a prohibition against works, undertakings or activities resulting in "serious harm to fish that are part of or support a commercial recreational or Aboriginal fishery". The latter prohibition applies to fish and fish habitat that are part of or support the specified fisheries.

This amendment to the *Fisheries Act* narrowed its application from protection of fish habitats generally to protection of specific fisheries. Limiting the prohibition on habitat destruction to fish and fish habitat that are part of or support specific fisheries is arbitrary and has the potential to harm the very fish the prohibition is meant to protect. The Federal Court of Appeal came to this same conclusion, noting that the 2012/2013 amendments to the *Fisheries Act* increased the risk of harm to fish.[6] The need for fish habitat protection is imperative, particularly given the declining health of fresh water and marine fisheries. Loss of fish habitat has historically been a major cause of fisheries decline.[7]

b. Repeal of Section 32: Killing of Fish

The 2012/2013 amendments also repealed the prohibition against killing fish by any means other than fishing unless specifically authorized by the Minister. Under section 35 of the current Act, "serious harm to fish" is defined as including the "death of fish".

Again, the former prohibition contained in section 32 of the Act applied to all fish generally. By contrast, the current prohibition contained in section 35 of the Act is limited to fish that are part of the specified fisheries. As a result, the removal of section 32 created a gap in the protection of fish.

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[6] *Courtoreille*, at para. 103.

[7] West Coast Environmental Law, *Scaling up the Fisheries Act: Restoring lost protections and incorporating modern safeguards*, p. 3.

c. Environmental Assessment Triggers

Amendments to the federal environmental assessment process, introduced with the *Canadian Environmental Assessment Act, 2012*, removed the environmental assessment triggers that previously existed for authorizations issued by the Minister under sections 32, 35 and 36 of the former *Fisheries Act*. As a result, the environmental assessment processes that previously served to assess, understand and mitigate the potential effects of works, undertakings and activities on fish, fish habitat and fisheries before projects were approved are no longer available.

Recommendation: Restore lost protections under the *Fisheries Act.*

To ensure that all fish and fish habitat are properly protected by the *Fisheries Act*, we recommend the following:

a. habitat protection should be restored for all fish, not simply those fish that are part of or support a particular fishery;

b. the prohibition against the killing of fish should be restored;

c. authorizations issued under the Act should be reestablished as environmental triggers under federal environmental assessment legislation.

Concern No. 2: *Existing definitions within the Fisheries Act describing particular fisheries are inaccurate and misleading.*

As described above, the effect of the inclusion of Aboriginal, commercial and recreational fisheries in the 2012/2013 amendments to the *Fisheries Act* was to narrow the scope of protection from fish and fish habitat generally to particular fisheries.

The definition of Aboriginal fishery under the *Fisheries Act* is particularly problematic as it ignores the Indigenous perspective and demonstrates a complete misunderstanding of Aboriginal rights and Indigenous laws and governance. The Act currently defines Aboriginal in relation to a fishery as fish "harvested by an Aboriginal organization for 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".[8] As indicated above, this definition was arrived at without any consultation with or input from Indigenous peoples.

Contrary to this definition, Indigenous peoples' rights and responsibilities to fish are not based simply on what they are currently harvesting. Rather, Indigenous fisheries are a relationship that includes governance, ownership, management and stewardship of fish and fish habitat.

The current definition of Aboriginal fishery is restricted to current uses. As such, it undermines Aboriginal rights and has the potential to significantly restrict available protections for fish that

[8] *Fisheries Act,* s. 2(1).

Indigenous people may not currently be harvesting for conservation purposes, for example. The decision to hold off harvest to meet conservation and stewardship objectives must not impact whether the fisheries in question are Aboriginal fisheries or their protection under the *Fisheries Act*.

The inclusion of a definition of commercial fishery that is separate from Aboriginal fisheries is also problematic. Aboriginal rights include a right to fish for all purposes, including for sale, trade or barter purposes.

Recommendation: Delete the definitions of Aboriginal, commercial and recreational in relation to fisheries.

For the reasons outlined above, we recommend that the separate definitions of Aboriginal, commercial and recreational in relation to fisheries be removed from the *Fisheries Act*.

If an amended definition of Aboriginal fishery is to be included in the *Fisheries Act*, then extensive consultation with Indigenous peoples is required.

Concern No. 3: *The Fisheries Act does not currently provide opportunities for Indigenous peoples to participate in decision-making regarding fish, fish habitat and fisheries management and conservation.*

The 2012/2013 amendments to the *Fisheries Act* included provisions allowing the Minister to enter into an agreement with a province to further the purposes of the Act. Despite the importance of fish and fish habitat to Indigenous peoples and their significant role in fish management and conservation, a similar provision was not included with respect to Indigenous peoples.

The federal government has indicated its full support for the principles of *UNDRIP* and its goal of renewing its relationship with Indigenous people in Canada and moving toward reconciliation. Respecting the rights, responsibilities and laws of Indigenous peoples through collaborative governance and management regimes must form an integral part of reconciliation.

Recommendations: Participation in Decision Making

Indigenous peoples, including the Métis, and the Crown can work together to develop collaborative regimes respecting the management of fish, fish habitat and fisheries. In an effort to modernize the *Fisheries Act*,amendments which specifically empower the Minister to develop such collaborative arrangements with Indigenous people and pave the way for collaborative decision-making should be included.

The federal government's decision to adopt the principles of *UNDRIP* and the Supreme Court of Canada's decision in *Tsilhqot'in* have important implications for federal regulatory processes. Both *UNDRIP* and *Tsilhqot'in* confirm the importance of engaging in consent-based decision-making with Indigenous peoples in respect of matters that have the potential to affect their rights.

Article 18 of *UNDRIP* confirms the rights of Indigenous peoples to participate in decision-making respecting matters that would affect their rights and to maintain and develop their own decision-making institutions. Article 25 recognizes the right of Indigenous people to maintain their relationship with their traditional waters and to uphold their responsibilities to those waters for future generations. Article 32 requires government to consult and cooperate in good faith with Indigenous peoples to obtain their free, prior and informed consent about any project affecting their lands and other resources.

In *Tsilhqot'in*, the Supreme Court of Canada confirmed the importance of obtaining the consent of Indigenous peoples potentially affected by resource development activities as a way of providing greater predictability for the activities. One obvious way for government to secure the consent of Indigenous peoples is through collaborative decision-making processes.

Collaborative decision-making provides an alternative to government's current policy of unilaterally imposing and seeking to fit Indigenous peoples into existing regulatory processes. This model of decision-making would allow our members to be directly involved in determining whether and how a project that has the potential to affect their rights should proceed to development. This is a necessary step in advancing the goal of reconciliation and ensuring that Métis rights are protected.

Concern No. 4: ***The Fisheries Act does not currently include a consideration of cumulative effects.***

The level of development activity taking place across British Columbia has increased significantly in recent years. The assessment of the potential effects of these projects, including their effects on fish, fish habitat and fisheries and the ability of our members to exercise their rights, cannot take place in a vacuum and should not be treated as separate from other projects operating within or planned for the same area.

Recommendation: Cumulative Effects Assessment for Impacts on Fish and Fish Habitat

The Minister should be required to consider the cumulative effects of all works, undertakings and activities that have the potential to harm fish and fish habitat when considering issuing an authorization under the Act.

Regards,

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BC Métis Federation