

OCEAN LAW DEVELOPMENTS IN CANADA 2015-2019

Stephanie Hewson | Aug 29, 2019



© Nick Hawkins





The last four years have seen tremendous change in the legal landscape of the ocean in Canada. This report charts legal progress in four areas: how the ocean is governed, how the ocean is protected, how marine spills are addressed, and how marine wildlife is protected.

Commitments made in the publicly-available Ministerial mandate letters set the stage in 2015. In these letters, the Ministers of Fisheries, Oceans and the Canadian Coast Guard, Transport, and Environment and Climate Change Canada were charged with responsibility for legislative reforms on fisheries, protected areas, shipping, and wildlife protection.

A year later, the Oceans Protection Plan was announced. It further accelerated progress on ocean law change in Canada.

LEGAL PROGRESS IN NUMBERS

New/amended statutes	10
New/updated policies and regulations	7
New protected areas	8
Ocean governance agreements	5 (+2 under negotiation)
Industrial activities prohibited in new protected areas	4
At-risk species protected	9

On the following pages is a list of the changes, and what they mean for the ocean.

I. CHANGING THE WAY THE OCEAN IS GOVERNED:

Significant advances have been made in ocean governance. Countries came together to address environmental challenges to ocean health at a global level. Another key area of development is within Canada's borders, as federal, provincial and Indigenous governments are working to build co-governance of the ocean. These efforts recognize that the ocean is a place of overlapping jurisdiction, and that all levels of government are needed on deck in order to govern and protect the ocean.



© Nick Hawkins

INTERNATIONAL OCEAN GOVERNANCE

Internationally, Canada has been party to several key frameworks and agreements in the last four years:

- In 2017, Canada built on G20 commitments by initiating the **G7 Ocean Plastics Charter**, which recognizes the need for urgent action to address the devastating impacts of marine litter on the ocean, and calls for governments to act to eradicate plastic.¹
- In 2018, all five nations with Arctic coastlines signed the **Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean**, along with five other states with significant Arctic interests. The Agreement places a 16-year moratorium on unregulated commercial fishing within the high seas portion of the central Arctic Ocean.²
- In 2019, Canada ratified the **Agreement on Port State Measures to Prevent, Deter, And Eliminate Illegal, Unreported and Unregulated (IUU) Fishing**. This is the first binding international agreement to target IUU fishing, a major contributor to the destruction of marine habitat and global fish stock decline. The Agreement allows ports to deny entry to vessels that have engaged in IUU fishing, and prevent them from landing their catches.³
- Canada is actively participating in the **Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction** to develop a new international treaty for the high seas. The agreement fills several major gaps in international ocean law, filling a major gaps in international ocean law, including marine protected areas, environmental impact assessments, access and benefit sharing to marine genetic resources, and capacity, development and technology transfer related to these legal gaps.
- Canada is also participating in the negotiation of **new terrestrial and ocean conservation targets under the Convention on Biological Diversity**. These will replace and extend the current Aichi targets, which expire in 2020.⁴

INDIGENOUS RELATIONS AND CO-GOVERNANCE

- The Government of Canada and 14 First Nations have signed the **Reconciliation Framework Agreement for Bioregional Oceans Management and Protection on the Pacific North Coast**. The Agreement will support the development of the Marine Protected Area (MPA) Network Planning Process in the Northern Shelf Bioregion, and will help create a more coordinated and efficient approach to ocean governance in the Pacific North Coast.
- The Government of Canada and seven First Nations part of the Coastal First Nations signed the **Coastal First Nations Fisheries Resources Reconciliation Agreement**. The agreement will increase the role of First Nations in fisheries management decisions within their traditional territories. It also provides the First Nations with better access to community-based commercial fishing opportunities.⁵

In addition to these major governance agreements, smaller but equally significant changes have been made to increase Indigenous leadership in other areas of ocean law. For example, new amendments to the *Fisheries Act* require the consideration of Indigenous traditional knowledge in habitat protection decisions; require consideration of adverse effects on Indigenous rights when making decisions under the *Act*; and allow the creation of Indigenous governing bodies to carry out purposes of the *Act*. First Nations on the Pacific Coast have also been instrumental in developing safer shipping guidelines under the *Pilotage Act*. Following the sinking of the Nathan E. Stewart, Heiltsuk and Gitga'at First Nations helped identify several “no-go” areas on BC’s Central Coast for oil tankers without local pilots on board.⁶ Finally, there have been developments in co-governance over specific marine protected areas, discussed further in the following sections.



