## THE MALISEET NATION OF NEW BRUNSWICK

## Submission to the Standing Committee on Transport, Infrastructure and Communities

**December 7, 2016**

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***Highlights***

- The Maliseet Nation of New Brunswick consists of Kingsclear First Nation, Madawaska Maliseet First Nation, Oromocto First Nation, St. Mary's First Nation, Tobique First Nation and Woodstock First Nation. Our communities and members share a common territory, history, culture, language, as well as Aboriginal and treaty rights.
- We are concerned with how the *Navigation Protection Act*[1] Review process is unfolding. The accelerated timeline and poor communication has not allowed us to prepare full submissions or consult with our members. The process is failing to meet the legal standards required by section 35 and the *United Nations Declaration on the Rights of Indigenous Peoples*.[2] We provide these recommendations with that significant caveat.
- We recommend that the definition of 'navigable waters' be revised to navigable in fact (i.e. same as before 2009/2012 amendments), which would allow for improved protection of all reaches of the Saint John River watershed, instead of limiting protection to Scheduled waters, based mainly on freight movements and nautical charts.
- We recommend that all water bodies large enough to allow the navigation of canoes be declared navigable waters, including those upstream of the Mactaquac Dam.

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[1] .S.C., 1985, c. N-22 (the "*Act*")

[2] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly,* 2 October 2007, A/RES/61/295 ("UNDRIP")

- We recommend that an additional consideration in assessing navigability be added based on historical or current use by Indigenous groups for transportation, harvesting, cultural, social, traditional or other use or activity.
- We recommend that the Schedule be done away with and that the *Act* provide full legal protection for all navigable waterways and ensure that development on these waters cannot go ahead until impacts, including environmental, on public navigation rights are addressed.
- The *Act* should be amended so that Indigenous groups whose Aboriginal and treaty rights are, or likely will be, affected are notified by the Minister of works that cause or are likely to cause a serious and imminent danger.
- The *Act* must be amended to require the consideration of Aboriginal and treaty rights in every decision made by the Minister that could impact Aboriginal and treaty rights.
- It should be made clear that a central purpose of the *Act* is to protect and sustain Aboriginal and treaty rights related to navigable waters.
- Environmental factors need to be considered again under the *Act* and authorizations must give rise to environmental assessments.
- We recommend that cumulative effects, broadly defined, be required to be considered for all works.
- We recommend that the *Act* be amended to provide for co-management and collaborative decision-making with Indigenous peoples. Both the federal Minister and affected Indigenous nations must have an opportunity to approve and consent to any work.
- To ensure proper maintenance and monitoring of works, the requirement to renew authorizations issued under the *Act* should be reinstated.
- To enhance transparency, we recommend the re-instatement of the provision that the owner of a work be automatically required to notify potentially affected communities, including Indigenous peoples, about their project.
- There needs to be set factors that must be considered in the exercise of Ministerial discretion that amount to more than just considering what is in the “public interest”.

- We recommend that, during any required environmental assessment, proponents of works be required to show that they have quantitatively considered climate change in their impact predictions. For example, this can be done by modeling existing and future flow regimes (including high and low flows) using established trends or future climate projections that take into account site-specific changes in air temperature and precipitation and associated extreme weather events that are expected to result from climate change.
- We recommend that pipelines buried under the bed of a navigable water are removed from the *Minor Works and Water Order*, and that they not be considered a designated work under the *Act*. Instead we recommend that pipelines be listed as works requiring approval to become either approved works or permitted works.
- We recommend that the *Act* clearly regulate existing and proposed hydroelectric and other dams to ensure navigation protection, especially where such operations may constitute dewatering.

