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Raymond MacCallum*

The Community-Based
Management of Fisheries
in Atlantic Canada:
A Legislative Proposal

The crises in Canada's fisheries demonstrate the failure of Canadian fisheries management practices to achieve their public policy objectives. The author proposes that a new fisheries management regime, based on principles of community-based management, should be implemented to better ensure the sustainability of both the fisheries and fishing communities. A draft bill is provided to establish a specific framework around which to discuss those values and interests that should be promoted and protected by legislation, and how legislation can be used to establish and nurture a new community-based management regime.

Les crises vécues par les pêcheries canadiennes sont la preuve de l'échec des pratiques de gestion actuelles à atteindre les objectifs des politiques en matière de pêcheries. Cet article propose qu'un nouveau régime de gestion des pêcheries, fondé sur des principes de gestion communautaire, soit implanté afin d'assurer un meilleur maintien des pêcheries et des communautés s'y rattachant. Un projet de loi est proposé qui fournit un cadre concret à l'intérieur duquel peuvent être discutés les valeurs et intérêts qui devraient être promus et protégés par la législation ainsi que la façon dont celle-ci peut être utilisée afin d'établir et de construire un nouveau régime de gestion communautaire.

Introduction

The crisis in Canada's Atlantic fisheries has provided both an opportunity and a justification for replacing the traditional fisheries management paradigm. In its stead should be considered an approach that is rooted in human history at the same time that it is radically new: community-based management.¹ The theory and practice of community-based manage-

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1. Individual Transferable Quotas (ITQs), which have the effect of conferring private rights to a pre-specified share of the Total Allowable Catch (TAC) on an individual fisher, are also receiving significant attention as fisheries managers attempt to find solutions to the crises. However, it is not the purpose of this proposal to debate the merits of ITQs. On ITQs, see generally, P.A. Neher, R. Arnason & N. Mollett, eds., *Rights Based Fishing* (Dordrecht: Kluwer Academic Publishers, 1989).

ment² has received significant attention from social scientists,³ as well as tentative acceptance by legislators and administrators, as a potential fisheries management tool.⁴ It is the purpose of this proposal to suggest that the community-based management of fisheries deserves policy primacy in Canada, and that this objective can be accomplished in part through legislative direction and promotion.

The institutionalization of community-based management of fisheries in Atlantic Canada⁵ would require a delegation of formal management responsibilities to local-level fishers' organizations and away from the Department of Fisheries and Oceans (DFO). The primary objective of such a fundamental restructuring of the formal management regime would be to empower fishers to take stewardship over the resources that sustain both their livelihoods and their communities. The potential advantage of a community-based management approach is that by granting actual and effective decision-making power to the people who live and work on the seas, who know the fisheries from first-hand

2. The literature discusses both "community-based management" and "co-management," sometimes confusing the two, but more often conceiving of them as a continuum of greater or less user-participation in the actual management of the resource. See, e.g., S. Sen & J.R. Nielsen, "Fisheries Co-management: A Comparative Analysis" (1996) 20 *Marine Policy* 405 at 406-7, and E. Pinkerton & M. Weinstein, *Fisheries that Work: Sustainability Through Community-Based Management* (Vancouver: The David Suzuki Foundation, 1995) at 11.

For the purposes of this paper and the proposed legislation (see Appendix), the term "community-based management" will be used. The literature generally reserves the term for informal management institutions that exist without official government sanction and in the absence of any governmental support or decision-making input. By this logic, any community-based management system that received state sanction in the form of legislative protection or institutionalization would therefore become "co-management". It is preferable, however, to sustain the emphasis on "community" in a proposal that is designed to give to fishing communities meaningful responsibilities and an increased capacity for self-determination.

3. See, e.g., Sen & Nielsen, *supra* note 2; Pinkerton & Weinstein, *supra* note 2; F.T. Christy, *Territorial Use Rights in Marine Fisheries: Definitions and Conditions*. FAO Fisheries Technical Paper No. 227 (Rome: FAO, 1982); F. Berkes, ed., *Common Property Resources: Ecology and Community-Based Sustainable Development* (London: Belhaven Press, 1989); R.S. Pomeroy, "Small-scale fisheries management and development: Towards a community-based approach" (1991) 15 *Marine Policy* 39; and S. Jento and B. McCay, "User Participation in Fisheries Management: Lessons Drawn from International Experiences" (1995) 19 *Marine Policy* 227.

4. See, e.g., s. 17 of the proposed *Fisheries Act*, Bill C-62, An Act Respecting Fisheries, 2d sess., 35th Parl., 1996 (1st reading 3 October 1996 died on the order paper April 1997); *The Fisheries Management Partnering Concept: DFO/5362*, (Ottawa: DFO, 1996); and Pinkerton and Weinstein, *supra* note 2 at 55-62.

5. This proposal is limited to Atlantic Canada because the author's research has focussed on rectifying the problems of management in an economy and society highly dependent on coastal fisheries, and characterized by "inshore" versus "offshore" conflicts. It is hoped that future discussion might determine the extent to which the legislative proposal can be modified or expanded to encompass the different management needs of the Pacific fisheries.

experience, and who depend on the health of the marine environment for the survival of their individual livelihoods and their collective way of life, the sustainability of the fisheries and of the fishing communities will be enhanced.⁶

What is the role of the law in this process?⁷ One of the law's many purposes is to effect change in the way that society functions by extending legal protection to new values or interests that have heretofore been unprotected. In fulfilling this purpose, the law can either react to social pressures for change, or it can be pro-active in recognizing the need for change. In formally institutionalizing community-based management of fisheries, the law would be acting both reactively and pro-actively: some interest already exists in creating a formal community-based management structure, but the actual taking of legislative initiative should encourage support for the process from fishers. Establishing a legislative framework for the operation of community-based management would allow fishers to envisage the potential results. The fishers would also be secure in the knowledge that the benefits of any efforts that they expended in developing an alternative management structure would be protected by law.

In proposing a *Community-Based Management of Fisheries Act (CBMFA)*,⁸ there exists an additional agenda aside from the desire that it might some day pass into law. Law has a way of focussing the discussion and narrowing the issues (admittedly, not always a desirable outcome). A draft *CBMFA* can hopefully serve this purpose in a milieu in which the social science has not yet consolidated, and where sophisticated practical experience in formal community-based management is rare.⁹ By having

6. J.R. McGoodwin, *Crisis in the World's Fisheries: People, Problems, and Policies* (Stanford: Stanford University Press, 1990) at 179. The author notes the general correlation that fishers enjoying some sort of proprietary rights (control of access) to fisheries, tend voluntarily to restrain fishing effort in order to sustain the resources. See also C.J.N. Gibbs & D.W. Bromley, "Institutional Arrangements for Managing Rural Resources: Common-property regimes" in F. Berkes, *supra* note 3, 22 at 29-30.

7. In the "Preface" to a special issue of the *Dalhousie Law Journal*, entitled *After the Collapse*, D. Russell and M. McConnell point out that a legal analysis is of the least importance in explaining the crisis in East Coast fisheries, compared to the perspectives of other disciplines ((1995) 18 Dal. L.J. 1 at 5). However, the legal perspective does have a significant contribution to make in preventing any further crises, when it helps to determine which interests and processes will be promoted and protected by the law.

8. Attached as the Appendix.

9. Some experience does exist in Canada. The Fundy Fixed Gear Council concluded an agreement with DFO to manage the quota for the hand-line, long-line and gill-net fisheries in the Bay of Fundy in 1996. See Fundy Fixed Gear Council, *1996 Season Review*, Digby. Extensive experience in community-based management also exists in Japan, where a highly institutionalized management regime has functioned since the 19th century. But Japan has not

a concrete and relatively specific framework as a common reference point, those interested in transforming the management of Canada's fisheries will be able to test their theories and assumptions against the *CBMFA*, and from the discussions, achieve a workable consensus.

This proposal is set out in five parts. First, a brief discussion of the perceived failures of the dominant fisheries management practices is undertaken in order to outline the need for reform. Second, the potential benefits that can be realized for the sustainability of the fisheries and of fishing communities are described. Third, the essential elements of historically successful community-based management regimes are outlined. Fourth, the structure and function of the *CBMFA* are explained. Finally, the conclusion reiterates the need for a principled, structured yet flexible approach to the legislative institutionalization of community-based management of fisheries in Canada.

I. *The Need For an Alternative Approach*

It is generally recognized that fisheries in Canada and around the world are in crisis.¹⁰ By implication, the management of those fisheries is similarly in crisis. That the Department of Fisheries and Oceans (DFO) has been unsuccessful in its objective to conserve Atlantic Canada's major fisheries is clear.¹¹ Beyond the obvious conclusion that over-fishing has led to the decline in fish stocks, what is not clear are the root

been emulated to the same degree anywhere else. On the Japanese fisheries management regime, see generally Yohoji Asada, Yutaka Hirasawa & Fukuzo Nagasaki, *Fishery Management in Japan: FAO Fisheries Technical Paper No. 238* (Rome: FAO, 1983); K. Ruddle, Administration and Conflict Management in Japanese Coastal Fisheries *FAO Fisheries Technical Paper No. 273* (Rome: FAO, 1987); and Pinkerton & Weinstein, *supra* note 2 at 71-98.

10. See, e.g., B.J. McCay & A.C. Finlayson, "The Political Ecology of Crisis and Institutional Change: The Case of the Northern Cod" (Paper presented to the Annual Meetings of the American Anthropological Association, Washington, D.C., 15-19 Nov. 1995, at 1); A.C. Finlayson, *Fishing for Truth: A Sociological Analysis of Northern Cod Stock Assessments from 1977-1990* (St. John's: Institute of Social and Economic Research, Memorial University of Newfoundland, 1994) at 6-10; J. Harvey & D. Coon, *Beyond Crisis in the Fisheries: A Proposal for Community-Based Ecological Fisheries Management* (Fredericton: Conservation Council of New Brunswick, 1997) at 4; and P. Weber, *Net Loss: Fish, Jobs, and the Marine Environment* (Washington, D.C.: Worldwatch Institute, 1994) at 5-6. See generally, *After the Collapse*, *supra* note 7.

11. See, e.g., M. Sinclair, "Summary of Conclusions of First Scotia-Fundy Groundfish Workshop" in *Report of the Second Workshop on Scotia-Fundy Groundfish Management*, 1996, 44 at 47; and R.A. Rogers, *The Oceans are Emptying: Fish Wars and Sustainability* (Montreal: Black Rose Books, 1995) at 147-48. See also the general historical decline of most groundfish stocks as evidenced in the species specific data reproduced in, *1996 Atlantic Groundfish Management Plan, DFO/5167*. (Ottawa: DFO, 1996).

causes of that over-fishing.¹² Of critical importance is the relationship between the science that formed the basis of fisheries management strategies and the policies that were pursued. Another dynamic to understand concerns the reasons for, and the extent of, DFO management bias in favour of offshore, large-scale and corporate-dominated fish production as opposed to small-scale, inshore fishers.¹³ A final and related factor in assessing the failure of fisheries management to conserve the stocks is the lack of legitimacy accorded to DFO policies and regulations in the fishing communities.

