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WRITTEN SUBMISSIONS BY ELSIPOGTOG FIRST NATION

SUBMITTED TO THE EXPERT PANEL REGARDING THE REVIEW OF FEDERAL ENVIRONMENTAL ASSESSMENT PROCESSES

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Elsipogtog First Nation's Submissions on the
Expert Panel's Review of Federal Environmental Assessment Processes

Introduction

Elsipogtog First Nation ("EFN") is a Mi'kmaq community with approximately 3,000 members. Our traditional lands and waters are located in Mi'kma'ki, also referred to as New Brunswick, Canada. As part of the Mi'kmaq Nation, EFN holds and exercises unextinguished Aboriginal title, rights and treaty rights over the portion of Mi'kma'ki known as Sikniktuk or District 6.

EFN faces a time of unprecedented changes to our traditional lands, waters and resources. There is increased pressure from the Crown and companies to proceed with resource development activities that have the potential to affect our lands and our way of life for generations.

EFN is committed to defending, protecting and advancing our title, rights and treaty rights. We are responsible pursuant to our laws for fulfilling our role as stewards of Sikniktuk and for protecting our rights, lands and waters. This includes a responsibility to past, current and future generations to ensure that any development activities in our territory are carried out in a way that is respectful of our title, rights and treaty rights and our relationship with our territory. To meet our responsibilities, it is imperative that we play a central role in decisions about any proposed activities that have the potential to affect our lands, waters and resources and the exercise of our title and rights.

Elsipogtog Aboriginal Title and Rights and Treaty Rights

As part of the Mi'kmaq Nation, EFN holds and exercises unextinguished Aboriginal title and rights over our territory of Sikniktuk in Mi'kma'ki. These rights are vital to the survival of our traditions, culture and way of life of as Mi'kmaq people.

On November 9, 2016, EFN filed a claim seeking declarations from the court that the Mi'kmaq Nation continues to hold Aboriginal title and rights in Sikniktuk and that New Brunswick and Canada have interfered with and unjustifiably infringed our title and rights. We see our title claim as an important and necessary step in protecting our lands and waters and to fulfilling our responsibilities in accordance with our own laws as stewards of Sikniktuk.

We also hold and exercise treaty rights pursuant to our treaty of peace and friendship, which our ancestors entered into with the British Crown in 1761. By entering into treaty, we did not surrender title to our lands or the right to use and trade our resources. Rather, the treaty recognizes Mi'kmaq title and establishes rules respecting the ongoing relationship between the British and the Mi'kmaq. Canadian courts have since confirmed our treaty rights in a number of cases.

Reform of Environmental Assessment Processes

Like other Indigenous peoples, the Mi'kmaq have worked for generations to protect our territory in order to ensure we are able to survive as a people into the future. In recent years we have become increasingly concerned about government and industry activities that threaten our lands and waters, including forestry, fracking, peat moss mining and pipeline projects. These and other activities directly threaten the sustainability of our territory and our title and rights.

Current environmental assessment processes are insufficient for the Crown to fulfill its constitutional obligations to EFN and do not allow us to effectively meet our responsibilities to protect and preserve our lands. In these submissions, we highlight some of the major shortcomings with these processes. We also offer a number of recommendations to address these shortcomings in order to ensure the health and protection of our lands for our ancestors and our children.

Environmental assessments in our territory must take place in a manner that is consistent with our laws and protocols, the Crown's constitutional obligations, and the federal government's commitment to a renewed relationship with Indigenous peoples based on partnership and respect, and in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*"). If this promise is to be fulfilled, then the Crown cannot disregard our rights and make decisions that threaten our lands without first engaging with us and obtaining our consent. This is the underlying principle in each of the recommendations that we have put forward for the reform of environmental assessment processes.

