OUR LAND IS OUR FUTURE

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Submission to the Standing Committee on Transport, Infrastructure and Communities

Re: Navigation Protection Act

Indigenous Peoples' Rights and the Navigation Protection Act

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Submitted on behalf of Union of BC Indian Chiefs (UBCIC)

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Water is the Lifeblood of the Land – Importance of Water to Indigenous Peoples

> *Common to all traditions of Indigenous Peoples is that water is celebrated as Sacred, and that the deep connections between all things living here, and in the spirit world, are reconfirmed. Water is the lifeblood of the land and the Indigenous Peoples whose cultures flow from the land. Indigenous Peoples recognize that to dam the waters is to dam the connection to our future generations. To fail to protect our lands and waters is a contravention of our traditional laws, and our Aboriginal Title and Rights.*[1]

As Indigenous Peoples', our cultures are closely linked to water, and negative impacts on water are cycled back to our cultures and societies. Waters are fundamental to the physical, cultural and spiritual survival of Indigenous Peoples, who have a responsibility to protect the availability and purity of the waters that our Peoples, and all life, depend upon. It is from this perspective – knowledge of the overwhelming importance of water to Indigenous Peoples – that UBCIC makes these submissions on the *Navigation Protection Act* (NPA).

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[1] EAGLE, "*Lifeblood of the Land. Aboriginal Peoples' Water Rights in British Columbia*" ed. Ardith Walkem et al., June 2004 at p.1-2.

Who is the Union of B.C Indian Chiefs (UBCIC)?

The UBCIC is an organization of Indigenous Nations in British Columbia, founded in 1969, dedicated to promoting and supporting the efforts of Indigenous Peoples to affirm and defend Aboriginal Title and Rights. The UBCIC works with our members to develop common strategies to defend Aboriginal Title and Rights in legal and political forums, and advocates for the recognition, affirmation and protection of Aboriginal Title and Rights at the provincial, national and international levels. The UBCIC has achieved recognition as a non-governmental organization with special consultative status of the Social and Economic forum of the United Nations. The majority of the member Indigenous Nations of the UBCIC has chosen not to negotiate modern treaty agreements with Canadian governments.

Recognizing that Aboriginal Title Includes Water

Aboriginal Title could include waters such as lakes, streams, rivers, hot springs, ice fields, ocean waters and the ocean located within an Indigenous Nation's territory. Many Aboriginal and Treaty rights rely upon healthy and sufficient flows of water to sustain them, such as fishing, hunting, or other gathering rights, and spiritual practices. It is nearly impossible to imagine an Aboriginal or Treaty right that does not depend upon water.

The purpose of Aboriginal Title is to protect Indigenous Peoples' existence as Peoples, to protect Indigenous cultures, and to maintain the connections between Indigenous Peoples and their Title territories including waters.[2] Indigenous Peoples have the constitutionally protected right to have a say about new, renewed, or continued water uses which potentially impact Aboriginal Title, Rights and Treaty Rights. Aboriginal Title includes rights to manage and control Title lands, and Indigenous laws and legal orders are the mechanism through which that land and resource management and planning are carried out.

Restructuring the Relationship between Indigenous Peoples and the Crown

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) protects the fundamental human rights of Indigenous Peoples' way of life: our language, cultural practices, and our sacred relationships to the natural world, including water. UNDRIP, Article 19, requires the "free, prior and informed consent" about legislation or policy which impacts Indigenous Peoples. Article 25 recognizes the importance of water:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

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[2] *Tsilhqot'in Nation v. British* Columbia 2014 SCC 44; *R. v. Van der Peet*, [1996] 2 SCR 507; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511

The Truth and Reconciliation Commission (TRC) also reflected these principles of reconciliation and recognition, and identified a path toward a respectful relationship between Indigenous and non-Indigenous Canadians. Two key features of the TRC recommendations which need to be reflected in the NPA review are (1) the direction to change how the Crown deals with claims of Indigenous rights, including Title to waters [recognition rather than denial] ; and, (2) finally recognizing Indigenous laws and legal orders and completing the unfinished work of the Canadian constitutional project.