II. CHANGING THE WAY THE OCEAN IS PROTECTED:

The last four years have seen a surge in the amount of the ocean that is under protection, rising from around 1% in 2015 to 13.81% in 2019. A total of **eight new federal marine protected areas** have been established to protect marine wildlife on all three coasts, from whales and seals, to seabirds and endangered turtles:

- Anguniaqvia niqiqyuam MPA
- Banc-des-Américains MPA
- Hecate Strait/Queen Charlotte Sound Glass Sponge Reef MPA
- Laurentian Channel MPA
- Scott Islands marine National Wildlife Area
- St Anns Bank MPA
- Tuvaijuittuq Interim MPA
- Tallurutiup Imanga National Marine Conservation Area

Six of these areas are MPAs under the federal *Oceans Act*. One is a National Marine Conservation Area under the federal law of the same name, and another is a marine National Wildlife Area under the *Canada Wildlife Act*. The government has also identified four “areas of interest” (AOIs) for potential future MPAs: the Offshore Pacific, Fundian Channel, Eastern Shore Islands, and South Hampton Islands.

In addition to these new protected areas, recent law and policy reforms now make it easier to protect the ocean, and ensures that this protection is effective:

- Canada’s **renewed *Oceans Act***, amended by Bill C-55, creates a new order power to create interim MPAs quickly, which was used to designate Tuvaijuittuq MPA in August 2019. The *Oceans Act* amendments introduce the principle of ecological integrity for the first time in Canadian marine law, and incorporate the precautionary principle into the *Act*.
- Bill C-55 also **amended the *Canada Petroleum Resources Act*** which will make it possible for the government to rescind oil and gas leases within *Oceans Act* MPAs.
- Recognizing that the quality of protection is as important as quantity, the Minister of Fisheries and Oceans has committed to **establishing protection standards** that prohibit oil and gas activities, dumping, mining, and bottom trawl fishing in all new federal MPAs. Fisheries and Oceans Canada has also promised to undertake a review of all existing MPAs during the five year review period to ensure that they also benefit from these protection standards.

© Nick Hawkins



© Nick Hawkins

The dramatic increase in protected areas is also due to the development of a new type of conservation mechanism called a **marine refuge**. Marine refuges are long-term fisheries closures designated by Variation Orders or licence conditions under the *Fisheries Act*, to protect sensitive ecosystems and fish populations. There are currently 34 of these refuges in Canada, and they comprise about half of the new marine protected areas.

- The federal government has **developed operational guidance** for identifying and designating “other effective area-based conservation measures,” or OECMs, which are conserved areas in the ocean that are not marine protected areas. For example, fisheries closures, marine refuges, and Indigenous Protected Areas, can all be considered OECMs in international marine conservation. This document lays out the requirements for an OECM to count towards international conservation targets.
- **Amendments to the *Fisheries Act*** create a new power to develop regulations to establish long term spatial restrictions to fishing activities to protect marine biodiversity. These spatial protection areas are called marine refuges. The renewed *Fisheries Act* also makes it easier to designate Ecologically Significant Areas, which could be used to restrict development or otherwise protect sensitive areas.

CO-GOVERNANCE IN PROTECTED AREA PROCESSES

Advances in ocean governance discussed in the previous section are transforming marine protected areas. Governance and management measures are being developed that recognize inherent Indigenous jurisdiction over coastal and ocean areas, involve greater collaboration between federal, provincial, territorial and Indigenous governments, and take into account the livelihood, health and well-being of communities who depend on the ocean for the livelihood and way of life.