Appendix "A"

CONCERNS REGARDING FEDERAL ENVIRONMENTAL ASSESSMENT PROCESSES AND RECOMMENDATIONS FOR REFORM

The following is a summary of the deficiencies with existing environmental assessment processes, and recommendations for addressing these shortcomings.

<u>Concern No. 1:</u> ***Existing environmental assessment processes do not meaningfully fulfil the Crown's constitutional obligations to Indigenous Peoples.***

The Crown has a constitutional duty to consult and accommodate Indigenous peoples about the potential effects of proposed projects on their Aboriginal rights and title,[1] and to attempt to justify the potential infringement of these rights.[2] These obligations flow from the rights guaranteed to Indigenous peoples pursuant to section 35(1) of the *Constitution Act, 1982* and the Crowns' duty to act honourably in its dealings with Indigenous peoples. To meet its constitutional obligations, the Crown must engage in meaningful consultation with Indigenous peoples, seek to accommodate their concerns and attempt to justify potential infringements.[3]

The Crown's obligations to Indigenous peoples are distinct from the Crown's legislative obligations in the environmental assessment process. These obligations lie upstream of legislative requirements and the statutory mandate of decision makers, and statutory decision makers must respect the legal and constitutional limits they impose.[4]

For the reasons set out below, environmental assessment processes are inadequate for the Crown to fulfill its constitutional obligations.

(i) The Crown's duty to consult may arise prior to the environmental assessment process

Consultation with Indigenous peoples must take place early, when the project is being defined, and should continue until the project's completion.[5] This ensures that concerns about a proposed project are addressed and integrated at the earliest stage of government decision-making, before irrevocable decisions about the proposed project are made. Relying solely on environmental assessment processes for consultation means that, by the time the assessment is triggered, important decisions about the project may have already been made without any

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[1] *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida*"), at para. 20.
[2] *Sparrow*, at 1110-1112; *Tsilhqot'in*, at para. 80.
[3] *Haida*, at paras. 41-42; *Tsilhqot'in*, at paras. 78 and 80; *Sparrow*, at 1110-1112.
[4] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (CanLII), at para. 106. Also, *Beckman v. Little Salmon / Carmacks First Nation*, 2010 SCC 53 (CanLII), at para. 48; *Halfway River First Nation v. British Columbia*, 1999 BCCA 470 (CanLII), at para. 177.
[5] *Kwikwetlem*, at para. 70.

consultation having taken place with Indigenous peoples.

(ii) The duty to consult is triggered at a low threshold

The Crown must consult about any decision or activity with the potential to impact Indigenous peoples' rights and title. By contrast, the threshold for initiating an environmental assessment for a proposed project is set out in legislation and subject to change. The starting point for consultation should not be conflated with a government decision about when an environmental assessment is required.

(iii) Environmental assessment does not allow for iterative consultation

Consultation requires an interactive process, which includes opportunities for Indigenous peoples to identify concerns about a proposed activity and provide information about the potential impacts of the proposed activity on their rights, and for the Crown to take steps to accommodate these concerns and attempt to justify infringements of rights and title.[6] The legislated timelines for environmental assessment processes and restricted scope of issues considered in the process precludes meaningful consultation.

(iv) Adverse environmental effects are not equivalent to impacts on rights and title

The scope of an environmental assessment is very different from the objective of reconciliation which underlies the Crowns' constitutional obligations to Indigenous peoples. In the context of environmental assessment, the Crown can justify a project's serious environmental effects based on its potential socio-economic benefits. By contrast, the Crown can only justify an infringement of Aboriginal rights by demonstrating that the project contributes a compelling and substantial objective consistent with its fiduciary duty to Indigenous peoples. The infringement must be more than simply in the public interest. The project must be necessary, it must be designed to minimally affect Aboriginal rights, and the adverse effects on Indigenous peoples cannot outweigh the benefits for the general public.[7]

(v) Government representatives in environmental assessments cannot fully accommodate impacts or justify infringements

Consultation must involve Crown representatives who have the capacity and mandate to address Indigenous peoples' concerns and give effect to meaningful accommodation. However, government representatives in the environmental assessment process often lack the required mandates to fully address concerns and provide necessary accommodation measures and to attempt to justify infringements on rights and title.

