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Written Submissions to the Minister of Fisheries and Oceans regarding its Review of the *Fisheries Act*

Submitted by Elsipogtog First Nation

January 31, 2017

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 and 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, waters and 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.

Fish, fish habitat and fisheries are deeply ingrained in Mi'kmaq culture. We have traditionally relied on the fisheries within our territory to support our way of life, including our spiritual, social, cultural and economic well-being. It is our responsibility to act as stewards of all water within our territory, and we hold and exercise this sacred responsibility on behalf of our past, present and future generations. We expect that EFN will play a central role in decision-making processes respecting fish, fish habitat, fisheries and their management and conservation within our territory.

Mi'kmaq 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. The treaty confirmed the Mi'kmaq rights to hunt, fish, harvest and gather for food, social and ceremonial purpose and for the purposes of trade and earning a livelihood in our territory. These treaty rights have been confirmed by Canadian courts in a number of cases, including by the Supreme Court of Canada in *R. v. Marshall*.[1]

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.

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 title and rights and treaty rights,[2] and to attempt to justify the potential infringement of these rights.[3] These obligations flow from the rights guaranteed to Indigenous peoples pursuant to section 35(1) of the *Constitution Act, 1982* and the Crown's 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.[4] More recently, the Supreme Court of Canada has emphasized the importance of obtaining the consent of Indigenous peoples before decisions affecting our lands and resources are made.[5]

Where a proposed legislative amendment has the potential to impact Indigenous peoples' territory or rights, the Crown must consult with them about the proposed amendment.[6] When the federal government amended the *Fisheries Act*, R.S.C. 1985, c. F-14 in 2012 and 2013, it did not fulfill these obligations.

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[1] [1999] 3 S.C.R. 456.
[2] *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida*"), at para. 20.
[3] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 ("*Sparrow*"), at 1110-1112; *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256 ("*Tsilhqot'in*"), at para. 80.
[4] *Haida*, at paras. 41-42; *Tsilhqot'in*, at paras. 78 and 80; *Sparrow*, at 1110-1112.
[5] *Tsilhqot'in*, at paras. 92, 97.
[6] *Courtoreille v. Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244 (CanLII) at paras. 101 and 103.

As described in further detail below, the 2012/2013 amendments to the *Fisheries Act* introduced significant changes to the protection of fish and fish habitat and the management of fisheries in Canada. Yet, because of the lack of consultation undertaken by the federal government at the time, EFN was unable to communicate our concerns about the proposed legislative amendments or undertake the work necessary to determine the extent of their implications on our Aboriginal title and rights and treaty rights before their enactment.

The Federal Government's Review Process

We understand the current federal government has expressed a renewed commitment to review the 2012/2013 amendments to the *Fisheries Act* with a view to restoring lost protections and incorporating modern safeguards. The federal government has also committed to working directly with Indigenous peoples to ensure that our views and concerns are heard and taken into account in any further amendments that are to be made to the *Fisheries Act*. In the attached Appendix, we highlight our concerns with the *Fisheries Act* and offer a number of recommendations to address the Act's deficiencies.

EFN provides these submissions to ensure the protection of our Aboriginal title and rights and treaty rights. Going forward, we expect that we will be fully informed and engaged regarding the federal government's review and amendment of the *Fisheries Act* in a manner that is consistent with the honour of the Crown, the Crown's constitutional obligations and the principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*").

Appendix "A"

Concerns Regarding the *Fisheries Act* and Recommendations for Reform

Below we summarize the major deficiencies we have identified with the *Fisheries Act* and propose recommendations to address these shortcomings.

Concern No. 1: ***The 2012/2013 changes to the Fisheries Act resulted in diminished protection and increased vulnerability for fish and fish habitat.***

The following amendments to the *Fisheries Act* served to narrow the protections offered for fish and fish habitat and, as a result, put the exercise and preservation of our constitutionally-protected rights, culture and traditions at risk.

a. Amendment of Section 35: Serious Harm to Fish Prohibition

Key among the 2012/2013 amendments to the *Fisheries Act* was the removal of the prohibition against "harmful alteration or disruption, or the destruction of fish habitat" ("HADD"). The HADD prohibition was replaced with a prohibition against works, undertakings or activities resulting in "serious harm to fish that are part of or support a commercial recreational or Aboriginal fishery". The latter prohibition applies to fish and fish habitat that are part of or support the specified fisheries.