Trails, Waterways and Indigenous Navigation

In *Tsilhqot'in Nation v. British Columbia*[3] the Tsilhqot'in evidence included an extensive network of trails, both beside and on the waters. This extensive network of trails, including on water courses, showed regular and intensive use of the territory by the Tsilhqot'in and grounded a finding of Aboriginal title:[4]

> "Tsilhqot'in people occupied and used the land, the rivers, the lakes, and the many trails as definite tracts of land on a regular basis for the hunting, trapping, fishing and gathering. This is the land over which they held exclusionary rights of control: …. This was the land that provided security and continuity for Tsilhqot'in people…"[5]

Navigable waters – trails – waterways and foreshore are critical components of Aboriginal Title lands and need to be protected. Destruction – or failure to protect – navigable trails relied on by Indigenous Peoples is an attack on Aboriginal Title. Navigation across waters is not just a matter of transit, but embodies a deeper and multi-layered relationship of Indigenous Peoples to their lands. The NPA should protect all navigable waters, including in their ecological aspects. Indigenous Peoples should participate in identifying waters within their territories that need to be protected and in identifying and participating in appropriate decision-making standards. The NPA should prioritize Indigenous Peoples' need to protect healthy water, either for current or future generations, or for the fish, wildlife, lands, and resources upon which Indigenous lives, economic, traditions and cultures depend.

Navigation across water is part of the exercise of Aboriginal Title that is constitutionally protected. The NPA entirely ignores key aspects of navigation and the protection of navigable waters.

Restricting navigation – either directly or by failing to protect and maintain the health and environmental integrity of navigable waters – strikes at the heart of Aboriginal Title and Indigenous Peoples' relationship with the land.

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[3] 2007 BCSC 1700

[4] *Tsilhqot'in* at para 959.

[5] *Tsilhqot'in* at para 960.

Recommendations:

- An assessment of the NPA must consider what "navigation" means in the context of Indigenous Peoples Aboriginal Title and legal orders: Navigation across waterways is one way that Indigenous Peoples flow onto – and use – Title lands. Navigable waters, for Indigenous Peoples, both shows Aboriginal Title, and is a crucial aspect of the use and enjoyment of that Title.
- The NPA should protect all navigable waters (not just navigation), and the previous definition should be restored and expanded to incorporate Indigenous notions of navigation.
- An overarching federal scheme to acknowledge and address Indigenous Peoples' rights, laws and relationship to navigable waters must be incorporated within the NPA. This includes setting out processes for active involvement of Indigenous Peoples in decision making about navigable waters which meet the standards set by the UNDRIP and TRC.

Changes to the *Navigation Protection Act*

The original *Navigable Waters Protection Act* (NWPA) protected the right to navigate – including against interference from industrial users, pipelines, dams, bridges. More broadly, the NWPA protected the health of navigable waters. The Supreme Court of Canada (SCC), in *Friends of the Oldman River Society v. Canada (Minister of Transport),* recognized that the NWPA protected both "navigation" and also the "biophysical environmental concerns that affect navigation" recognizing that the former NWPA had "a more expansive environmental dimension, given the common law context in which is was enacted."[6]

Failed Consultation:

The federal Crown's refusal to acknowledge and address the existence and legal implications of Aboriginal Title, including to waters, means that decisions are made without regard to their impact on Indigenous Peoples, or the waterways that Indigenous cultures are tied to. The NPA continues this tradition.

Significant and far reaching changes to the NWPA (now NPA) were hidden in Omnibus budget bills (Bill C-38 and Bill C-45) which streamlined decisions about matters under federal jurisdiction to the benefit of resource extractive industries and to the exclusion of Indigenous Peoples, environmental concerns and inclusive economies. The "inclusive economies" referred to here are economies that flourish within (rather than destruct or damage) the ecosystems that they rely on.

[6] [1992] 1 S.C.R. 3 at paras. 88-89

Recommendation:

- Indigenous economies, recreational uses and tourism, amongst other inclusive economies, are dependant on waterways and navigation. These economic concerns must be reflected in consideration of the "public good" in assessing amendments to the NPA. The NPA should reflect the need to protect navigable waters themselves versus protecting limited economic activity on the water.

Changes to the NPA were passed without adequate consultation or involvement of Indigenous Peoples. The UBCIC's letter to then Prime Minister Stephen Harper (dated June 12, 2012) outlined problems with the rushed process followed in passing Bill C-38, noting grave concern "with the content of Bill C-38 and its massive implications, including infringement on our Aboriginal title, Rights, and Treaty Rights and weakened protections for our precious environment to the benefit of third party interests." Cautioning: "we remind you that your government cannot legislate itself out of its duties to consult and accommodate Aboriginal Title, Rights and Treaty Rights where there is potential for infringement." UBCIC Resolution No. 2012-21 (Re: Opposition to Bill C-38, Federal Omnibus Budget Bill) highlighted these problems:

- Weakened environmental protection measures;
- Broad decision making powers for Cabinet and Ministers with less accountability; and fewer opportunities for First Nations to engage on key issues such as environmental protection and related decisions; and
- The undermining of critical roles played by oversight bodies such as the Office of the Auditor General of Canada and the National Energy Board, thereby essentially silencing institutional checks and balances.

