



Schulich School of Law
Dalhousie University
Marine and Environmental Law Institute

Law and Policy Working Group

David VanderZwaag & Phillip Saunders
OceanCanada Conference
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No, really...it's law AND policy



OceanCanada Proposal: Law and Policy WG

Three main areas of study originally proposed:

- Sustainability principles in fisheries management practice
- Rethinking aquaculture law and policy
- Integrated coastal/ocean governance

In each area:

- Assessment of “state of play” in Canada
- Comparative studies: international best practices
- Scenarios and recommendations for future legal and policy development (reliant on regional groups to some extent)



Aquaculture

- MELAW (Dal) has initiated study of comparative aquaculture legislation/policy with Jebsen Centre, Tromso
 - Integrated this work with initial phase of aquaculture component – added OCP elements
 - Further regional studies may be sequenced in later OCP project years (depending on regional WG work)



Progress to date - Aquaculture

- Organized Special Session on Aquaculture Law and Policy at the International Conference on Aquaculture and Fisheries (Brisbane, Australia, 20-22 July) – plus 2 presentations
 - “Towards Sustainable Aquaculture: Navigating International Law and Policy Currents” (VanderZwaag)
 - “Governance of Aquaculture in Canada: Regulation, Property Rights and Constitutional Impediments” (Saunders)
- International Workshop on Aquaculture Law and Policy (April 2015) - co-organized with the K.G. Jebsen Centre for the Law of the Sea at the Fridtjof Nansen Institute in Oslo, Norway. (VanderZwaag & M. Doelle)



Aquaculture – cont'd

- Book: “Aquaculture Law and Policy: Global, Regional and National Perspectives” – ed. By N. Bankes, I. Dahl & D. VanderZwaag (In press, E. Elgar, 2016). Plus Chapters:
 - “Introduction: Navigating Multi-level Governance in Aquaculture” (VanderZwaag, Bankes & Dahl)
 - “The International Law and Policy Seascape for Aquaculture: Navigating Tangled Currents” (VanderZwaag)
 - “Canada: Status” (Saunders and Doelle)



Aquaculture, cont'd

- Participation (VanderZwaag) in FAO Workshop on Aquaculture Zoning, Site Selection and Area Management, Izmir, (July 2015) Turkey
- Expert Contribution to upcoming FAO/World Bank Technical Report on Aquaculture, Spatial Planning and Management: Implementation of an Ecosystem Approach (VanderZwaag)



Sustainability Principles in Fisheries Management Practice

“Scoping” workshop in Halifax, June 2015 – partners and WG reps (some remotely).

- Liaison with CFRN
- Refined focus for initial stages of project:

“Integrated Fisheries Management Planning in an Era of Changing Oceans”
- To follow with specific workshop, presentations on this theme



Workshop – May 9, 2016: “Integrated Fisheries Management Planning in an Era of Changing Oceans: Principles, Policies and Implementation”

I. Sustainability Principles, Ocean Governance and Changing Oceans

- Ecosystem approach in international fisheries law and policy (Engler)
- Precautionary approach in international law and policy (VanderZwaag)
- Implementation of Sustainability Principles in Canadian Fisheries Law and Policy (Saunders)



May workshop cont'd

II. Implementation of Principles in Integrated Fisheries Planning – Overview of Existing Research

- Review of Implementation in Existing IFMPs (Paul)
- Implementation With Respect to Species at Risk (Fuller)
- Experience in the Atlantic WG (Epstein and Andrews)



Workshop, cont'd

III. Cont'd

- Experience in the Pacific WG (Jones and Ban)
- Assessment of Gaps – Law, Policy and Implementation (Stephenson)

