Memorandum

CLARK WILSON LLP

To	BC Métis Federation ("**BCMF**")
From	Clark Wilson LLP
Date	April 5, 2019
Re	**Proposed amendments to the *Navigation Protection Act* (the "*NPA*") under Bill C-69**

You have asked us to prepare a report regarding Canada's proposed amendments to the *NPA* and to consider how these proposed changes will impact BCMF's interests. As such, we have reviewed the proposed amendments and provide our analysis below. We have written the following from BCMF's perspective, trying to put ourselves in your shoes with the intention of providing a report that you can send directly to Canada subsequent to consultation with the BCMF community. Following your review, please let us know if there are changes we can make to the report before you send it to Canada.

We note that Bill C-69 is currently in its second reading in the Senate, and BCMF has missed the deadline to submit a response under the federal government's consultation period. Thus, BCMF may choose to provide the report to the Minister of Crown-Indigenous Relations, or make the report public in order to place added political pressure on the Liberal party. We welcome a discussion regarding the best way to ensure the BCMF's opinion on the proposed amendments is heard and considered by the federal government.

The following is a report which can be sent to the Minister, or any of BCMF's key liaisons within the federal government.

Summary

In 2012, the Harper government severely curtailed the protections afforded to navigable waters in Canada. Through the introduction of the *NPA*, Harper reduced the number of protected navigable bodies of water from an estimated 2.5 million to a schedule of only 159. The *NPA* was widely seen by environmental and Aboriginal groups as a thinly veiled way for Harper to make life easier for pipeline proponents.

In 2015, the Federal Liberal party ran on a platform that included overhauling pieces of legislation which had drastically undermined Canada's environmental protections under the Harper administration. Specifically, the Liberal platform included the following:

> "We will undertake, in full partnership and consultation with First Nations, Inuit, and the Métis Nation, a full review of laws, policies, and operational practices. This will ensure that on project reviews and assessments, the Crown is fully executing its consultation, accommodation, and consent obligations, in accordance with its constitutional and international human rights obligations, including Aboriginal and Treaty rights and the United Nations Declaration on the Rights of Aboriginal Peoples.

> We recognize the relationship between Aboriginal Peoples and the land, and will respect legal traditions and perspectives on environmental stewardship.
>
> Stephen Harper's changes to the Fisheries Act, and his elimination of the Navigable Waters Protection Act, have weakened environmental protections. We will review these changes, restore lost protections, and incorporate more modern safeguards."[1]

The BCMF has reviewed the *Canadian Navigable Waters Act* ("***CNWA***" or, the "**Act**") – the Liberal party's response to the *NPA* under Bill C-69 – and we are all disappointed. While including Indigenous knowledge, Indigenous means of transport, and an affirmation of Aboriginal rights as considerations under the Act are welcome steps forward, the process by which the *CNWA* provides for these considerations fails to accomplish what the Liberal party set out to do in its 2015 platform.

The Act does not sufficiently provide for the fulfillment of Canada's constitutional duty to *meaningfully* consult with Aboriginal groups. Further, there is no mention of environmental protections anywhere in the Act. Though the BCMF is confident that the Federal Liberal party is genuinely committed to reconciliation, the *CNWA* falls short of meeting the party's stated aspirations.

Below, we lay out our three major concerns with the Act.

Lack of notice

Under section 10(1) of the *CNWA*, an owner who proposes to construct a work that is neither major nor minor, over navigable waters that are not listed in the schedule, can opt to either (a) seek approval from the Minister or (b) publish a notice as specified by the Minister. We are greatly concerned that the latter option will be used and abused by project proponents seeking to sidestep necessary consultations with Aboriginal groups whose rights and title may be infringed by the project. For this reason and the reasons described below, section 10(1)(b) (the "**Notice Provision**") is extremely troublesome.

Providing notice to the public does not recognize that Aboriginal rights are *collective* in nature. In our guide to Métis consultation, published on our website, we clearly lay out BCMF's position in terms of what constitutes adequate notice under Canada's constitutional duty to consult and accommodate:

> "The first step in proper consultation is to give notice to the Métis community whose potential or existing Aboriginal rights may be infringed by a proposed project. Notice must be given to the appropriate representative of the Métis community. Notice to an individual Métis citizen does not constitute a completion of this step. The duty to consult is a duty to a collective. Simply holding a public forum or taking out an ad in a local newspaper does not satisfy the community's right to be consulted."[2]

Under the Notice Provision as it is currently proposed, the Minister may require owners to provide notice by way of public forums or taking out ads in local newspapers. Indeed, in our experience with Crown consultation processes, this is likely to be the type of notice the Minister specifies. How, under this process, can the Minister assure the Métis community of BC, and particularly the Métis

[1] Liberal Party of Canada, "Environmental Assessments," accessed on April 3, 2019 at: https://www.liberal.ca/realchange/environmental-assessments/.
[2] BC Métis Federation, "The Duty to Consult: BC Métis Federation – Guide to Métis Consultation," available at: http://bcmetis.com/wp-content/uploads/BCMF-The-Duty-to-Consult-FINAL-2.pdf.

organizations that represent that community, that they will receive adequate notice of every project that may impact their asserted Aboriginal rights?

As the proposed legislation currently stands, we sincerely doubt such an assurance is possible.