It is the UBCIC's opinion that the process followed in amending the NPA violates the constitutional obligations and Honour of the Crown standard owed to Indigenous Peoples and is vulnerable to constitutional challenge. The SCC has cautioned that governments should not treat their procedural obligations to consult and accommodate Aboriginal constitutional rights merely as legal hoops, without a true intent to engage with Indigenous Peoples, and to meaningfully respond to their concerns. Legislation passed in cavalier disregard of Indigenous Peoples' Aboriginal Title – such as the NPA – is at risk of being set aside. [7] The process followed in passing the NPA – and the NPA itself – are deeply flawed, rushed and imbalanced.

[7] *Tsilhqot'in* at para. 92, the SCC cautioned:

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

Recommendations:

- The *Tsilhqot'in* decision creates space for Indigenous laws and legal orders. The exercise of laws is one way that Indigenous Peoples maintain control over their Title territories. Aboriginal Title includes rights to manage and control Title lands, and Indigenous laws are the mechanism through which that land and resource management and planning are carried out. The NPA – following recommendations of the TRC and UNDRIP's clear direction on the need for free, prior and informed consent – must incorporate mechanisms that actively involve Indigenous Peoples in decision making.
- Canada must work with Indigenous Nations in BC in the spirit of the UNDRIP by acknowledging Indigenous Title and jurisdiction over navigable waters, recognizing waterways as a vital part of Title territories, and committing to preserve Indigenous Nations' legal, governance and conservation practices associated with navigable waters.

Specific Provisions of the NPA:

1) The amendments reduced the scope of the NPA by dramatically limiting the number of waterways protected. Creation of a "schedule" of protected waters resulted in a far smaller number of waters being protected: from 17,000 under the NWPA to only 162 under the NPA. Lakes or rivers not listed are no longer be protected by the NPA, and there is no automatic assessment of projects such as dams, pipelines, or other industrial activities which impact non-listed waters. The list of navigable waters excludes some major waterways in BC, including salmon-bearing rivers such as the Fraser River. It is estimated that 99.7% of Canada's lakes and 99.9% of Canada's rivers are now exempt from the NPA. With only 1% of waters in Canada listed, most waters that Indigenous Peoples use and rely on are left unprotected and no approval is needed for potential interferences.
2) Changes to the NPA consolidated reviews of projects and activities (where not eliminating them entirely) into industry-specific ministries where they have a higher chance of approval, with less environmental oversight. For example:
    - The *National Energy Board Act* amended the NWPA so that off-shore oil and gas lines, pipelines, and power lines crossing navigable waters or interprovincial power line projects are not "works" subject to the NPA, and are exempt from review under the NPA; and
    - Changes to the *Canadian Environmental Assessment Act*, 2012 (CEAA, 2012) reduce the number and type of projects that were reviewable. Deregulation benefits resource extractive industries such as oil and gas producers at the cost of navigation, ecosystem health and Indigenous Peoples' rights. The transfer of decision-making to the same Ministries or offices which permit resource extractive industries is akin to putting a "fox in charge of the hen house".

Recommendations:

- Where decisions were moved from the NWPA (NPA) to industry-specific Ministries, these decisions should be restored to where there is a likely environmental cost. Environmental oversight and protection for navigable waters needs to be restored.
- A resourced review process should be triggered upon notice by Indigenous Peoples that their rights will be impacted by works which impact navigable waters. Each project impacting on Indigenous Peoples' ability to navigate or their Aboriginal Title, Rights or Treaty Rights must include their full and active involvement in assessing those projects.
- The NPA should include provisions reflecting the precautionary principle to guide all applications for new or revised water uses. Where the potential environmental impact of a proposed project on navigable waters is unknown – or has a serious known risk, despite that it may have economic advantage to some sectors – It should not be allowed.

3) The NPA winnows down of the area of involvement or consultation in decision making, creating far less opportunities for public input or comment, subjecting the decision to seek public input to the use of Ministerial discretion, and shortening timelines.

Recommendations:

- Waterways are some of the most precious resources in this country. Water is a finite resource. The NPA should legislate as though water were a precious or finite resource.
- Public review of projects should be required where navigation and ecosystem impacts will be significant.
- There should be an independent oversight body created to oversee navigable waters management to preserve those waters for future generations. Indigenous Nations should be fully represented to ensure that Aboriginal Title, Rights and Treaty Rights are an active consideration in decision making.