(vi) The Crown must consult regardless of whether an environmental assessment is required

[6] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 209 BCCA 68 (CanLII) ("*Kwikwetlem*"), at para. 68.
[7] *Sparrow,* at 1113-1119*; Tsilhqot'in*, at paras. 77 and 88.

CEAA 2012's streamlined approach to environmental assessments means that a number of projects will not be required to undergo a full assessment. When a project does not trigger an environmental assessment, the Crown will often rely on the proponent of the project to engage in consultation activities with Indigenous peoples. In many cases this means the Crown is absent from the consultation process. While the Crown may delegate certain procedural aspects of consultation to third parties,[8] it cannot completely disengage from the consultation and accommodation process.[9] The Crown alone can fulfill its constitutional obligations,[10] and must do so regardless of whether a particular project has triggered an environmental assessment.

Recommendations:

1. Consultation over and above environmental assessment processes

The recommendations that follow would, if implemented, improve current environmental assessment processes by ensuring that Indigenous peoples are meaningfully involved in the review of projects that could affect their territory and their rights and title. However, environmental assessments by their nature remain insufficient on their own to meet the Crown's constitutional obligations to Indigenous peoples. The Crown must consult and accommodate Indigenous peoples and attempt to justify infringements consistent with the honour of the Crown regardless of the parameters of environmental assessment processes.

2. Indigenous-driven environmental assessment processes

The main deficiencies with current environmental assessment processes are rooted in their inability to fully and appropriately engage Indigenous peoples and address their concerns about development activities that have the potential to affect their territory and rights. Indigenous-driven environmental assessment processes are essential to addressing these gaps and ensuring that Indigenous laws, knowledge, perspectives, culture and traditions are incorporated into the review processes.

Indigenous-driven processes enable environmental reviews to assess both a project's tangible impacts, including its impacts on the physical environment, and its intangible impacts on Aboriginal rights and title and treaty rights. This is key if an assessment of the effects of a proposed project on rights and title is to be accurate. This is also important for determining how to address Indigenous peoples' concerns or accommodate potential impacts on their rights and title.

While Indigenous-driven environmental assessment processes may differ from one nation or community to the next, the underlying principle is to ensure that Indigenous perspectives and

[8] *Haida,* at para. 53.
[9] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation et al.*, 2006 CanLII 26171 (ON SC), at paras. 92-95.
[10] *Haida,* at para. 53.

concerns are properly understood and used to inform the review process. This will go a long way to adding credibility to environmental assessment processes.

3. Consent-based decision-making

The federal government's decision to adopt the principles of *UNDRIP* and the Supreme Court of Canada's decision in *Tsilhqot'in* have important implications for environmental assessment processes. Both *UNDRIP* and *Tsilhqot'in* confirm the importance of engaging in consent-based decision-making with Indigenous peoples in respect of matters that have the potential to affect their rights.

Article 18 of *UNDRIP* confirms the rights of Indigenous peoples to participate in decision-making respecting matters that would affect their rights and to maintain and develop their own decision-making institutions. Article 32 requires government to consult and cooperate in good faith with Indigenous peoples to obtain their free, prior and informed consent about any project affecting their lands and other resources.

In *Tsilhqot'in*, the Supreme Court of Canada confirmed the importance of obtaining the consent of Indigenous peoples potentially affected by resource development activities as a way of providing greater predictability for the activities. One obvious way for government to secure the consent of Indigenous peoples is through collaborative decision-making processes.

