

Bill C-98 and the *Oceans Act*: a retrospective

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*This paper is dedicated to the memory of Terry Fenge (1950 – 2015)*³.

Executive Summary: The *Canada Oceans Act* became law in 1997 following its introduction as Bill C-98 in 1995. This background paper documents the efforts of a coalition of environmental groups to expand the scope of the Act and strengthen its provisions, particularly with respect to the establishment of Marine Protected Areas (MPAs). The paper suggests that while the coalition was successful in lobbying for a much stronger MPA provision it was unable to establish a clearer focus on ecosystem management and ecosystem health, a commitment to research on the marine environment, or to provide strong guidance on implementation.

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1.0 Introduction

Eventually entering into force on January 1, 1997, the *Oceans Act* was first introduced in Parliament in the summer of 1995 as Bill C-98. A great deal of engagement between elements of civil society and the government of Canada leading up to the introduction of Bill C-98 positioned a number of groups to have a significant impact on parliamentary deliberations, resulting in several significant revisions to the Act.

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³ *Born and raised in the United Kingdom, Dr. Terence Alfred Edward (Terry) Fenge earned a Bachelor's degree in physical geography at the University of Wales, a Master's degree in applied geography at the University of Victoria and a doctorate in regional planning and resource development from the University of Waterloo. From 1985 to 1993 he was Director of Research and Senior Negotiator for the Tunngavik Federation of Nunavut (TFN), the Inuit organization that negotiated the 1993 Nunavut Land Claims Agreement. Terry later took the position of Executive Director at the Canadian Arctic Resources Committee (CARC) where, along with Julie Gelfand, then Executive Director of the Canadian Nature Federation (CNF), he was the driving force behind the establishment of the National Marine Conservation Strategy (NMCS) Programme to promote the development of marine policy appropriate for all three of Canada's coasts. Terry went on from CARC to work with the Inuit Circumpolar Conference (ICC), the Arctic Athabaskan Council, Gwich'in (Canada) International, Nunavut Tunngavik Incorporated (NTI), and the Circumpolar Conservation Union (CCU) on climate change, biodiversity conservation, and contaminants management in the far north. Terry brought huge energy, fiery enthusiasm, and strategic insights to all his work with indigenous peoples and in the cause of conservation both in Canada and in the circumpolar arctic. He died suddenly in late 2015 at the age of 65. He is sorely missed.*

Both Beckmann and Bankes were involved in these processes. Beckmann was particularly heavily involved as the Marine Conservation Advisor and project coordinator of the National Marine Conservation Strategy Programme, a joint initiative of the Canadian Arctic Resources Committee (CARC) and the Canadian Nature Federation (CNF). Bankes was involved as the chair of CARC and as one of the drafters of the CARC\CNF Brief (“the Brief”) presented⁴ to the Parliamentary Committee (the Standing Committee on Fisheries and Oceans) reviewing the draft Act.

The present paper has three objectives. The first is to describe the engagement between a number of non-governmental organizations and the government of Canada at a time when the striking and unprecedented collapse of the cod fishery off Canada’s east coast, a sharp downturn in the number of returning salmon on the west coast, and questions about contaminants and climate change in the arctic were raising concerns about Canada’s ability to care for the marine areas that fell within its jurisdiction. A second objective is to describe CARC and CNF’s goals in critiquing Bill C-98, as contained in the Brief. A third objective is to identify how the Bill was amended before it was adopted. The final version of the Act represented an improvement over the original Bill.

The paper proceeds as follows. Part 2 describes the CARC/CNF National Marine Strategy Programme. Part 3 briefly discusses the interdisciplinary exercise that informed the development of the CARC\CNF Brief to the Standing Committee while Part 4 highlights the key elements of the brief. Part 5 identifies the changes that were made between Bill C-98 and the *Oceans Act* as adopted. Part 6 offers some brief observations on the implementation of the *Oceans Act* and Part 7 concludes.

