



Fisheries and Oceans  
Canada

# **Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries**

**A Discussion Document**

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## Message from the Minister

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As I announced a few weeks ago, I am now distributing a discussion document to thousands of Atlantic fishing industry stakeholders who are as interested in preserving the independence of the inshore fleet as I am.

I encourage you to read the paper and then participate in consultations starting in January to explore options aimed at developing specific measures to strengthen the vitality of inshore fleets. They are the backbone of the fishing industry.

I want your advice at this important stage of the Atlantic Fisheries Policy Review (AFPR) as we seek to modernize the policies that govern our commercial fisheries and to keep pace with their evolution. With your help, the AFPR policy framework will become the first comprehensive guide to fisheries management on Canada's Atlantic coast.

In building the foundation of the AFPR, it has become clear at previous meetings with resource users that dealing with these so called "trust agreements" was something we needed to move forward with quickly. This discussion paper asks you to focus on the owner-operator and fleet separation policies and also invites discussion into widespread concern that the fleet separation policy is being undermined by so-called "trust agreements."

I want to make sure that the spirit of the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* is not undermined. It is important that the vibrant small business community of inshore fleets continues to contribute to the health and prosperity of hundreds of coastal communities.

Enclosed you will find a schedule of the public consultation sessions to be held in Atlantic Canada, Quebec and Nunavut. If you are unable to attend one of these sessions, I would ask that you please submit your comments by one of the methods outlined at the end of this document.

My objective in this process is to continue working with you to create the circumstances for resource users to be more self-reliant, economically viable and self-sustaining on a long-term basis. Please take the time and effort to make your opinions known so that we can reach this goal together.

A handwritten signature in black ink, appearing to read 'R. Thibault', with a long horizontal flourish extending to the right.

**The Honourable Robert G. Thibault**  
**Minister of Fisheries and Oceans**

December 2003

# 1.0 Introduction

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During the AFPR consultation process, inshore fleets expressed widespread concerns that the fleet separation policy is being undermined by an apparent proliferation of “trust agreements” and asked that Fisheries and Oceans Canada close so-called “loopholes” in the policy that allow this to happen. These consultations also revealed concerns that a proposal in the policy framework to introduce a degree of flexibility to the owner-operator and fleet separation policies would erode their purpose.

The Minister of Fisheries and Oceans is committed to preserving the independence of the inshore fleets while meeting one of the two core objectives of the AFPR to create the circumstances for resource users to be more self-reliant, economically viable and self-sustaining on a long-term basis. This consultation provides an opportunity to examine options available to ensure that this commitment is kept. Fisheries and Oceans Canada is thus inviting resource users in the commercial fisheries to participate in this examination of the effectiveness of the fleet separation policy with respect to its underlying objectives. Fisheries and Oceans Canada is also seeking views on other approaches to foster the independence and economic viability of fleets covered by the owner-operator and fleet separation policies.



## 2.0 Background

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The release of this document represents an acceleration of a part of Phase II of the Atlantic Fisheries Policy Review (AFPR). Phase I of the AFPR focused on developing a policy framework for the management of Atlantic fisheries, which will be released in the coming months. Phase II will establish priorities and begin to operationalize elements of the policy framework.

### 2.1 Atlantic Fisheries Policy Review (AFPR)

The AFPR was established by Fisheries and Oceans Canada to develop a consistent and cohesive policy framework for the management of Canada's East Coast fish stocks. The work of the AFPR is being done in two phases with the first phase nearing completion and due to be announced in the coming months. Phase I included extensive consultations, which demonstrated broad support for a vision for the management of the Atlantic fisheries. Principles to guide decision-making in the long term were developed, along with clear objectives to achieve the vision. Phase I will be completed with the release of a comprehensive policy framework. Phase II will establish priorities and begin the practical implementation of the policy framework.

