



Kopit Lodge's Manifesto

Part 1: Background Elsipogtog First Nation

- Elsipogtog First Nation (“Elsipogtog”) is a Mi’kmaq community of approximately 3,000 members.
- The Mi’kmaq Nation is an Aboriginal group which has used and occupied lands known as Mi’kma’ki prior to and at contact with Europeans and the assertion of sovereignty by the British Crown.
- Elsipogtog’s community, reserves and traditional lands are located within present day New Brunswick, known by the Mi’kmaq as District 6 or Sikniktuk.
- Prior to and since contact and sovereignty, Elsipogtog and its predecessors have used, occupied and maintained a substantial connection to Mi’kma’ki, including Sikniktuk.
- Sikniktuk includes the land, land covered by water, offshore and inshore water bodies, foreshore, rivers, lakes and streams situated within its bounds.

The Treaty

In 1761, Elsipogtog’s ancestors entered into a Peace and Friendship Treaty with the British Crown (the “Treaty”).

The *Treaty* is a solemn agreement that sets out long-standing promises, mutual obligations and benefits for both parties. The purpose of this *Treaty* was to establish ongoing relations between the Mi’kmaq and the British settlers. This *Treaty* was meant to ensure peace by protecting the traditional economy of the Mi’kmaq, including Mi’kmaq trade, and the right to participate in their traditional resource activities, such as hunting and fishing.

By entering into the *Treaty*, Elsipogtog did not surrender title to our lands or the right to use and trade their resources. Rather, the *Treaty* confirmed these rights.



Elsipogtog's Treaty Rights

The *Treaty* confirmed Elsipogtog's rights to hunt, fish, harvest and gather for food, social and ceremonial purposes and for the purposes of trade and earning a livelihood in their territory.

The Canadian courts have confirmed these *Treaty* rights in a number of cases.

Elsipogtog's Aboriginal Rights

Prior to and since contact, Elsipogtog have continually exercised Aboriginal rights over the lands and waters of Sikniktuk for a variety of purposes, including fishing, hunting and trapping, harvesting / gathering timber and related materials, gathering plants for foods and traditional medicines and engaging in a variety of cultural and spiritual customs and traditions.

These Aboriginal rights have never been surrendered or lawfully extinguished, and Elsipogtog continues to hold and exercise these rights in Sikniktuk.

Elsipogtog exercises its Aboriginal and *Treaty* rights in a number of ways, including by hunting, fishing and harvesting for their family and for the community. Many Elsipogtog members rely on these traditional activities for survival. These rights are vital to Mi'kmaq culture and way of life.

The Supreme Court of Canada and the Courts of New Brunswick have recognized and affirmed the validity of the Mi'kmaq's Aboriginal rights to hunt, fish and harvest from their lands and waters.

Elsipogtog's Aboriginal Title

Prior to and at sovereignty, Elsipogtog exclusively used, occupied and exercised effective control over Sikniktuk, used Sikniktuk for a variety of purposes, including hunting, fishing, gathering and other resource-harvesting activities, trade, and cultural and spiritual practices, and exercised jurisdiction over Sikniktuk pursuant to Mi'kmaq legal and political regimes governing the use and occupation of land.

Elsipogtog continues to hold and exercise Aboriginal title to the lands and waters that make up Sikniktuk today. Elsipogtog's Aboriginal title to our lands has never been extinguished.



Protection of Elsipogtog Aboriginal Title and Rights and Treaty Rights

Elsipogtog is facing a time of unprecedented changes to our traditional lands, waters and resources. In recent years, proposals from the Crown and companies seeking to develop Elsipogtog's lands and resources have increased dramatically. This development has the potential to significantly affect Elsipogtog's lands and way of life for many generations to come.

Kopit Lodge is a voluntary group that has been delegated authority by the Chief and Council of Elsipogtog to participate in consultation activities on behalf of Elsipogtog.

Elsipogtog and our members are committed to defending, protecting and advancing our Aboriginal title and rights and Treaty rights. This includes preserving and protecting the natural resources in our territory, for both present and future generations.

In April of 2016, Elsipogtog served a Notice of Intent on the Attorney General of New Brunswick, indicating the intention to commence legal action for declarations of Elsipogtog's Aboriginal title and rights in respect of the lands at Sikniktuk and declarations that the Province has interfered with and unjustifiably infringed our Aboriginal title and rights.

Part 2: Concerns Regarding the Federal EA Process

The Crown's Duty to Consult and Accommodate

Elsipogtog sees the Crown's duty to consult and accommodate in respect of proposed development projects as distinct from any environmental assessment process.