**Introduction**

The *Act* is vital legislation which serves an important purpose in balancing the public right to navigate with the need to construct works. The *Act* was amended in 2009, and again in 2012 with a focus on narrowing its scope and streamlining the approval process.[3] The amendments of the *Act* have threatened its effectiveness. As such, the Minister of Transport has asked the Standing Committee on Transport, Infrastructure and Communities (the "Committee") to review the *Act* to determine how to restore lost protections and introduce modern safeguards (the "Review"). The Minister of Transport has requested that the Committee evaluate the recent amendments to the *Act* with a focus on:

- The environmental and sector impacts of the changes;
- The impact of the changes on the long-term viability of commercial and recreational utilization of Canada's waterways;

[3] Transport Canada 2016a: Fact Sheet #1 – Navigation Protection. https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/Navigation_protection.pdf. Accessed November 2016 ("Transport Canada 2016a")

- The cost, practicality and effectiveness of the changes when gauged against the environmental, business and recreational function of Canada's waterways; and
- The efficiency of the changes when viewed holistically, from a user perspective, with other Acts that collectively impact upon users[4]

Public engagement has been stated to be at the core of this Review. Specifically, the Government of Canada has stated that engagement with Indigenous groups is of the utmost importance as part of their commitment to renewing relationships with Indigenous peoples.

We, the Maliseet Nation, have decided to undertake this Review in unity. The Maliseet Nation of New Brunswick consists of Kingsclear First Nation, Madawaska Maliseet First Nation, Oromocto First Nation, St. Mary's First Nation, Tobique First Nation and Woodstock First Nation. Our communities and members share a common territory, history, culture, language, as well as Aboriginal and treaty rights. We share a deep relationship with our traditional territory and have embraced the duty of protecting it and ensuring that its use is in keeping with the values and beliefs of our ancestors and in the best interest of future generations.

**Concerns with the Review Process**

While we acknowledge that the schedule for the Review is being fast tracked to ensure that the legislation and regulations are amended quickly, we are very concerned with how this process is unfolding. The Review, overall, is a positive step. It has the potential, if done right, to be a once in a lifetime opportunity to engage with Indigenous people to create a system that finally respects Indigenous rights, perspectives and jurisdiction and when the Review began, we were hopeful. However, we are steadily losing faith that this will be the case. These process problems are more than a surface concern—they may critically undermine the Review unless steps are taken to amend the process.

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[4] Government of Canada 2016. Review of Environmental and Regulatory Processes: Navigation Protection Review. https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/navigation-protection.html. Accessed November 2016

It is no secret that the amendments to the *Act* were ill-conceived and led to the loss of public confidence. A key shortcoming of the amendments was the rushed way in which they were done and the lack of proper public and Indigenous engagement. The amendments could not be legitimate on the basis of that process. Although a step in the right direction, the Review seems to be on the same path to repeating this history and squandering the opportunity to ensure that a proper review is done.

From the start, this whole process has been unorganized and rushed, with decisions being thrust upon us with very little communication or consultation. For example, the deadline for written submissions to the Committee was made without any announcement or notification to us. It was also made before decisions on funding were made. We only just received confirmation of funding, allowing us only a short time to prepare these submissions. We have not even had time to have community meetings to discuss the *Act* with our communities and gather feedback. The accelerated timeline has created barriers to our participation and for these submissions specifically, minimized our available time to prepare.

It is our understanding that as part of the Government of Canada's commitment to renewing its relationship with Indigenous peoples, Transport Canada will work directly with Indigenous groups to ensure that that their concerns are heard and taken into account in preparation for the Government's response to the Committee's recommendations. However, at this point we are not even sure if consultation on the specifics of any draft legislation will happen but anticipate that if there is, Canada will continue its pattern of informing us last minute and not providing us adequate time to prepare or meaningfully engage. The result will unavoidably be that legislation that continually affects our rights will be left without real input or feedback from us and likely do little to respect our rights, perspectives and jurisdiction.

Beyond these logistical problems created by the accelerated timeline and inadequate communication, the way in which the Review is unfolding is also a concern as it does not meet the legal standards of consultation as laid down in caselaw, or the principles of UNDRIP. If it continues on the same path, it will be open to challenges. In fact, UNDRIP explicitly states at Article 19 that "States shall consult and cooperate in good faith with the [I]ndigenous peoples concerned through their own representative institutions in order to *obtain their free, prior and*

*informed consent before adopting and implementing legislative or administrative measures that may affect them*."