During the AFPR consultation process it became clear that industry views regarding the owner-operator and fleet separation policies were highly polarized. The inshore fleets expressed widespread concerns that the fleet separation policy is being undermined by "trust agreements" and asked that Fisheries and Oceans Canada close so-called "loopholes" in the policy that allow this to happen. These consultations also revealed that a proposal in the policy framework to apply a degree of flexibility to the owner-operator and fleet separation policies without limiting the use of "trust agreements" would erode their purpose.

However, others, including offshore interests and representatives of the processing sector, argued that these policies impair the ability of the fishing industry to compete in the global market. These interests further argued that while inshore fishers can hold processing licences, under the fleet separation policy, new inshore licences cannot be issued to processors.

#### *AFPR Vision and Objectives*

The vision for the Atlantic fisheries is of a biologically sustainable resource supporting fisheries that:

- are robust, diverse and self-reliant,
- effectively involve all interests in appropriate fisheries management processes,
- are sustainable and economically viable, contributing to the economic base of coastal communities, and
- provide for the constitutional protection afforded Aboriginal and treaty rights and where Aboriginal and non-Aboriginal resource users work collaboratively.

To make the vision for the Atlantic fisheries a reality there are two core objectives of conservation and sustainable use, and self-reliance. To be more self-reliant, resource users will have more flexibility to make decisions about their own economic and social objectives. Self-reliant fisheries and collaboration among all orders of government will contribute to the well-being of coastal communities.

## 2.2 “Trust Agreements”

A fishing licence reflects a privilege to fish, which is granted annually at the absolute discretion of the Minister pursuant to the *Fisheries Act* (the *Act*). It is a limited permission to fish constrained by conditions of licence. When the licence expires, the privilege to fish terminates.

Some licences that have been issued to individuals or to companies become the subjects of what is often referred to as “trust agreements”. Fisheries and Oceans Canada is not a party to these contracts and is not bound by their provisions. These “trust agreements” are entered into between the licence holder and a processor or other third party. Oftentimes, these agreements purport to direct the use of the licence (the beneficial interest) by the processor or the other third party. These private contracts are legal instruments, which bind the parties that sign them.

The *Act* or the regulations made pursuant thereto do not specify that a licence holder must hold the licence *and* the rights that flow from the licence (i.e. what is referred to as the “beneficial interest”). Section 16 of the *Fishery (General) Regulations* sets out that a document, which includes a licence, is the property of the Crown and is not transferable. The restriction on transfers has been interpreted by the courts as prohibiting the transferring of the “legal title” of the licence but not the “beneficial interest” that flows from it. The *Act* or the regulations made pursuant thereto thus do not currently prohibit some licence holders from transferring, by way of contract or “trust agreements”, the beneficial interests in their licence to another party.

The concepts of “legal title” and “beneficial interest” have been considered by the Courts in the context of fishing licences. The British Columbia Court of Appeal held in *British Columbia Packers v. Sparrow* 35 B.C.L.R. (2<sup>nd</sup>) 334 (1989) that nothing in the *Act* or regulations prohibited a nominee from holding in trust, or prohibited a transfer of a beneficial interest in a licence as the restrictions in the regulations applied only to transfers of the title.

Where a licence is the subject of such a “trust agreement” and the beneficial interest in the licence is transferred to another party, the legal title remains vested in the licence holder and he/she remains, according to the courts, a “bare trustee holding the licence”.

“Trust agreements” that purport to transfer the beneficial use of a licence, although they have not been considered as illegal by courts, contravene the owner-operator and fleet separation policies and the Core fisher designation since they allow a corporation, third party or entity other than the licence holder to control a licence in the inshore fleet.

### **2.3 Commercial Fisheries Licensing Policy for Eastern Canada, 1996**

The *Commercial Fisheries Licensing Policy for Eastern Canada, 1996*, provides guidance in relation to access to the fishery to provide for orderly harvesting of the resource. The Policy deals with the issues of Core enterprises, foreign ownership, fleet separation, owner-operator, processing at sea, factory freezer trawlers, vessel replacement, seal licensing and appeals process and procedures. It promotes viable and profitable operations for the average participant while recognizing that specific measures may be necessary for certain fisheries and geographical locations of Eastern Canada.