The dominant management perspective since the North Atlantic stock crises of the 1970s has been based on the concept of the “tragedy of the commons.”¹⁴ The “tragedy of the commons” theory posits that in a common property resource regime, where there exists unrestricted access to the resources, the resource-users will act in their individual, economically rational best interests, to exploit the resource as quickly as possible before it is depleted. The actions of the resource-users are undertaken in the expectation that everyone else will act in the same way. Individual behaviour is based on the assumption that each user will maximize present exploitation efforts in order to secure the greatest benefits from an inevitably diminishing resource. Total economic and biological deple-

12. Other potential culprits in the crisis in Atlantic fisheries, which will not be discussed here, have been noted in G.D. Taylor, “The Collapse of the Northern Cod Fishery: A Historical Perspective” (1995) 18 Dal. L.J. 13 at 14. Taylor relates that blame has been directed at the foreign fleet by John Crosbie, then Minister of Fisheries and Oceans; fishers have pointed the finger at the International Fund for Animal Welfare for achieving the cancellation of the seal hunt, therefore allowing an increase in predation of juvenile cod; DFO scientists have been blamed for their too optimistic stock assessments following the excitement of the declaration of the Exclusive Economic Zone (EEZ). See also P. Underwood, “To Manage Quotas or Manage Fisheries? The Root Cause of Mismanagement of Canada’s Groundfish Fishery” (1995) 18 Dal. L.J. 37.

13. The issue as to how to classify fishers as either offshore or inshore, and/or small-scale or large-scale has received some attention in the literature. For the purposes of this discussion, inshore/small-scale fishers are generally those who are economically dependent on local fishing grounds, own and operate their own fishing endeavours, and lack alternative employment or investment opportunities. See T. Panayotou, *Management Concepts for Small Scale Fisheries: Economic and Social Aspects: FAO Fisheries Technical Paper No. 228* (Rome: FAO, 1982) at 1 (footnote 1). See also C. Emery, *The Northern Cod crisis: Background Paper No. BP-313E* (Ottawa: Library of Parliament—Research Branch, 1992) at note 6, for a more specifically technical differentiation between the inshore and offshore fleet, focusing on vessel size (greater versus smaller than 65 feet).

14. G. Hardin, “The Tragedy of the Commons” (1968) 162 Science 1243. On the origins and development of the “tragedy of the commons” bio-economic perspective, and its application to fisheries management, see D.R. Matthews, *Controlling Common Property: Regulating Canada’s East Coast Fishery* (Toronto: University of Toronto Press, 1993) at 40-47.

tion of the resource results in the absence of collective action or external compulsion to prevent it.¹⁵

The acceptance of the “tragedy of the commons” theory by Canadian fisheries managers led to obvious conclusions about the need to restrain fishing effort.¹⁶ As a result, a quota-based management regime was adopted in order to restrict fishing effort to sustainable levels.¹⁷ The idea of quota-based management was first employed by the International Commission for the Northwest Atlantic Fisheries (ICNAF), an international organization whose member states had fishing interests in the Northwest Atlantic. The decreasing economic viability of the Northwest Atlantic fishery led ICNAF to introduce the concept of an annual Total Allowable Catch (TAC) for a given species, subdivided into a further quota for each member state restricting the amount of fish its nationals could harvest.¹⁸ After the establishment of the 200-mile limit, and the creation of Canada's new exclusive fisheries zone in 1977, Canadian fisheries managers adopted TAC as a management tool and established quotas for each targeted species.¹⁹

15. See K. Kuperan & Nik Mustapha Raja Abdullah, “Small-scale Coastal Fisheries and Co-management” (1994) 18 *Marine Policy* 306 at 308.

16. C. Emery, *Quota Licensing in Canada's Fishing Industry: Background Paper No. BP-344E*, (Ottawa: Library of Parliament—Research Branch, 1993) at 3, notes the acceptance by Canadian fisheries managers of the tragedy of the commons perspective in 1976, as evidenced in a policy paper of the then Department of Fisheries and the Environment, *Policy For Canada's Commercial Fisheries* (Ottawa: Supply and Services, 1976). He cites p. 39 of the paper for the declaration that:

[T]he central problem of the ground fisheries is rooted in a conflict between individual interests and a collective interest. . . . In an open-access, free for all fishery, competing fishermen try to catch all of the fish available to them regardless of the consequences, unless they are checked; the usual consequence is a collapse of the fishery: that is resource extinction in the commercial sense, repeating in a fishery context “the tragedy of the commons.”

17. The *United Nations Law of the Sea Convention*, U.N. Doc. A/CONF. 62/122 (1982), reproduced in 21 I.L.M. 1261 [hereinafter *LOSC*], article 61(1) requires that all coastal states establish TACs, in order to achieve the management objective of maximum sustainable yield (MSY) (article 61(3)).

18. See C. Emery, *Overfishing Outside the 200-mile Limit: Atlantic Coast: Current Issue Review No. 90-60E* (Ottawa: Library of Parliament—Research Branch, 1996) at 3.

19. R.G. Halliday, F.G. Peacock & D.L. Burke, “Development of Management Measures for the Groundfish Fishery in Atlantic Canada” (1992) 16 *Marine Policy* 411 at 414. Explaining that TAC was developed by the International Commission for the Northwest Atlantic Fisheries (ICNAF) in 1972, to obtain the objective of MSY, is M.J. Kirby, *Navigating Troubled Waters: A New Policy for the Atlantic Fisheries* (Ottawa: Supply and Services Canada, 1983) at 17. Finally, J. Gough, “A Historical Sketch of Fisheries Management in Canada,” in L. S. Parsons & W.H. Lear, eds., *Perspectives on Canadian Marine Fisheries Management: Canadian Bulletin of Fisheries and Aquatic Sciences* 226 (Ottawa: National Research Council of Canada, 1993) at 40, notes that MSY was replaced by optimum sustainable yield (OSY) as the objective

In theory, TAC is established in accordance with the scientific estimate, expressed in tonnes, of the total surplus of fish that the industry can catch in a given year without jeopardizing the ability of the fisheries to maintain themselves perpetually.²⁰ Ideally, the industry is prevented from exceeding the TACs through regulation. It is a simple bio-economic model that, with hind-sight and a deeper understanding and awareness of the complexity of marine ecosystems, can be condemned as simple to a fault.

A misplaced faith in the ability of science to explain our complex world, and to do so in a utilitarian and cost-effective manner, seems to have contributed to the crisis.²¹ Fisheries managers require a tool that is consistent with economic concepts such as "production surpluses," "catch per unit of effort" and "volume throughput." Conceptually, quota-based management serves the needs of fisheries managers. However, the practical limits of scientific knowledge and ability mean that the value of the recommended quotas on which TACs are based, is seriously over-rated.²² These limitations put into doubt whether single-species quota management has any utilitarian value at all as a management tool in an ecosystem as complicated as the Northwest Atlantic Ocean,²³ and in an industry as diffuse and difficult to regulate as the fishing industry.

Multiple sources of error exist that diminish the value of quota management.²⁴ First, recommended quotas are based on estimates of the total biomass of a given species of fish, combined with considerations of natural mortality, science's imperfect understanding of recruitment rates, and the stock abundance required for species sustainability. The assess-

of TACs. OSY represents a blend of biological and economic considerations of stability and predictability.

20. R.A. Rogers, *supra* note 11, at 18 argues the common sense position that it is a fallacy of economics that it presumes that nature will produce an exploitable surplus each year.

21. G.D. Taylor, *supra* note 12, at 18-19, explains that there is a gap between the public's perception of science, and DFO's actual capacity to understand fish population dynamics and mathematical modelling.

22. Finlayson, *supra* note 10 at 149, quotes a senior DFO scientist commenting on economic management tools: "All our forecasting tools... are flawed in some fundamental way, and not only do we not understand how they are flawed, we are not even seeing the general pattern." And yet, note McCay & Finlayson, *supra* note 10 at 8, science maintains its legitimacy because it "is so firmly established and deeply rooted in society's consciousness as the well of certified knowledge and objective authority that it will take more and larger ecological crises than simply the collapse of a few fish stocks to seriously destabilize its authority."

23. Noting the multi-faceted difficulties of managing complex ecosystems for fisheries sustainability is S.M. Garcia, *The Precautionary Approach to Fisheries with Reference to Straddling Fish Stocks and Highly Migratory Fish Stocks: FAO Fisheries Circular No. 871* (Rome: FAO, 1994) at 4-5.

24. *Ibid.* See also Harvey & Coon, *supra* note 10, at 6-9, and; Finlayson, *supra* note 10, at 33-35.

ment takes place on a species-by-species basis, largely in ignorance of the impacts of interdependencies with other species and their fluctuations.²⁵ More general ecosystem variations, such as water temperature and marine pollution, are also poorly understood in terms of their effects on stock abundance, recruitment and mortality rates.²⁶ It does not appear that fisheries and marine science has yet achieved a level of sophistication where it can estimate stock abundance and surplus with sufficient reliability.²⁷

The quality of the recommended quotas on which TACs are based is also dependent on an accurate appreciation of catch-related mortality. However, in an industry in which misreporting of landings and discarding are rational strategies to avoid quota limits,²⁸ the quality of data collected by DFO scientists to input into the TAC estimating formula is significantly suspect.²⁹ The representativeness of the data that forms the basis of TAC calculations is also an issue.³⁰ DFO scientists have demonstrated a traditional bias towards data accumulated from the catch levels of large-scale, offshore vessels, while failing to systematically integrate stock abundance and behavioural observations from the inshore fisheries and

25. P. Underwood, *supra* note 12, at 39, suggests that "linear equilibrium models, based on questionable data and mistaken assumptions as to the critical and dynamic variables of recruitment and natural mortality, have proven to be incapable of simulating the complexities of a fisheries ecosystem." See also, Harvey & Coon, *supra* note 10, at 7.

26. *Ibid.*, Harvey & Coon.

27. Finlayson, *supra* note 10, at 154, suggests that science does not have now, and never will have, sufficient information to achieve a consensus on scientifically based fisheries management. The only alternative, he suggests, is to manage the fishery from a sociological perspective, *i.e.*, managing people, not fish. See also L.S. Parsons & W.H. Lear, "History and Management of the Fishery for Northern Cod in NAFO Divisions 2J, 3K and 3L", in L.S. Parsons & W.H. Lear, *supra* note 19, 55 at 86.

S.M. Garcia, *supra* note 23, at 5 states a truism when he notes that the cost of obtaining sufficiently complete data concerning marine ecosystem behaviour and relations would be uneconomical. He advocates a precautionary approach to fisheries management to take account of the uncertainty. See also Harvey & Coon, *supra* note 10, at 9.

28. Underwood, *supra* note 12 at 39.

29. Sinclair, *supra* note 11 at 44-45; J.G. Leefe, "The Groundfishery in Crisis: A Personal Snapshot" (1995) 18 Dal. L.J. 23, at 27. See generally D.L. Alverson et al. *A Global Assessment of Fisheries Bycatch and Discards: FAO Fisheries Technical Paper No. 339* (Rome: FAO, 1994).

30. A. T. Charles, "The Atlantic Canadian Groundfishery: Roots of a Collapse" (1995) 18 Dal. L.J. 65 at 80, explains that the data upon which DFO relies is suspect because it relies on non-comprehensive, research data gathered only from offshore trawling, as well as catch reports from the offshore sector. The catch "success" reports are suspect as indicators of stock abundance because the technology employed by this sector would allow the vessels to find even the last fish in the ocean.

fishers.³¹ This leads to a less than comprehensive understanding of stock levels and impairs the accuracy of stock assessments.³²

Finally, the actual TACs adopted by DFO for a given annual management plan may not represent the scientists' recommendations.³³ Policy-makers understand that TAC is only an estimate of the surplus stock. They understand that there are many variables that cannot be accurately quantified and that may possibly disguise *greater* stock abundance. Therefore, taking a risk by adopting a higher TAC than the recommendation is often justified for political reasons.³⁴ In fact, the "interpretive flexibility" of the data led to frequent inflation of TACs above the recommended quota for Atlantic groundfish stocks between 1977 and 1992.³⁵

In addition to the discounting of inshore fishers' knowledge and experience for the purpose of stock assessments, there exists further dissonance between the dominant management paradigm and the management needs of inshore fishers.³⁶ As previously discussed, the guiding

31. See Finlayson, *supra* note 10 at 105. See also Pinkerton & Weinstein, *supra* note 2 at 2-3, who identify as one of the "Nine Great Socio-Political Problems in Fisheries Management" the undervaluing of fishers' knowledge by government managers.