The Government of Canada has stated that it is committed to directly engaging with Indigenous peoples. It has claimed that it is time for a renewed nation-to-nation relationship with Indigenous peoples, based on recognition of rights, respect, co-operation and partnership. In November 2015, the Minister of Indigenous and Northern Affairs Canada announced that the Government would implement UNDRIP. The Prime Minister has also stated that the federal government will act on the recommendations of the Truth and Reconciliation Commission to implement UNDRIP. It is time that these words be supported by action.

If the Government of Canada is truly committed to engaging with Indigenous peoples and truly committed to renewing the nation-to-nation relationship with Indigenous Peoples based on recognition of rights, respect, co-operation and partnership, then it needs to both ensure its legislation protects section 35 rights and rights to free, prior and informed consent as guaranteed by UNDRIP and it needs to actually undertake the amendments of legislation properly and in accordance with the expanding law in support of respectful relationships with Indigenous peoples.

**Background: The Maliseet Nation and Our Waters**

The Maliseet or Wolastoqiyik (people of the Beautiful or Bountiful River) have occupied the lands and waters of what is now called New Brunswick since time immemorial. The Saint John River basin or the Wolastoq (Beautiful or Bountiful River), specifically, has long been, and continues to be, of central significance to the Maliseet people. It is a key part of our traditional homeland and culture. We are physically and culturally connected to it. Our name, "Wolastoqiyik", expresses this connection at the heart of our identity: we are the people of the Beautiful River.

Since time immemorial and prior to first contact, the Maliseet people have engaged in a variety of activities within our traditional territory. Our people have traditionally been mobile and used sophisticated canoe technologies to access a diverse array of natural resources throughout the traditional waters of our homeland. We have proven rights to hunt, trap, fish, and engage in

other harvesting and traditional practices in this territory. We also have asserted our treaty and Aboriginal rights to our lands, waters and resources, including Aboriginal title. None of these rights were ever surrendered.

In New Brunswick, Peace and Friendship Treaties were entered into with the Maliseet, Mi'kmaq and Passamaquoddy First Nations prior to 1779. Specifically, the Maliseet entered into the 1749, 1752, 1760/61 Treaties. These Peace and Friendship Treaties encouraged peaceful relations between the parties. Their sole purpose was to end hostilities and encourage cooperation between the British and First Nations. Our Treaties did not involve or even purport to involve the ceding or surrendering of our rights to lands or resources that were traditionally used or occupied.

These rights are constitutionally guaranteed though section 35 of the *Constitution Act*[5] and have been strengthened by the recent Supreme Court of Canada decision in *Tsilhqot'in Nation v British Columbia*.[6]

But, in the past century, our lands, water and resources have been increasingly exploited to the point that they are in serious danger. We have experienced considerable loss in our livelihood through this exploitation. Our lands and resources have been and continue to be heavily impacted through settlement, resource extraction such as forestry, fishing and agriculture, environmental degradation, and highly restrictive government regulations. As a result of the cumulative effects of these projects and activities in our traditional territory, there are few accessible areas remaining for traditional uses and valued resources, which has caused significant challenges to the Maliseet people, our economy and our culture.

Despite these challenges, we Maliseet people are a strong and resilient people and our culture, traditions and way of life, have persisted into the present. We continue to have a deep spiritual connection to our territory and continue to hunt, trap, fish, and engage in other harvesting and traditional practices in our traditional territory.

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[5] Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982 ("*Constitution*")
[6] 2014 SCC 44 ("*Tsilhqot'in*")

Our deep relationship with our traditional territory and our duty to protect this territory includes its waters. We did not cede or surrender our rights to our waters or the resources within our waters. The waters of our traditional homeland have long been, and continue to be, of central significance to our people not only for subsistence and economic purposes, but also for sacred purposes. Our waters continue to be an important resource for transportation, sustenance and ceremony. We consider the many waters of our traditional homeland to be sacred.