This amendment to the *Fisheries Act* narrowed its application from protection of fish habitats generally to protection of specific fisheries. Limiting the prohibition on habitat destruction to fish and fish habitat that are part of or support specific fisheries is arbitrary and has the potential to harm the very fish the prohibition is meant to protect. The Federal Court of Appeal came to this same conclusion, noting that the 2012 / 2013 amendments to the *Fisheries Act* increased the risk of harm to fish.[7] The need for fish habitat protection is imperative, particularly given the declining health of fresh water and marine fisheries. Loss of fish habitat has historically been a major cause of fisheries decline.[8]

b. Repeal of Section 32: Killing of Fish

The 2012/2013 amendments also repealed the prohibition against killing fish by any means other than fishing unless specifically authorized by the Minister. Under section 35 of the current Act, "serious harm to fish" is defined as including the "death of fish".

Again, the former prohibition contained in section 32 of the Act applied to all fish generally. By contrast, the current prohibition contained in section 35 of the Act is limited to fish that are part

[7] *Courtoreille*, at para. 103.
[8] West Coast Environmental Law, *Scaling up the Fisheries Act: Restoring lost protections and incorporating modern safeguards*, p. 3.

of the specified fisheries. As a result, the removal of section 32 created a gap in the protection of fish.

c. Environmental Assessment Triggers

Amendments to the federal environmental assessment process, introduced with the *Canadian Environmental Assessment Act, 2012*, removed the environmental assessment triggers that previously existed for authorizations issued by the Minister under sections 32, 35 and 36 of the former *Fisheries Act*. As a result, the environmental assessment processes that previously served to assess, understand and mitigate the potential effects of works, undertakings and activities on fish, fish habitat and fisheries before projects were approved are no longer available.

Recommendation: Restore lost protections under the *Fisheries Act*.

To ensure that all fish and fish habitat are properly protected by the *Fisheries Act*, we recommend the following:

a. habitat protection should be restored for all fish, not simply those fish that are part of or support a particular fishery;

b. the prohibition against the killing of fish should be restored;

c. authorizations issued under the Act should be reestablished as environmental triggers under federal environmental assessment legislation.

Concern No. 2: *Existing definitions within the Fisheries Act describing particular fisheries are inaccurate and misleading.*

As described above, the effect of the inclusion of Aboriginal, commercial and recreational fisheries in the 2012/2013 amendments to the *Fisheries Act* was to narrow the scope of protection from fish and fish habitat generally to particular fisheries.

The definition of Aboriginal fishery under the *Fisheries Act* is particularly problematic as it ignores the Indigenous perspective and demonstrates a complete misunderstanding of Aboriginal and treaty rights and Indigenous laws and governance. The Act currently defines Aboriginal in relation to a fishery as fish "harvested by an Aboriginal organization for any of its members for the purpose of using the fish as food, for social or ceremonial purposes or for purposes set out in a land claims agreement entered into with the Aboriginal organization".[9] As indicated above, this definition was arrived at without any consultation with or input from Indigenous peoples.

Contrary to this definition, Indigenous peoples' rights and responsibilities to fish are not based

[9] *Fisheries Act,* s. 2(1).

simply on what they are currently harvesting. Rather, Indigenous fisheries are a relationship that includes governance, ownership, management and stewardship of fish and fish habitat. It is our responsibility to protect and preserve fish for future generations.