- The Nunatsiavut Government is **developing the Imappivut (“Our Waters”) Marine Plan** that will fully implement Chapter 6 of the Labrador Inuit Land Claims Agreement and will cover the full extent of the coastal and ocean areas of Nunatsiavut. Imappivut will include a co-management plan for the entire marine area out to the 200 nautical mile limit.



© Nick Hawkins

- Two new protected areas in the High Arctic, **Tallurutiup Imanga NMCA and Tuvaijuittuq Interim MPA** have been established under collaborative leadership by Qikiqtani Inuit Association, the Government of Nunavut, and the Government of Canada.
- The **Parks Canada – James Bay Cree MOU**, signed in June 2019, is an agreement between the two parties to assess the feasibility of establishing an NMCA in Eastern James Bay.⁷
- The recently completed **Gwaii Haanas Gina ‘Waadluxan KilGulGa Land-Sea-People Management Plan 2018** sets the direction for the Archipelago Management Board, which is made up of an equal number of representatives from the Haida Nation and the Government of Canada, to manage Gwaii Haanas NMCA from mountaintop to seafloor as a single, interconnected ecosystem.
- One of the two conservation objectives of **Anguniaqvia niqiqyuam MPA**, established in October 2016, is to maintain habitat and support populations of species including beluga whales, Arctic char, and seals. This is the first MPA to identify a conservation objective entirely based on Indigenous traditional and local knowledge.⁸
- **SGaan Kinghlas-Bowie Seamount MPA bottom contact agreement** between Fisheries and Oceans Canada and the Council of the Haida Nation to close all bottom contact fishing within the MPA, in order to protect the delicate corals and sponges that grow on the underwater volcano and support marine life.⁹ The **SGaan Kinghlas-Bowie Seamount Gin Siigee TI’a Damaan Kinggangs Gin K’aalaagangs Marine Protected Area Management Plan** was completed and signed by the Council of Haida Nation and the Department of Fisheries and Oceans Canada after ten years of hard work.

- Quebec and Canada have signed the **Quebec-Canada Collaborative Agreement on MPAs** to establish an MPA network in the Estuary and Gulf of the St Lawrence. The Agreement recognizes the overlapping jurisdiction that the parties share in marine areas, and creates a legal framework under which they can work together to establish new protected areas. The areas will be jointly selected, planned, implemented and designated, and they will be recognized as aquatic reserves under Quebec law, and as MPAs under the *Oceans Act*.¹⁰
- **Northern Shelf Bioregion Marine Protected Area (MPA) Network Planning Process** underway on BC's North Pacific Coast, is a collaborative partnership between the Government of Canada, the Province of BC, and Coastal First Nations. The process builds on the innovative Marine Planning Partnership between the Province of BC and Coastal First Nations, which designed plans to responsibly and sustainably manage the entirety of the coastal and ocean areas within the region.

III. ADDRESSING THE RISK OF MARINE SPILLS:

Oil spills pose a significant threat to marine wildlife and to the livelihoods of coastal communities. Significant effort has been put towards improving Canada's ability to prevent and respond to spills, and many more efforts are ongoing. Some highlights from the legal changes include:

- The **new *Oil Tanker Moratorium Act***, passed in June 2019, will prohibit tankers carrying more than 12,500 tonnes of crude oil and certain other types of oil from docking, loading or unloading in Hecate Strait, Queen Charlotte Sound and Dixon Entrance. Though a de facto moratorium has been in place for decades, the *Act* entrenches it in law, to ensure long-term protection of this unique and remote region from catastrophic spills.
- **Amendments to the *Canada Shipping Act*** have updated the marine pollution framework to change the marine safety framework and allow for faster, more effective response to marine pollution.