The Crown has a constitutional duty to consult and accommodate Elsipogtog with respect to the potential effects of proposed projects on our Aboriginal title and rights and treaty rights.

The Crown's duty to consult with Aboriginal peoples and accommodate our rights is grounded in the honour of the Crown. While the Crown may delegate procedural aspects of consultation, the honour of the Crown cannot be delegated and the ultimate legal responsibility for consultation belongs to the Crown.

Given Elsipogtog's assertion of Aboriginal title, the Supreme Court of Canada's decision in *Tsilhqot'in* applies and provides guidance to the Crown in fulfilling its duty to consult with Elsipogtog in connection with projects being proposed within Elsipogtog territory.

As affirmed in *Tsilhqot'in*, prior to the establishment of Aboriginal title, the Crown is required to consult in good faith with any Aboriginal group asserting title to the land about proposed uses of the land and, where appropriate, accommodate its interests. The level of consultation and accommodation required



will vary with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest being claimed. The Crown can avoid allegations of failure to adequately consult by obtaining the consent of the interested Aboriginal group.

Elsipogtog expects that the Crown will always do all that is necessary to fulfill its constitutional obligations to consult and accommodate Elsipogtog in respect of any proposed projects that have the potential to affect our Aboriginal title and rights and treaty rights.

At a minimum, Elsipogtog expects that the Crown will:

- Engage with Elsipogtog respectfully on a government-to-government basis;
- Provide Elsipogtog with all relevant information respecting a proposed project;
- Ensure that Elsipogtog has sufficient time to adequately consider and respond to any information provided respecting a proposed project;
- Provide Elsipogtog with adequate resources to participate meaningfully in the consultation process.

The EA Process is Inadequate to Fulfill the Crown's Constitutional Obligations

Given the nature of the Crown's obligation to consult and accommodate First Nations in respect of the potential effects of activities on their Aboriginal rights, the environmental assessment process as it currently exists is inadequate to fulfill these obligations.

In particular, Elsipogtog has the following concerns with the current federal environmental assessment process:

(a) Limiting consultation to environmental assessment processes makes it easier for government to avoid consulting Aboriginal peoples on a particular project.

- For example, if a particular project does not trigger an environmental assessment under the Act, the Crown will often rely on the proponent of the project to engage in consultation activities with First Nations.
- The courts have made clear that government cannot completely disengage itself from the consultation and accommodation process.
- Consultation processes that do not involve the Crown serve to undermine Elsipogtog's nation-to-nation relationship with the Crown.



- By forcing us to engage solely with industry, our credibility in representing the interests of the community is also undermined as community members may interpret our efforts at consultation as selling out to the company's interests.

(b) Limiting consultation to environmental assessment processes sometimes means that, by the time the environmental assessment is triggered, important decisions about the project may have already been made without any consultation having taken place with First Nations.

- Early decisions may have important implications for the direction a project will take.
- Once these decisions have been made, our influence over those decisions, and the decisions that follow it, is often limited.
- To be meaningful, consultation must take place early, and consultation is required at the administrative and strategic levels of government conduct as well as the operational level.

(c) The Canadian Environmental Assessment Act is limited in its ability to consider the cumulative effects of projects.

- In recent years, Elsipogtog has been bombarded by numerous companies wishing to develop within our territory.
- Consultation in respect of these various proposed projects must consider the cumulative effect of all of these projects potentially operating within our territory.

(d) Elsipogtog has a nation-to-nation relationship with the Crown, and its right to seek consultation and accommodation should not be limited to a single agency of government (for example, CEAA), and should not be limited to engaging with companies.

(e) The tight timelines provided for in the Canadian Environmental Assessment Act mean that the consultation undertaken by CEAA is often hurried, and CEAA representatives often lack the required mandate to properly address and accommodate First Nation concerns regarding proposed projects.

- It is imperative that consultation take place with Crown representatives that have sufficient authority to make decisions and properly respond to our concerns about a proposed project.
- Meaningful consultation requires the Crown to demonstrate a willingness to accommodate Aboriginal interests by, for example, changing plans, proposed actions and policies. Mitigation of Aboriginal concerns is only one form of accommodation.



- Meaningful consultation and accommodation cannot take place if government decision-makers are not participating in the consultation / accommodation process.
- (f) ***Inadequate funding is provided for Aboriginal peoples to meaningfully participate in the environmental assessment process, and when funding is provided, it is often delayed.***
- Elsipogtog is currently operating in a deficit.
 - We do not have endless amounts of time or money to spend participating in environmental assessment processes.
 - As members of Kopit Lodge, we fulfill the responsibilities we have been delegated by Elsipogtog Chief and Council on a voluntary basis.
 - When funding is delayed, we are forced into a situation of deficit spending, where we incur expenses for which we are later reimbursed by government. This situation is not economically feasible for Elsipogtog.
 - If a consultation process is to be meaningful and we are to be able to fully participate in the process, adequate funding must be made available as early as possible in the process.