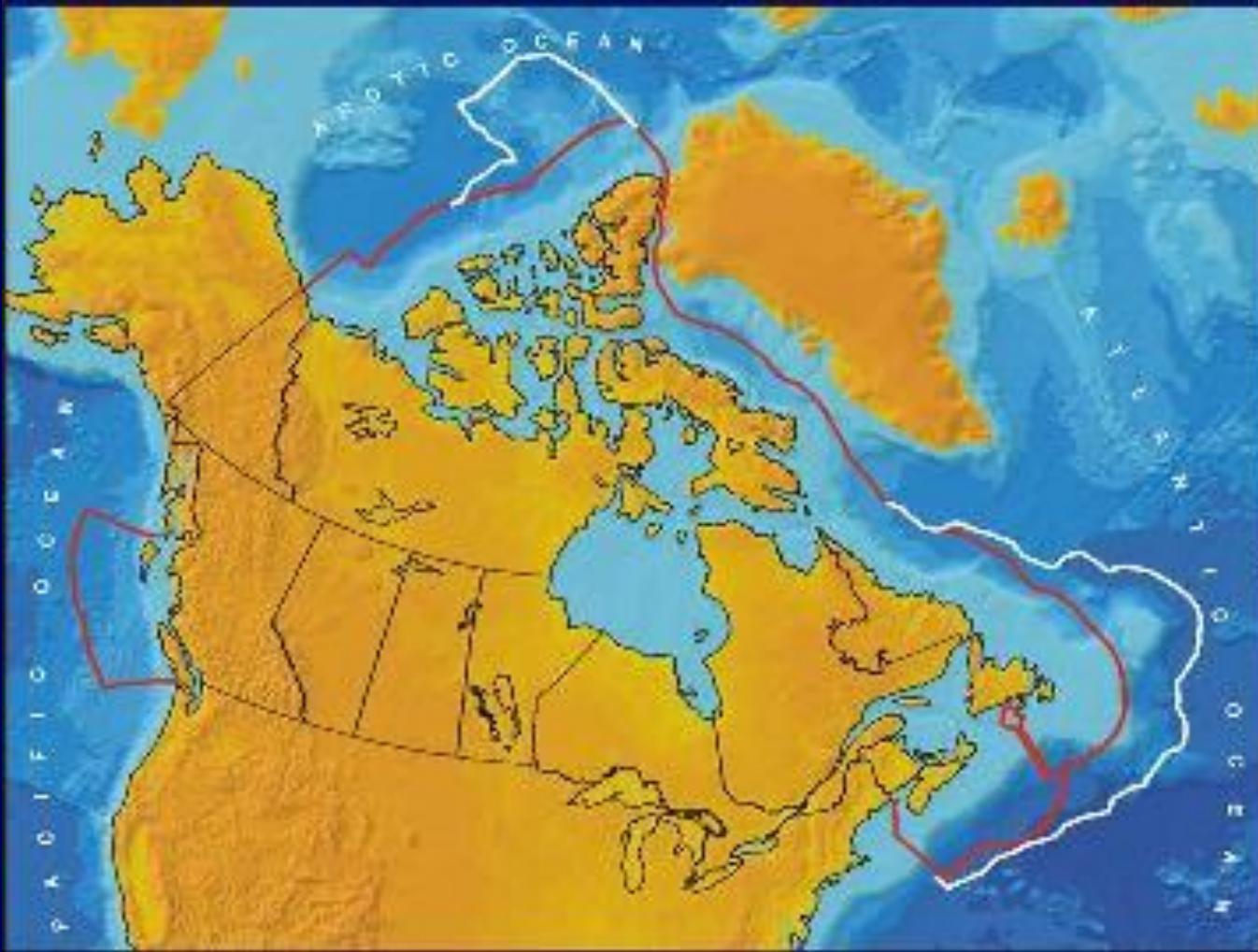
IV. Roundtable and Research Strategy

- Future steps and research agenda
- Possible comparative legislative studies
- IFMPs in Canada: Regional Comparisons



Context: IFMPs in Canada & the Scope of the Challenge

- Starting point: International law and sustainability principles: especially precaution, ecosystem approach
 - Requirement for domestic implementation of treaty rules in Canadian law
 - Some (limited) latitude for automatic adoption of customary law rules – subject to explicit rejection
- Essential point: precaution, ecosystem approach **NOT** self-implementing in fisheries context



The context of implementation:
Three Oceans: 7 mill. Sq km of EEZ jurisdiction
(and more with Shelf)
Source: Govt. of Canada

Common Law

- *Magna Carta* – Public Right of Fishing
 - BUT – can be removed/limited by explicit act of *legislature*
- No Public Trust Doctrine
- *Fisheries Act* leaves little room for common law development
- And aboriginal rights – s. 35 – separate legal order



Constitutional Jurisdiction

- Constitution Act 1867: legislative & proprietary jurisdiction
 - Legislative: Federal jurisdiction over “seacoast and inland fisheries”
 - Broadly interpreted – conservation, sustainability, social and economic benefits – all valid purposes under fisheries power

So: Where do we look for implementation??