32. McCay & Finlayson, *supra* note 10 at 7, explain how the reluctance of DFO to collect and assess inshore fisheries data led to an overestimation of stock abundance by almost 100 percent and fishing mortality by 50 percent in 1989, despite appeals by inshore fishers.

33. Even the scientists' methodology and practice cannot be described as risk averse, however. A.T. Charles, *supra* note 30 at 71-72, explains that the presumption of a constant recruitment rate in estimating *F0.1* (the formula to set TACs) instead of developing a method to investigate more accurate recruitment rates, combined with a refusal to make systematic down-ward adjustments of total biomass due to by-catch, illegal catch and discarding, indicates that the only risks that DFO were avoiding were foregone economic benefits.

34. Even the Harris Report (L. Harris, *Independent Review of the State of the Northern Cod Stock* (Ottawa: Department of Fisheries and Oceans, 1990)), which reviewed DFO's Northern Cod assessments for the 1980s, and concluded that they were all inflated, recommended a higher than biologically ideal TAC due to the potential socio-economic ramifications of a too drastically reduced quota. See Finlayson, *supra* note 10 at 80, and; A.T. Charles, *supra* note 30 at 75. Charles also explains at 74, that DFO followed the "50% rule" whereby a recommendation to reduce a TAC in a given year because of lower stock levels would only be heeded by 50 percent of the recommended reduction, in order to alleviate the socio-economic disruption of the adjustment.

The pressure on DFO to make Nature conform to the economic needs of the fishing industry, is implicit in the following quotation from National Sea President, Henry Demone: "Our philosophy in the early 1990s was that we couldn't just sit here and explain to our brokers and shareholders: 'Well, the quota went down again and the fishing was bad and I'm sorry.' They don't take that for an answer." (*The [Toronto] Globe and Mail* (13 May 1997)).

35. Sinclair, *supra* note 11, at 45, and; Finlayson, *supra* note 10, at 74.

36. See Harvey and Coon, *supra* note 10, at 27.

principle of Canadian fisheries management (and indeed state-controlled fisheries management around the world)³⁷ is the need to control fishing effort, in order to avoid the “tragedy of the commons.”³⁸ The “tragedy of the commons” concept presumes a homogeneity of economically rational behaviour by every fisher operating in a common property regime.³⁹ The presumption has led DFO to treat all fishers with the same rules, and all fishing areas as open-access, common property subject to a uniform management regime.⁴⁰ This management regime may be appropriate for offshore, corporate-dominated fishing operations, but arguably has the effect of undermining the small-scale fishers and their presumptively more sustainable relationship to the fishery.⁴¹ One has to question whether overall management measures can be successful when they do not accord with the reality and needs of small-scale fishers.

It has been persuasively asserted that successful fisheries management is mostly about managing the fishers, not the fish.⁴² The real nature of inshore fisheries demands such an approach. An abundance of case studies and literature from around the world demonstrates that the small-scale fisher does not necessarily act as a rapacious, profit-maximizing,

37. See also D.M. Johnston, “Stresses and Mind-sets in Fishery Management” (1995) 18 Dal. L.J. 154 at 158, who criticizes the inflexibility of *LOSC* obligations under article 61, discussed *supra*, in footnote 17, and its inconsistency with the need for local level adjustment in order to produce effective management.

38. Fishing effort is controlled by various management and regulatory tools, depending on the species and the sector, in order to ensure respect for TACs. Management tools include the use of input/effort controls, such as restrictions on the mesh size of fishing nets, restrictions on the size of vessels, or the use of controls such as area closures, seasonal openings and “days at sea” limitations.

39. R.S. Pomeroy, *supra* note 3 at 45, advocates the need for a community-based management approach to take account of the sociological diversity of fishers.

40. Noting the inappropriateness of homogeneous treatment is A. Davis, “Property Rights and Access Management in the Small Boat Fishery: A Case Study From Southwest Nova Scotia”, in C. Lamson & A.J. Hanson, eds., *Atlantic Fisheries and Coastal Communities: Fisheries Decision-Making Case Studies* (Halifax: Dalhousie Ocean Studies Programme, 1984) at 155. R.A. Rogers, *supra* note 11 at 48, argues that government policy belittled the inshore sector as “dated,” “backwards,” and an impediment to modernization.

See also D.R. Matthews, *supra* note 14, at 92-93 who posits that the root of the dissonance between government and inshore views of the fishery, lies in the government’s belief in its ownership in the fish (on behalf of the public) whereas the fishers believe they have a “property” right in their local fishing territory.

41. R.A. Rogers, *supra* note 11, at 52-3.

42. See Pinkerton & Weinstein, *supra* note 2 at 1. Pinkerton and Weinstein note that the Japanese management system rarely calculates or relies on TAC, *ibid.* at 71-2. Instead, Japan has created the most highly institutionalized system for participatory decision-making and community-based management of fisheries in the world, as well as one of the most successful fishing industries in the world. See also Jentoft & McCay, *supra* note 3 at 227, and; K. Kuperan & Nik Mustapha Raja Abdullah, *supra* note 15 at 306.

market-economic actor.⁴³ To the contrary, many informal, community-based management practices have existed to successfully regulate for appropriate objectives: the promotion of equitable use of the fisheries, and resource and community sustainability.⁴⁴

The fact of the fishers' economic dependence on limited local fishing grounds,⁴⁵ the absence of alternative livelihoods, the desire to maintain a particular way of life and tradition, and a recognition of responsibilities to each other and to the community, have often led to the development over generations of highly particularized community-based management rules.⁴⁶ In contexts where community-based management of fisheries has developed, the rules invariably control access to fishing grounds, usually excluding non-community members.⁴⁷ They also often involve gear restrictions, closed-areas and seasons, and equitable mechanisms for sharing the most productive fishing grounds.⁴⁸ The rules in these communities have legitimacy because they serve the fishers' dual and inter-related management objectives of sustaining the fisheries and, as a result, ensure the continued well-being of the fishing communities.⁴⁹

These informal management rules, and the community efforts to enforce them, are based on the communities' beliefs in their "ownership" of the fishing areas that they use. A combination of geographic proximity to, historical use of, and economic dependency on the fishery leads to the development of a collective belief in a right to manage the local fisheries for the benefit of the community, and to the exclusion of outsiders.⁵⁰

Contrary to this view, DFO management policy and regulations in Atlantic Canada conceive of most fisheries as the common property of all natural and legal Canadians, and enforce open-access to those fisheries for all license-holders, without regard to community dependencies and

43. See, e.g., K. Kuperan and Nik Mustapha Raja Abdullah, *supra* note 15 at 311; D.J. Doulman, "Community-based Fishery Management: Towards the Restoration of Traditional Practices in the South Pacific" (1993), 17 *Marine Policy* 108; S. Sen & J.R. Nielsen, *supra* note 2; Pinkerton & Weinstein, *supra* note 2 at 24-32; Davis, *supra* note 40; K. Ruddle, *A Guide to the Literature on Traditional Community-based Fishery Management in the Asia-Pacific Tropics: FAO Fisheries Circular No. 869* (Rome: FAO, 1994), and; D.R. Matthews, *supra* note 14 at 95-137.

44. For a contrary perspective on small-scale fishers' behaviour, see R.S. Pomeroy, *supra* note 3 at 40-41.

45. Pinkerton & Weinstein, *supra* note 2 at 179.

46. See, e.g., J.R. McGoodwin, *supra* note 6 at 140.

47. See, e.g., F.T. Christy, *supra* note 3 at 5.

48. D.J. Doulman, *supra* note 43 at 111.

49. K. Kuperan & Nik Mustapha Raja Abdullah, *supra* note 15 at 310.

50. A. Davis, *supra* note 40 at 145.

historical ties.⁵¹ By enacting regulations that are inconsistent with small-scale fishers' perceived needs,⁵² and by attempting to enforce a regime upon fishers that does not represent their economic and social reality, DFO cannot hope to achieve "buy-in." The contempt and animosity often directed towards DFO scientists and managers by fishers is plainly evident.⁵³ The predictable result is that the policies and regulations promulgated to manage the resources have little or no legitimacy with the people whose activities they are designed to control. Not only are the regulations based upon science and data largely developed without the benefit of significant input of fishers' knowledge and observation, but they are also predicated on management concepts that arguably are alien to a large part of the fishing industry.

II. *The Promise of Community-Based Management*

The basic theory of community-based management of fisheries can be explained in terms as simple as the dominant bio-economic management model pursued by DFO: the actual people who depend on the fisheries for their own livelihood and the social and economic maintenance of their communities are responsible for collectively and cooperatively making, implementing and enforcing the rules necessary to manage the fisheries in order to achieve resource sustainability. At a superficial level of analysis, the state-centred command and control model of management shares the same conservation objective with community-based management. However, fundamental differences between the two approaches lie in their respective loci of decision-making, in whose primary interests the decisions will be made, their competing views of human nature, and the management tools upon which these competing views rely.

51. DFO does take into account proximity of the particular fishery resource and the economic dependence of coastal communities on that fishery, in allocating TAC as between sectors: see DFO's *1996 Atlantic Groundfish Management Plan*, *supra* note 11 at 41. But this does not address the need of fishing communities to exclude outsiders from upsetting the equitable distribution of local fishing privileges, or the need to establish fishing effort controls within local fishing grounds, which serve the sustainability objectives of communities.

52. See, e.g., D.R. Matthews, *supra* note 14 at 154.

53. J.R. McGoodwin, *supra* note 6 at 77, notes that "At best, many fishers perceive fisheries scientists and managers as meddlesome people with whom they must cooperate; at worst, they see them as arrogant and insensitive bureaucrats who have the power to implement arbitrary and decidedly prejudicial fisheries regulations." Davis, *supra* note 40 at 133, states that "[i]t is almost an understatement to suggest that small boat, independent fishermen often perceive the federal government and the Department of Fisheries and Oceans (DFO) as adversaries and oppressors, i.e., unfamiliar but powerful outsiders forcing them to conform to sets of rules which make it more difficult to earn a living from fishing." See also Finlayson, *supra* note 10 at 103.

The traditional fisheries management paradigm has long presumed that the fishing industry is largely composed of highly independent and individualized profit maximizers, and it designs its rules and regulations based on this presumption. Community-based management contrarily presumes that small-scale fishers, in particular, are tied to their fishing communities and define their self-interest, to a certain extent, in terms of the best interests of those communities. It is not the purpose of this proposal to resolve the endless debate over humanity's fundamental nature. But the peculiar blend of self-interest and community interest that community-based management relies upon has generally led us, as a society, to establish democratic decision-making processes at all levels of society in order to govern ourselves. Conceived in this way, the community-based management of fisheries is entirely consistent with Canadian social values for democratic, participatory self-governance, and cannot be discounted as a concept that subordinates the individual to the community. However, it is recognized that it is a legitimate issue for public debate whether, and to what extent, fishing communities possess the appropriate socio-cultural values and capacity for responsible self-governance.