However, our waters have experienced considerable impacts as a result of the cumulative effects in our traditional territory. We have increasingly lost access to this vital resource through resource extraction, environmental degradation and highly restrictive government regulation, including hydro dams which have profoundly affected our resource use within and along the waters of our traditional homeland. After the settlement of Europeans in our territory, what is now New Brunswick, the river underwent a large amount of change. There are now several dams that are barriers to fish movements and human navigation. Negative impacts to quality, quantity and diversity of traditional resources in waters have resulted in a complete loss of harvesting areas in some cases. Our use of waters is being continually threatened by new industrial activities in combination with cumulative effects of past projects and activities. Unfortunately, the *Act* does nothing to aid this problem and in some cases only appears to make it worse.

**The Navigation Protection Act**

Before 2009, the federal government could apply the *Act* to almost all works and waters, including ditches, brooks and streams.[7] In 2009, amendments were issued to narrow the *Act*'s application and speed up approvals, including:

- simplifying the definition of 'work' and allowing the Minister of Transport to consider multiple works as a single work; and

[7] Transport Canada 2016a, *supra* note 3

- creating Minor Works and Waters Order, which allowed some works to be built without review under the *Act*.

The 2012 Amendments included adding a Schedule to the *Act* (the "Schedule") that lists the navigable waters where people must apply for federal authorization for works that interfere with navigation. All other waters remain largely unprotected by the *Act*. The Schedule essentially allows the Minister to exempt most rivers and waters from navigation protection under the *Act* and takes away federal environmental review triggers based on navigability for 99% of Canada`s waterways, including the entire Saint John River watershed upstream of the Mactaquac Dam. Now, only 97 lakes and 62 rivers are subject to the *Act*. This is a drastic reduction from 32,000 lakes and 2.25 million rivers which were previously subject to the *Act.*

As it stands, a large proportion of our traditional territory remains unprotected under the current *Act*. The *Act* needs to be amended to better protect our Aboriginal and treaty rights. It needs to reflect the importance and strength of our Aboriginal and treaty rights and the significance of potential impacts of further development on these rights.

As mentioned, we never gave up our rights to our lands, waters and resources. We continue to have a deep relationship with our lands, waters and resources. Our culture, traditions and way of life have persisted into the present and we continue to exercise our Aboriginal and treaty rights over and engage in traditional practices on our traditional territory. However, the exercise of our Aboriginal and treaty rights and the persistence of our culture, traditions and way of life into the future depends on the continued existence of an intact land base that we can access. Our lands, water and resources have experienced considerable impacts and are in serious danger. We are being left with less and less territory over which to exercise and assert our Aboriginal and treaty rights. Without protections for navigable waterways, the lands, waters and resources that we depend on to exercise and assert our Aboriginal and treaty rights will continue to diminish until we are eventually left with nothing.

It is imperative that the de-regulation of environmental protection in the *Act* be reversed to its state before the 2009 changes. Not only do current provisions need to be amended, but modern safeguards need to be added to improve and ensure navigable water protection

throughout Canada. Given the limit on time and funding to review and provide written submissions on the *Act*, we cannot focus on every amendment that is needed. Instead, we have chosen to focus on those amendments that are important to the Maliseet, such as we can identify them now. Below are our recommended amendments to improve navigable waterways throughout our traditional territory, which are outlined at a high level. We expect in the coming weeks to meet with Transport Canada to directly engage on our recommendations and trust that Transport Canada will honour its constitutional obligation that legislative changes will not be proposed prior to meaningful consultation with Indigenous peoples having taken place.