- The **amendments to the *Marine Liability Act*** update the Ship Source Oil Pollution Fund to remove the per occurrence limit to liability so that unlimited compensation is potentially available to responders and victims of ship-source oil spills. Responders will also be eligible for reimbursement from the Fund for any measures taken to prevent spills, in addition to responding, and fishers and other ocean users can now apply to the Fund for recovery for economic loss as a result of a spill. The Fund will now be replenished by a levy on receivers and exporters of oil, ensuring that those who benefit from the oil industry also bear its costs.
- The **new *Wrecked, Abandoned or Hazardous Vessels Act*** will better protect the public and the environment from the risks posed by wrecked vessels, which can be a significant source of pollution. Ship owners are now liable for wrecks, and vessels weighing more than 300t must have wreck removal insurance. The *Act* also implements an international convention that allows the government to address wrecks in Canada's exclusive economic zone.
- Canada has **updated the *Pilotage Act***, which regulates when pilots with local knowledge of an area are required to direct a ship through navigationally challenging parts of Canada's oceans and waterways. The amendments will standardize pilotage regulation across the country and increase oversight and enforcement.
- Canada has **published draft *Navigation Safety Regulations*** that would expand the number of vessels required to have radiocommunication equipment and AIS on board. Increasing ship tracking has several environmental benefits: it helps decrease the number of spill incidents, and decrease response time to spills that do occur, by allowing the government to identify ships that are off-course or in trouble before a catastrophe occurs. It also helps government officials monitor for compliance with environmental regulations, such as speed restrictions and no-go zones, and allows the collection of data on shipping routes and traffic that will help us better understand the acoustic impacts of ships in the ocean.

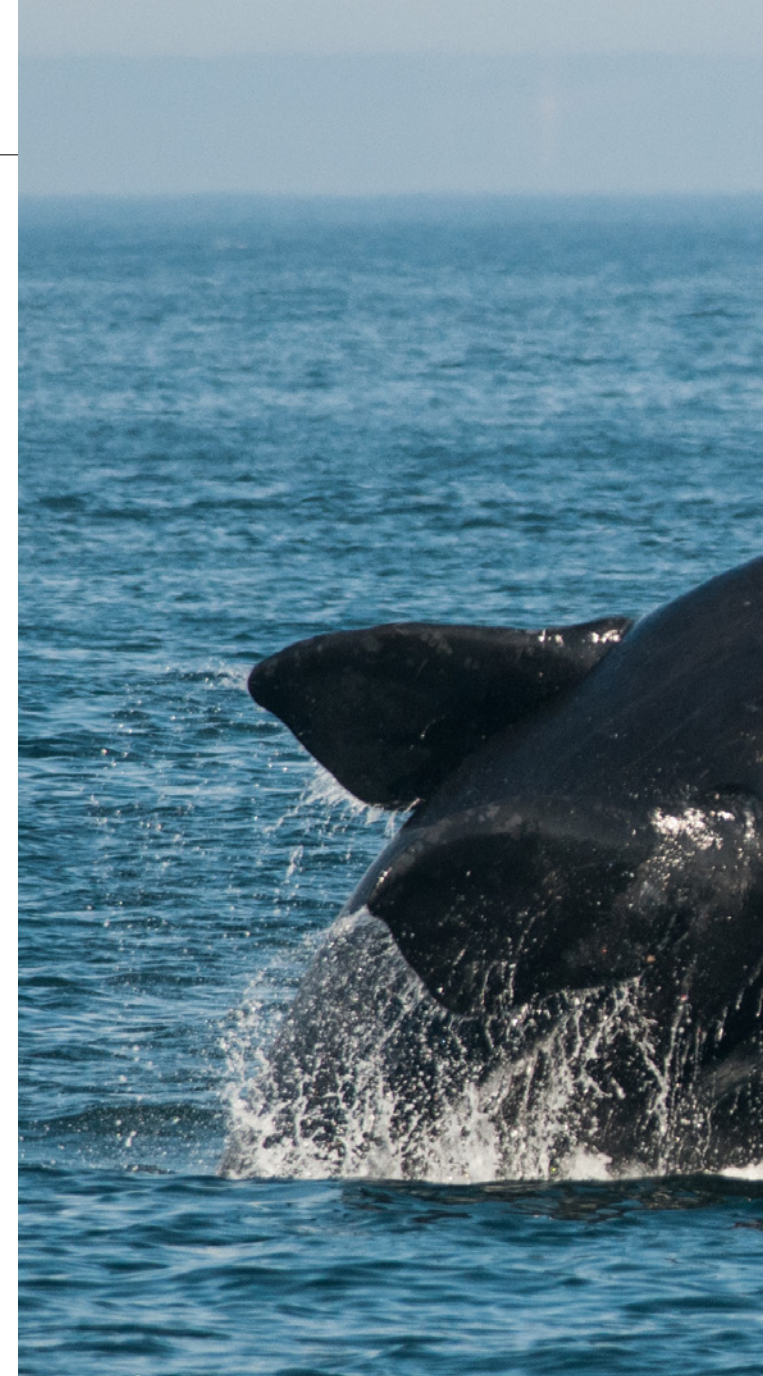
The federal government is in the midst of **consultation on the transportation of Hazardous and Noxious Substances** by ships, in order to address unique challenges and impacts associated with marine spills of these types of substances.

