



One of the objectives of the regulatory amendments¹ to the *Atlantic Fishery Regulations, 1985* and the *Maritime Provinces Fishery Regulations* that came into force on April 1, 2021 is to keep the benefits of inshore fishing licences in the hands of independent core harvesters.

To better protect the independence of inshore harvesters, previously existing policies are now enshrined in regulations that outline who may be issued an inshore commercial licence. Only harvesters who have not transferred the use or control of the rights or privileges conferred under an inshore licence are eligible to hold inshore licences. Among other things, this means that licence holders must maintain control over the use of the licence and control all decisions related to the licence, at all times. This document is intended to provide the inshore fishing industry with guidance on certain implementation aspects of the regulatory amendments.

FINANCIAL ARRANGEMENTS PROVIDING INSHORE LICENCE AS A SECURITY FOR A LOAN

In order to borrow money, it is common practice to use something of value to guarantee the loan. In the context of fisheries, the most valuable asset is often the fishing licence. Fisheries and Oceans Canada (DFO) interpreted policy in such a way as to ensure that its implementation did not prevent a creditor from exercising a financial remedy to which they are entitled by law. As a result, the use of a licence as collateral and general security agreements have been permitted, so long as the licence holder was not controlled or influenced in their decision to submit a request for issuance of a replacement licence to the Minister pre-default of payment. DFO's objective is to ensure that licence holders retain this option to access capital to grow and maintain their operations. The amendments enable the continuation of this standard business practice.

However, DFO would like to clarify that, with respect to financial agreements providing a security for a loan over a fishing licence ("financial agreements"), irrespective of what the provisions of the agreements provide, the following are the only rights that DFO will deem to be in compliance with the Inshore Regulations for a secured creditor ("lender").

LENDER'S RIGHTS: PRE-DEFAULT SITUATION

In a pre-default situation, upon receipt of a request of, for example, the reissuance of a licence or a request for the reallocation of quotas, DFO will consult the [Notice and Acknowledgement System](#) (NAS) to ensure that the secured creditor, if any, is aware of and amenable to the transaction.

The NAS, set up by DFO in 2007, allows licence holders and financial lenders to notify DFO that they have a financial agreement in place in respect of a particular licence. When a Notice is on file, before DFO will authorize any of the pre-identified transactions found on [DFO's website](#), an Acknowledgement form signed by the lender (or their representative) is required. In other words, DFO makes certain licensing

¹ This guidance applies to the implementation of Part III (sections 17.2 to 22) of the *Atlantic Fishery Regulations, 1985* (AFR) and Part I.1 (sections 29.01 to 29.5) of the *Maritime Provinces Fishery Regulations* (MPFR), also known as the "Inshore Regulations". Specifically, this guidance applies to section 17.2 and paragraphs 19(5) (a),(b),(c) and (d) of the AFR and to section 29.01 and paragraphs 29.2(5) (a),(b), (c) and (d) of the MPFR.



transactions subject to the approval of the lender indicated on the Notice. DFO strongly encourages licence holders and financial lenders to file a Notice with DFO (in accordance with the NAS) regarding any loan for which an inshore or coastal fishing licence is collateral.

Thus, in the context of the review of a financial agreement, clauses pursuant to which a secured licence cannot be disposed of without the lender's acknowledgement in a pre-default situation will be deemed to comply with the Inshore Regulations by DFO even in cases where no Notice pursuant to the NAS has been filed with DFO.

LENDER'S RIGHTS: POST-DEFAULT SITUATION

In the event of default, if the circumstances giving rise to the default event are relevant to the financial agreement and recognized as such for the implementation of the Inshore Regulations, DFO will authorize:

- a. If the secured creditor is a recognized financial institution (RFI²), the use or control of the rights or privileges under the licence in order to exercise its rights with respect to a security; or
- b. If the secured creditor is not a recognized financial institution (NRFI³), the use of the privilege under the licence to recommend to the Minister the next licence holder or the reallocation of fishing quotas, in order to exercise its rights with respect to a security.

For example, power of substitution clauses (i.e., power to operate the business instead of the licence holder, to appoint a receiver, manager, etc.) will be considered to comply only in a post default situation where the financial agreement is with an RFI. This type of clause will not be deemed in compliance if it is in an agreement with an NRFI.

LENDER'S RIGHTS: DFO RECOGNIZED DEFAULT

DFO will recognize defaults that are closely associated with repayment under a financial agreement, or obligations on the licence holder to maintain the value in the secured inshore fishing licence, as defaults for the implementation of the Inshore Regulations. This also means that DFO would not recognize rights with respect to a security on a licence to fish in implementing the Inshore Regulations in some situations. Consequently, the following types of obligations for which failure to perform would constitute a default would, amongst others, **be recognized** for the purpose of implementing the Inshore Regulations:

- Failure to repay capital and interest (e.g., default of payment);
- Failure to keep the licence in good standing with DFO (e.g., pay fees);
- Failure to pay fines associated with the licence; or

² Recognized Financial Institution (RFI) are: Canadian and regulated foreign financial institutions as defined in the *Bank Act*; Federal Government Programs or Lending Agencies; the Business Development Bank of Canada; Export Development Canada; Provincial Governments and programs; and Provincial Loan Boards.

