

## Legal update

### The tabling of Bill C-68: amending the *Fisheries Act* to provide more protection to fish and their habitat

---

#### March 2018 Environmental

On February 6, 2018, the federal government tabled Bill C-68 *An Act to Amend the Fisheries Act and other Acts in consequence*.

This bill implements an oft-repeated promise of the Liberal government of Prime Minister Justin Trudeau to restore fish and fish habitat protections removed by the previous Conservative government. You will remember that, in 2012, Stephen Harper's government introduced amendments replacing the protection of fish and fish habitat by a more utilitarian vision of Canada's fish resources by limiting certain *Fisheries Act* protections to "commercial, recreational or Aboriginal" fisheries or to fish that support such a fishery.

---

#### Former *Fisheries Act* protections restored

With the 2012 legislative amendments, the government of the day introduced the concept of "serious harm to fish that are part of a commercial, recreational or Aboriginal fishery" while restricting the concept of "serious harm" so it included only the death of fish or any permanent alteration to, or destruction of, fish habitat. The concept of serious harm was inserted into six sections of the *Fisheries Act*, including a section that incorporated the concept into the minister's discretionary powers in respect of a dozen sections of the *Fisheries Act*.

These amendments reduced the scope of the *Fisheries Act*, especially for industrial or commercial projects likely to affect the aquatic environment.

Bill C-68 proposes to replace the concept of serious harm by reviving the concept of "*harmful alteration, disruption or destruction of fish habitat*." The concept of "*habitat*" will be broadened to clearly include all waters in which fish live. These and other amendments will roll back the changes introduced by the Conservatives, restoring the protections that existed before 2012.

Bill C-68 does not stop there, however. It is far more ambitious. It introduces new legal concepts that broaden the scope of the *Fisheries Act* and give great importance to Canada's Indigenous peoples.

#### Involvement of Indigenous peoples

Bill C-68 reflects the government's commitment to Canada's Indigenous peoples. By making it a requirement in the *Fisheries Act* that the minister consider the rights of Indigenous peoples before making a decision, the government is taking a step that has obvious political and legal implications, since the Act applies to fishing, a traditional activity of considerable historical, cultural and economic importance to Indigenous peoples.

The bill provides such indigenous recognition in various ways, including by:

- authorizing the making of equivalency agreements with Indigenous governing bodies that will permit the exclusive application of regulations made by Indigenous governing bodies for the protection of fish resources;
- providing for the consideration of traditional knowledge in decisions relating to fish habitat;
- requiring the minister to consider the adverse effects that a decision made under the *Fisheries Act* may have on the rights of Indigenous peoples; and
- providing opportunities to partner with Indigenous communities for the purpose of protecting fish and fish habitat.

### **Consideration of new factors in implementing the *Fisheries Act***

Bill C-68 requires that the minister consider a whole series of factors or criteria in exercising his or her discretionary powers under the *Fisheries Act*. Those factors, many of which have never been seen before, include:

- the application of a precautionary approach and an ecosystem approach
- sustainability
- science
- traditional knowledge of the Indigenous peoples
- community knowledge
- cooperation with governments and Indigenous governing bodies
- social, economic and cultural factors
- independence of licence holders in commercial inshore fisheries
- the “*intersection of sex and gender with other identity factors*”

While maintaining the discretionary nature of decisions made under the *Fisheries Act*, the above-listed factors, although still optional (“the minister may consider”), include considerations that are not always obvious for legislation designed to protect fish and the environment of fish. For example, Bill C-68 marks the first time that “the intersection of sex and gender with other identity factors” is being included in environmental protection legislation.

### **Regulation of industrial and other projects**

Under Bill C-68, projects deemed likely to affect fish or fish habitat will be “designated projects” and will require a ministerial authorization.

In a way, this innovation provides greater certainty, because developers of such projects will know in advance that they will need a permit. This will allow the federal government to further regulate projects of all kinds, including industrial, municipal and even government projects that are likely to affect fish. This new federal involvement in activities that have traditionally been regulated through permits issued under provincial laws could result in more environmental red tape for businesses and public bodies.

It will be interesting to follow the work of the standing committee of the House of Commons to which the bill will be referred, especially if it holds public hearings on the bill.

Jean Piette

---

For further information, please contact one of the following lawyers:

> <b>Jean Piette</b>	Québec	+1 418.640.5002	<a href="mailto:jean.piette@nortonrosefulbright.com">jean.piette@nortonrosefulbright.com</a>
> <b>Janet Bobechko</b>	Toronto	+1 416.216.1886	<a href="mailto:janet.bobechko@nortonrosefulbright.com">janet.bobechko@nortonrosefulbright.com</a>
> <b>Alan Harvie</b>	Calgary	+1 403.267.9411	<a href="mailto:alan.harvie@nortonrosefulbright.com">alan.harvie@nortonrosefulbright.com</a>
> <b>Max Collett</b>	Vancouver	+1 604.641.4912	<a href="mailto:max.collett@nortonrosefulbright.com">max.collett@nortonrosefulbright.com</a>

Norton Rose Fulbright Canada LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright South Africa Inc and Norton Rose Fulbright US LLP are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to "Norton Rose Fulbright", "the law firm", and "legal practice" are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together "Norton Rose Fulbright entity/entities"). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a "partner") accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.