Aboriginal title gives Indigenous peoples the right to use and control the land and enjoy its benefits.[11] The Mi'kmaq have never surrendered their Aboriginal title and rights treaty rights. As a result, the Mi'kmaq retain the jurisdiction and authority to make decisions on matters that have the potential to affect their rights and their lands. With this comes the right to develop their own Indigenous decision-making institutions and to determine whether and how the lands and resources should be developed. It is not enough for Indigenous peoples to be involved in the environmental review of proposed development projects. They must also have a say in whether and how such projects will be developed. This includes final decision-making about whether it will consent to an activity and, if so, what mitigation, accommodation and / or justification measures are required.

Consent-based decision-making provides an alternative to government's current policy of unilaterally imposing and seeking to fit Indigenous peoples into existing environmental assessment processes. Indigenous peoples should be directly involved in determining whether and how a project that has the potential to affect their rights should proceed to development. This model of decision-making allows for variation from one group to another, to fit with their specific circumstances and priorities. It provides a means for applying and integrating Indigenous laws and perspectives into decision-making about land and resources management. It also better reflects the nation-to-nation relationship between Indigenous peoples and the Crown, and serves to advance the goal of reconciliation.

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[11] *Tsilhqot'in*, at paras. 18 and 75-76.

4. Traditional knowledge

A key component of Indigenous-driven environmental assessment processes is their emphasis on Indigenous laws, knowledge, perspectives, culture and traditions. While western scientific information is important and should inform environmental assessments, equal weight should be given to the traditional knowledge of Indigenous peoples.

EFN members are intimately connected to and familiar with their lands and the resources on these lands. They are stewards of the land. As such, they offer valuable insight into the potential development of a project.

To date, reliance on traditional knowledge within the context of environmental assessments has usually been limited to the traditional use studies commissioned by proponents. These studies are driven by the proponent's particular project agenda, which often seek to identify specific areas that might be of particular concern to Indigenous peoples. They rarely take into consideration the interconnectedness of the resources and the sweeping implications that development of the land may have for the exercise of Aboriginal title and spiritual and cultural practices and the preservation of the land for future generations. These are a project's "intangible impacts".

Indigenous-driven environmental assessment processes support the inclusion of available traditional knowledge to fully assess a project's tangible and intangible impacts. For an environmental assessment to be complete, it must rely on traditional knowledge in conjunction with available western scientific knowledge.

5. Nation building

The Mi'kmaq are committed to achieving a nation-to-nation relationship with the Crown that is based on respect and recognition of their title, rights, treaty rights and Indigenous laws and values. This nation-to-nation relationship, and the recognition of Aboriginal title and rights, treaty rights and jurisdiction, must underlie any Indigenous-driven environmental assessment and decision-making process.

To advance this goal, Indigenous groups must first strengthen themselves. They must implement and exercise their Aboriginal title and jurisdiction. They must develop their own governance, legislative and decision-making institutions, processes and structures, and ensure that they have the systems in place to sustain the renewed relationship.

This type of nation building requires the support and active involvement of the Crown working in collaboration with Indigenous peoples.

<u>Concern No. 2:</u> ***The accommodation of Indigenous concerns offered by existing environmental assessment processes is limited.***

The Crown's constitutional obligations require it to both consult and, when necessary, accommodate Aboriginal rights potentially affected by proposed development. In the context of environmental assessments, government will often equate the mitigation of Indigenous concerns with their accommodation. Mitigation is not synonymous with accommodation. Mitigation is only one form of accommodation.

The implications associated with a project's potential effects do not disappear with the termination of its environmental assessment and a determination that the project's environmental effects are outweighed by the public interest in having the project proceed. Proper accommodation measures must be put in place. If not, once a project has been approved Indigenous peoples are often left wondering what they can do to ensure their rights are protected and preserved in light of government's decision.

As part of the consultation and accommodation process, the Crown must demonstrate a willingness to consider and address Indigenous interests.[12] This may require the Crown to change its plans, proposed actions and policies.[13] The Crown and Indigenous peoples may also work together to negotiate alternative solutions to ensure that both of their interests are addressed. Whatever the approach, to be effective accommodation measures will need to be determined on a project-by-project basis and in collaboration with Indigenous peoples.