As a preliminary clarification, community-based management of fisheries does not necessarily imply the recognition of rights of ownership by a given community over a share of fish or an area of the sea.⁵⁴ The distinction is about jurisdiction, not ownership. Community-based management is about who has the management responsibilities to decide the who, what, where, when and how of fishing. In practice, the difference may appear to be more semantic than real, but in law semantics are often determinative.⁵⁵ The characterization of community-based management as "public" management, but at a lower level of decision-making, and serving different public interests than state-centred management, is appropriate.⁵⁶

What can be gained by locating decision-making authority in the community? In general, the potential gains can be characterized as improving the particularization of the management rules, the legitimacy of the management regime and, as a result, the achievement of the

54. Although, as noted by A.P. Lino Grima & F. Berkes in "Natural Resources: Access, Rights to Use and Management," in F. Berkes, *supra* note 3 at 33, community resource use rights *can* be characterized as proprietary even if they do not connote "ownership," as the community has some of the incidents of property ownership, such as a right of exclusion and access control.

55. For example, in the absence of ownership rights, a community would not be able to alienate its rights to fish, or to a fishing area.

56. Harvey & Coon, *supra* note 10, at 45.

management objectives (the sustainability of the community and the fisheries).

As discussed previously, DFO science has collected most of its data from offshore fishing operations, and this data has been used to formulate the policies and regulations that have structured the fishing industry.⁵⁷ In a complex ecosystem with multiple interacting and interdependent species, subject to various human pressures from pollution to predation, the blunt instrument of single-species quota management so far has proven ineffective in meeting the dual biological and social objectives of fisheries management.⁵⁸ However, communities have demonstrated that they have the capacity to develop management rules that meet the particular needs of the individual communities and sustain the fisheries on which they rely.⁵⁹ Generations of accumulated knowledge of the behaviour of fisheries at the local level cannot be discounted as backwards, out-dated, or irrelevant.⁶⁰ Locating formal management authority in fishing communities would allow the legitimization of such expertise, as it would become the central source of knowledge for the development and justification of management rules.⁶¹

In addition to elevating the status and utility of local knowledge, community-based management would allow greater particularization of the rules to the local fisheries.⁶² DFO management is responsive to the scale requirements of its entire jurisdiction, which generally means that it attempts to enforce gear selectivity rules, seasonal closures, and quotas on entire sectors and North Atlantic Fisheries Organization (NAFO)

57. With the creation of the Fisheries Research Council of Canada in 1992 (see *Fisheries Resource Conservation Council: Building Partnerships in Resource Conservation* (Ottawa: DFO, 1994)) the data input into the management decision-making formula is no longer as myopic. However the management model still rests on the questionable ability of science to be able to accurately determine surplus biomass for a given species.

58. The Canadian Council of Professional Fish Harvesters, *A Discussion Paper on Sections 17-21 of Bill C-62: The New Fisheries Act*, (Ottawa: The Council, 1997) at 1, only identifies the maximization of economic returns and social benefits as the central objectives of federal fisheries policy. However, it cannot be denied that conservation, no matter how poorly accomplished, has always been an at least an implied objective of fisheries management.

59. See note 43.

60. For a view of a DFO scientist on traditional fishers' knowledge, see, e.g., Finlayson, *supra* note 10 at 109-10.

61. It is not being suggested that science would cease to play a role, but merely that in a community-based management system, it would not have a monopoly on "objectivity." McCay & Finlayson, *supra* note 10 at 1, suggest that "participatory research" between community-based management groups and scientists, implying collaboration and mutual respect for each's way of knowing, is an appropriate approach.

62. See K. Ruddle, "Solving the Common Property Dilemma: Village Fisheries Rights in Japanese Coastal Waters" in F. Berkes, *supra* note 3, 168 at 172, who describes the management responsibilities of Japanese locally-based Fisheries Cooperative Associations.

Fishing Areas. These rules may be inappropriate for some local fisheries, as well as in conflict with effective local practices.⁶³ Further, the rules are relatively inflexible, developed in a context divorced from the community and non-responsive to local concerns.⁶⁴ Locating decision-making authority in the community ensures that the management rules reflect local concerns, and can be altered as those needs and concerns require.

Of paramount importance to the small-scale fishers is their reliance on multiple species to earn a living.⁶⁵ Dependent on near-shore resources, due to gear and vessel-type, small-scale fishers need to be able to harvest whatever commercial species exist within their reach. The licensing requirements and quota allocations by individual species for large areas of the sea are often insensitive to the small-scale fishers' organizational and resource needs.⁶⁶ Community-based management would allow the rules on access to, and distribution of, particular species to be tailored to the socio-economic needs of the local community.

Another benefit of community-based management of fisheries is that, at least at the local level, there is a "closed loop" between decisions, their effects and the knowledge and information required to inform the decisions.⁶⁷ The decision-makers are the same people who provide the knowledge and gather the information that forms the basis of the decisions. They are also the same people who experience the effects of these decisions on their activities and observe the impacts of the decisions on the fisheries. The potential for detailed management rules, flexible adjustments and continuous feedback of actions and effects⁶⁸ can only be economically realized at the community level.

Another key to the success of community-based management rests with the legitimacy of the management regime.⁶⁹ Where every fisher in

63. See, e.g., A. Davis, *supra* note 40 at 155-8.

64. *Ibid.* at 154-5.

65. T. Panayotou, *supra* note 13 at 22.

66. See, e.g., Fundy Fixed Gear Council, *supra* note 9 at 9, where multiple species, fixed-gear fishers were unable to fish their fair share of hake and halibut, because the entire TAC had been externally harvested for those species prior to when the Fundy fishers usually fish for hake and halibut.

67. The local scale would avoid the problem, identified by Pinkerton and Weinstein, *supra* note 2, at 2-3, of undervaluing and ignoring local knowledge, which leads to management measures based on incomplete data.

68. McCay & Finlayson, *supra* note 10 at 1. In this way, community-based management is consistent with the need for "adaptive management" to take account of scientific uncertainty and variable management needs. See also A.T. Charles, *supra* note 30 at 75.

69. On the legitimacy of management rules generally, see Pinkerton & Weinstein, *supra* note 2 at 4-5.

the community has contributed to the development of the rules through a participatory decision-making institution, the decision-makers are both the subjects and the beneficiaries of the decisions. The rules are designed by the participants to ensure the collective well-being of the community with which the fishers identify their self-interest. The individual fisher then supports the management rules because he/she has had a meaningful voice in the development of those rules.⁷⁰ Fishers comply with the rules because they have already accepted the efficacy of those rules in achieving the collectively determined management objectives.⁷¹

Additional pressures for compliance with community-made management rules are rooted in the social dynamic of communities. Theoretically, as a member of a community that has collective control over its endeavours and aims to achieve its objectives in the best interests of all of its members, an individual fisher experiences substantial peer pressure to comply with the rules. Breaking community rules is considered to be theft from neighbours and a threat to the sustainability of the community and the fisheries.⁷² Given the greater identification of the fishers with the management regime and its objectives, the fishers should each become monitors and enforcers of the rules. The facility for enforcement and monitoring is also simplified by its relatively local basis. As “outsiders” are excluded from fishing within a community’s jurisdiction, there is greater awareness amongst the community of each other’s fishing activities and practices.⁷³

III. *The Elements of Community-Based Management*

What are the essential elements of a sustainable community-based fisheries management regime? These will be briefly outlined below and will receive greater attention in the explanation of the *CBMFA* (Part IV).

70. See, e.g., S. Jentoft & T. Kristofferson, “Fishermen’s Co-management: The Case of the Lofoten Fishery” (1989) 48 *Human Organization* 355 at 362.

71. D.J. Douman, *supra* note 43 at 113.

72. See, e.g., D.J. Douman, *supra* note 43 at 110, where he characterizes a breach of traditional community rules as tantamount to denying future generations their resource, heritage and birthright. Arguably, a breach of DFO regulations is considered in a different light. Where DFO regulations are considered arbitrary and illegitimate, little or no condemnation is likely to be forthcoming from a fisher’s community. A.T. Charles, *supra* note 30 at 68, even suggests that peer pressure operates to the opposite effect with DFO regulations. Fishers are encouraged to break regulations in order to “beat the system” and maximize profits.

73. Pinkerton & Weinstein, *supra* note 2 at 6.

A community-based management regime should have a defined territory over which it can exercise exclusive jurisdiction,⁷⁴ with concordant rights to control access to fisheries and effort.⁷⁵ It should have the ability to determine the conditions for membership, and should possess the means to enforce the specified rights and duties of membership.⁷⁶ The rights of membership must be non-transferable, to ensure that the resource rights stay within the community, serving the community's interests and subject to the community's control.⁷⁷ The benefits of membership should be equitably determined and distributed, in order to maintain widespread support for the management regime, and to protect its continued legitimacy.⁷⁸

In a successful community-based management regime, the community tends to have a relationship of geographical proximity, historical use, and dependency on the area of the sea over which it is exercising management jurisdiction.⁷⁹ These conditions provide circumstantial guarantees of the community's commitment to the sustainability of the fisheries. The community also needs to have the ability to influence fishing activities that occur outside its jurisdiction, either in adjacent communities or offshore, in order to prevent the dissipation of the benefits of its management efforts.⁸⁰ The obvious reason for this is that community-based management cannot survive if, for instance, offshore trawlers or adjacent communities can intercept and deplete a migrating stock before it enters a community's territory.

The decision-making process must be participatory, enlisting knowledge input from all of its members, and receiving in return respect for the institutions and rules.⁸¹ In theory, this ensures that everyone believes that

74. E.P. Durrenberger & G. Pálsson, "Ownership at Sea: Fishing Territories and Access to Sea Resources" (1987) 14 *Am. Ethnologist* 508 at 509, note that Japanese Fisheries Cooperative Associations exercise exclusive jurisdiction over a specific area of the sea. The authors also comment on the similarity of Japanese and Canadian inshore fisheries practices and behaviour, despite the legal distinctions between the two "property" regimes. Arguably, this is an indication of the compatibility of Canadian fisheries management with community control.

75. See, e.g., F.T. Christy, *supra* note 3 at 5; Pinkerton & Weinstein, *supra* note 2 at 6. See also R. Hannesson, *Studies on the Role of Fishermen's Organizations in Fisheries Management: FAO Fisheries Technical Paper No. 300* (Rome: FAO, 1982) at 4, who points out that there is a political advantage to conferring on fishers' organizations the unenviable responsibility for equitably determining access rights to the fisheries.

76. The enforcement of rights and duties of membership can occur either through civil contract (i.e., agreement amongst all the members), or through legislative enforcement, or through both.

77. Harvey & Coon, *supra* note 10 at 47.

78. See, e.g., Jentoft & Kristofferson, *supra* note 70 at 362.

79. A. Davis, *supra* note 40 at 141. See also Pinkerton & Weinstein, *supra* note 2 at 179.

80. F.T. Christy, *supra* note 3 at 5; Pinkerton & Weinstein, *supra* note 2 at 186.

81. See, e.g., Jentoft & Kristofferson, *supra* note 70 at 362-363.

they have an ability to influence the rules, as well as a stake in the observance of those rules. Legitimacy will also be enhanced where there is sufficient consensus on the primary objectives of the management regime, and the tools used to accomplish those objectives.⁸² Without a “community of interest” on objectives and methods, the management regime will not enjoy sufficient legitimacy to guarantee compliance with the rules.⁸³

Even with democratic input and sufficient consensus, the community must also exhibit a willingness for self-monitoring and enforcement.⁸⁴ An important part of the legitimacy and effectiveness of community-based management is rooted in peer pressure⁸⁵ and the belief in the protection of collective interests.⁸⁶ The fear of social condemnation is a powerful tool to ensure conformity with social norms.