- *Fisheries Act (1868)*
 - General prohibition on unlicensed fishing coupled with broad power to regulate.
 - Little or no direction on management or allocation policy
 - No purposes, no principles



The Bluenose

Source: Govt of NS

Fisheries Act Regulation Power

43. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

- (a) for the proper management and control of the sea-coast and inland fisheries;
- (b) respecting the conservation and protection of fish

Regulations Under Fisheries Act

- Regulations under Act include, eg.:
 - Licensing requirements
 - Gear Restrictions
 - Closed Seasons
 - Zones and Fishing areas
- But not: implementation of sustainable development principles
 - Left to general Ministerial power & **non-binding policies**
 - Again – aboriginal rights a distinct category



Oceans Act 1997

- Declaration of zones of jurisdiction
- MPAs; call for National Ocean Strategy & integrated ocean management plans
 - Some limited progress through LOMA process
- But precaution? Arises in two contexts

- First: the ever-popular statement of a non-fact in the Preamble:

“WHEREAS Canada promotes the wide application of the precautionary approach to the conservation, management and exploitation of marine resources in order to protect these resources and preserve the marine environment..”

Second, in s. 30, dealing with National Ocean Strategy (NOS):

30. The national strategy will be based on the principles of
 - (a) sustainable development...
 - (b) the integrated management of activities in estuaries, coastal waters and marine waters...; and
 - (c) the precautionary approach, that is, erring on the side of caution.

A limited formulation of precaution, confined on its face to the criteria for the NOS

Federal Sustainable Development Act 2008

- S. 9(1) mandates the preparation of federal Sustainable Development Strategy
 - Based on the **precautionary principle** (why just one?)
- Fuller definition of precaution:

Precautionary principle means the principle that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

S. 11: Departments to prepare strategies that comply with and contribute to federal strategy

DFO Sustainable Fisheries Framework 2009

Framework built around two elements:

- Policies (existing and evolving)
- Planning and Monitoring Tools

Policies:

- A Fishery Decision-Making Framework Incorporating the Precautionary Approach
- Guidance for the Development of Rebuilding Plans under the Precautionary Approach Framework
- Managing Impacts of Fishing on Benthic Habitat, Communities and Species
- Ecological Risk Assessment Framework (ERAF) for Coldwater Corals and Sponge Dominated Communities
- Policy on New Fisheries for Forage Species

Precautionary Approach/Decision-Making Policy

Modifies UNFA approach to precautionary reference points (target and limit reference points)

Here – framework built on:

- i) Reference points (limit, upper, and target) and stock status zones (Healthy, Cautious and Critical).
- ii) Harvest strategy and harvest decision rules (i.e. responses to status)
- iii) The need to take into account uncertainty and risk when developing reference points and decision rules.

BUT – implementation of this and other policies to be done through IFMP process

IFMPs: Reality & Implementation?

- A “process and a document”
- Consultative exercise – but chaired, driven and finalized by Govt
- Template: set out status of stock, management issues, objectives, access and allocation
- Possible: Joint Project Agreements under IFMP (not quite binding)
- Ultimately: discretion of Minister remains
 - Not enforceable – not complete in coverage



Mandatory Wording in All IFMPs

“This IFMP is **not a legally binding instrument** which can form the basis of a **legal challenge**. The IFMP can be modified at any time and **does not fetter the Minister's discretionary powers** set out in the *Fisheries Act*. The **Minister can**, for reasons of conservation or for any other valid reasons, **modify any provision of the IFMP** in accordance with the powers granted pursuant to the *Fisheries Act*.”

Summary

- Policy documents & IFMPs are guidance, not law
 - Rest in end on broad discretionary powers of Minister
 - Pro: Can be creative, productive (vs slow pace of legislative change)
 - Con: Lack of transparency, political influence, lack of opportunity to challenge, patchwork of results nationally
- Major Issue: Gaps: Law, Policy and/or Implementation?? (per Stephenson)

Next directions and outcomes

- Short, Multi-authored review and critique of Canada's IFMP Process
- Comparative Assessment of National fisheries legislation and policies from selected countries
 - Objectives, Principles
 - Institutional arrangements, science support, recovery planning, habitat protection,
 - Dispute resolution
 - Specific consideration of climate change, acidification
- Data collection in progress this summer

- Critical review of Canada's fisheries management policies, with focus on IFMPs
 - Gaps in law, policy, implementation
 - Work towards special journal issue or report on Canada and IFMPs
- New Project under OceansCanada: possibly collaborative project of national WGs?
“Transboundary Fisheries Management in an Era of Shifting Ecosystems” (for discussion Day 3)
 - Some relevant work on Bluefin tuna, NAFO already complete through sustainable fisheries component



Intergrated Coastal & Ocean Governance

- Component phased later in OCP project
 - Some work conducted but internal to L&P WG
- Need re-examination: not clear there is base/interest in regional WG work
- For discussion at conference
 - Broader issue with structure of national WGs: integrated outputs depend on projects in regions: sequencing

Thank you



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