**Recommendations**

***Change Definition of Navigable Waters and Assessment of Navigability***

For over 130 years, the protection of navigation rights and the associated waterways have played a fundamental role in the federal environmental governance across Canada. The *Navigable Waters Protection Act* ("NWPA"), was, until 2012, one of Canada's oldest federal environmental laws, originally passed by Parliament in 1882. By 2002, the NWPA was described as a "*federal statute designed to protect the public's right to navigation and marine safety in the navigable waters of Canada*."[8] The concept of navigability in law is that the river or stream is a public aqueous 'highway' used or capable of use by the public. Therefore, navigable waters include all water bodies capable of being navigated by any type of floating craft, as small as canoes, for transportation, recreation or commerce. In that respect, frequency of navigation may not be a key factor in determining a navigable waterway and, as long as the water body has the potential to be navigated, it will be determined 'navigable'.[9] The critical 'floating canoe' threshold was adopted by the Supreme Court of Canada in 1906.[10]

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[8] Department of Fisheries and Oceans 2002: Interim Guide to Application and Marking Requirements for Aquaculture Projects in Canada under the Navigable Waters Protection Act. (Retrieved February 10, 2013) at page 1

[9] Minister of Natural Resources, 2011: Simpson v. Ontario (Natural Resources) 2011 ONSC 1168at par. 23 (18 February 2011) (citing Coleman v Ontario (Attorney General), [1983] O.J. No. 275, at par. 15)

[10] Attorney-General of Quebec v. Fraser / Attorney-General of Quebec v. Adams 1906 CanLII 58 at pp. 596–597, 37 SCR 577 (17 October 1906), Canada), affirmed by the Judicial Committee of the Privy Council in Martha Suzanna Wyatt and others v The Attorney General of the Province of Quebec [1911] UKPC 39, [1911] A.C. 489 (13 June 1911), Canada

The critical 'floating canoe' threshold was principally applied until 2012, at which time, the definition of navigable waters was altered to include only the 62 rivers and river reaches included in the Schedule. Before the changes were made, the *Act* applied to almost all works and waters, including ditches, brooks and streams. Navigable waters included all water bodies capable of being navigated by any type of floating craft, as small as canoes, for transportation, recreation or commerce, including most river reaches upstream of the Mactaquac Dam in New Brunswick. Under the 2012 changes to the *Act*, which included the establishment of the Schedule of waters, over 99.9% of all water bodies in Canada are no longer protected, including the entire Saint John River watershed upstream of the Mactaquac Dam. The Schedule includes only those waters that are the busiest waterways in the country, accessible by ports and marinas and often close to heavily populated areas .[11] Along with nautical charts and historical data, freight movement data were used to select the waters included in the Schedule.

Transport Canada has developed a "Navigability Assessment Framework" to consistently assess whether a waterway is navigable. The framework includes criteria it must consider in each assessment. These criteria are:

1) Navigable in fact: Do the physical characteristics of the waterway support carrying a vessel of any size from one point to another?

2) Use by the public for navigation: Is the public currently using the waterway as an aqueous highway?

3) Historical use: Did the public historically use the waterway as an aqueous highway?

4) Reasonable appeal for public use: Is there a reasonable likelihood that the public will use the waterway as an aqueous highway?"[12]

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[11] Transport Canada 2016a, *supra* note 3

[12] Transport Canada 2016e: Fact Sheet #5 – Determining Navigability. https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/Determining_navigability.pdf. Accessed November 2016

Based on Maliseet traditional use of rivers for navigating through the Saint John River watershed for fishing, hunting, gathering, transportation, and commerce, and to the area upstream of the Mactaquac Dam, it would appear that all waterways within the Saint John River watershed would qualify under these criteria for the Maliseet. Therefore, based on this Navigability Assessment Framework, all water bodies large enough to allow the navigation of canoes should be declared navigable waters. However, this is not demonstrated in the Schedule.