- Arctic vessel hazards are addressed by **new Arctic Shipping Safety and Pollution Prevention Regulations** and by the implementation of the International Maritime Organization's *International Code for Ships Operating in Polar Waters*.
- The government is undertaking national consultation and two pilot projects on **Proactive Vessel Management**, which will reduce conflicts between local waterway users. It will also protect environmentally and culturally sensitive areas and assist in the development of a national framework to guide how proactive vessel management is implemented in our local waterways.

IV. PROTECTING MARINE WILDLIFE:

As industrial activity in the ocean grows, so too does the pressure on marine wildlife. Legal protection for threatened and endangered species and their habitat is increasingly important, because prosecution of the prohibition on destroying critical habitat is not possible until a Critical Habitat Protection Order has been issued.

In the last four years, orders under the *Species at Risk Act* have been issued to protect the critical habitat of **orcas, Right whales, bottlenose whales, belugas, leatherback turtles, abalone and seals**, along with many important fish species. The federal government also implemented a new timeline for listing aquatic species under the *Species at Risk Act*. The Minister must now list the species within 36 months of receiving a species status assessment from the Committee on the Status of Endangered Wildlife in Canada. This timeframe will introduce greater accountability and make sure that aquatic species are protected more quickly.





Many species have also been protected by the creation of marine protected areas, such as the Anguniaqvia niqiqyuam MPA, which protects beluga and seal habitat, Laurentian Channel, which protects turtles, whales, and sharks, and Scott Islands marine National Wildlife Area, which protects critical habitat for tufted puffins and other seabirds.

The government has also used special legal tools to address the impacts of industry on endangered species. For example, the Minister of Transport issued a **Ministerial order under the *Canada Shipping Act*** to protect the Salish Sea Southern Resident Killer Whales, also known as orcas. This order increases approach distances to 400m, and establishes no-go zones within orca critical habitat. Other measures introduced for the benefit of the Southern Resident Killer Whales are:

- **Closures and restrictions on recreational fishing and commercial salmon fishing** in key foraging areas;
- **Voluntary vessel slowdowns** in Haro Strait during key months when orcas are present;
- **Rerouting vessels** within shipping lanes in the Strait of Juan de Fuca to lanes further south to measure potential noise reduction in key foraging areas;
- **Enhancement of regulatory controls under the *Canadian Environmental Protection Act*** for two flame retardants and three oil and water repellents. Two additional flame retardants may be restricted if final scientific risk assessments confirm their toxicity.

On the East Coast, the government has issued **rolling fisheries closures** and **seasonal speed restrictions** in the Gulf of St. Lawrence to reduce industrial pressure on North Atlantic Right whales, and Parks Canada has identified **no-boating zones** within the Saguenay-St Lawrence Marine Park to limit disturbance of endangered belugas.