<u>Recommendations:</u>

1. Indigenous-driven environmental assessment processes

As described above, Indigenous-driven environmental assessment processes will enable Indigenous peoples to have a central role in determining how to address or accommodate a project's potential affects on their communities, their lands and their constitutionally-protected rights.

2. Consent-based decision-making

The consent of Indigenous peoples is required for any activity that has the potential to affect their rights. As described above, Indigenous peoples must have the ability to make final decisions about whether they will consent to an activity and, if they decide to do so, what mitigation, accommodation and other justification measures are required.

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[12] *Haida*, at para. 42.
[13] *Kwikwetlem*, at para. 68.

3. Sharing of Benefits

There are many strategies that Indigenous peoples and the Crown working together can develop to address Aboriginal concerns with a particular project. Resource revenue sharing opportunities are one such strategy. This form of revenue sharing is distinct and separate from any benefits that Indigenous peoples may negotiate directly with a development company. Revenue sharing opportunities recognize Indigenous interests in maintaining a connection with the lands and resources in their traditional territories, while providing them with long-term benefits from the development of their traditional territories.

Lands that are subject to unextinguished Aboriginal title are not available to the Crown as a source of revenue. As the Supreme Court of Canada noted in *Tsilhqot'in*, "[t]he content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it."[14]

Aboriginal title has an "inescapable economic component",[15] and Aboriginal title gives Indigenous groups the right to use and control the land and to reap the benefits flowing from it.[16] Indigenous peoples must be part of the prosperity that is derived from their traditional territories.

The Mi'kmaq have never surrendered or ceded title to their territory. Revenue sharing serves as an expression of the recognition of co-existing Indigenous and Crown jurisdictions. It allows Indigenous peoples to share in the revenues generated from the use of their lands and resources. In so doing, it supports Indigenous peoples' continued reliance on their traditional lands for their cultural and economic survival.

Revenue sharing opportunities also contribute to the capacity development of Indigenous peoples by providing a sustained or ongoing stream of revenues. These revenues may be used to support and strengthen their government functions and to pursue the goals of their communities. For instance, Indigenous peoples may choose to use these revenues to fund their own environmental assessment processes. And once projects have been authorized to proceed to development, they may use the revenues to fund processes aimed at the ongoing monitoring and management of the projects.

Concern No. 3: ***The timelines set out in current environmental assessment legislation are extremely short, and the environmental assessment processes are often rushed.***

The tight timelines provided for in CEAA 2012 mean that the consultation undertaken in connection with environmental assessments is often hurried, and Indigenous peoples are not given the time necessary to fully consider the potential effects of a proposed project on their Aboriginal title and rights and treaty rights. In *Gitxaala*, the Federal Court of Appeal criticized

[14] *Tsilhqot'in*, at para. 70.
[15] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 166.
[16] *Tsilhqot'in*, at paras. 2 and 18.

this aspect of Canada's consultation activities in the context of the environmental assessment for the Enbridge Northern Gateway Pipeline project.[17]

Indigenous perspectives must inform environmental assessments about the potential effects of the proposed project on Aboriginal title and rights and treaty rights. One way to accomplish this is through the preparation of project-specific traditional land use information. The current timelines contained within CEAA 2012, however, are often so short that they do not provide Indigenous peoples with adequate time to pull together and present this information. Addressing Indigenous peoples' concerns about the potential effects of proposed development on their rights and title should not be arbitrarily limited by legislative timelines.

Recommendation:

1. Indigenous-driven environmental assessment processes

Indigenous-driven environmental assessment processes remove the guesswork around when and how Indigenous peoples should be engaged as part of the process. Instead of forcing Indigenous perspectives into existing regulatory processes, Indigenous peoples have a central role in deciding what the process will look like.

