Elsipogtog Band Council

373 Big Cove Road, Elsipogtog, NB E4W 2S3
Phone: 506-523-8200 Fax: 506-523-8230

Written Submissions to the Minister of Transport regarding its Review of the *Navigation Protection Act*

Submitted by Elsipogtog First Nation

January 30, 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.

The navigability of waters within our territory is extremely important to EFN, as we must travel these waters to access the areas we use to practice our fishing rights. Protecting these waters and navigation within them is all the more important given the increased pressure for development within 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 Aboriginal title and rights and treaty rights.

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 former *Navigable Waters Protection Act* (the "NWPA"), it did not fulfill these obligations. Protection, access and the use of water for navigation purposes are necessary for the exercise of our Aboriginal title and rights and treaty rights and to ensure that these rights are preserved for our future generations. As described in further detail below, the

[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.

amendments to the *Navigation Protection Act*, R.S.C., 1985, C. N-22 (the "NPA") were significant in that they removed protections to more than 98 per cent of Canada's waters. 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 provide any input on the extent of their implications for our Aboriginal title and rights and treaty rights before the NPA's enactment.

The Federal Government's Review Process

We understand that the current federal government has expressed a renewed commitment to reviewing the existing NPA in a manner that is consistent with the Crown's constitutional obligations and the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*"). In the attached Appendix, we highlight our concerns with the NPA and offer recommendations to address the NPA's deficiencies and to incorporate modern safeguards within its structure.

Notwithstanding the Crown's previous failure to engage with us when it amended the NWPA, EFN provides these submissions to ensure the protection of our Aboriginal title and rights and treaty rights. We expect that the Crown will continue to engage with us throughout the NPA review process, including as amendments are made to the NPA and any relevant regulations and policies, in a manner that is consistent with the honour of the Crown, the Crown's constitutional responsibilities and the principles set out in *UNDRIP*.

Appendix "A"

Concerns Regarding the *Navigation Protection Act* and Recommendations for Reform

Concerns Regarding the *Navigation Protection Act*

Below we summarize our principal concerns with the NPA and set out recommendations to address these shortcomings.

Concern No. 1: *The NPA weakens protections for navigable waters.*

The protection of our waters is critical to the exercise of our constitutionally-protected rights and for sustaining our culture and future generations. The federal government reduced available protections for navigable waters when it amended the NWPA.

The amendments introduced to the NWPA drastically reduced the number of waterways where development could be considered to pose a substantial interference with navigation. The existing NPA only applies to 62 rivers, 97 lakes and 3 oceans.[7] As a result, the remaining waterways in Canada, totaling approximately 98 per cent of Canada's waters, now have no federal protection.

For the navigable waters that remain regulated under the NPA, the protection offered is significantly weakened. Under the former NWPA, anyone wanting to construct or place a "work" in, on, over, under, through or across any navigable water required permission from the Minister of Transport. The Minister would then determine whether the project threatened the navigability of the waterway. A project deemed to substantially interfere with navigable waters would automatically trigger a federal environmental assessment.

As a result of the new regime introduced by the NPA, developers looking to build on or around waterways not specifically identified by the NPA are no longer required to notify the federal government of their plans or seek permission from the Minister of Transport to proceed with the development.[8] As well, with the streamlined approach to environmental assessments introduced by the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012"), an approval issued under the NPA no longer automatically triggers an environmental assessment. If a project requiring approval under the NPA does not otherwise trigger an environmental assessment, its potential impacts on navigable waters, and on our Aboriginal title and rights and treaty rights as a result, will not be assessed.

The current legislation also allows the Minister make orders exempting certain works and listed

[7] *NPA, Schedule of Navigable Waters.*
[8] *NPA,* ss. 3 and 5.

waters from assessment and approval under the NPA.[9] This may be done without consultation, disclosure or review. As described in further detail below, the arbitrary nature of these powers is a direct contravention of the Crown's constitutional obligations to Indigenous peoples.

The weakened protection offered to navigable waters by the current legislation is of significant concern to EFN. The waterways surrounding our community form part of our territory and we rely on them heavily for the exercise of our Aboriginal title and rights and treaty rights and for the preservation of our laws, culture and traditions. Our community is located on the Richibucto River in New Brunswick, a waterway that is not protected under the current NPA. Without these protections, our ability to safeguard our territory and our rights for our future generations is at risk.

Concern No. 2: ***The NPA undermines the Crown's constitutional obligations to Indigenous peoples.***

As described above, the Crown has constitutional obligations to consult and accommodate Indigenous peoples when the Crown is contemplating conduct that could adversely impact Aboriginal rights and title and to attempt to justify any potential infringement of these rights.