2.0 The CARC/CNF National Marine Strategy Programme

The National Marine Conservation Strategy Programme (the Programme) was established by CARC and CNF in 1993 with funding from the federal Departments of Fisheries and Oceans

⁴ Beckman and Bankes presented the brief to the Standing Committee along with Dr. Peter Sly. The testimony is available here: http://www.parl.gc.ca/content/hoc/archives/committee/351/ocea/evidence/46_95-10-24/ocea46_blk-e.html

(DFO) and Indian Affairs and Northern Development (DIAND), the Chawkers Foundation, the Richard and Jean Ivey Fund, the John Labatt Foundation, Wildlife Habitat Canada (WHC), and Mountain Equipment Co-op (MEC). Conceived of as a two-year research and advocacy program, the goal was to work with communities on all three of Canada's coasts to summarize threats to coastal communities and ecosystems, identify obstacles to appropriate marine management, and make recommendations to move towards sustainability.

The Programme began by commissioning three "issues papers" (one for each coast). These became the basis for wide-ranging discussions among resource users, government managers, community and First Nation leaders, and scientists at a series of five multi-stakeholder workshops held across the country⁵ in February and March of 1995. These were followed by the development of a white paper entitled *Seas the Day: Towards a National Marine Conservation Strategy for Canada*⁶ intended to guide a national conversation on with governments on how to take better care of Canada's oceans.

3.0 Background to the CARC\CNF Brief

The series of workshops proved to be remarkable for several reasons: participants at each workshop were passionate about their oceans, shared the same concerns on each coast, and were essentially unanimous in their views on the need for changes if marine ecosystems and the communities that depended on them were to have a hope of surviving. The CARC/CNF team set about organizing these views and recording them as a grass-roots advocacy document that later became *Seas the Day*.

Key findings of the community consultation process were as follows:

- The discussion about marine issues in Canada had to be widened from a focus on resource extraction to one that was based on ecosystem health and function;

⁵ St. John's, Halifax, Inuvik, Iqaluit, and Vancouver

⁶ A digital copy of *Seas the Day* is available from Beckmann, on request

- New, geographically-based management structures and systems that integrated use and were informed and supported by communities and aboriginal groups were critical to successful marine management; and
- More and better information – garnered from both scientific research and the wisdom held by aboriginal communities – was needed about marine systems and, in the absence of this information, a precautionary approach, particularly in setting limits on human activity, was crucial.

Through the workshop process, CARC and CNF developed a close working relationship with a number of other non-governmental organizations. Chief among them was the World Wildlife Fund Canada (WWF): WWF's interest in establishing protected areas intersected with CARC/CNF's workshop findings in favour of marine protection as a key tool for marine management.

In June of 1995, just as CARC and CNF were completing the initial draft of *Seas the Day*, the federal government introduced Bill C-98 to the House for first and second reading, and then sent it to Committee for review.

Having completed their national workshops, CARC and CNF had the ability to speak with authority on marine management. Together with WWF, it was agreed that a meeting would be sought with the Minister laying out a joint position⁷, following which point, CARC and CNF would present a brief to the Standing Committee proposing amendments that our members and workshop participants felt would improve the Act. WWF would also appear before the Standing Committee.

4.0 The CARC\CNF Brief

⁷ Politics and policy-making are inextricably intertwined: the-then Minister was not convinced of the value of no-take protection areas because, despite evidence to the contrary, he believed it would alienate a key constituency - fishermen. During the meeting, the Minister offered a bargain he expected would be refused: he could support MPAs if CARC, CNF, and WWF could support the seal hunt in his home province. He was surprised to discover that, on scientific principles, these organizations could support any harvest provided it was humane and sustainable. If he could demonstrate both, he had our support. It is unclear whether this conversation ultimately led to greater comfort within DFO for the MPA provisions ultimately contained within the Act, but it does suggest that reframing issues may lead to progress.

In this section we summarize key elements of the Brief⁸ under the headings used within the Brief itself: (1) ecosystem health and a purposes clause, (2) integrated management plans, (3) indigenous communities, (4) ocean science, (5) co-operation and coordination, and (6) marine protected areas.

