

CONFIDENTIAL

Continuing Committee of Ministers on the Constitution
Toronto, July 17, 1980

Report of Committee of Officials
on Fisheries

The Committee has heard and discussed the positions expressed by each of the governments and tried to develop consensus, particularly on three aspects of the legislative jurisdiction concerning fisheries. The "modus operandi" was to have both federal-provincial and interprovincial meetings.

Regarding the inland fisheries, the representatives of the ten provincial governments agreed that there should be "exclusive provincial jurisdiction in the matter of inland fisheries except for "diadromous"* species where there would be concurrent jurisdiction, with federal paramountcy for international relations and quotas to provinces."

Regarding marine plants and sedentary species, the representatives of the ten provincial governments agreed that there should be "exclusive provincial jurisdiction over aquaculture in tidal and non tidal zones, marine plants and sedentary species such as oysters, clams and mussels. However, the discussion of the delineation of the seaward extension for provincial responsibility has not been completed.

On these two questions, the federal representatives stated "a willingness to consider a transfer of constitutional powers to the provinces in the field of inland fisheries subject to an exception with respect to salmon and other "diadromous" species and appropriate provision for the protection of the environment and native rights. Similarly constitutional change could be considered with respect to aquaculture and selected estuarine and inter tidal species."

Regarding the sea coast fisheries, a variety of positions have been expressed by governments. In response to an expression by the federal side of a willingness "to consider proposals which have achieved a broad inter-provincial consensus", the provincial delegates have devoted a considerable portion of the time to defining the degree of the consensus which exists. It is possible to report that most of the provinces support the fundamental proposition that there should be a concurrent jurisdiction in this area.

Particular attention was paid to an examination of the proposal of Newfoundland for concurrent jurisdiction with federal or provincial paramountcy for different aspects of the question. Three provinces have expressed an objection to certain aspects of this proposal. These are coastal provinces. Two of them want concurrent powers with a federal paramountcy while the other province does not favour concurrent powers but prefers to see exclusive federal jurisdiction.

On this matter, the federal representatives indicated that they intend to recommend to federal ministers that they consult with fishermen and the fishing industry on any consensus among the provinces for constitutional change.

With respect to sea coast fisheries, the federal position was, "that no change in legislative jurisdiction is necessary or desirable, having regard in particular to the realities of the fishery, and the interprovincial and international aspects of fisheries management. In the federal view, concurrent legislative jurisdiction would introduce unnecessary complexity into the field, would not necessarily achieve the objective of improved federal-provincial cooperation, and would not be in the best interests of fishermen or fish processors. However, noting that many provinces had expressed a desire for more meaningful consultative procedures, the federal delegation indicated that it was prepared to consider legal mechanisms achieving this objective. It appeared to the federal delegation that there was a wide variety of proposals from the various provinces and that no consensus on a specific approach with respect to coastal fisheries had developed."

The Committee recommends that it continue its deliberations in Vancouver next week.

A number of papers presented to the Committee are appended.

* diadromous species - species such as salmon and eels which spend part of their life cycle in both fresh and salt water

NEWFOUNDLAND

SUGGESTED B.N.A. ACT AMENDMENT
ON FISHERIES

JULY , 1980

EXPLANATORY NOTES TO DOCUMENT 830-81/022 (attached)

Section 4 (a) Management of the fishery would continue on a stock and species basis. Fishermen would be licenced by their respective province to fish the provincial quota of any stock allocated to that province.

Section 4 (b) Should a province decide not to fish its quota in any given year, it may upon the advice of the provinces involved license vessels from other provinces to fish its residual quota.

Harvesting plans would be developed jointly between the provinces involved where more than one province has an allocation from a fish stock. In case of failure to agree, the matter would be referred to the Review Board.

NEWFOUNDLAND

SUGGESTED B.N.A. ACT AMENDMENT
ON FISHERIESJULY, 1980

(a) Section 91(12) of the British North America Act should be repealed.

(b) The enactment of a separate section in the British North America Act in the following terms:

"95A (1) With respect to fish stocks adjacent to each province (as defined in subsection (5) below), the Legislature may make laws relative to the sea coast (and inland)* fisheries but any law covering those matters set out in subsection (3) shall have effect in and for the province so long as they are not repugnant to any Act of the Parliament of Canada made under subsection (2).

(2) The Parliament of Canada may make laws relative to the sea coast (and inland)* fisheries but any law covering those matters set out in subsection (4) shall have effect in and for any or all of the provinces so long as they are not repugnant to any Act of the Legislature of a province made under subsection (1).