The Maliseet consider the river reaches upstream of the Mactaquac Dam and the Saint John River as important parts of our traditional territory and key elements for sustaining our traditional livelihoods. One Maliseet elder highlighted this notion when describing how "*Canoes were used to travel up and down the river to hunt, fish, and collect other foods and medicines."*[13] The construction of dams in the Saint John River watershed during the past 170 years has resulted in a significantly transformed hydrological and ecological state.[14]

In light of existing development-related socio-economic and environmental pressures (e.g. obstructions, alteration of flows) on the Saint John River and water bodies generally, we recommend that the definition of 'navigable waters' be revised from those waters included on the Schedule to one that would consider the value and traditional importance of waterways to the Maliseet and other Indigenous communities. Therefore:

- **We recommend that the definition of 'navigable waters' be revised to navigable in fact (i.e. same as before 2009/2012 amendments), which would allow for improved protection of all reaches of the Saint John River watershed, instead of limiting protection to Scheduled waters, based mainly on freight movements and nautical charts.**
- **We recommend that all water bodies, including those upstream of the Mactaquac Dam, large enough to allow the navigation of canoes be declared navigable waters.**

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[13] Canadian Rivers Institute 2011: The Saint John River: A State of the Environment Report. Eds: Scott D. Kidd, R. Allen Curry, Kelly R. Munkittrick. Canadian River Institute, University of New Brunswick. 175 pp. at page 144 (`Canadian Rivers Institute 2011")

[14] Canadian Rivers Institute 2011, *supra* at note 13

- **We recommend that an additional consideration in assessing navigability be added based on historical or current use by Indigenous groups for transportation, harvesting, cultural, social, traditional or other use or activity.**

***Extend Protection to All Navigable Waters***

Right now, only those waters listed in the Schedule are protected. Section 3 of the *Act* states that:

> It is prohibited to construct, place, alter, repair, rebuild, remove or decommission a work in, on, over, under, through or across any navigable water that is listed in the schedule except in accordance with this *Act* or any other federal Act.

The Schedule to the *Act* lists navigable waters where people must apply for federal authorization for works that interfere with navigation. These are the only waters that require authorization for works to proceed. For all other works that are not listed in the Schedule, proponents do not need to notify the government that they are building a work that interferes with navigation and do not need approval.

An owner of a work, however, can request to "opt-in" to the *Act* so that it will apply to their work.[15] The Governor in Council can also, by regulation, amend the Schedule by adding a reference to a navigable water if the Governor in Council is satisfied that: it is in the national or regional economic interest; it is in the public interest; or it is requested by a local authority.[16] Local authority is defined as "the government of a municipality, any other government constituted under the laws of a province or a department of a provincial government"[17] and explicitly leaves out Indigenous groups. The inevitable result is that the only options the *Act* provides to add to the Schedule leave Indigenous groups with no recourse to request that navigable waters be added to the Schedule so that they are protected.

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[15] *Act*, *supra* note 1 s. 4
[16] *Act*, *supra* note 1 s.29(2)
[17] *Act*, *supra* note 1 s. 29(1)

This means that the Crown's constitutional duty to consult Indigenous groups is in almost all cases avoided when it comes to navigable waters. This is because by narrowing authorization of works on only a select list of navigable waters, the federal government has removed government approval from those waters that are not on the Schedule. Works that could interfere with navigable waters and infringe on Aboriginal and treaty rights, will never have to be addressed because there is no governmental action involved since there is no authorization required.

- **We recommend that the Schedule be done away with and that the *Act* provide full legal protection for all navigable waterways and ensure that development on these waters cannot go ahead until impacts, including environmental, on public navigation rights are addressed.**

By abolishing the Schedule, sections 4 (the opt-in provisions) and 29 (addition to Schedule provisions) of the *Act* would become obsolete and so too should be removed.

Simply amending the Schedule is not enough to address our concerns. There is no guarantee that there will be consultation on such additions and no guarantee that the process will be any more transparent. Further, amending the *Act* to include mechanism for waters to be added to Schedule if requested by Indigenous groups is also not enough as the Minister will still maintain the discretion on whether to approve the request.

***Require Duty to Notify Potentially Affected Indigenous Groups***

Section 12(1) of the *Act* provides that:

> An owner of a work in, on, over, under, through or across any navigable water that is listed in the [S]chedule shall immediately notify the Minister if the work causes or is likely to cause a serious and imminent danger to navigation.

