

INFORMATION NOTE

PRESERVING THE INDEPENDENCE OF THE INSHORE FLEET IN CANADA'S ATLANTIC FISHERIES

In April 2007, the Department of Fisheries and Oceans (DFO) announced measures to Preserve the Independence of the Inshore Fleet in Canada's Atlantic Fisheries (PIIFCAF). These measures are designed to address the negative impacts of certain "trust agreements" on the proper management and control of the fisheries and how they circumvent various DFO licensing policies.

The PIIFCAF measures were adopted following extensive consultations with inshore fish harvesters, who have long requested that DFO take action to stop those fish harvesters who were circumventing licensing policies.

PIIFCAF aims to ensure the proper management and control of the inshore fishery in Atlantic Canada, and the conservation and sustainable use of the resource for future generations. It also aims to re-affirm the importance of maintaining an independent and economically viable inshore fleet in which the benefits of the licence stay with licence holders and provide social and economic benefits to Atlantic Canada's coastal communities.

THE DECLARATION

As part of the PIIFCAF measures, every core fish harvester received an information package including a Declaration which they were asked to complete to indicate whether or not they are involved in a "Controlling Agreement" (CA).

The existence of a CA will be considered by DFO when determining whether licence holders are Independent Core fish harvesters. If licence holders are in a CA that existed before April 12, 2007, they have seven years in which to terminate the agreement or make amendments to bring them in line with the PIIFCAF policy.

If licence holders state that they are not party to a CA in relation to any vessel-based fishing licence, and there are no valid reasons and supporting evidence to believe they submitted a false statement, the licence holders will be eligible to hold the Independent Core status. Independent Core fish harvesters will be eligible for all of the benefits previously granted to Core fish harvesters.

If licence holders state that they are a party to a CA in relation to any vessel-based fishing licence, DFO will require that the CA be terminated or amended to bring it in line with the PIIFCAF objectives by April 12, 2014. Licence holders in a CA will continue to be

categorized as Core, but will not be eligible to be recommended as a new licence holder in a proposed licence “transfer”.

If a fish harvester does not complete a Declaration by the deadline, he will not be eligible for category reclassification. In addition, no licensing transactions (renewal, tag issuance, "transfer", registration, etc.) will be processed until the fish harvester has filed a Declaration.

WHAT’S NEW?

Since PIIFCAF was announced, DFO has received questions from fish harvesters, processors, lawyers, accountants and others, requesting clarification on what defines “control” and “influence”. It has become apparent that there is a need to clarify what is captured by the definition of a “controlling agreement”.

To accommodate these requests for clarification, DFO has extended the deadline for the return of Declarations to March 31, 2008. Fish harvesters who have already filed Declarations, and do not wish to amend them based on these clarifications will have nothing more to do. Fish harvesters who wish to file an amended Declaration will be given that opportunity.

The majority of licence transfers will continue to be processed, as they have in the past, within 30 days. Formerly many requests for transfer were approved immediately; however, under the PIIFCAF policy this process may take two or three days. In the event a “transfer” requires more than 30 days, the fish harvester will be notified in writing.

The following is a non-exhaustive list of possible indicators that could result in a review of a declaration when a request for “transfer” is filed:

Actions that **will** trigger a review:

- **Declaration** by the licence holder of the existence of a “controlling agreement”
- Admission by the other party of a “controlling agreement”
- The Department is in possession of documents referring to a “controlling agreement”

Actions that **may** trigger a review:

- Licence fee has been paid by a party other than the licence holder or his/her wholly-owned corporation
- Licence documents are regularly requested by a party other than the licence holder.
- Another individual accompanying the licence holder to the Licensing Service Center requests policy and/or enforcement information.
- Vessel registered with DFO by licence holder but owned by another party.

DEFINITIONS

A Controlling Agreement (CA) is defined as an agreement between a licence holder and an individual or entity that permits someone other than the licence holder to control or influence the licence holder's decision to submit a request to DFO for a licence "transfer". The definition of a CA does not include agreements with recognized financial institutions which include: a) a Canadian financial institution as defined in the *Bank Act*; b) the Business Development Bank of Canada; c) a Provincial Loan Board: Fisheries Loan Guarantee Program (N&L); Direct Loans for Commercial Fishing Program (New Brunswick); Fisheries and Aquaculture Loan Board (Nova Scotia); P.E.I. Lending Agency (P.E.I); Commercial Fishery Financing Program (Québec); Programme d'allégement temporaire du remboursement des prêts aux entreprises de la pêche (Québec).