We note that the BCMF is an organization that has often had to fight to have our voice heard. While the federal government has recognized its constitutional duty to consult with Métis people – unlike the BC provincial government – we are often sidestepped in consultation processes because we do not have legally recognized traditional territory or reserve land in BC. Accordingly, even if notice is provided to the First Nations on whose territory a given project is taking place, we fear the same notice will not be extended to the BCMF.

Lack of consultation

There are multiple avenues in the *CNWA* by which project proponents and the Crown are likely to minimize the level of consultation they engage in with Aboriginal groups, or worse yet, avoid consultation altogether.

There are at least two clear ways by which the Crown's constitutional duty to consult and accommodate can be avoided entirely:

- First, section 6 provides that a project may go ahead without any approval process if the Minister is of the opinion that the project will not interfere with navigation. This is troubling not only because it provides the Minister unfettered discretion to bypass approval processes, it also completely avoids consideration of possible infringements on Aboriginal rights. It is completely foreseeable that a project might not have an impact on *navigation* as defined by the Act, but could significantly impact Aboriginal rights.

- Second, as discussed above, the notice requirements under the Notice Provision provide an easy way for project proponents to avoid consultation if the notice does not actually get in front of affected Aboriginal groups, such as the BCMF. That provision puts far too great an onus on organizations like the BCMF, as well as the Minister, to ensure that affected Aboriginal groups are aware of projects that may infringe their potential or existing Aboriginal rights.

If a project proponent does not bypass consultation entirely, there is a high likelihood the proponent will be able to bypass *meaningful* consultation. Here, sections 10(3) and 10.1 of the *CNWA* are most concerning.

Section 10(3) provides that a notice published under the Notice Provision "must invite interested persons to provide written comments on the proposal, as it relates to navigation, to the owner within 30 days after publication of the notice or within any other period prescribed by regulation." Section 10.1(1) provides that if a comment is provided to a project proponent under section 10(3) which "expresses a concern relating to navigation, the owner and the person who made the comment must attempt to resolve the person's concern within 45 days."

These provisions undermine the duty to meaningfully consult and accommodate Aboriginal peoples.

Even assuming the notice published actually gets in front of impacted Aboriginal groups on the first day of the 30 day timeline, that will not be enough time for organizations like the BCMF and other Aboriginal

communities – groups that are typically under-resourced and over-worked – to raise serious concerns regarding their Aboriginal rights. Similarly, 45 days will rarely, if ever, be enough time to fully come to a workable solution when it comes to accommodation of infringements on Aboriginal rights. Short timelines like these only serve to exacerbate problems for Canada by frustrating Aboriginal groups and discouraging reconciliation.

However, as frustrating as the short timelines are, the exclusive focus on navigation under these provisions is even more problematic. As specified in both sections 10(3) and 10.1(1), comments may only be provided to project proponents which express concerns relating to navigation. In other words, our constitutionally protected Aboriginal rights are not just ignored, they are explicitly excluded as a relevant consideration. The BCMF is disappointed with this narrow and counter-productive focus.

All of this is to say nothing of the fact that Canada has removed itself from the entire process discussed above, despite being told repeatedly by the Supreme Court of Canada ("**SCC**"), in *Haida Nation* and subsequent cases, that the Crown's duty of good faith consultation and accommodation cannot be delegated to third parties.

Lack of environmental protections

The final disappointment of these proposed amendments is the complete lack of consideration for environmental effects in the project approval process. Even in circumstances where the Minister is prevented from shirking its responsibility to undergo a legitimate approval process for a given project, the factors the Minister must consider under section 7 of the Act ignore environmental impacts.

An Act to protect navigable waters does not restrict the federal legislature to only protecting navigation. The *CNWA* must also attempt to minimize projects' adverse environmental effects. As the SCC stated in *Friends of Oldman River Society v Canada*, "[t]he protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legislative schemes and administrative structures."[3] In *R v Hydro-Québec*, the SCC noted at paragraph 86 that both federal and provincial governments have an "all-important duty… to make full use of the legislative powers respectively assigned to them in protecting the environment."[4]

The *CNWA* is a prime example of legislation which can and should be used by the federal government to protect the environment. The BCMF is disappointed that Canada has chosen to largely ignore projects' environmental impacts under these proposed amendments. As such, we are disappointed with the Act's narrow view of protections for navigable waters.

Conclusion

The way the *CNWA* has been proposed seems to assume that projects taking place in navigable waters will either be captured by other environmental protection legislation, or not have an impact on Aboriginal rights or the environment. This simply is not true.

Due to the Act's narrow focus on the protection of navigation, countless projects will be liable to infringe upon Aboriginal rights, including Métis cultural and economic activities, such as hunting, fishing

[3] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, at pp. 16-17.
[4] *R v Hydro-Québec*, [1997] 3 SCR 213, at para. 85.

or trapping, without ever considering these possible infringements or ever speaking with organizations like the BCMF. Yes, the Act should be designed to protect navigable waters, but it does not follow that only *navigation* should be protected. Environmental impacts must play a central role in any process where a project is considered which will have an impact on our waters.

Lastly, our constitution demands the protection of Aboriginal rights. Canada has done everything it can in the narrative surrounding the *CNWA*'s approval process to present the Act as advancing reconciliation and protection of Aboriginal rights. Unfortunately, however, the Act affords too many avenues by which meaningful consultation and accommodation can be sidestepped.

We kindly request that Canada respond to this opinion with meaningful dialogue in the spirit of the Federal Liberal party's commitment to reconciliation.