The current definition of Aboriginal fishery restricts it to current uses. In so doing, it undermines our Aboriginal and treaty rights and has the potential to significantly restrict available protections for fish that Indigenous people may not currently be harvesting for conservation purposes, for example. When resources are scarce and vulnerable, our Indigenous laws and traditions inform us to not exercise our rights to harvest these resources. The decision to hold off harvesting fish to meet conservation and stewardship objectives must not impact whether the fisheries in question are Aboriginal fisheries or their protection under the *Fisheries Act*.

The inclusion of a definition of commercial fishery that is separate from Aboriginal fisheries is also problematic. Our Aboriginal and treaty rights include the right to fish for all purposes. Our rights are not restricted to fishing for food, social and ceremonial purposes. Rather, our rights include the right to fish for sale, trade or barter purposes as well.

Recommendation: Delete the definitions of Aboriginal, commercial and recreational in relation to fisheries.

For the reasons outlined above, we recommend that the separate definitions of Aboriginal, commercial and recreational in relation to fisheries be removed from the *Fisheries Act*.

If an amended definition of Aboriginal fishery is to be included in the *Fisheries Act*, then extensive consultation with Indigenous peoples is required.

Concern No. 3: ***The Fisheries Act does not currently provide opportunities for Indigenous peoples to participate in decision-making regarding fish, fish habitat and fisheries management and conservation.***

The 2012/2013 amendments to the *Fisheries Act* included provisions allowing the Minister to enter into an agreement with a province to further the purposes of the Act. Despite the importance of fish and fish habitat to Indigenous peoples and their significant role in fish management and conservation, a similar provision was not included with respect to Indigenous peoples.

The federal government has indicated its full support for the principles of *UNDRIP* and its goal of renewing its relationship with Indigenous people in Canada and moving toward reconciliation. Respecting the rights, responsibilities and laws of Indigenous peoples through collaborative governance and management regimes must form an integral part of reconciliation.

Recommendations: Consent-Based Decision Making

Indigenous peoples and the Crown can work together to develop collaborative regimes respecting the governance and management of fish, fish habitat and fisheries. In an effort to modernize the *Fisheries Act*, amendments which specifically empower the Minister to develop such collaborative arrangements with Indigenous people and pave the way for consent-based decision-making should be included.

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 federal regulatory 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 25 recognizes the right of Indigenous people to maintain their relationship with their traditional waters and to uphold their responsibilities to those waters for future generations. 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. Obtaining consent is one way to ensure that the Crown fulfills its constitutional obligations and furthers the objective of reconciliation. One obvious way for government to secure the consent of Indigenous peoples is through collaborative decision-making processes.

Aboriginal title includes the right to use and control the land and enjoy its benefits.[10] The Mi'kmaq have never surrendered our Aboriginal title and rights and treaty rights to our territory and the resources within our territory. As a result, the Mi'kmaq retain the jurisdiction and authority to make decisions on matters that have the potential to affect our rights and our territory. With this comes the right to develop our own Indigenous decision-making institutions and to determine how the lands, waters and resources should be managed. Given the importance of this resource for our culture, traditions and economy, Indigenous peoples should be directly involved in the management and governance of fish, fish habitat and fisheries.

Consent-based decision-making provides an alternative to government's current policy of unilaterally imposing and seeking to fit Indigenous peoples into existing regulatory processes. 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 fish, fish habitat and fisheries management. It would also help facilitate cooperation in areas of common interest with the

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

federal and provincial governments, including conservation, stewardship, habitat protection and restoration, harvest planning and management and enforcement, monitoring and compliance.

Concern No. 4: *The Fisheries Act does not currently include a consideration of cumulative effects.*

In recent years, EFN has been involved in a number of resource development projects within our territory. The assessment of the potential effects of these projects, including their effects on fish, fish habitat and fisheries and our Aboriginal title and rights and treaty rights in respect of these areas, cannot take place in a vacuum and should not be treated as separate from other projects operating within or planned for the same area.

Recommendation: Cumulative Effects Assessment for Impacts on Fish and Fish Habitat

The Minister should be required to consider the cumulative effects of all works, undertakings and activities that have the potential to harm fish and fish habitat when considering issuing an authorization under the Act.