### **2.4 The Owner-Operator and Fleet Separation Policies**

(Contained within the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996*)

The intent of the owner-operator and fleet separation policies is to protect the independence of the inshore fleet from control by other interests such as processing companies. Both policies are designed to keep separate the processing and harvesting functions.

### *Owner-Operator Policy*

Under the owner-operator provision, licence holders who are restricted to using vessels less than 65 feet in length are required to fish their licences personally. The Policy contains a provision whereby licence holders who have previously designated an operator for one or more of their vessels may continue to do so under a “grandfather” clause. A substitute operator may be designated when a licence holder is prevented, by circumstances beyond his/her control, from engaging in the activity authorized by the licence.

### *The Fleet Separation Policy*

The fleet separation policy, initially adopted in 1979, covers fisheries where licence holders are restricted to using vessels less than 65 feet in length. The Policy includes the following provisions:

- Corporations may not hold new fishing licences for vessels less than 65 feet in length;
- allows for the retention of licences held by corporations before 1979, including those involved in the processing sector; and
- allows fishing licences for vessels less than 65 feet in length, held by corporations prior to 1979, to be issued as replacement licences to another pre-79 corporation which holds fishing licences for vessels less than 65 feet in length.

## 3.0 Preserving the Independence of the Inshore Fleet

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Fisheries and Oceans Canada endorses the importance of maintaining an independent and economically viable inshore fleet. It is important to restate that the owner-operator and fleet separation policies are integral elements of the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996*, and remain in effect. Given the widespread concern expressed by inshore fleets that the fleet separation policy is being undermined by “trust agreements”, Fisheries and Oceans Canada is intent on dealing with the issue of “trust agreements” that direct the use of the licence (the beneficial interest) by a party other than the licence holder by exploring options for preserving the independence of the inshore fleet. Part of a strong and independent inshore fleet is the viability and profitability of the individual operations. The AFPR seeks to create the conditions for enterprises to be more self-reliant, economically viable and self-sustaining on a long term basis. Some resource users have noted that this might include incorporation, other business planning tools or further diversification of their operations.

Fisheries and Oceans Canada is inviting resource users in the commercial fisheries to examine the effectiveness of the fleet separation policy with respect to its underlying objectives, and to provide their views on exploring other approaches to foster the independence and economic viability of fleets covered by the owner-operator and fleet separation policies.

### 3.1 Possible Options

*Proposed regulation made pursuant to the Fisheries Act.*

A carefully drafted regulatory modification based on fisheries management objectives could be an option to address some of the issues that arise as a result of “trust agreements”, one of them being the issue of dividing what is referred to as “legal title” and the “beneficial interest” which flow from the licence between two entities, i.e. the licence holder and the other party. DFO may have the competence, if it does so for fisheries management reasons, to require that the licence holder remains the only entity that holds the title as well as the beneficial interest in the licence. DFO would have to demonstrate that it is essential from a fisheries management point of view that these “trust agreements” be

dealt with as they negatively affect the management of the fisheries. DFO would have to justify that for proper fishery management reasons, the licence holder, i.e. the entity that receives the privilege to fish, is the one who should actually benefit directly from the granting of the privilege and maintain control of the privilege.

The underlying objective and purpose of such a proposed regulation would be to strengthen current policies and protect the independence of the inshore fleet. DFO cannot simply attempt to prohibit two parties from entering into a legal contract, nor can it dictate the terms of such a contract. Any such proposed regulation would purport to interfere with private financial transactions and this falls outside the jurisdiction of DFO.

#### *Licensing Policy*

Subject to the *Fisheries Act* and regulations made thereunder, the Minister of Fisheries and Oceans has the absolute discretion to issue licences to fish. The exercise of this discretionary power is guided by, among other things, the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996*. There may be an opportunity to update this licensing policy to include a list of relevant considerations that may be taken into account by the Minister when making a decision regarding the issuance of a licence. DFO could develop clear written criteria that are to be taken into account when decisions are made to issue licences such as the existence of “trust agreements”.