Finally, legislative sanction for the community’s jurisdiction offers a guarantee that the benefits flow to the community members, thus encouraging “buy-in” and support for the process.⁸⁷ Additionally, formal institutionalization enlists the law to defend the physical boundaries of the management area⁸⁸ without need of extra-legal measures.⁸⁹

A condition that suggests the appropriateness of community-based management is a community’s economic, social and cultural dependence on local fisheries.⁹⁰ This implies both a lack of alternative employment opportunities for community members, and a high degree of vulnerability to the non-sustainable use of the fisheries. A strong commitment to, and identification with, the community by individual fishers is also a factor favourable to successful community-based management.⁹¹ These condi-

82. K. Kuperan & Nik Mustapha Raja Abdullah, *supra* note 15 at 310.

83. For instance if a community is divided between those who are intent on racing to fish every last fish in the sea, and those interested in sustaining the resource and the community, it is unlikely that community-based management will be successful.

84. Pinkerton & Weinstein, *supra* note 2 at 10.

85. See R.S. Pomeroy, *supra* note 3 at 46.

86. Whether community-based management entails the collective protection of collectively defined interests, or whether it is a rational individual response to economic and biological resource scarcity is unclear. To the extent that it is in an individual’s personal, social, cultural and economic self interest to belong to a community, and that that community’s approbation demands cooperative behaviour, the distinction is academic.

87. J.R. McGoodwin, *supra* note 6 at 141.

88. Jentoft and McCay, *supra* note 3 at 516.

89. For example, cutting off the gear of outsiders: see, e.g., Davis, *supra* note 40 at 147; or threats of physical violence: see, e.g. Pinkerton & Weinstein, *supra* note 2 at 27.

90. Pinkerton & Weinstein, *supra* note 2 at 179, Harvey & Coon, *supra* note 10 at 30.

91. Pinkerton & Weinstein, *supra* note 2 at 185.

tions act to encourage the sustainable use of the fisheries in order to preserve individual livelihoods and community well-being.⁹²

IV. *An Act Respecting the Community-Based Management of Fisheries*

The impetus for proposing the *Community-Based Management of Fisheries Act* comes in part from the federal government's weak and potentially dangerous attempt at legislating to allow community-based management. Section 17 of a proposed new *Fisheries Act* which was introduced in October 1996, but whose fate is now uncertain after it died on the order paper in April 1997 would have given authority to the Minister of Fisheries and Oceans to enter into legally binding "fisheries management agreements" with fishers' organizations.⁹³ On one hand, this is a positive indication of the government's acceptance of the concept of community-based management as a fisheries management tool. However, the content of section 17 was inadequate to ensure the conclusion of effective or equitable fisheries management agreements with community-based fisheries organizations. If s. 17 is re-introduced as is, its structural and substantive weakness portends an ad hoc and unprincipled approach to

92. Pinkerton & Weinstein, *supra* note 2 at 182, emphasize that an important component of community-based management is the notion that the community is managing the resource as much to preserve it for future generations as it is to derive present benefits.

93. Section 17 of the proposed *Fisheries Act*, The House of Commons, Bill C-62, First reading Oct. 3, 1996, reads as follows:

17. (1) Her Majesty in right of Canada, represented by the Minister, may enter into a fisheries management agreement with any organization that, in the opinion of the Minister, is representative of a class of person or holders.
- (2) An agreement may establish
 - (a) the harvest limits, and other conservation and management measures for a fishery;
 - (b) the number of licences that may be issued for the class of holders or person;
 - (c) the fees payable to Her Majesty in right of Canada with respect to the issuance of the licences and the variation or rescission of, or addition to, conditions of the licences;
 - (d) the obligations, responsibilities and funding arrangements with respect to management of the fishery; and
 - (f) conservation and management programs for the fishery.
- (3) An Agreement may, for the purposes of Part III, establish guidelines for use by a Tribunal on allowing a proceeding with respect to a major violation.
- (4) It is a condition of any licence issued for fishing in a fishery to which a fisheries management agreement applies that the conservation and management measures set out in the agreement be complied with.

the delegation of DFO's management responsibilities.⁹⁴ A few criticisms of section 17 therefore are warranted.

First, section 17 leaves everything up to ministerial discretion. There are no enumerated criteria that an interested organization must meet other than that it must be, in the Minister's opinion, "representative of a class of persons or holders." There are no safeguards against the conclusion of a fisheries management agreement that has the effect of "rationalizing" the industry to the exclusion of fishers not members of the "representative" organization. Neither are there guidelines to ensure that a fisheries management agreement is consistent with overall conservation or socio-economic objectives. Accordingly, it is recommended that section 17 in its proposed form should not be included in any new *Fisheries Act*.

Alternatively, the proposed *Community-Based Management of Fisheries Act* attempts to set out a more comprehensive legislative approach. It is hoped that the proposed structure and content of the *CBMFA* would lead to the development of a principled and effective process to delegate real management authority to fishing industry stakeholders. In particular, and in contrast to section 17 of the proposed *Fisheries Act*, the *CBMFA* would necessitate the firm acceptance of a legislated policy bias in favour of inshore fisheries and small-scale fishers. Where the dominant management methods that led to the present fisheries crisis were based on top-down management practices attuned to the reality and needs of large-scale offshore operators, the *CBMFA* would be grounded at the community level. The other industry interests would have to be accommodated only to the extent that their operations were consistent with the interests of small-scale inshore fishers.

As a preliminary note to the explanation of the *CBMFA*, it is important to recognize that it was developed presupposing the enactment of a new *Fisheries Act*. It is intended that the two Acts would co-exist. However, whether a new *Fisheries Act* comes into law, the *CBMFA* would be complementary.

The following discussion is not designed to offer a comprehensive overview of the operation of the *CBMFA*, but rather to comment selectively on some of its highlights, and some of its less self-explanatory provisions. It is hoped that the *CBMFA* can speak for itself with regard to its structure and function, as well as the administrative scheme that it envisages. Important details have been ignored, such as the estimated costs of implementing an integrated network of community-based man-

94. Harvey and Coon, *supra* note 10 at 15, note a similar concern based on the lack of preparation that seems to have gone into DFO's approach to co-management. See also Canadian Council of Professional Fish Harvesters, *supra* note 58.

agement organs, because they can await a demonstrated political interest for the proposal.

1. *Purposes (Section 2)*

A purposes section serves as a normative reference point to which decision-makers exercising authority under the *CBMFA* can refer,⁹⁵ and on which adjudicators can rely in attempting to interpret the provisions and procedures of the *CBMFA*.⁹⁶ It is particularly important in legislation that is aimed at creating new administrative/management regimes and at encouraging new ways of thinking about issues. As well, a purposes section is justified where concrete objectives are sought within a flexible framework, whose actual structure and procedure will be adapting as it develops. Simply, it provides substantive guidelines against which to hold decision-makers accountable.⁹⁷

Section 2 establishes a clear policy bias in favour of the development of community-based management of fisheries within a common property (as opposed to a private property) regime.⁹⁸ The management of Canada's Atlantic fisheries is to be exercised to achieve the dual and inter-related objectives of sustainable fisheries and sustainable communities.⁹⁹ Management actions are to be informed by concerns for intra- and inter-generational equity, and are to direct fisher participation in decision-making and stewardship. Caution and an awareness of ecosystem

95. Perhaps atypically amongst environmental/resource management legislation, the *CBMFA* seeks to limit the scope of discretion that can be exercised by decision-makers enabled by its provisions. A purposes section accordingly provides necessary, substantive criteria that must be respected in making decisions under the *CBMFA*. By structuring it so that the purposes of the *CBMFA* provide a constant framework against which actions must be assessed, decision-making will be made more accountable to the specific objectives of the *CBMFA*. For an example of ministerial discretion arguably *subverting* the unspecified intent of environmental legislation, see *Cantwell v. Canada (Minister of the Environment)* (1991), 41 F.T.R. 18.

96. On the interpretive utility of clearly defined legislative objectives to adjudicators, see E.A. Dreidger, *Construction of Statutes* (Toronto: Butterworths, 1983) at 35-36.

97. See, e.g., T.M. Cloutier, "Conflicts of Interest on Regional Fisheries Management Councils: Corruption or Co-operative Management" (1996) 2 *Ocean & Coastal L.J.* 101 at 102, noting that the Regional Fisheries Management Councils established under the U.S. federal *Magnuson Fishery Conservation and Management Act of 1976 (MFCMA)* 16 U.S.C. §§ 1801-1882 (1994) are perceived as corrupt and self-interested, due to a lack of public oversight and adequate checks on authority.

98. Section 2(c) is intended to indicate that community-based management is not about transferring ownership rights in either fish or territory to the communities. Rather it is about delegating jurisdiction to manage local resources to those people who have the greatest practical expertise and the most direct interest in their judicious use.

99. Harvey & Coon, *supra* note 10 at 27, note that government policy needs to meaningfully recognize the historical inter-relationship between fishing communities and the fisheries.

dynamics¹⁰⁰ are to inform decision-making under the *CBMFA*.¹⁰¹ Express references to the purposes of the *CBMFA* (e.g. sections 30, 40, 43, 44, 47 and 49) are to affirm that these policy objectives are intended to be guiding principles throughout the administration of the Act.¹⁰²

It is urged that the new policy direction expressed in section 2 can be amply justified as being in the public interest. For instance, an estimated 1,300 communities in Atlantic Canada depend on the fisheries as the basis of their livelihood, society and culture.¹⁰³ The small boat fisheries can provide for three times more jobs than large trawlers, at a lower level of investment per job.¹⁰⁴ Also, the economic health of other significant industries (e.g., tourism) is directly dependent on the survival of coastal communities in Atlantic Canada.¹⁰⁵ These justifications are in addition to the benefits of a community-based management regime described in Part II.

The general policy of the *CBMFA* would be consistent with Canada's international obligations under Agenda 21,¹⁰⁶ the global plan of action adopted by the participants of the United Nations Conference on Environment and Development held in Rio de Janeiro in June 1992. In particular, para. 17.79 urges the parties to implement management strategies that are particularly suited to the needs of small-scale fishers, and to take

100. S.M. Garcia, *supra* note 23 at 13, enumerates some of the aims and principles of ecosystem management as:

minimizing conversion of critical ecosystems to "lower" conditions, compensating habitat conversion with restoration (allowing no net loss), maintaining ecological relationships, maintaining populations at greatest net annual increment, restoring depleted populations, minimizing risk of irreversible change in the marine ecosystem, etc.

101. Arguably, precaution is inherent in a community-based management approach. The nature of a community's dependence on a fishery resource makes it risk averse, and willing to forego present benefits for greater certainty of sustainable returns. See, e.g., McGoodwin, *supra* note 6 at 179.

102. Another reason for emphasizing the purposes of the *CBMFA* is that although there appears to exist a presumption that community-based management is inherently sustainable in intent, due to the socio-economic dependency of communities on the fisheries, legislative support for, and direction to that specific end is prudent in the absence of more widespread empirical proof in the Canadian context. Such an approach is consistent with Pinkerton & Weinstein, *supra* note 2 at 182, who emphasize that checks and balances are appropriate to ensure sustainable use practices, until an ethic of stewardship is securely ingrained in the community.

103. Harvey & Coon, *supra* note 10 at 41.

104. *Coastal Communities News* (Halifax), April 1997 at 4.

105. *Coastal Communities News* (Halifax), March 1996 at 10.