(3) The matters referred to in subsection (1) are:

- (a) fixing standards for and implementing different areas of scientific and other forms of research;
- (b) fixing parameters for the total allowable catch for stocks;

*Possible deletion

(c) the allocation of quotas to foreign countries and the licensing of foreign vessels, subject to 4 (a) below;

(d) inspection for export;

(e) conservation of fish stocks;

(f) matters incidental or pertaining to the foregoing.

(4) The matters referred to in sub-section) are:

a) fixing the level of catch within the parameters referred to in subsection (3) (b) and the issuance of quotas up to the level so fixed, including a cumulative quota to the government of Canada for allocation by it to foreign countries;

(b) licensing of fishing vessels other than foreign vessels taking fish from the residual quota;

(c) all matters not referred to in this sub-section and sub-section (3).

5. (a) The delineation of the fish stocks adjacent to each Province shall, as between Provinces which traditionally have fished these stocks, be determined by agreement between the Provinces in accordance with equitable principles taking account of all relevant information relating to traditional fishing patterns.

(b) If no agreement can be reached within a reasonable period of time, the Provinces concerned shall refer the particular matter in dispute for expeditious and final determination by a Review Board equitably constituted by the said Provinces based upon the fishing patterns referred to in paragraph (a).

PRINCE EDWARD I

Position - Put fisheries concurrent

Rationale - 1. To acknowledge role in of comm

2. To encou

CONFIDENTIALPRINCE EDWARD ISLAND - POSITION ON FISHERIES

- Position - Put fisheries into Section 95 as a concurrent jurisdictional area.
- Rationale -
1. To acknowledge the legitimate provincial role in fisheries without losing the benefit of common regulation from the Federal level.
 2. To encourage meaningful joint consultations.
 3. Is based on established constitutional practice.

Prince Edward Island recognizes that the subject of fisheries is one which by its very nature extends beyond the interests of a single province. It therefore requires a strong federal authority in allocating quotas, licensing participation etc. There is no question then that the federal government ought to enjoy legislative paramountcy over areas of common concern between the provinces.

However, since the provinces have a strong interest in most of these matters, especially as they relate to fisheries development and marketing, a role must be recognized for provincial action in this area provided it is not repugnant to laws of the Parliament of Canada. Since we think a definitive list of exclusive jurisdictional areas would be difficult to arrive at and since concurrency already exists in our constitution in agriculture and immigration under section 95, we would argue that fisheries should be similarly treated.

We think that there should be enshrined in the Constitution a Federal obligation to protect the fisheries and an equitable right of access by coastal Provinces as a matter of principle.

Constitutional Review
Fisheries Sector

Nova Scotia believes that the Federal Government must continue to be recognized as the paramount authority in fisheries matters that affect more than one province. Nova Scotia recognizes that the Government of Canada must be responsible for the management of the common property marine fishery resources but believes that each province should be meaningfully involved in the management process.

Although the fishery must be viewed as a Canadian resource with no provincial waters, problems arise since federal policies emanating from biological factors have serious effects on economic conditions within specific provinces. The source of these problems is based upon -

- (1) inconsistency in the application of policies and regulations within federal administrative regions and provinces,
- (2) federal policies (over-the-side sales) directly affecting processing plant activities within a province,
- (3) inadequate study, promotion and development of coastal resources which relate to only one province,
- (4) a lack of sufficient and meaningful consultation coupled with excessive power vested in one office (the Federal Minister),
- (5) varying management systems for fisheries within the nation (in some provinces, inland fisheries are within provincial administration).

Nova Scotia believes that, as is now provided in the British North America Act, provinces should continue to be responsible for matters pertaining to education, economic development and private property as such matters affect the

fishery. In the interests of furthering economic development and the quality of life, new constitutional considerations must provide provinces with decision making authority and responsibility for aquaculture in adjacent tidal waters, for fisheries management in non-tidal waters and for non-migratory shoreline species (oysters, mussels, clams, and marine plants) which affect the residents of no other province.

It is also recommended that the Federal and Provincial Governments jointly commit each to establish meaningful program co-ordination on specific matters which affect the activities of the other. Examples of such items include Licensing, Direct Sales to Foreign Nationals, Quota Allocations, Management of Anadromous Species, Provision of Infrastructure, and Assistance Programs. In instances where agreement cannot be reached, provision should be made for an arbitration process for final resolution.

1. Inland

Delegation of the Federal A
for 6 of the 10 Provinces.