#### *Role for Others*

Provinces echoed the concerns of representatives of the inshore fleet with regard to the owner-operator and fleet separation policies during the consultations on the AFPR. As the regulation of processing plants falls under provincial jurisdiction, there may be a role for provinces, or for others, in preserving the independence of the inshore fleet.

## **3.2 Questions for Discussion**

#### *Regulatory Options*

- Should Fisheries and Oceans Canada pursue a regulatory solution to the issue of “trust agreements”?

### *Licensing Policy Option*

- How can Fisheries and Oceans Canada bring greater transparency to the decision-making process related to the issuance of licences?
- Should it be possible for licences to be issued to corporations in the inshore sector? Under what constraints (for example, should such corporations be wholly owned by individual Core fishers)?
- Should limits be imposed on the concentration of licences? If so, what limits are appropriate?

### *Other Options*

- Are there approaches other than regulatory change that should be explored to deal with the issue of “trust agreements”? If so, what alternatives may be feasible?
- Apart from the owner-operator and fleet separation policies, what else can be done to foster the independence and economic viability of inshore fleets?
- What role could the provinces play to deal with the issue of “trust agreements”?

### *Enforcement Issues*

- What are the most effective and efficient means to enforce policies or regulations designed to protect the independence of inshore fleets?
- What role could resource users play in enforcing those policies or regulations?
- What would be an appropriate penalty? What other penalties would be effective?

### *Other Issues*

- How will the approach to deal with “trust agreements” affect existing arrangements?
- The fleet separation policy allows fishing licences for vessels less than 65 feet in length, held by corporations prior to 1979, to be issued as replacement licences to another pre-79 corporation which holds fishing licences for vessels less than 65 feet in length. What effect would measures to deal with trust agreements have on these arrangements?



## 4.0 Owner-Operator and Fleet Separation Policies

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In addition to the questions raised above, DFO is also seeking to add specificity on new processes that could be developed in the application of the owner-operator and fleet separation policies.

The AFPR Policy Framework proposes that resource users take a greater role in the decision-making processes that affect their operations. This will help to improve the viability and profitability of those operations, and ultimately benefit their communities. To meet their objectives, resource users might want to seek modifications to existing fisheries management policies, including the owner-operator and fleet separation policies. Resource users may also wish to propose new initiatives that better reflect their specific interests.

In keeping with the spirit of allowing fleets to make decisions and seek changes in policy that are best for them, Fisheries and Oceans Canada would consider requests from legitimate and recognized organizations representing a significant proportion of commercial licence holders within their fleets or regions for some changes to the owner-operator and fleet separation policies. Adaptation of these policies must continue to respect their underlying objectives – that is, avoiding undue concentration of licences and preserving and fostering a diversified sector of viable multi-licensed/multi-species independent inshore enterprises headed by professional fish harvesters. Some examples of what might be considered include flexibility for the owner-operator provisions to deal with: facilitation of intergenerational transfers; authorization for heads of enterprises to combine by pooling their quota shares (or licences or gear); or designation of qualified operators who have a long-term attachment to the industry.

More flexibility for resource users to define economic and social objectives must take place within the limits of sustainable use and certain constraints, some of which are listed in section 4.1 below. Procedures must be developed to ensure that communities, citizens and other groups are informed of new initiatives or proposed changes to existing policies that may affect their interests and to ensure that they have an opportunity to participate in the decision-making process. Such procedures will promote full, informed and open participation and debate in the decision-making process.

This new approach proposed is similar to the one adopted for *Vessel Replacement Rules* and is consistent with the AFPR objective of promoting a self-reliant industry where fleets take on a greater role in decisions that affect their operations.