106. United Nations Conference on Environment and Development, *Agenda 21: Programme of Action for Sustainable Development*, U.N. Doc. A/CONF. 151/26, (New York: U.N. Department of Public Information, 1993).

legislative action in support of such strategies. Para. 17.82 is also apposite, encouraging states to integrate small-scale fishers' concerns into decision-making, and to promote the sustainability of their communities and fisheries.¹⁰⁷

In addition, the *CBMFA* would be promoting the objectives of Principle 22 of the Rio Declaration,¹⁰⁸ which declares that:

Indigenous people and their communities, *and other local communities*, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. [Emphasis added.]¹⁰⁹

Finally, the *CBMFA* is consistent with Article 7 of the Food and Agricultural Organization's *Code of Conduct for Responsible Fisheries*.¹¹⁰ The *Code of Conduct* emphasizes that sustainability of fisheries is the primary management objective,¹¹¹ and that the interests of small-scale fishers in particular need to be taken into account.¹¹² Additionally, Article 7.5 encourages the adoption of a precautionary approach to fisheries management, entailing an awareness of the uncertainties inherent in fisheries management¹¹³ and a concordant need to be flexible.¹¹⁴

2. Interpretation (Section 3)

In the interest of simplicity, the definition of "community" was restricted to the territorial aspect.¹¹⁵ Other important elements of a "community"—such as commonality of management objectives and dependence on the fisheries—that contribute to a successful community-based management

107. See U. Barg and U.N. Wijkstrom, "Environmental Management Options for Coastal Fisheries and Aquaculture" (1994) 18 *Marine Policy* 127 at 133-34.

108. June 13, 1992, U.N. Doc. A/CONF. 151/5/Rev. 1, reprinted in 31 I.L.M. 874 (1992).

109. But see D. VanderZwaag, *Canada and Marine Environmental Protection: Charting a Legal Course Towards Sustainable Development* (London: Kluwer Law International, 1995) at 38-39, who criticizes Principle 22 for its vague and ambiguous terms, and for "stop[ping] short of clear recognition of co-management or self-government commitments."

110. (Rome: FAO, 1992).

111. *Ibid.*, article 7.1.1.

112. *Ibid.* See, e.g., articles 7.2.2(c) and 7.6.6.

113. *Ibid.*, article 7.5.2.

114. *Ibid.*, article 7.5.5.

115. See Jentoft and McCay, *supra* note 3 at 237-238, on the difficulties of defining "community."

regime have been integrated into the *CBMFA* in other ways (see section 2 and subsection 34(2)).

Also noteworthy in section 3 is the definition of “fisher,” and its exclusion of corporations. A “community” of corporations would be presumptively inimical to the purposes of the *CBMFA*.

3. *Atlantic Fisheries Tribunal*

Part I of the Act has been adopted, with only minor changes, from the proposed *Fisheries Act*.¹¹⁶ Under the *Fisheries Act*, the Atlantic Fisheries Tribunal is intended to serve as an administrative adjudicator, and to take over jurisdiction from the courts for the prosecution of fisheries violations. It also has been given the jurisdiction to hear appeals of the Minister’s rejection of a license application.¹¹⁷

Under the *CBMFA*, the Tribunal has been given the critical responsibility of assessing the capacity of a fishers’ organization to take on fisheries management responsibilities on behalf of a community. Accordingly, section 9 requires that all Tribunal members have relevant “expertise” to ensure informed decision-making, while section 19(a) mandates that a three member panel consider and decide whether to certify a Community Fisheries Management Board (CFMB). Section 33 is a standard privative clause, protecting decisions regarding certification or decertification of CFMBs from judicial review. Finally, section 49 gives the Tribunal jurisdiction to hear complaints that decisions or agreements authorized by the *CBMFA* have been inconsistent with the Act’s objectives.¹¹⁸

If a new *Fisheries Act* is enacted, and an Atlantic Fisheries Tribunal is thereby established, its mandate under the *Fisheries Act* can be readily integrated with the mandate envisaged for it pursuant to the *CBMFA*. Even if the *Fisheries Act* were to abandon the establishment of an administrative sanctions body, the Tribunal, as represented in the *CBMFA*, would have sufficient competence and guarantee of procedural fairness to accomplish its assigned tasks.

116. See sections 66-89 of the proposed *Fisheries Act*.

117. *Ibid.*, s. 90.

118. The U.S. experience with co-operative management of fisheries under the *MFCMA*, 16 U.S.C. §§ 1801-1882 (1994) suggests the need for judicial review of decision-makers to ensure that their activities conform with the objectives of the legislation. See T.M. Cloutier, *supra* note 97 at 125-127.

4. *Community Fisheries Management Boards*

The certification of a CFMB under section 30 is the first step in the development of a successful community-based management regime.¹¹⁹ The *CBMFA* establishes criteria that the Tribunal must assess in determining the validity of applications for certification. An ideal applicant would be a democratically elected fishers' association, bound by a constitution with guaranteed membership rights and responsibilities, evidencing the unanimous support of all of the fishers active in a traditionally recognized fishing area. An applicant meeting these criteria would likely be able to enlist the widespread participation in decision-making and respect for those decisions that is necessary for efficient and effective management.¹²⁰ The notion of an "appropriate fisheries management unit" in subsection 30(4)(c) is intended to encompass considerations of economies of scale, and the resource needs of multi-species fishers. As well, considerations of those factors enumerated in subsections 34(2)(a) to (d) should inform the inquiry into what is an "appropriate fisheries management unit." Undoubtedly, greater specificity would be achieved as administrative experience is gained.

The combination of subsections 30(2) and 30(3) ensure that the certification process is not used to make unjustifiable "power-grabs" by competing fishers' organizations, or for incursions into fishing grounds traditionally used by other fishers or informally managed by other communities. For the sake of administrative simplicity, overlapping CFMBs are prohibited by subsection 30(5). This will also preserve the jurisdictional exclusivity required to ensure that the most complete information on fishing effort, practices and catch levels is kept within the CFMB, thereby enabling the most informed decision-making possible. Representational exclusivity will also avoid potential conflicts of interest in the event of disagreements between adjacent CFMBs.

Section 31 is central to creating an equitable management regime, and is potentially the most contentious provision in the *CBMFA*. It has several important ramifications. First, whether or not all of the individual fishers support the association that applied for certification, once that association is certified for the community, all fishers within that community are deemed members of the CFMB, with an equal say in the development of management rules. Second, combined with the effect of subsection 34(2),

119. The structure of the proposed management regime is very similar to the one proposed by Harvey & Coon, *supra* note 10 at pp. 46-52, and is consistent with Jentoft and McCay, *supra* note 3 at 243, where they advocate that biological realities should determine the level of decision-making.

120. See A.T. Charles, *supra* note 30 at 70. See also Jentoft & McCay, *supra* note 3 at 244-45.

every fisher who fishes within the CFMB's jurisdiction must abide by the CFMB's rules. Permitting the co-existence of overlapping management regimes, by allowing individual fishers to opt out, would weaken the legitimacy of the CFMB and detract from the self-enforcing nature of community-based management.¹²¹

The decertification of a CFMB is intended to be an extreme remedy, to be used in cases where a CFMB has persistently mismanaged its responsibilities or otherwise lost its legitimacy. Ideally, both the democratic workings of a CFMB and its legal obligations under a fisheries management agreement would act as checks on a CFMB to ensure accountability. However, the option of decertification (section 32) should also be available where a CFMB has demonstrated an incapacity or an unwillingness to abide by its legal obligations. In addition, decertification should be used to allow the growth, and/or realignment of CFMBs, in accordance with the purposes of the *CBMFA* and section 30. Subsection 32(2)(d) recognizes that the development of a community-based management regime will be an incremental process, informed by trial and error. Accordingly, the legislative structure must be flexible.

5. Fisheries Management Agreements (Section 34)

The negotiation of a fisheries management agreement will be the principal method of establishing, between the Minister and a certified CFMB, which management duties and responsibilities will be taken on by the CFMB. Section 34(1) is evidence of the strong policy objective in the *CBMFA* to promote community-based management of fisheries. The Minister is directed to conclude a fisheries management agreement with any fishers' organization that has been certified as a CFMB, so long as an agreement can be reached that is consistent with the purposes of the *CBMFA*. The only reason for which the Minister could refuse to delegate real management authority to a CFMB is that a proposed agreement would not promote the purposes of the *CBMFA* (*i.e.*, that it would be inconsistent with the achievement of sustainable fisheries or sustainable fishing communities).

Subsection 34(2) serves several important functions. By necessitating the delegation of exclusive management authority over a given area of the sea, it attempts to promote the ability of a CFMB to manage its jurisdic-

121. A.T. Charles, *supra* note 30 at 70, warns against sector-based management within community-based management because it would further institutionalize divisions amongst fishers and reduce the capacity of communities to exercise moral suasion in favour of compliance with the rules.

tion with as complete information as possible.¹²² Where all activity within a CFMB's jurisdiction is subject to its control, then ideally there are no information gaps to weaken the feedback loop of decision-making, action and reaction.

By granting exclusive jurisdiction to a CFMB, the *CBMFA* also promotes the ecosystem approach to management. A management regime composed of multiple CFMBs, representing only single gear-types or single species fisheries, will not be able to flourish. Prohibiting overlapping jurisdictions, and preventing the escape of information from the loop through outsiders fishing within a CFMB's jurisdiction, will assist a CFMB to better understand and monitor the interacting behaviours of multiple species.¹²³ As well, exclusive territorial jurisdiction will enhance the objectives for which exclusive representation is granted to the CFMBs.¹²⁴

Finally, by mandating the delegation of exclusive jurisdiction over an area of the sea, the Minister is forced to grant real authority to a CFMB. Subsection 34(2) therefore shifts the balance of power in the negotiating process to the CFMB. If a CFMB is to be given exclusive jurisdiction, then the Minister must agree to the delegation of sufficient rights and responsibilities to enable it to manage the fisheries in accordance with the purposes of the *CBMFA*. Otherwise, the *CBMFA* is permissive on which precise powers and duties will be delegated through a fisheries management agreement (subsection 34(3)), in order to allow for flexibility.¹²⁵ The full panoply of management tools, which can be effectively implemented at the community level and which are consistent with the purposes of the *CBMFA*, will be available to a CFMB. Different CFMB's will have different needs, ambitions and capacities, which should be accommodated through the negotiation process.¹²⁶

Violations of fisheries management agreements are to be accorded differential treatment depending on who commits the infraction. If a non-member of a CFMB illegally fishes in a CFMB's jurisdiction, then the

122. Harvey & Coon, *supra* note 10 at 47-49, stress the importance of complete information for sustainable management plans and link it to the need for exclusive jurisdiction.

123. *Ibid.*

124. See note 121, and accompanying text.

125. T. Panayotou, *supra* note 13 at 40, advocates the need for flexibility in small-scale multi-species fisheries management, in order to make constant adjustments to respond to the uncertain ecosystem inter-relationships. See also J.R. McGoodwin, *supra* note 6 at 180, who emphasizes that flexibility is a crucial component of a community-based management regime, both to take account of local variations in fisheries, as well as to allow adaptation to the changing social, cultural and economic concerns of fishers.

126. See, e.g., Jentoft & McCay, *supra* note 3 at 244-45.

fisher is to be prosecuted according to the *Fisheries Act*.¹²⁷ However, if a member of the CFMB is accused of violating the fisheries management agreement, then the decision whether to prosecute under the *Fisheries Act* rests with the CFMB. Ideally, a fisheries management agreement would allow a CFMB to enforce its own management rules through sanctions. The stigma of being sanctioned by one's fellow fishers would promote compliance. As well, the authority to sanction would enhance the legitimacy of the CFMB. These are the objectives of subsection 38(2).

Finally, section 39 is a necessary protection for the integrity of fisheries management agreements and the exclusive jurisdiction of CFMBs.

