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The Senate, the *Oceans Act* and Marine Protected Areas

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Matter Commented On: Bill C-55, *An Act to amend the Oceans Act and the Canada Petroleum Resources Act*, as passed by the House of Commons, April 20. 2018.

There is a lot of attention focused on the Senate these days, principally in relation to Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, (and the subject of numerous ABlawg posts); but, there are other Bills standing in a long and slowly moving line in that Chamber as well. These Bills include Romeo Saguenash's private member's Bill C-262 (also endorsed by the Liberals) to give application to the *United Nations Declaration on the Rights of Indigenous Peoples* in Canadian law (and the subject of an ABlawg post here), but also proposed amendments to the *Oceans Act*, SC 1996, c 31 to create an expedited process for establishing marine protected areas (MPAs). This blog post focuses on the latter.

The existing rules for establishing an MPA under the *Oceans Act* are provided in section 35:

> **35 (1)** A marine protected area is an area of the sea that forms part of the internal waters of Canada, the territorial sea of Canada or the exclusive economic zone of Canada and has been designated under this section for special protection for one or more of the following reasons:
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> **(a)** the conservation and protection of commercial and non-commercial fishery resources, including marine mammals, and their habitats;
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> **(b)** the conservation and protection of endangered or threatened marine species, and their habitats;
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> **(c)** the conservation and protection of unique habitats;
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> **(d)** the conservation and protection of marine areas of high biodiversity or biological productivity; and
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> **(e)** the conservation and protection of any other marine resource or habitat as is necessary to fulfil the mandate of the Minister.
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> **(2)** For the purposes of integrated management plans referred to in sections 31 and 32, the Minister will lead and coordinate the development and implementation of a national system of marine protected areas on behalf of the Government of Canada.
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> **(3)** The Governor in Council, on the recommendation of the Minister, may make regulations

> **(a)** designating marine protected areas; and
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> **(b)** prescribing measures that may include but not be limited to
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> **(i)** the zoning of marine protected areas,
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> **(ii)** the prohibition of classes of activities within marine protected areas, and
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> **(iii)** any other matter consistent with the purpose of the designation.

In addition, the current section 36 of the *Oceans Act* provides for "interim marine protected areas in emergency situations".

> **36 (1)** The Governor in Council, on the recommendation of the Minister, may make orders exercising any power under section 35 on an emergency basis, where the Minister is of the opinion that a marine resource or habitat is or is likely to be at risk to the extent that such orders are not inconsistent with a land claims agreement that has been given effect and has been ratified or approved by an Act of Parliament.
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> **(2)** An order made under this section is exempt from the application of sections 3, 5 and 11 of the *Statutory Instruments Act*.

It should be noted that neither of these sections contains a specific procedural stipulation requiring consultation with affected parties or governments, but all of the powers in this part of the *Oceans Act* (Part 2) are subject to the general provision in section 33(2) to the effect that:

> [i]n exercising the powers and performing the duties and functions mentioned in this Part, the Minister may consult with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements.

The *Oceans Act* was passed in 1996. Since then, 11 MPAs have been designated by regulation as follows: (1) Anguniaqvia niqiqyuam Marine Protected Areas Regulations, SOR/2016-280; (2) Basin Head Marine Protected Area Regulations, SOR/2005-293; (3) Bowie Seamount Marine Protected Area Regulations, SOR/2008-124; (4) Eastport Marine Protected Areas Regulations, SOR/2005-294; (5) Endeavour Hydrothermal Vents Marine Protected Area Regulations, SOR/2003-87; (6) Gilbert Bay Marine Protected Area Regulations, SOR/2005-295;(7) Gully Marine Protected Area Regulations, SOR/2004-112; (8) Hecate Strait and Queen Charlotte Sound Glass Sponge Reefs Marine Protected Areas Regulations, SOR/2017-15; (9) Musquash Estuary Marine Protected Area Regulations, SOR/2006-354;(10) St. Anns Bank Marine Protected Area Regulations, SOR/2017-106; and (11) Tarium Niryutait Marine Protected Areas Regulations, SOR/2010-190.