Concern No. 4: ***Current environmental assessment processes are limited in their ability to consider the cumulative effects of projects.***

In recent years, EFN has experienced increased pressure from the Crown and resource companies wanting to develop projects within their territory. CEAA 2012 is limited in its ability to consider the cumulative effects of these projects. The environmental assessment of a project cannot take place in a vacuum and should not be treated as separate from other projects operating within or planned for the same area. The environmental assessment of these proposed projects must consider the cumulative effects of all of these projects potentially operating within the same area.

Recommendation:

1. Regional land use planning

The Supreme Court of Canada in *Tsilhqot'in* confirmed that Aboriginal title exists on a territorial basis, extending to tracts of land that were regularly used by Indigenous peoples and over which the group exercised effective control. *UNDRIP* confirms the right of Indigenous peoples to determine priorities and strategies for the development or use of Indigenous lands, territories and other resources. These principles should also inform environmental assessment processes.

[17] *Gitxaala Nation v. Canada*, 2016 FCA 187 (CanLII).

Many Indigenous groups have put in place land use policies and protocols that identify their expectations about the way in which the land and resources will be managed and the role they will play in their management. Such regional land use planning allows Indigenous peoples to identify areas within their territory where potential development may take place and where development will not be possible due to the existence of important cultural, traditional, archaeological, heritage or other interests.

Effective regional land use plans can also help to address existing gaps relating to cumulative effects assessments. By identifying existing areas where development has taken place, Indigenous peoples and government will be better able to assess the increased pressure that could be introduced if new projects were to be developed in these same areas. The cumulative effects assessment must take place at the stage of strategic planning, before any decisions about the project's feasibility are made.

Government must invest the resources necessary to allow Indigenous peoples to undertake regional land use planning initiatives. Once complete, the valuable information contained within these land use plans will help inform the environmental assessments of potential development activities within Canada, and would also encourage an improved investment climate by providing greater clarity and predictability over where such development may take place.

Concern No. 5: ***Indigenous peoples are often not provided with adequate capacity funding to fully participate in environmental assessment processes.***

It is extremely important that EFN have the opportunity to engage with the Crown as much as possible on issues affecting their lands and their title, rights and treaty rights, including through environmental assessment processes. However, their ability to participate in these processes is severely restricted by their limited internal capacity.

The funding provided to Indigenous peoples is often insufficient to allow them to meaningfully participate in the environmental assessment process. As a result, they are often forced to bear the burden of studying the potential effects of a project on their land and resource use. To undertake this work, financial and human resources must be diverted away from other important government programs and services.

Recommendation:

1. Adequate capacity funding

Indigenous peoples cannot meaningfully participate in consultation and environmental assessment processes or determine whether it can consent to a proposed project without the funding required to assess the potential impacts of the project on the land and resources and their rights.

Canadian courts have expressly endorsed the provision of funding by the Crown for First

Nations to participate in consultation.[18] Appropriate funding is essential to a fair and balanced consultation process and to ensure a level playing field between First Nations and the Crown.[19]

It is also important to ensure that funding is provided to Indigenous peoples to support their participation in consultation processes on a timely basis. There must be adequate time for them to review any information that has been provided about the proposed activity and to provide their input.

Indigenous peoples have limited resources to participate in environmental assessments and related consultation processes that are meant to support resource development initiatives being proposed within their territory. They should not be forced to fund industry's initiatives. Without access to appropriate and timely capacity funding, they will be without the means to properly engage with the Crown on issues that could have long-lasting impacts on their communities, lands and constitutionally-protected rights.

[18] *Wabauskang First Nation v. Minister of Northern Development and Mines et al.,* 2014 ONSC 44214 (CanLII), at para. 232.
[19] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CanLII 20790 (ON SC), at para. 27; *Enge v. Mandeville et al.,* 2013 NWTSC 33, at para. 269.