6. Bioregional Management Councils (Sections 40 to 46)

A higher-level management council is needed to undertake planning at an ecosystem-wide level.¹²⁸ The approach will differ from that of the dominant management paradigm, which takes generalizations about ecosystem functions and fishers behaviour and attempts to create regulations that force the particular to conform to the general. Instead, the Bioregional Management Councils (BMCs)¹²⁹ will be informed by the particular. The majority of the members of the BMCs will be representatives of the local-level CFMBs. Accordingly, the BMCs will serve the management needs of the ecosystem, but be informed by the community-level management perspective.

Recognizing that initially, and perhaps perpetually, fisheries management in Atlantic Canada will remain a mixture of community-based and state-controlled management, subsection 41(1)(b) mandates the participation of fishers on BMCs who fall outside the jurisdiction of any CFMB. Ideally, the management regime will evolve so that all major fishing activity occurs within the jurisdiction of a network of CFMBs.¹³⁰ Unless

127. Whether such a prosecution would occur in provincial court or under the Tribunal depends on whether the proposed *Fisheries Act* eventually becomes law. See sections 91-120.

128. A.P. Lino Grima & F. Berkes, *supra* note 54 at 35, emphasize that the key to an ecosystem approach to management is that the "resources" are treated not as "factors of production," but are valued for the ecological functions that they serve.

129. Section 40 contains a list of proposed "bioregions." This list is not intended to be immutable, and awaits input from those more knowledgeable about marine ecosystems in Atlantic Canada.

130. J.F. Caddy, *infra* note 133 at 7, makes an important point about the difficulty of inter-jurisdictional cooperation where each jurisdiction shares fundamentally different management values, e.g., management under an ITQ regime versus community-based management relying on effort controls.

and until that happens, the *CBMFA* is still fundamentally about ensuring the meaningful participation of fishers in the decision-making process, especially where they are to be subject to its regulatory authority (see section 50). Accordingly, fishers who are not represented by a CFMB deserve equally to have a role in the management of the fisheries.

In particular, a BMC will offer a forum to resolve conflicts between competing CFMBs.¹³¹ As well, the BMCs will take an ecosystem-wide approach to the management of fish stocks that migrate through more than one CFMB jurisdiction.¹³² Such a management perspective is necessary in order to avoid “gauntlet” fisheries, whereby a particular stock is fished in different jurisdictions at different times in its life-cycle, thus frustrating recruitment and an accurate understanding of stock abundance.¹³³ To ensure that CFMB management practices are consistent with the sustainability of fisheries beyond CFMB boundaries, section 43 combined with subsection 34(2) gives regulatory supremacy to the BMCs over CFMB management rules. Also worthy of note, under section 44 a BMC can force two conflicting CFMBs to agree to, for instance, joint harvesting plans or the merging of jurisdiction for the harvesting of a particular species.

Finally, a role is expressly reserved for DFO scientists on the BMCs.¹³⁴ Despite criticisms of the dominant management paradigm, and the contribution of science to legitimizing that model, it is expected that science will play a critical and irreplaceable role in ecosystem-wide fisheries management. The difference is that the structure and objectives of a community-based management regime will orient the scientists’ expertise to serve different ends.

7. Offshore Fisheries Boards (Sections 47 and 48)

Admittedly, little attention in this proposal has been reserved for offshore fisheries management. The primary concern of the *CBMFA* is the promotion of sustainable fisheries and sustainable fishing communities.

131. The United Sea Area Fisheries Adjustment Commissions of Japan play a similar role in Japan’s multi-layered fisheries management regime. See Ruddle, *supra* note 9 at 41. See also Harvey & Coon, *supra* note 10 at 50-51.

132. Harvey & Coon, *supra* note 10 at 49.

133. See J.F. Caddy, *Some Considerations Relevant to the Definition of Shared Stocks and Their Allocation between Adjacent Economic Zones: FAO Fisheries Circular No. 749* (Rome: FAO, 1982) at 4. Although Caddy’s report was addressed to the problems of fish stocks straddling international boundaries, the report is apposite in this context.

134. Jentoft & McCay, *supra* note 3 at 241, suggest that the appropriate role for scientists on a community-based management decision-making body is as a “supplement to rather than a substitute for moral and practical knowledge and common sense.”

Accordingly, offshore fisheries management is made subject to these dual purposes. The representation of the BMCs on the Offshore Fisheries Boards (OFBs) ensures that the ecosystem-wide perspective, and the concerns of the CFMBs, are taken into account in the development of offshore fisheries management policies.¹³⁵ It is expected that circulation and ongoing discussion of the *CBMFA* will lead to an expansion and specification of the OFBs' structure and function.

Conclusion

The purpose of this proposal has been to indicate the need for a radical change in the values and methods of fisheries management in Atlantic Canada. The proposal has attempted to demonstrate the failures of the traditional approach and to propose community-based management as an alternative to the traditional approach, and to any other paradigmatic management philosophy (*i.e.*, individual transferable quotas). In explaining how community-based management might be able to address these deficiencies of knowledge input, regulatory specificity, and regulatory legitimacy and compliance, this proposal has sought to justify the development of legislation that would make community-based management of fisheries a central component of Canadian fisheries policy.

This structured and principled approach, firmly grounded in a policy of promoting the sustainability of fisheries and fishing communities, is sufficiently flexible to permit adjustments in the institutionalization process, and to respond to the varied needs of different communities. At the same time, the proposal contains the necessary checks and balances to ensure that, on an ongoing basis, community-based management is consistent with public policy objectives. It is hoped that this proposal will receive serious attention, out of which might come a typically Canadian consensus amongst government, the fishing communities and the greater public, on how to fix our fisheries.

135. Harvey & Coon, *supra* note 10 at 52.

ANNEX

..... Session, Parliament,
45 Elizabeth II, 199...

THE HOUSE OF COMMONS OF CANADA

BILL C-....

An Act respecting the community-based management of fisheries in
Atlantic Canada

First reading, , 199...

..... Session,th Parliament
45 Elizabeth II, 199...

THE HOUSE OF COMMONS OF CANADA

PROPOSED BILL C-...

An Act respecting the community-based management of fisheries in Atlantic Canada

WHEREAS Canadians recognize the integral role which fisheries have played in the development of our country;

WHEREAS Canada desires to maintain the importance and viability of the fishing industry in perpetuity, for the benefit of present and future generations;

WHEREAS Canada holds that conservation, based on an ecosystem approach, is of fundamental importance to maintaining biological diversity and productivity in the marine environment;

WHEREAS Canada recognizes the need to promote a precautionary approach to the conservation, management and use of marine resources, in order to protect these resources and preserve the marine environment;

WHEREAS the conservation of Canada's fisheries and their management on a sustainable basis are central to the livelihood of fishers and the sustainability of fishing communities;

WHEREAS the sustainability of Canada's fishing communities depends on equitable access to the fisheries by members of the present generation, and as between the present and future generations;

WHEREAS fishers and their organizations wish to have a greater role in the direct management of Canada's fisheries;

AND WHEREAS Canada recognizes that the principled delegation of fisheries management authority to community-based management organizations can achieve the sustained use of marine resources and promote the sustainability of fishing communities;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons, enacts as follows:

SHORT TITLE

1. This Act may be cited as the *Community-based Management of Fisheries Act*.

PURPOSES

2. For greater certainty, the purpose of this Act is to facilitate the delegation of management responsibilities to Community Fisheries Management Boards, and equally

(a) to ensure the sustainability of Canada's fisheries through a precautionary and ecosystem approach to the conservation, management and use of marine resources;

(b) to ensure the sustainability of Canada's fishing communities through

(i) the proper management and stewardship of all marine resources, and

(ii) the promotion of equitable access to, and participation in the control of the fisheries by present and future fishers; and

(c) to recognize that Canada's fisheries are the common property of all present and future Canadians, and therefore to manage those resources for the maximum benefits of all.

INTERPRETATION

3. In this *Act*,

"community" means all fishers who reside in a geographically defined area;

"conservation" means the protection of a species and its habitat to ensure the ability of the species to propagate itself indefinitely;

"Department" means the Department of Fisheries and Oceans;

"fish"

(a) where used as a noun, includes

(i) parts of fish,

(ii) shellfish, crustaceans, other marine animals, and any parts thereof, and

(iii) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and other marine animals, and

(b) where used as a verb, means catch or attempt to catch fish;

"fisher" means a person engaged in fishing, and for greater certainty, does not include corporations

"fishers' organization" means an organization representing fishers'

“fishery” means a fishery described in terms of

- (a) a species of fish,
- (b) a place where fishing may be carried on,
- (c) a particular method of fishing, or
- (d) a particular type of fishing gear or equipment or vessel used;

“Minister” means the Minister of Fisheries and Oceans;

“precautionary approach” means erring on the side of caution in favour of the environment where there is uncertainty as to the risk of serious or irreversible environmental damage;

“sustainability” means maintaining the viability of resources in order to meet the needs of the present without compromising the ability of future generations to meet their own needs.

HER MAJESTY

4. This Act is binding on Her Majesty in right of Canada or a province.

TERRITORIAL OPERATION

5. This Act applies, in addition to its application to Canada,
- (a) to the exclusive economic zone of Canada;
 - (b) in respect of sedentary species, to the continental shelf of Canada; and
 - (c) to Canadian fishing vessels and Canadian citizens on any area of the sea other than an area of the sea that forms part of the territorial sea or internal waters of another state.

PART I

ATLANTIC FISHERIES TRIBUNAL

ESTABLISHMENT

6. There is hereby established a tribunal, to be known as the Atlantic Fisheries Tribunal, consisting of a full-time Chairperson and any part-time members, all appointed by the Governor in Council.
7. (1) The Chairperson is the chief executive officer of the Tribunal.
- (2) If the Chairperson is absent or unable to act or if the office of Chairperson is vacant, such other member of the Tribunal as is designated by the Governor in Council shall perform the functions of the Chairperson.

8. (1) The members of the Tribunal shall be appointed to hold office during good behaviour for a term not exceeding three years, but may be removed by the Governor in Council at any time for cause.

(2) A member may be re-appointed to the Tribunal.

9. A person is not eligible to be appointed as a member unless the person has expertise about Canada's fisheries resources and is knowledgeable about administrative decision-making.

10. (1) A person is not eligible to be appointed or to continue as a member if the person is, directly or indirectly, as owner, shareholder, director, officer, partner or otherwise, engaged in a fisheries business or undertaking or is a member of, or the holder of an office in, a fishers' organization, a Community Fisheries Management Board, a Bioregional Management Council, or the Offshore Fisheries Board.

(2) A member who becomes engaged in the manner referred to in subsection (1) by will or succession shall become disengaged within ninety days after becoming so engaged.

11. Members shall not accept or hold any office or employment inconsistent with their functions under this Act.

12. The Chairperson of the Tribunal shall be paid such remuneration and allowances as are fixed by the Governor in Council, and each other member is entitled to be paid such fees for that other member's services as are fixed by the Governor in Council.

13. If a person who is engaged as a member in respect of any matter ceases to be a member before rendering a decision in respect of the matter, the person may, with the authorization of the Chairperson of the Tribunal, continue, during a period not exceeding one hundred and eighty days, to act as a member in respect of the matter.

14. (1) The secretary and other staff necessary for the proper conduct of the business of the Tribunal shall be appointed in accordance with the *Public Service Employment Act*.

(2) The Tribunal may engage and, subject to the approval of the Treasury Board, fix the remuneration of persons having technical or special knowledge to assist or advise the Tribunal in any matter.