4.1 Ecosystem health and a purposes clause

A key idea underlying and reflected in the Brief was that the *Oceans Act* should provide a “Charter for healthy marine ecosystems for Canada” fully reflecting the “Vision for Ocean Management” articulated by the then Minister of Fisheries and Oceans, Hon. Brian Tobin.⁹ CARC/CNF argued that the Minister’s vision, if adopted in the Act, would transform Canada’s ocean management approach from one focused on the commercial fishery to one based on the concept of ocean ecosystem health. To that end, CARC/CNF urged that the Bill be amended to include a goal-oriented purposes clause to accompany the preamble as well as a definition of ecosystem health which would be further operationalized in the body of the statute. CARC/CNF argued that it was the concept of ecosystem health which should inform the development of the national strategy for the management of estuarine, coastal and marine ecosystems and subsequent integrated management plans (IMPs).

4.2 The integrated management plans

The CARC/CNF Brief aimed to ensure that the IMPs called for by the Bill would provide meaningful guidance to those concerned with the management of human activities. To that end CARC/CNF suggested that the Act should provide detailed guidance (or at least an indicative list) as to the possible contents of IMPs. Such a list should include performance indicators both procedural (reporting and monitoring) and substantive (e.g. shellfish fit for human consumption). Plans should cover not only activities but also other related measures. These other measures could reasonably include policies and operational procedures that might affect the marine environment indirectly but might not be considered an “activity.” For instance, it was our view

⁸ A pdf of the full text of the brief is available on the conference website.

⁹ A Vision for Ocean Management (1994). Unfortunately, this important document no longer appears to be available on-line.

that policies associated with terrestrial resource and waste management, marine transportation, and research, to name just three, could affect the marine environment. “Measures” that governed policies and procedures, therefore, also needed to fall within the purview of IMPs. The CRC\CNF brief also urged that the IMPs should be iterative documents completed in a timely manner and based on appropriately sized marine planning units – ones that were large enough to embrace large-scale oceanic processes.

4.3 Indigenous communities

Given the understanding that Canada’s indigenous peoples, particularly those in remote and northern communities, were both heavily reliant on, and deeply knowledgeable about ocean ecosystems, the CARC\CNF Brief suggested that the Bill did not go nearly far enough in recognizing the important role of indigenous communities and land claim agreements in all aspects of ocean management. Indeed, Bill C-98’s only reference to indigenous communities took the form of a non-derogation clause which now appears as s.2.1 of the Act. At our meetings across the country, however, CARC and CNF heard that local communities, both indigenous and non-indigenous, had a long history and deep understanding of marine cycles and processes specific to their needs and locations that could inform research priorities and management decisions. We heard from east coast communities that they knew the cod collapse was coming and had argued for lower harvesting quotas long before it happened: had they been heeded the collapse might not have been as long or as deep. The Brief therefore recommended that provision be made to permit local community management of marine systems and resources. Interestingly, two other local concerns were raised in our workshops that underscored the importance of this recommendation but were prescient only in retrospect: in the north, communities noted the arrival of previously unknown bird species and warned of global change; on the west coast, communities raised concerns about transportation noise and marine mammal health. These are each recognized now as threats to the marine environment and one wonders if these threats might have been lessened had local communities had been more involved in setting management priorities.

4.4 Ocean Science

The CARC\CNF Brief underlined that “good science is an essential element of ecosystem management” and argued, to that end, that “we must build a legacy of marine systems knowledge.” More specifically, the Brief advocated the creation of an Ocean Futures Program – a dedicated fund for marine science (particularly ecosystem science) – to enhance our understanding of marine ecological processes on all three coasts. In doing so, the brief also recognized the importance of, and called for, full integration of traditional ecological knowledge (TEK) into our understanding and management of marine ecological processes.