July 1980

CONFIDENTIAL

NOTES FOR A STATEMENT BY THE
DEPARTMENT OF FISHERIES AND OCEANS OF CANADA

1. Inland

Delegation of the Federal Authority to manage inland fisheries exists for 6 of the 10 Provinces, the exceptions being New Brunswick, P.E.I., Nova Scotia and Newfoundland. These Delegated authorities are long-standing (e.g. from 1898 for Ontario) and seldom cause problems of an inter-Provincial or Federal-Provincial nature. Regulations drafted by the Provinces are processed through the Department of Fisheries and Oceans and the Federal Justice Department and enacted by Order-in-Council. Long-standing cooperative activities exist in areas of international concern involving fish and fish habitat (Great Lakes Fisheries Commission, International Joint Commission, Garrison Diversions, northern pipelines, tar sands development). The Federal Government maintains substantial research programs in freshwater ecology and contaminants research.

The Federal Government is prepared to discuss constitutional change which would formalize/
Provincial authority to manage inland fisheries (all 10 Provinces).

In so doing, it would probably wish to withdraw from much of its current research activity in freshwater in all regions and of course, from its management function in the 4 Atlantic Provinces. Certain activities

... 2

involving rights of native peoples, and transboundary habitat and pollution issues would continue to be of Federal interest. Diadromous* species would be excepted and would continue to be managed Federally, including habitat. This would not exclude the possibility of developing joint arrangements with various Provinces

There would appear to be room for more Federal-Provincial cooperation in this area as a follow-up to recent initiatives (Pacific Salmon Enhancement Program, Atlantic Salmon Board). Within the past 12 months, the Federal Government has offered to delegate to the Atlantic Provinces the enforcement function on salmon rivers (it is the Provinces who collect revenues from recreational fishing). The response has not been enthusiastic.

* Species which live in both freshwaters and marine areas at various stages in their life cycle (e.g. Salmon and Eels).

2. Estuarine - Intertidal

The Federal Government is willing to pursue, with the Provinces, and on a species basis, a transfer of responsibility for estuarine and intertidal species such as oysters and clams. It would appear that management and harvesting of such species is highly "localized" in nature and usually does not involve the same people who make a living from the coastal and offshore fisheries. An item to be resolved would be responsibility for human health (shellfish contamination, paralytic shellfish poisoning).

Similarly the Federal Government is willing to review Federal and Provincial roles and responsibilities in aquaculture. It would appear that Federal responsibility for introduction and inter-Provincial transfer of "exotic" species, as well as for fish disease monitoring and regulations would continue to be necessary.

Progress could obviously be made in both the above areas with or without constitutional change. In fact, the latter may be preferable, leaving room for different kinds of arrangements with different Provinces, since inter-Provincial impacts would seem to be minimal.

3. Coastal and Offshore

Management of coastal and offshore fisheries (often the same fish stock fished in both areas) involves substantial inter-Provincial and international implications. It is not only the fish themselves which move seasonally across political boundaries; the fishermen do so even more. Some species and stocks may be totally contained at the harvestable stage within a particular jurisdiction, but not necessarily at juvenile stages. Others may be contained at all stages within a single jurisdiction. Others migrate freely between the waters adjacent to 2 or more Provinces.

On the Pacific coast many of the major species extend into international waters or U.S. waters, or both. On the Atlantic coast there are substantial trans-boundary distributions into international waters (tuna, whales, cod, flounders, redfish), and the jurisdictions of the

pollock, mackerel, herring, squid), France (cod, mackerel, herring, squid) and the EEC (shrimp, salmon, Greenland halibut).

Limited entry is universally accepted within Canada as a technique of managing the common-property fisheries for conservation and optimum utilization. Licences are the vehicle for applying limited entry. Fishermen, as well as fish, are mobile. Any change in administration of licensing is fundamental to the management of the fishery. The changes proposed by Quebec and Newfoundland would require fishermen (often the same fisherman) to be licensed by 5 different Provinces in the Atlantic (depending on where or for what he was fishing) and by the Federal Government in international waters, as well as by the USA, France or EEC in certain areas. The potential for conflict and confusion is so obvious, that it may be for this reason also that Canadian fishing industry organizations which have pronounced themselves on the subject of fisheries jurisdiction, have overwhelmingly stated a preference for maintenance of Federal jurisdiction.