Part 3: Recommendations for Reform of the Federal EA Process

1. *Ensure direct First Nation participation early in the environmental assessment process.*

- Elsipogtog should be engaged at the earliest possible stage of government decision-making respecting a proposed project, before there is any possibility of the project affecting our Aboriginal title and rights and Treaty rights.

2. *Where a project has the potential to impact Aboriginal rights, a process for shared decision-making that is consistent with the United Nations Declaration on the Rights of Indigenous Peoples, including the principle of free, prior and informed consent, should be developed.*

- The federal government has confirmed its full support for the principles of the United Nations Declaration on the Rights of Indigenous Peoples.
- Article 32 of UNDRIP requires that Indigenous peoples be consulted and cooperated with in good faith in order to obtain our free and informed consent prior to the approval of any project affecting our lands or territories and other resources.



- Article 18 of UNDRIP confirms that Indigenous peoples have the right to participate in decision-making in matters that would affect our rights.
 - Shared decision-making in the context of environmental assessments would provide Elsipogtog with the opportunity to 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 is based on the recognition that there are Crown and First Nation decision-makers that must each make a decision with respect to land and resource matters.
 - Shared decision-making recognizes the government-to-government relationship between Elsipogtog and the Crown, and enables us to collaboratively establish processes and mechanisms for making decisions on matters of mutual interest and concern.
 - Shared decision-making provides an alternative to the federal government's current policy of unilaterally imposing and seeking to fit First Nations into existing environmental assessment processes and legislation.
 - This model allows for variation from one First Nation to another, to fit with their specific circumstances and priorities, and also provides a means for applying Aboriginal laws and integrating Aboriginal perspectives into decision-making about land and resource management.
- 3. Provide opportunities for First Nation regional land use planning initiatives to inform environmental assessment processes.**
- Article 32 of UNDRIP confirms the right of Indigenous peoples to determine and develop priorities and strategies for the development or use of our lands, territories and other resources.
 - Federally funded regional land use planning would enable Elsipogtog to identify areas within our territory where potential development may take place and where development will not be possible due to the existence of important cultural, traditional, archaeological or other heritage values.
 - This information would not only help inform the environmental assessment of potential development activities within Canada, but would also provide greater certainty over where such development may take place.
- 4. Incorporate traditional First Nation knowledge in the environmental assessment of a project.**



- Elsipogtog is intimately connected to and familiar with Sikniktuk and its resources and can offer valuable information about this area.
 - Reliance on Aboriginal traditional knowledge should not be limited to the traditional use studies often undertaken by companies as part of environmental assessment processes; as such studies are often driven by the company's particular project agenda.
 - Instead, First Nations should be consulted with on a project-by-project basis to determine what traditional knowledge is available to support a particular environmental assessment process. Aboriginal traditional knowledge should be relied on in addition to western scientific knowledge.
5. ***Provide adequate funding to promote capacity development of First Nations so that they can meaningfully participate in the environmental assessment process.***
- As discussed, First Nations, including Elsipogtog, have limited resources to participate in environmental assessments and related consultation processes that are meant to support developments being proposed by industry. To enable First Nations to meaningfully participate in such processes, adequate funding provided on a timely basis is imperative.
6. ***Provide for meaningful accommodation of Aboriginal concerns***
- As discussed, mitigation does not equal accommodation.
 - There are a number of strategies that Canada and Aboriginal peoples working together can develop to address Aboriginal concerns about a particular project.
 - The federal government must be open to discussing the various possibilities.
7. ***Provide opportunities for sharing of benefits from economic activity, including through revenue sharing.***
- Lands that are subject to unextinguished Aboriginal title are not available to the Crown as a source of revenue.
 - Elsipogtog has recently served notice of its intention to commence legal action for declarations of Elsipogtog's Aboriginal title and rights in respect of the lands at Sikniktuk.
 - Revenue sharing would serve to recognize the co-existing Elsipogtog and Crown jurisdictions, and would allow Elsipogtog to share in the revenues generated from the use of our lands and resources.



- Revenue sharing opportunities would contribute to our capacity development by providing an ongoing stream of revenues, which may be used by Elsipogtog to strengthen our government and pursue our community goals.
- Revenue sharing is separate from any benefits negotiated directly with a company.