4.5 Co-operation and coordination

The CARC\CNF Brief argued the need for greater co-operation between DFO and other federal agencies with respect to achieving the goal of managing with the broader goal of restoring and maintaining ecosystem health. The Brief noted that while the Minister was obliged to cooperate with other Departments and agencies, the Bill did not reflect a reciprocal obligation on those other departments and agencies. Furthermore, DFO’s responsibilities under the Bill were constrained by the statement of the Department’s responsibilities under the *Department of Fisheries and Oceans Act* (DFOA).¹⁰ The Brief proposed to rectify both of these shortcomings by specific amendments to the Bill (to require other departments and agencies to participate in the development of the national strategy and plans) and to the DFOA to extend the responsibilities of the Department to “oceans processes and marine ecosystems including fisheries”.

4.6 Marine Protected Areas

The CARC\CNF Brief welcomed the authority to create marine protected areas (MPAs) provided for in Bill C-98 but pointed out that the section required more elaboration with respect to such matters as definition, purpose, means of protection, and the need to foster a link between the creation of MPAs and the IMP process.¹¹ The Brief also suggested that there might be merit in

¹⁰ RSC 1985, c. F-15 available here <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-f-15/latest/rsc-1985-c-f-15.html?resultIndex=1>

¹¹ Indeed, the original provision (s.35 of Bill C-98) merely proposed a regulation-making power with respect to MPAs.

allowing different Ministers\Departments to recommend the creation of an MPA under the *Oceans Act*.

5.0 From the Bill to the Act

This part of the paper follows the sub-headings of Part 4 as a guide to analyze where changes were made or were not made to the Bill as it passed through the parliamentary process. In doing so, and with one exception, we make no claims as to whether any changes that were made were made in response to this particular Brief or to other briefs or indeed were part of a re-thinking on the part of the Department.¹² The one exception relates to the MPA provision which made its way into the Act. This provision closely tracks the proposed MPA language offered in the CARC\CNF Brief.

5.1 Recommendations that Languished

A definition of ecosystem health: The Bill was never amended to include an overall purposes clause or a definition of ecosystem health. As a result, neither the sections of the Act dealing with the national strategy nor the sections dealing with integrated management plans reflect the normative value of restoring and maintaining ecosystem health.¹³ The Bill was amended to include a more elaborate preamble referencing, for example, the ecosystem approach, the precautionary approach and the importance of maintaining biological diversity.

Guidance for IMPs: The Bill was never amended to provide detailed guidance as to the content of the proposed integrated management plans. The Bill was amended to extend IMPs to cover “measures” as well as activities and the potential significance of this change is discussed above.¹⁴ The Act as adopted did not include recommended timelines for adoption of the national strategy and IMPs.

¹² Other briefs presented by ENGOs include WCEL (Linda Nowlan), “Translating the Vision into Law”, <http://wcel.org/sites/default/files/publications/Comments%20on%20The%20Oceans%20Act%20-%20Translating%20the%20Vision%20Into%20Law%20Bill%20C-98.pdf>

¹³ Oceans Act, ss. 28 – 32.

¹⁴ Oceans Act, s.31.

Funding for Science: The Act did not establish anything equivalent to an Arctic Futures Program although the marine science sections of the Act were amended to include specific reference (s. 42(j)) to the power of the Minister to “conduct studies to obtain traditional ecological knowledge for the purpose of understanding oceans and their living resources and ecosystems.” This power however, like the power (s.42(a)) to “collect data for the purpose of understanding oceans and their living resources and ecosystems” is purely permissive and does not require the necessary investments to enhance our understanding of ecosystem function on each of our three coasts.

Federal Coordination: The Bill was not amended to impose a clear duty on other departments of government to participate in the development of a national strategy and IMPs and neither was the DFOA amended to recognize more of an ecosystem orientation for the Department.

5.2 Recommendations that found their way into the Act

The role of aboriginal groups and communities: The Bill was amended to include a duty to collaborate with affected aboriginal organizations and bodies established under land claims agreements and more generally with coastal communities in the development and implementation of a national oceans strategy.

