January 30, 2017

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

Introduction

The British Columbia Métis Federation ("BCMF") is a non-profit association that works with Métis communities across British Columbia. Founded in 2011, BCMF's mandate is to advance the culture and rights of Métis people and to work with Métis communities to ensure the well being of our members. The BC Métis Federation is governed by its President and a board of directors elected by our membership. We currently have 7,500 members across British Columbia.

Much of BC Métis Federation's work is focused on building and maintaining relationships with governments, industry partners and service delivery organizations throughout British Columbia. We work with these organizations to meet the needs of our members, advance their concerns, and ensure that their voice is present. The BC Métis Federation regularly engages with regulatory agencies and other government entities in relation to issues of interest and concern to BC Métis Federation members.

Métis rights are constitutionally enshrined and protected. Our members have important knowledge about the social and economic landscape of the regions they live in, as well as the land and natural environment. They value the integrity and beauty of the natural environment, and are committed to defending, protecting and advancing our rights. The BC Métis Federation is continually engaged in research with our members to ensure the protection and advancement of, and advocacy for, their rights.

Our members favour a balanced and responsible approach to development that is inclusive of our unique voice and perspective. We cannot support the practice of regulatory agencies or the enactment of regulatory processes and procedures that do not incorporate our views. Doing so puts our members' rights and livelihoods at risk.

The navigability of Canada's waters is an area of great importance for our members, as they must travel these waters to access the areas where they exercise their rights. Our communities expect to be involved in any regulatory process considering proposed development work that has the potential to affect our members' rights, including Canada's navigable waters.

The Crown's Constitutional Obligations to Indigenous Peoples

The Crown has a constitutional duty to consult and accommodate Indigenous peoples, including the Métis, about the potential effects of proposed projects on their Aboriginal title and rights,[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 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.[3] More recently, the Supreme Court of Canada in *Tsilhqot'in* emphasized the importance of obtaining the consent of Indigenous peoples before decisions affecting the lands and resources are made.[4]

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.[5] 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 is necessary for the exercise and preservation of our members' rights. As described in further detail below, the 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. The federal government's lack of consultation at the time mean that our members were unable to communicate concerns about the proposed legislative amendments or provide any input on the extent of their implications for our members before the NPA's enactment.

The Federal Government's Review Process

We understand that the current federal government has expressed a renewed commitment to undertaking a review of 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*

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

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.

The BC Métis Federation provides these submissions to ensure the protection of our members' 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 Canada's waters is critical to the exercise of our constitutionally-protected rights and for sustaining our culture. The federal government reduced available protections to these 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.[6] As a result, the remaining waterways in Canada, totalling 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.[7]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 will no longer automatically trigger 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 Aboriginal rights as a result, will not be assessed.

The current legislation also allows the Minister make orders exempting certain works and listed waters from assessment and approval under the NPA.[8] 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.

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[6] *NPA, Schedule of Navigable Waters.*
[7] *NPA,* ss. 3 and 5.
[8] *NPA*, s. 28(2).

The weakened protection offered to navigable waters by the current legislation is of significant concern to our members. Our members rely on waterways located throughout British Columbia for the exercise of their rights and the preservation of their traditions. However, many of these waterways are no longer protected by the NPA. Without these protections, the ability of our members to safeguard these rights and traditions is at risk.

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

The Crown has constitutional obligations to consult and accommodate Indigenous peoples when the Crown is contemplating conduct that could adversely impact Aboriginal title and rights 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 title and rights of Indigenous peoples. As a result, activities that have the potential to harm Aboriginal title and rights 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 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.[9] This process is completely voluntary and there is no legal

[9] *NPA,* s. 4.

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.[10]

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 these rights, 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.

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

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.

a. Participation in Decision Making

Indigenous peoples, including the Métis, and the Crown can work together to develop collaborative processes for considering authorizations that have the potential to affect Canada's navigable waters. The revised NPA should incorporate the ability for the Métis to engage in

[10] *Haida,* at para. 53.

collaborative decision-making in respect of works, navigation and any related matters that have the ability to affect their 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 and their rights. Both *UNDRIP* and *Tsilhqot'in* confirm the importance of Indigenous peoples' participation in decision-making about 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.

Collaborative 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 would allow our members to be directly involved in determining whether and how a project that has the potential to affect their rights should proceed to development. This is a necessary step in advancing the goal of reconciliation and ensuring that Métis rights are protected.

b. Incorporate Indigenous Knowledge

Indigenous knowledge is necessary to understand the interconnectedness of the resources and the sweeping implications that development of the land may have for the exercise of Métis rights, our traditional practices and the preservation of the lands and waters. 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

The level of development activity taking place across British Columbia has increased significantly in recent years. The assessment of the potential effects of these development projects, including their effects on navigation, navigable waters and the ability of our members to exercise their rights, cannot take place in a vacuum. A proposed project 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

projects potentially operating within the same area when determining the potential effects of a work.

Regards,

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