While this seems like an impressive list, progress has also been very slow as acknowledged in a 2012 report of the Commissioner on Environment and Sustainable Development and as noted by several environmental non-governmental organizations (ENGOs) that have lamented as to how long it has taken to designate MPAs, Furthermore, no use whatsoever has been made of the interim protection order process. In the meantime, sensitive candidate areas continue to be subject to the risk of degradation by, *inter alia*, invasive fishery activities. It was for this reason

that Bill C-55 includes a provision that offers an expedited process for creating an MPA on a temporary basis. The proposed new section 35.1(2) in the *Oceans Act* will allow the Minister to designate an MPA by order.

> (2) The Minister may, by order, designate a marine protected area in any area of the sea that is not designated as a marine protected area under paragraph 35(3)(a), in a manner that is not inconsistent with a land claims agreement that has been given effect and has been ratified or approved by an Act of Parliament and, in that order, the Minister
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> (a) shall list the classes of activities that are ongoing activities in the marine protected area;
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> (b) shall prohibit, in the marine protected area, any activity that is not part of a class of activities set out in paragraph (a) and that disturbs, damages, destroys or removes from that marine protected area any unique geological or archeological features or any living marine organism or any part of its habitat or is likely to do so;
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> (c) may prohibit, in the marine protected area, any activity that is part of a class of activities set out in paragraph (a) and that is governed by an Act of Parliament under which the Minister is responsible for the management, conservation or protection of fisheries resources; and
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> (d) may exempt from the prohibition in paragraph (b) or (c), subject to any conditions that the Minister considers appropriate, any activity referred to in those paragraphs in the marine protected area by a foreign national, an entity incorporated or formed by or under the laws of a country other than Canada, a foreign ship or a foreign state.

The order will expire after five years and thus within that time the Minister must recommend that an Order in Council and a set of regulations be made under section 35(3) to continue the MPA status of the area or repeal the order. The amendment also includes a restatement of the precautionary principle in a proposed new section 35.2 to the effect that:

> [t]he Governor in Council and the Minister shall not use lack of scientific certainty regarding the risks posed by any activity that may be carried out in certain areas of 35 the sea as a reason to postpone or refrain from exercising their powers or performing their duties and functions under subsection 35(3) or 35.1(2).

As with the current MPA provision, the new Ministerial designation provision does not contain its own procedural safeguard, although it does indicate that any designation by order must not be inconsistent with a land claims agreement (much like the current section 36). That said, this ministerial power would be just as subject to the general procedural requirements imposed by section 33(2) of the Act and, in addition, both the power to create an MPA by regulation and the power to create an MPA by order would also be subject to the Crown's constitutional duty to consult and accommodate: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), and *Chief Steve Courtoreille on behalf of himself and the members of the Mikisew Cree First Nation v Governor General in Council, et al*, 2017 CanLII 29943 (SCC).

It is therefore somewhat puzzling to learn that the Senate's Standing Committee on Fisheries and Oceans has voted to adopt an amendment to the designation by order process that threatens to tie up this supposedly expedited process for creating a temporary MPA in a procedural quagmire. If it does so, this will completely undermine the objectives of this alternative means of creating an MPA. Indeed, since the amendment is only proposed to apply to the creation of MPAs by ministerial order and *not* to the process of creating an MPA by Order in Council and regulation, it will arguably be *more difficult* to use the ministerial order process than the MPA by regulation process.

The amendment, if passed by the full Senate, will provide as follows:

THAT Bill C-55 be amended in clause 5, on page 4, by adding the following after line 32:

35.11 (1) Before an order may be made under subsection 35.1(2), the Minister shall

(a) cause the proposed order to be posted on the Minister's website, accompanied by a notice that invites the public to provide comments during a period, to be set by the Minister, of at least 60 days, beginning on the day after the day on which the proposed order is posted;

(b) ensure that the public is provided with an opportunity to participate meaningfully in informing the Minister's consideration of the proposed order within the period set under paragraph (a);

(c) provide written notice of the proposed order to every jurisdiction whose lands or interests may be affected by the order and consult and cooperate with every such jurisdiction that requests a consultation no later than 30 days after the day on which it received the notice; and

(d) prepare and post on the Minister's website a report that

(i) summarizes the comments received under paragraph (a),

(ii) describes how the public was provided an opportunity for meaningful participation as required under paragraph (b),

(iii) lists the requests received for consultation under paragraph (c), and

(iv) summarizes the consultations that occurred under paragraph (c).