Finally, the government has passed several new laws and regulations that will benefit fish and marine wildlife. A few highlights:

- The **new Fisheries Act** restores lost protections for fish and fish habitat, including the prohibitions on habitat alteration, damage and destruction (HADD) and on causing the death of fish other than fishing. It also includes a duty to maintain fish stocks “to or above” reference point levels, and it adds new modern safeguards such as the recognition of Indigenous knowledge in decision-making and the creation of a public registry for fish habitat proposals and decisions. The new *Fisheries Act* also has new provisions related to marine conservation more broadly, such as: additional Ministerial powers to stop fisheries and to address urgent situations such as whale entanglement in fishing gear; expanded powers to designate Ecologically Significant Areas; and new powers to protect areas for marine biodiversity.
- The amended **Marine Mammal Regulations** define what qualifies as disturbance of marine mammals, and sets approach distances for vessels to better protect marine mammal species.
- There is now a statutory **ban on holding dolphins and whales in captivity**. This new law will grandfather out whale, dolphin and porpoise captivity in Canada. It is now a criminal offence to keep and breed dolphins, whales and porpoises in captivity, with exceptions for those that were in captivity before the new law was passed, and it is a regulatory offence to capture one of these marine mammals in the wild, or to import them from another country.
- The new **Ban on Shark Fin Importation and Exportation Act** prohibits the import and export of shark fins to and from Canada. It also prohibits the practice of shark finning in Canada.



© Nick Hawkins

V. CONCLUSION:

The oceans are changing, and the law must change too in order to protect the ocean and its wildlife for the future. Progress can be swift when governments commit to take action, as this report demonstrates. Over the past four years, Canada has made a record number of changes to the ocean protection legal regime.

Is this progress enough? With a warming climate leading to a warmer ocean and increased ocean acidification, with habitat loss and pollution continuing to drive marine species to the brink of extinction and with a human population that continually chooses economic growth over keeping nature intact and thriving, even more will need to be done in the coming years. And as the old saying goes, where there's a will, there's a way. The ocean deserves our help.



© Nick Hawkins

REFERENCES:

- 1 <https://www.canada.ca/en/environment-climate-change/services/managing-reducing-waste/international-commitments/ocean-plastics-charter.html>
- 2 https://eur-lex.europa.eu/resource.html?uri=cellar:2554f475-6e25-11e8-9483-01aa75ed71a1.0001.02/DOC_2&format=PDF
- 3 <http://www.dfo-mpo.gc.ca/international/isu-iuu-09a-eng.htm>
- 4 For more information, see our blog: <https://www.wcel.org/blog/sea-change-four-developments-in-international-marine-law>
- 5 <https://coastfunds.ca/news/coastal-first-nations-signs-fisheries-reconciliation-agreement-with-canada/>
- 6 <https://ppa.gc.ca/sites/default/files/2018-07/PPA%20Pilote%20Waiver%20Standard%20of%20Care%20September%2015%202017.pdf>
- 7 <https://www.canada.ca/en/parks-canada/news/2019/06/government-of-canada-and-cree-nation-government-working-collaboratively-to-protect-eastern-james-bay.html>
- 8 <https://www.dfo-mpo.gc.ca/oceans/mpa-zpm/anguniaqvia-niqiqyuam/index-eng.html>
- 9 <http://www.haidanation.ca/?p=6471>
- 10 <https://francophonie.sqrc.gouv.qc.ca/VoirDocEntentes/AfficherDoc.asp?cleDoc=121130121045218040101144092147123223004025184067>





© Nick Hawkins

SEABLUE CANADA

SeaBlue Canada is an alliance of Environmental Non-Governmental Organizations (ENGOS) that are cooperating in advocating for a better protected ocean. SeaBlue Canada is: Canadian Parks and Wilderness Society, David Suzuki Foundation, Ecology Action Centre, Oceans North, West Coast Environmental Law, and WWF-Canada.



For more information contact:

Stephanie Hewson
Staff Lawyer
West Coast Environmental Law
shewson@wcel.org