By removing the requirement that private companies notify the federal government and seek its approval when undertaking infrastructure projects on or near navigable waters not identified in the NPA, the federal government has effectively removed itself from the decision-making process for non-listed navigable waters. These changes drastically reduced the number of decisions under the NPA that would trigger the Crown's duty to consult and accommodate Indigenous peoples. Now, a proposed project that does not trigger the NPA approval process may proceed without any consultation or accommodation respecting the potential impacts of the project on the rights and title of Indigenous peoples. As a result, activities that have the potential to harm Aboriginal rights and title may proceed without any consideration of Indigenous concerns or any effort to address these concerns.

This process is inconsistent with the Crown's constitutional obligations to Indigenous peoples. It also undermines the principle of reconciliation, the ability of Indigenous peoples to participate in decision-making processes that affect them, and the principles of free, prior and informed consent enshrined in *UNDRIP*.

Concern No. 3: ***The NPA places a disproportionate burden on Indigenous peoples to protect navigable waters.***

By removing the majority of Canada's waters from the protection of the NPA, Indigenous peoples that rely on these waterways for the exercise of their rights or their livelihood must now go to court to challenge any development that they believe impedes navigation. This change

[9] *NPA*, s. 28(2).

improperly shifted the government's responsibility to enforce the law onto Indigenous peoples, forcing them to use their limited resources to bring lawsuits against the Crown or project proponents to ensure protection of the waterways and their rights. By doing so, the federal government has evaded its responsibility to protect Canada's navigable waters.

The NPA also included an opt-in clause whereby private companies whose proposed development may affect a waterway not specifically listed in the NPA may request that the NPA apply to their particular project.[10] This process is completely voluntary and there is no legal requirement for the Minister of Transport or the proponent to request this. This clause is wholly inappropriate, as it places the decision of applying the regulatory regime in the hands of the proponent. Protection of Canada's waterways and the fulfillment of the duty to consult and accommodate Indigenous peoples and justify potential infringements of their rights are obligations that properly lie with the Crown.[11]

Recommendations for Reform of the *Navigation Protection Act*

To address the shortcomings with the NPA we have identified above, we recommend that the federal government do the following:

1. Restore Lost Protections

The NPA is one of Canada's oldest federal environmental laws. To be consistent with its purpose and to ensure that the waters used by Indigenous peoples for rights-based activities, along with Aboriginal rights and title, are preserved, the protections removed from the NPA should be restored. Specifically, the NPA should:

a. reincorporate a model that provides broad criteria for determining what waters will be deemed navigable waters and subject to the NPA;

b. require that the potential environmental effects of activities that may impact navigation be considered as part of the decision-making process under the NPA and restore linkages to federal environmental assessment legislation; and

c. make mandatory authorizations for all activities that may impact navigation, navigable waters and Aboriginal title and rights and treaty rights.

EFN expects that the federal government will work in collaboration with Indigenous peoples to develop revised legislation respecting navigable waters that is consistent with the Crown's constitutional obligations to Indigenous peoples.

[10] *NPA,* s. 4.
[11] *Haida,* at para. 53.

2. Incorporate Modern Safeguards

In addition to restoring former protections under the NPA, we recommend that the federal government incorporate the following modernized safeguards into the Act to enhance protection of navigation and navigable waters and to better preserve Aboriginal title and rights and treaty rights.

a. Consent-Based Decision Making

Indigenous peoples and the Crown can work together to develop collaborative processes for considering potential authorizations that have the potential to affect Canada's navigable waters. The revised NPA should incorporate the ability for Indigenous people to engage in consent-based decision-making in respect of works, navigation and any related matters that have the ability to affect their Aboriginal title and rights and treaty rights.

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 all regulatory processes that have the potential to affect Indigenous peoples, their territory and their rights and title. 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. 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.[12] The Mi'kmaq have never surrendered our Aboriginal title and rights and treaty rights to our territory, including the waters 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 territory. With this comes the right to develop our own Indigenous decision-making institutions and to determine whether and how the lands, waters and resources should be developed. This includes final decision-making about whether we will consent to an activity and, if so, what mitigation, accommodation and / or justification measures are required.

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

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. Indigenous peoples should be directly involved in determining whether and how a project that has the potential to affect our 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.

b. Incorporate Indigenous Knowledge

EFN members are intimately connected to and familiar with the lands, waters and within our territory. We are stewards of our territory. As such, we offer valuable insight into potential developments proposed within our territory. Indigenous knowledge is necessary to understand the interconnectedness of the resources and the sweeping implications that development of the land and water may have for the exercise of our Aboriginal title and spiritual and cultural practices and the preservation of the land and water for future generations.

To further advance the goal of reconciliation and to be consistent with the principles of *UNDRIP*, the NPA should make the incorporation of Indigenous knowledge a mandatory consideration in the Act's decision-making process.

c. Cumulative Effects Assessment for Navigation

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 navigation, navigable waters and Aboriginal title and rights and treaty rights, 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 NPA should incorporate mechanisms that require decision-makers to consider the cumulative effects of all of these projects potentially operating within the same area when determining the potential effects of a work.