## 4.1 Constraints in Proposing Changes

When considering proposals for modification of any policies or for the introduction of new initiatives, Fisheries and Oceans Canada will examine them in relation to the following constraints, with the understanding that Ministerial approval will be necessary to implement changes:

- adhering to conservation objectives;
- respecting the constitutional protection afforded Aboriginal and treaty rights;
- maintaining a balance between fishing capacity and available resources on a sustainable basis;
- no increase in the number of enterprises consistent with existing licensing policy;
- avoiding imposition of undue costs on governments or other resource users;
- taking into account the interests of others who may be affected by the proposals;
- maintaining the geographic distribution of economic opportunities within a diverse fleet structure; and
- taking into account the Minister's overall authority and responsibility for sustainable use of fisheries resources and their habitat, and for the access and allocation thereof.

Examination of proposals to seek flexible application of the owner-operator and fleet separation policies will also need to adhere to the following additional constraints:

- Fisheries and Oceans Canada will only consider proposals from legitimate and recognized organizations;
- Proposals must represent a significant proportion of commercial licence holders within a given fleet or region;
- Proposals must not result in an undue concentration of licences; and
- Proposals must respect the need to preserve and foster a diversified sector of viable, multi-licensed independent inshore enterprises headed by professional fish harvesters.

## 4.2 Questions for Discussion

- What process should fleets follow to bring proposals to Fisheries and Oceans Canada on the application of the owner-operator and fleet separation policies? Is the process developed through consultations on *Vessel Replacement Rules* appropriate? If not, what should be changed?
- How will the interests of other fleets or non-resource users be factored in? How will fleets bringing proposals forward be accountable for this?
- How should “a significant proportion of commercial licence holders within a fleet or region” be defined?
- How should “legitimate and recognized organizations” be defined?
- Apart from the set of constraints identified in section 4.1, what other constraints should be considered in evaluating proposals with respect to application of the owner-operator and fleet separation policies?
- What should be the contribution of fleets to the costs of implementing proposals for change or new initiatives?
- Should proposed policy changes be reversible? How will the effectiveness of these policy changes be measured? What is an appropriate timeframe for this?



## 5.0 Next Steps

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Based on these consultations, Fisheries and Oceans Canada intends to finalize and adopt an approach to preserving the independence of the inshore fleet.

- Fisheries and Oceans Canada will post “*What We Heard on Preserving the Independence of the Inshore Fleet*” on the Fisheries and Oceans Canada web-site at [www.dfo-mpo.gc.ca/afpr-rppa](http://www.dfo-mpo.gc.ca/afpr-rppa).
- If a proposed regulation is found to be the most effective means to preserve the independence of the inshore fleet, Fisheries and Oceans Canada will circulate a draft regulation that reflects the results of these consultations, and consult on the proposed change.
- Fisheries and Oceans Canada will finalize and release “*Guidelines for the Application of the Owner-Operator and Fleet Separation Policies*”.

Please provide us with your comments and concerns by February 29, 2004 by any of the following means:

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**“PRESERVING THE INDEPENDENCE OF THE INSHORE FLEET IN  
CANADA’S ATLANTIC FISHERIES”**

**CONSULTATION SCHEDULE**

Tuesday, January 13.....Maritime Inn, Port Hawkesbury, NS  
1000 hours

Thursday, January 15 .....Rodd Grand Hotel, Yarmouth, NS  
1000 hours

Tuesday, January 20.....Fairmont Newfoundland Hotel, St. John’s, NL  
1000 hours

Wednesday, January 21\* .....Delta Beausejour Hotel, Moncton, NB  
1000 hours

Thursday, January 22 .....Delta Prince Edward Hotel, Charlottetown, PEI  
1000 hours

Tuesday, January 27\*.....Hôtel des Commandants, Gaspé, QC  
1000 hours

Thursday, January 29 .....Discovery Lodge Hotel, Iqaluit, NT  
0900 hours

**ALL SESSIONS WILL BE OPEN TO THE PUBLIC. IF YOU WISH TO REGISTER TO MAKE A SHORT (10 MINUTE), FORMAL PRESENTATION, PLEASE CONTACT US AT:**

1-613-990-1733 or  
1-613-990-4111 (fax) or  
e-mail us at [afpr-rppa@dfo-mpo.gc.ca](mailto:afpr-rppa@dfo-mpo.gc.ca)

\*Simultaneous interpretation will be available