³ "Not a Recognized Financial Institution" (NRFI) refers to all lenders not captured by the RFI definition.



- Failure to abide by the limits on changing the corporate structure (e.g., change to the corporate structure of the fishing enterprise that affects the security).

In circumstance where the repayment of a loan is linked to the value of fish caught under the inshore licence, DFO **would recognize** the following as default:

- Making false representation to the lender; or
- Failure to continue carrying out business operations.

DFO **would not recognize** rights pertaining to financial agreements where the following default, among others, occur:

- Failure to request the lender for assistance;
- Failure to use crew members selected by a third party;
- Failure to abide by any specific instructions on how to conduct the fisheries; or
- Failure to comply with another agreement (e.g. supply agreement or matrimonial agreement).

LENDER'S RIGHTS: BANKRUPTCY

In a case of Bankruptcy, DFO will only accept requests respecting the licence from persons appointed under the *Bankruptcy and Insolvency Act*.

OTHER CONSIDERATION RELATING TO FINANCIAL AGREEMENTS

For a licence to be eligible for issuance, all financial agreements respecting an inshore fishing licence must comply with the provisions of the Inshore Regulations. Should a financial agreement transfer the use or control of the rights or privileges conferred under that licence to a third party (i.e., the lender or a party other than the licence holder) beyond what is expressly authorized under subsection 19(5) of the AFR or subsection 29.2 (5) of the MPFR, the licence will not be eligible for the proposed transaction.

Examples of provisions that **would not be deemed in compliance** with the Inshore Regulations include:

- Limitation on how to perform fishing activities (e.g., when and where to fish, crew selection) or to conduct business related to the fishing enterprise (e.g., which financial institution to do business with);
- Limitation on privileges granted through policy (e.g., requests for substitute operators);
- Financial agreements with no principal repayment possibility or with no predetermined term; or
- Clauses prohibiting the licence holder from reissuing licences before the expiry of the repayment period.

Examples of provisions that **could be deemed in compliance** with the Inshore Regulations include :



- Payment clauses expressed as a percentage of the value of the catch landed or directly in catch landed;
- Pre-payment or termination fees (e.g., penalties or “break-up clauses”) are an acceptable practice if they are proportional to the damage incurred by the lender and current financial market practices;
- Provisions that link future licences or revenues to repay existing loans.
- Loan guarantors, co-signatories or co-borrower as long as other related agreements do not lead to a transfer of the rights or privileges;
- Provisions requiring that the debt to the lender become payable in full if the licence holder request a reissuance; or
- Provisions that make a reissuance request conditional upon the lender acknowledging said request (comparable to NAS). For example, acknowledgement could be conditional upon repayment pursuant to the financial agreement and would not be deemed a transfer.

DFO will not dictate limits on the term of a financial agreement. However, a clearly stated fix term must be part of the agreement. Also, licence holders must have the option at all times to withdraw from the agreement by repaying the loan in full without penalty or with a penalty that would not be so high as to amount to control over the licence holder’s privilege to apply for a licence reissuance. The penalty cannot be set so high and the term so long that a licence holder is in a *de facto* perpetual agreement. Penalties linked to financial agreements that are comparable to current market practices for similar agreements are acceptable. Lenders might be required to demonstrate potential damages incurred by the termination of a financial agreement prior to DFO’s agreeing to issue a licence.

GENERAL INTERPRETATION PRINCIPLES

DFO does not encourage the duplication of requirements or the use of generic agreements that do not take fishing sector realities into consideration, or the fact that a licence is not a tangible good.

Approval of a request for licence issuance where a particular agreement exists cannot be interpreted as confirmation that all clauses in the agreement will be given full effect by DFO. Rights and privileges available to secured creditors are those granted by law and by DFO policy, irrespective of how a particular agreement may be interpreted from time to time.

All licensing requests are evaluated on a case-by-case basis, at the time of application, and the determination of compliance of some provisions or the interpretation of previously reviewed agreements may be impacted depending on the particular circumstances or other arrangements that may exist at the time of application. For example, a financial arrangement that is determined to be in compliance with the Inshore Regulations may, in a subsequent assessment of a licence, be determined to be non-compliant if other arrangements have been in place since the initial assessment.

At the request of a licence holder, DFO’s licensing teams may examine existing or proposed financial agreements to assess and confirm regulatory compliance.



DFO remind all parties that making a false or misleading statement, whether orally or in writing, in an application for a licence is an offence under subsection 63(2) of the Fisheries Act.

See [DFO's website](#) for separate guidance documents on the **review process, agreements and stipulations, corporate structures** and additional information.