15. In performing its functions, the Tribunal shall, where appropriate, make use of the services and facilities of departments, boards and agencies of the Government of Canada.

16. (1) The members and the secretary and other staff referred to in section 14 are not personally liable for anything done or omitted to be done in good faith in performing any functions under this Act.

(2) Subsection (1) does not, by reason of section 10 of the *Crown Liability and Proceedings Act*, relieve the Crown of liability in respect of a tort to which the Crown would otherwise be subject.

17. The Tribunal is an agent of Her Majesty in right of Canada for the purposes of the law of contract.

18. The Tribunal, its members and the secretary and other staff referred to in section 14 are servants of Her Majesty in right of Canada for the purposes of the law of tort.

19. The jurisdiction of the Tribunal shall be exercised,

(a) in certifying a Community Fisheries Management Board, by three members of the Tribunal assigned by the Chairperson of the Tribunal to that case, and the order made by the members is an order of the Tribunal, and

(b) in any other case, by a single member of the Tribunal assigned by the Chairperson of the Tribunal to that case, and the order made by the member is an order of the Tribunal.

20. All parties to a proceeding before the Tribunal may appear in person or may be represented by counsel or by an agent.

21. All proceedings before the Tribunal shall be open to the public.

22. (1) The Tribunal may summon any person to appear as a witness before it and may order the witness to

(a) give evidence orally or in writing; and

(b) produce any documents and things that the Tribunal

considers necessary or desirable for the purpose of performing any of its functions.

23. (2) A witness who is served with a summons under subsection (1) is entitled to receive the fees and allowances to which persons who are summoned to appear as witnesses before the Federal Court are entitled.

24. (1) Any summons to a witness issued or order made by the Tribunal may be made a summons to a witness or an order of the Federal Court or of the superior court of a province and is enforceable in the same manner as a summons to a witness or an order of that court.

(2) To make a summons or an order of the Tribunal a summons or an order of the Federal Court or of the superior court of a province, the usual

practice and procedure of the court in such matters may be followed, or the secretary of the Tribunal may file a certified copy of the summons or order with the registrar of the court and the summons or order thereupon becomes a summons or an order of the court.

25. The Tribunal may review and confirm, rescind or vary any decision or order made by it.

26. The Tribunal shall publish its decisions and orders in the manner it sees fit.

27. (1) For greater certainty, subject to section 33 of this Act, the Federal Court has jurisdiction under section 18.1 of the Federal Court Act to hear and determine an application for judicial review in which relief is sought against the Tribunal.

(2) The Tribunal is entitled to be heard by counsel or otherwise on the argument of an application referred to in subsection (1).

28. The Tribunal may make by-laws respecting the calling of meetings of the Tribunal, the conduct of business at meetings of the Tribunal and the internal administrative affairs of the Tribunal.

29. The Tribunal may, with the approval of the Governor in Council, make rules governing its practice and procedure.

PART II COMMUNITY FISHERIES MANAGEMENT BOARDS

CERTIFICATION

30. (1) An application may be made to the Tribunal for the certification of a fishers' organization as a Community Fisheries Management Board.

(2) Before an application can be made, notice of it shall be given to

(a) fishers of the community in respect of which the application is being made, and

(b) fishers of adjacent communities.

(3) Any interested party shall be entitled to make submissions to the Tribunal on issues relevant to the certification application.

(4) An application shall be granted if, in the opinion of the Tribunal, the application satisfies the following criteria:

(a) the fishers' organization is representative of the community;

(b) the fishers' organization is bound by a constitution which is based on democratic principles so that

- (i) every member of the community has a vote in electing representatives, and
- (ii) there exist mechanisms to ensure participatory decision-making by the members;
- (c) the geographic region comprising the community is an appropriate fisheries management unit, having regard to the purposes of the Act;
- (d) the fishers' organization has the capacity to take on management responsibilities, in furtherance of the purposes of the Act; and
- (e) the application is consistent with the purposes of the Act.

(5) Subject to subsection 32(2)(d), the Tribunal shall not certify as a Community Fisheries Management Board any fishers' organization claiming to represent a community already represented, in whole or in part, by another Community Fisheries Management Board.

EFFECTS OF CERTIFICATION

31. (1) All members of the community for which the Community Fisheries Management Board has been certified shall be deemed equal members of that Community Fisheries Management Board.

(2) Nothing in this Act shall be taken to abrogate or derogate in any way from existing aboriginal treaty or other rights.

DECERTIFICATION

32. (1) Any interested party may apply to the Tribunal to decertify a Community Fisheries Management Board, within three months prior to the termination of a fisheries management agreement.

(2) In deciding whether to decertify a Community Fisheries Management Board, the Tribunal shall have regard to

- (a) the level of community support for the application,
- (b) whether the Community Fisheries Management Board has acted inconsistently with the purposes of the Act, and the terms of the fisheries management agreement, and;
- (c) the ability of the applicant to otherwise enforce the terms of the Community Fisheries Management Board's constitution or the fisheries management agreement,

or whether

- (d) a more appropriate Community Fisheries Management Board has been proposed under section 30.

33. All decisions of the Tribunal concerning certification and decertification are final and conclusive, and not subject to question or review.

FISHERIES MANAGEMENT AGREEMENTS

34. (1) Her Majesty in right of Canada, represented by the Minister, shall enter into a fisheries management agreement with any Community Fisheries Management Board, if the fisheries management agreement is consistent with the purposes of the Act.

(2) An agreement shall establish, subject to subsection 35 of the *Oceans Act*, subsection 21 of the *Fisheries Act*, and subsection 43 and 44 of this Act, the area of the sea in which a Community Fisheries Management Board shall have exclusive management authority over fisheries, having regard to

- (a) the relative proximity of the area of the sea to the community,
- (b) the historical linkages between the community and the area of the sea,
- (c) the economic dependence of the community on the area of the sea, and
- (d) any competing claims to the area, based on proximity, historical use and economic dependency, by fishers who are not members of the Community Fisheries Management Board.

(3) An agreement may establish

- (a) harvest limits, and other conservation and management measures for a fishery;
- (b) conditions for access to a fishery;
- (c) the obligations, responsibilities and funding arrangements with respect to the management of a fishery;
- (d) conservation and management programmes for a fishery;
- (e) authority for the Community Fisheries Management Board to conclude binding agreements with other persons or bodies, including other Community Fisheries Management Boards;
- (f) any other matters necessary to ensure an agreement is consistent with the purposes of the Act.

35. Upon the request of either party, the Tribunal may appoint a facilitator to assist in the conclusion of a fisheries management agreement.

36. The Minister shall publish a fisheries management agreement in the *Gazette*.

EFFECTS OF AGREEMENT

37. (1) An agreement is binding between the parties, and has the force of law against all other persons with notice of it.

(2) A person is deemed to have notice of a fisheries management agreement once it has been published in the *Gazette*.

38. (1) Violations of fisheries management agreements shall be prosecuted as if they were violations of the *Fisheries Act*.

(2) Violations of a fisheries management agreement by members of the Community Fisheries Management Board covered by the fisheries management agreement, shall not be prosecuted pursuant to the *Fisheries Act* without the consent of that Community Fisheries Management Board.

39. In the event of an inconsistency between a term of a fisheries management agreement and a regulation or a provision of a regulation made pursuant to the *Fisheries Act*, the fisheries management agreement shall prevail to the extent of the inconsistency.

PART III
BIOREGIONAL MANAGEMENT COUNCILS

ESTABLISHMENT

40. There are hereby established Bioregional Management Councils for the following bioregions:

- (a) Bay of Fundy,
- (b) Scotia Shelf
- (c) Gulf of St. Lawrence, and
- (d) Newfoundland,

whose mandates are to ensure that management measures within the bioregion are consistent with the purposes of the Act, and in particular with subsection 2(a).

41. (1) A Bioregional Management Council shall be comprised of:

- (a) representatives from each of the Community Fisheries Management Boards within its jurisdiction;
- (b) persons representing fishers operating within its jurisdiction who are not represented by a Community Fisheries Management Board, and;

(c) fisheries managers and technical advisors appointed by the Governor in Council.

(2) The representatives under subsection (1)(b) shall be elected by the fishers within the jurisdiction of the Bioregional Management Councils who are not members of a Community Fisheries Management Board.

(3) The representatives of the Community Fisheries Management Boards and the persons referred to in subsection (2) shall comprise a majority of the voting members of a Bioregional Management Council.

42. The Minister may appoint to the Bioregional Management Council such non-voting members as she/he sees fit, to represent the broader public interest.

43. (1) In furtherance of its mandate and the purposes of the Act, a Bioregional Management Council may make regulations, and in particular, but without limiting the generality of the foregoing, may make regulations prescribing, within its region,

- (a) gear restrictions;
- (b) area closures;
- (c) closed seasons; and
- (d) minimum fish size limits.

(2) A regulation made pursuant to subsection (1) shall be published in the *Gazette* and is binding on every person who has notice of it.

(3) A person is deemed to have notice of a regulation once it has been published in the *Gazette*.

(4) A violation of a regulation made pursuant to subsection (1) shall be prosecuted as if it was a violation of the *Fisheries Act*.

44. In order to further the purposes of the Act, a Bioregional Management Council may establish binding conditions for an agreement between two or more Community Fisheries Management Boards.

45. (1) A Bioregional Management Council shall establish and appoint members to the Scientific Committee and the Management Committee.

(2) The Scientific Committee shall develop, collect, and evaluate relevant biological, social, economic and other scientific information relevant to the mandate of the Bioregional Management Council and the objectives of the Act, and shall make recommendations to the Bioregional Management Council on the exercise of its powers.

(3) The Management Committee shall develop, collect, and evaluate information on management needs, experiences and practices relevant to

the mandate of the Bioregional Management Council and the objectives of the Act, and shall make recommendations to the Bioregional Management Council on the exercise of its powers.

46. In the exercise of its mandate, a Bioregional Management Council shall

(a) gather, compile, analyze, coordinate and disseminate information; and

(b) consult with the Minister, other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, fishing communities and other persons and bodies, including Community Fisheries Management Boards, Bioregional Management Councils and the Offshore Fisheries Board.

PART IV OFFSHORE FISHERIES BOARD

ESTABLISHMENT

47. (1) There is hereby established the following Offshore Fisheries Boards, whose mandate is to pursue fisheries management in accordance with the purposes of the Act, in that area of the Exclusive Economic Zone which is outside the territorial jurisdiction of the Bioregional Management Councils.

(a) [list appropriate OFBs based on geography/economic activity]

(2) The Offshore Fisheries Boards shall be comprised of representatives of corporations, representatives of fishers' organizations whose membership works in the offshore industry, fisheries managers and technical advisors appointed by the Governor in Council, and representatives of the Bioregional Management Councils.

(3) The Minister may appoint to the Offshore Fisheries Boards such non-voting members as she/he sees fit, to represent the broader public interest.

48. (1) The Offshore Fisheries Boards may make regulations for carrying out the management of offshore fisheries and in particular, but without limiting the generality of the foregoing, may make regulations prescribing

- (a) monitoring and reporting requirements;
- (b) gear restrictions;
- (c) area or seasonal closures;
- (d) minimum fish size limits; and
- (e) conditions for the issuance of permits.

REVIEW

49. Any interested party may apply to the Tribunal for an order quashing any agreement, any provision of any agreement, or any regulation or direction made under Part II, III and IV of this Act, on the grounds that it is inconsistent with the purposes of this Act.

SUPREMACY OF REGULATIONS

50. Any regulation made under this Act which is inconsistent with any regulation or provision of any regulation under the *Fisheries Act*, shall prevail to the extent of the inconsistency.