Marine Protected Areas: The Act, as proclaimed, substantially followed the CARC/CNF brief with respect to elaborating¹⁵ on the purposes of designating a marine protected area and the mode of protecting an MPA. The Act did not allow for different ministers to propose the creation of an MPA but it did accept that the Minister for DFO should lead and coordinate the development and implementation of a national system of MPAs for the purposes of the integrated management plans.¹⁶

6.0 From Then to Now

¹⁵ Oceans Act, s. 35(1) & (3).

¹⁶ Oceans Act, s.35(2).

In 2005, on the tenth anniversary of the *Oceans Act*, an audit by the Commissioner of the Environment and Sustainable Development¹⁷ revealed that the Act contained several useful tools for improved marine management, but that poor headway had been way in terms of practical implementation.¹⁸

Since then, limited progress has been made on the single most prescriptive sections of the *Oceans Act* – those related to MPAs. Since the Act was promulgated in 1997, 10 MPAs have been established and three more are proposed. Some of these are small with limited protection measures, others are sizeable and represent a start. Nevertheless, overall progress has been painfully slow in the implementation of this important provision.

In some cases, indigenous groups have gained greater responsibility for marine systems – as in the case of Haida involvement in both the management of Gwaii Haanas, a reserve set aside for eventual creation under the *National Marine Conservation Areas Act*, and in the adjacent Bowie-Seamount MPA established under the *Oceans Act* – but arguably this had more to do with broader negotiations with respect to aboriginal title and self-government negotiations rather than through any provisions of the *Oceans Act*. Indeed, missing from both the *Oceans Act* and Canada's other conservation legislation is any explicit provision for the joint designation of protected areas.

The more complex provisions of the Act – those related to an oceans strategy and integrated management plans – continue to languish. This is only in part due to insufficient financial support or political will to operationalize these provisions of the Act. It is also related to the fact

¹⁷ Julie Gelfand, the Executive Director of CNF during the Programme, is currently (as of March 2014) the Commissioner of the Environment and Sustainable Development.

¹⁸ The 2005 Report of the Commissioner of the Environment and Sustainable Development, Chapter 1: Fisheries and Oceans Canada-Canada's Oceans Management Strategy: http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200509_01_e_14948.html

that the provisions themselves were too vague and permissive to facilitate the complex interjurisdictional cooperation or devolution of responsibility that is required¹⁹.

7.0 Conclusions

The CARC\CNF National Marine Conservation Strategy Programme was an example of the adage “if the people will lead, the leaders will follow.” The Programme’s strategy document identified a number of principles and strategies for marine management that remain relevant today. And CARC and CNF were well positioned to inform national policy at a crucial time – during the introduction of Bill C-98. The Brief could draw upon the research that had been commissioned as well as the contributions from a series of workshops and the Programme could seriously claim to be national in scope involving all three of Canada’s coasts.

While the Brief certainly had some influence on the final wording of the Act especially (and as already noted) with respect to the MPA provisions, in other arguably more important areas, the brief appears to have had little impact. This is especially true of the central informing idea of the Brief which was that the idea of ocean ecosystem health should be adopted as a central underpinning of the Act and indeed of DFO’s own Act the Department of Fisheries and Oceans Act. This idea obtained no purchase at the time and, as a result, there continues to be a lack of coherence in Canada’s oceans statutes, especially when we add the *Fisheries Act* to the mix.

Now, twenty years on, a new government may signify that change is coming. The federal liberals’ election platform used the language of habitat protection and contained promises to create more MPAs, restore funding for marine science, and to work towards community and First Nations co-management, all issues that were identified as important in the Brief. This renewed commitment might usefully be reflected in revisions to the *Oceans Act*, key among them a purpose clause, a commitment to ecosystem management and ecosystem health as defined in the

¹⁹A Review of Canada’s Implementation of the Oceans Act since 1997 – From Leader to Follower? S. Jessen, 2011 https://www.researchgate.net/publication/235437534_A_Review_of_Canada%27s_Implementation_of_the_Oceans_Act_since_1997-From_Leader_to_Follower

Brief, greater guidance on the contents of management plans, timelines for their implementation, and greater involvement of communities in marine management.