(2) For the purposes of paragraph (1)(c), ***jurisdiction*** means

(a) the government of a province;

(b) any agency or body that is established under an Act of the legislature of a province and that has powers, duties or functions in relation to the environment;

> **(c)** any body — including a co-management body — that is established under a land claim agreement referred to in section 35 of the *Constitution Act, 1982* and that has powers, duties or functions in relation to the environment; or
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> **(d)** any council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982* and that has powers, duties or functions in relation to the environment
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> > **(i)** under a land claim agreement referred to in section 35 of the *Constitution Act, 1982*, or
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> > **(ii)** under an Act of Parliament or an Act of the legislature of a province, including a law that implements a self-government agreement.
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> **(3)** For greater certainty, the requirement set out in paragraph (1)(c) to consult and cooperate with a jurisdiction includes, when appropriate, a duty to accommodate if the jurisdiction is a body or entity referred to in paragraph (2)(c) or (d).

The amendment proposes four procedural steps, each of which is a condition precedent that the Minister must fulfil *before* making an order. The steps are: (1) a web-based publication and notice requirement (at least 60 days); (2) an opportunity for 'meaningful participation' within that same period; (3) a notice requirement to all jurisdictions whose lands or interests may be affected along with a duty to consult (and later also referred to as a duty to consult and cooperate and where necessary accommodate) but no timeline; and, (4) a report that summarizes all of the activities undertaken under the first three steps, with the necessary implication that such report cannot be completed and posted until all of those earlier steps have been completed. 'Jurisdiction' is broadly defined, much as it is in Bill C-69. All of this of course must be read in light of the Crown's existing constitutional duties with respect to Indigenous communities.

In my view, this amendment illustrates two challenges that government face in the legislative process. First there are the challenges and pitfalls created by piecemeal amendments to existing laws detailing consultation obligations in particular statutory contexts. Second, there is the need to act expeditiously to protect the marine environment while - also observing constitutional obligations to consult and accommodate. This is a difficult balancing act.

At one level I think that we can all support the goal of clarifying the Crown's consultation and accommodation responsibilities, but if this is to be done at a statutory level it is important to look at the statute as a whole. The result of this amendment, if adopted, will be to create a stand-alone set of consultation provisions with respect to a single section and a single power within the statute. This is not a logical approach to address and improve the standard of consultation, nor an approach that will provide certainty with respect to consultation. It will simply beg more questions than it answers with respect to issues such as what the rules are (*or should be*) with respect to other powers within this same statute. In my view, section 33(2) and general constitutional law already provide important guidance with respect to consultation obligations with respect to the statutory powers exercisable under Part 2 of the *Oceans Act*. And, it makes no

sense to make an expedited process to provide a *temporary* MPA designation subject to *more* detailed statutory procedures than those that apply to a permanent designation by way of an order in council and regulation. Effective interim protection for marine areas at risk of harm requires speedy action: this amendment, if confirmed, will frustrate the very purpose of Bill C-55.

At the same time, we must also acknowledge that the need for urgent action cannot occur at the expense of constitutional obligations to consult and accommodate. But in this case the proposed amendment layers on a set of statutory obligations to engage other interests and jurisdictions that goes well beyond the constitutional obligations that the Government of Canada owes to Indigenous communities. These obligations are already protected by the Constitution. The proposed amendment cannot change that, but it can, as noted above, undermine the effectiveness of an important interim and precautionary tool to protect the marine environment.
In sum, the Senate should reject this proposed amendment.

This post may be cited as: Nigel Bankes, "The Senate, the Oceans Act and Marine Protected Areas" (March 30, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/03/Blog_NB_Senate_Oceans_Act_MPAs_Mar2019.pdf