Should a core fish harvester have an agreement with another funding organization, such as a community development board or community development organization, he/she is to contact his/her regional office to obtain more information on the process for determining whether such an agreement constitutes a Controlling Agreement (CA). Where an agreement with a community development board or community development organization is determined not to be a CA, the Notice and Acknowledgement procedure may be available to the licence holder and the board or organization.

Not every agreement involving a fishing licence falls within the definition of a CA under PIIFCAF. The key issue is to determine if the licence holder has full control over whether, or when they can request the issuance of a replacement licence, and to whom they want the replacement licence issued. In other words, is the licence holder free to independently decide to proceed with a request to DFO for a "transfer".

Flexibility

DFO is open to the possibility of industry proposing modifications to the Owner/Operator and Fleet Separation policies where they are reasonable. The goal is to avoid undue concentration of licences, and preserve and foster a diversified sector of viable, multi-species, independent inshore enterprises headed by eligible licence holders.

Financial Arrangements

Fish harvesters use many types of arrangements to secure financing. PIIFCAF was not designed to hinder the ability of these harvesters to raise capital. It was designed to preserve the independence of the inshore fleet, prevent the circumvention of existing policies, and curtail concentration of licence holdings in the hands of a few.

The following clarifications relate to some standard financial arrangements being presented to DFO.

1. Agreements between a fish harvester and a recognized financial institution are not considered to be CAs for the purpose of PIIFCAF. DFO is confident that the primary objective of these institutions is not to exercise any control in the fishery; rather it is to provide financial services.
2. Agreements involving co-signers on lending instruments may or may not be considered CAs for the purpose of PIIFCAF, depending on whether there is control or influence over how the licence is disposed
3. Where a financial agreement purports to give somebody influence or control over the management of the fisheries, and decisions to request the “transfer” of a licence are controlled by a third party, it would likely be considered a CA for the purposes of the PIIFCAF policy.
4. A loan requiring payment upon licence “transfer” would not on its own constitute a CA for the purposes of the PIIFCAF policy unless there is a provision in the agreement that influences or controls the decisions to submit a request for a «transfer» of the licence.
5. A penalty clause in an agreement may or may not result in the agreement being considered a CA for the purpose of PIIFCAF. It depends on whether there is influence or control over the decision to submit a request for a «transfer» of the licence.
6. The use of designated or substitute operators alone would not necessarily make an agreement a CA for the purpose of PIIFCAF, however the use of substitute or designated operators is not intended to allow licence holders to contravene DFO policy, including PIIFCAF.
7. Powers of Attorney or Rights of First Refusal in relation to decisions regarding licences would be considered CAs for the purposes of PIIFCAF.
8. Supply agreements, where a lender loans money on the condition that fish harvesters land their product with the lender, is not a CA if the lender does not influence or control the licence holder’s decision as to whether or when to apply for a licence “transfer” and whose name to recommend for the “transfer”.

Family Arrangements

Arrangements between family members can vary from an informal and implied understanding to consult, to formally-instituted family fishing corporations.

DFO would not expect licence holders to make a decision related to a licence “transfer” without considering the affected members of their households. If the decision to “transfer” the licence ultimately rests with the licence holder, and that person is merely

taking into account the opinion of others who may be affected by the decision, this is quite different from being “controlled” or “influenced”.

In addition, a licence cannot be the subject of a loan, sale or bequest and it does not convey any property rights.

Corporations

When a licence holder is incorporated, agreements with the corporation would not be deemed CAs as long as the licence holder retains control over the major decisions related to the licence. In accordance with the Owner-Operator Policy, licences are issued only in the name of an individual fish harvester and not in the names of corporations (with the exception of those issued under the grandfather clause -- pre-1979 -- of the Owner-Operator Policy) until further consultations can be held with industry.

Counsel

If you are unsure whether your agreement falls within the definition of a CA for the purposes of PIIFCAF, you should speak to a lawyer or financial advisor.

For more information about PIIFCAF contact:

Newfoundland Region: Your Local Area Licensing Administrator

Gulf Region: 1-888-854-4853 or 1-506-851-7810

Maritimes Region: 1-888-698-4555

Quebec Region: 1-877-535-7307 or by e-mail to Fishing-peche@dfo-mpo.gc.ca