Quebec has proposed exclusive Provincial jurisdiction with inter-Provincial boundaries fixed by equidistance. This would give to Quebec exclusive jurisdiction over fisheries in a large part of the Gulf of St. Lawrence, but would give it exclusive jurisdiction over virtually none of the species inhabiting this area; consider a partial list of the species which would migrate seasonally in and out of this zone, or whose distribution overlaps the boundaries-salmon, seals, cod, flounders, redfish, herring, mackerel, shrimp, crab. This is an area (the Gulf) where it is critical that fishermen have the mobility to

put together a multiple-species fishery in the ice-free season in order to make a living.

Newfoundland has proposed a form of concurrent jurisdiction. It would give the Province sole authority to determine how many licences are issued, the combination of licences (few fishermen prosecute a single species fishery) and to whom they are issued. The Federal Government would maintain the expensive functions of research, surveillance and enforcement, and fish inspection, (80-90% the expense, in people and dollars, of managing fisheries). Additionally, the way in which the licensing system was designed could have a major impact on other Federal programs, e.g. fishermen's unemployment insurance. Since an offshore fishery based in other Provinces could only exist if there were access to fisheries off Newfoundland, they would depend for their existence on the policies adopted by another Province.

It is not clear on what basis the Federal Government would set a total allowable catch. Fish stocks can be "conserved" at a wide variety of levels, many of them uneconomic to exploit, or uneconomic for some fleet sectors to exploit. It is not clear how inter-Provincial disputes could be resolved in the time-frames necessary; time-frames set by the fish themselves. The Federal Government would be called upon to enforce regulations which it did not design, and which might be unenforceable without enormous expense.

There would probably be several levels of licensing - Provincial for some stocks, Federal for others, 3rd country for others. A rational

licensing system for whatever goals might be jointly or severally decided would be elusive at best.

These are not hypothetical arguments. We just abandoned such a system (or almost so) on extending jurisdiction to 200 miles in 1977. There are few happy memories in the prelude to that extension.

The cost of catching fish, changed supply patterns (indeed the very certainty of supply) would vary from Province to Province. Some could find themselves at a distinct disadvantage in terms of fishing costs versus market prices. Those who then would think subsidy would also have to think countervail, tariffs and non-tariffs barriers.

In short, the nature of the resources as well as the nature of the industry (fishing, processing and marketing) combine, in our view, to make exclusive Provincial jurisdiction or concurrent jurisdiction as described by Newfoundland, basically unworkable - certainly no improvement over what exists. This is also the opinion of those being regulated - fishermen and the fishing industry generally.

4. The Existing Situation

The fisheries are managed by the Federal Government through a highly decentralized organization. More than 90% of some 3,600 employees are located in the coastal Provinces. A great variety of local, Provincial and regional consultative and advisory committees are in place - all open to and usually including Provincial participation

as well as the fishing industry. These committees are used as forums for information exchange, discussion and advice on all major policy issues in the fisheries, national and international. The Federal Government almost invariably follows through whenever consensus is reached on issues within these Committees, and acts in any case and as it must in the absence of consensus. In addition, there are several long-standing Federal-Provincial Committees involving only governmental officials, normally at the DM level. A special arrangement has existed with Quebec since 1922 whereby Federal regulations in certain coastal fisheries are administered by the Province, which also undertakes the expenditure of doing so, including research and enforcement.

The administrative arrangements and processes for consultation have not, in our view, been effectively challenged. The question of how the Provinces would operate in a more effective manner, to the benefit of the fishing industry located in various Provinces, has not been answered. If the Federal Government is to act in cases of inter-Provincial dispute, this is essentially what happens now. Most fisheries disputes involve resource allocation decisions and access to the fishery (licensing). Decisions are taken on a fleet sector basis with a basic principle being that fleets (and fishermen) contiguous to the resource get priority. Thus over the past 5 years, for example, about 90% of Canadian catches from the area around Newfoundland (including fisheries outside 200 miles) have been landed within that Province. From 1974 to 1978, landings of groundfish in Newfoundland increased from 189,000 tonnes to 325,000 tonnes, an increase of 72%. Landed value increased about 2.5 times from \$31 million to \$76 million.

If the Federal Government is doing something wrong, there is an onus on the Provinces to say what it is, and how it could be done better by the Provinces to their mutual satisfaction.

The Federal Government does not believe that constitutional change in the coastal and offshore fisheries is either necessary or desirable. In this, it has broad support from the fishing industry and elsewhere. However, it is prepared to react, and to consider proposals which have achieved broad inter-Provincial consensus. It is not yet clear that such proposals exist. We would be particularly interested to hear the reaction of all coastal Provinces to proposals put forward by Quebec and Newfoundland, and reactions of the four Atlantic Provinces for constitutional change involving the inland fisheries.