4) The Minister can delegate her or his responsibilities as follows (s. 27):

> "The Minister may, with respect to his or her responsibilities under this Act, enter into agreements or arrangements for carrying out the purposes of this Act and authorize any person or organization with whom an agreement or arrangement is entered into to exercise the powers or perform the duties under this Act that are specified in the agreement or arrangement."

Recommendation:

- The ability of the Minister to delegate their responsibilities to local governments or organizations should be struck from the NPA.

5) The Minister can designate works as "minor works" and exempt them from need for approvals. Process for this decision making is not set out or constrained on the face of the NPA to consider Indigenous Peoples' Title, Rights or Treaty Rights. The classes of works established by the Minor Works Order include: erosion-protection works, docks, aerial cables – power and telecommunication, pipelines buried under the bed of navigable water, and pipelines and power or communication cables attached to existing works. Non-regulation of small projects, deemed minor works, could build to large **cumulative impacts** in this area. Section 4 of the NPA sets out the factors the Minister will consider in deciding whether to approve a works, which include: characteristics of the water; safety of navigation; current or anticipated navigation; impact of the work on navigation; and cumulative impact of the work on navigation in that navigable water.

Recommendations:

- The classes of projects listed as "minor" and exempted from review should be drastically restricted.
- Indigenous Peoples should be able to trigger a review by stating that projects (although classified as "minor") have a significant impact on their Aboriginal Title, Rights or Treaty Rights. No project which impacts Aboriginal Title, Rights or Treaty Rights (as determined by Indigenous Peoples) should be classified as minor.
- Cumulative impacts of a series of "minor" projects need to be evaluated.
- Impacts on Indigenous and inclusive economies, and Indigenous navigation, should be factors taken into consideration in determining the public good or interest (Section 24).

6) The NPA could interfere with the right to use or benefit from reserve lands set aside for Indigenous Peoples. For example: Taking away the right to navigation on – or the health of – navigable waters eliminates Peoples' ability to use those waters. These are above any s. 35(1) Title, Rights or Treaty Rights discussions.

Recommendation:

- Canada should conduct an independent legal review about the impact of the NPA on reserved water rights interests in the water (especially rights to traverse to their territories on waterways – and protection of navigable waters – much like the Winter's Doctrine in the U.S.A. which presumes a reservation of waters necessary to make reserved lands usable) that were set aside for Indigenous communities when reserves were created. The NPA should be amended where it restricts those reserved rights.

7) The new NPA could be deemed to apply to certain works in navigable waters that are not otherwise subject to the new Act, with the approval of the Minister of Transport.

Waters may be added to the schedule by the GIC if the purpose of adding is for "national or regional economic interest," the "public interest," or at the request of a "local authority" (not

Indigenous Peoples but rather municipal or provincially constituted entities). (Section 29) Moving enforcement of navigation violations to private parties (instead of enforcing under the legislation) is a significant concern. This introduces an economic element and challenges access to justice. Who can actually achieve this protection? Only the few who can afford it. In Indigenous Peoples' own experience – common law protection is hard-won and impossible without resources. Privatization of protection hands over a responsibility Canada has under the Constitution over navigable waters. Makes the onus a private one – effectively meaning that people or organizations who cannot afford court are essentially left unprotected and without recourse.

Recommendation:

- The responsibility to protect navigation and navigable waters should stay with the Minister under the legislation and not be privatized. Justice should be accessible to all, not only those who can afford it.

8) **No Review – No Reviewable Decision – No s. 35(1) Constitutional Challenge?** The NPA builds government non-involvement in decision-making over navigable waters perhaps as way of washing its hands of its legal s. 35(1) obligations under the assumption that with no "triggering" act or decision, no constitutional challenge is possible.

Deregulation is an attempt to reduce fiduciary obligations – by automatically using a broad brush to remove waters and projects from review – arguable these "non-decisions" can trigger a review of the way government exercised discretion.

Recommendation:

- Government should not use deregulation in an attempt to shirk or sidestep constitutional obligations and should instead structure their discretion to respect Indigenous Peoples' Title, and Rights (including to UNDRP and TRC standards) under the NPA.

SUMMARY:

Administrative ease cannot be allowed to trump constitutionally protected Aboriginal Title, Rights and Treaty Rights. This review of the NPA calls upon Canada to question what kind of society it wants to be and the relationships it wants to foster and maintain with Indigenous Peoples going forward: One which is inclusive and responsive to Indigenous Peoples, or one which continues past practices of denial or one of respect and mutual recognition.