The duty to notify of works that cause or are likely to cause a serious and imminent danger to navigation only applies to the Minister. There is no requirement for anyone to notify other parties that may be affected by such serious and imminent danger, such as Indigenous groups.

Yet, it is Indigenous groups that will likely be the most affected parties and it is very possible and likely that they will never be notified of serious and imminent danger to their Aboriginal and treaty rights.

- **The *Act* should be amended so that Indigenous groups whose Aboriginal and treaty rights are, or likely will be, affected are notified by the Minister of works that cause or are likely to cause a serious and imminent danger.**

***Require That Aboriginal and Treaty Rights be Considered Throughout the Act***

In determining whether and how to protect navigable waters, the Minister is not currently required by the *Act* to take into account any Aboriginal or treaty rights, title, perspectives or interests. For example, in determining whether a work in a navigable water in the Schedule is likely to substantially interfere with navigation, the Minister shall take into account: the characteristics of the navigable water in question; the safety of navigation; current or anticipated navigation in that navigable water; impact of work on navigation in that navigable water; and cumulative impact of the work on navigation in the navigable water.[18] In determining whether to decide which waterways to add to the Schedule, the Minister need only consider: whether it would be in the national or regional economic interest; whether it would be in the public interest; or whether it was requested by a local authority.[19] Similarly, when deciding whether to provide an exemption to dumping, dewatering provisions, the Minister only needs to consider whether it is in the public interest.[20] In making orders to designate works as minor works and waters as minor waters, the Minister is not required to consider anything.[21] Finally, the definition of "navigable water" under the *Act* simply provides that it "includes a canal and any other body of water created or altered as a result of the construction of any work."

The common theme amongst all of these provisions and throughout the *Act* is that at no point is there a requirement to consider Aboriginal and treaty rights.

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[18] *Act*, *supra* note 1 section 5(4)
[19] *Act*, *supra* note 1 section 29(2)
[20] *Act*, *supra* note 1 section 24
[21] *Act*, *supra* note 1 section 28(2)

The Maliseet depend on unimpeded waterways for the practice of our Aboriginal and treaty rights. We also depend on the federal government to do its duty to protect our waterways as well as to honour constitutional obligations owed to us. However, the *Act* currently does neither. At no point is the federal government required to consider Aboriginal and treaty rights. Works on navigable waters not in the Schedule can proceed without any consultation or accommodation, works that could cause serious and imminent danger need not be communicated to potentially affected Indigenous groups, the Minister can make decisions on whether to add waters, make exemptions to the dumping and dewatering provisions or to make an order for a minor work or minor water without ever once considering Aboriginal and treaty rights.

Without any requirement to consider our Aboriginal and treaty rights, our lands, waters and resources that we depend on to exercise and assert our Aboriginal and treaty rights will continue to be degraded and diminished until we are eventually left with nothing.

- **The *Act* must be amended to require the consideration of Aboriginal and treaty rights in every decision made by the Minister that could impact Aboriginal and treaty rights.**
- **It should be made clear that a central purpose of the *Act* is to protect and sustain Aboriginal and treaty rights related to navigable waters.**

***Require Consideration of Environmental Factors***

The amendments have taken away federal environmental review triggers based on navigability for 99% of Canada's waterways.

- **Environmental factors need to be considered again under the *Act* and authorizations must give rise to environmental assessments.**

***Require Consideration of Cumulative Effects***

Cumulative effects are only mentioned once in the *Act*. In determining whether a work in a navigable water will substantially interfere with navigation, the Minister must decide the

cumulative effect of the work on navigation in the navigable water.[22] There are no further details of this requirement provided and there is no requirement to undertake a cumulative effects assessment. This should include the cumulative effect on any Aboriginal and treaty rights.

Assessment of cumulative effects is extremely important, if not the most important. Not only do project-level concerns of individual works need to be looked at, but the bigger picture also needs to be looked at. Reviews need to look at all factors that involve the waterbody, including how the project interacts with and will add to the effects from already existing projects and activities in the area, those of projects currently being developed, as well as potential future projects. There also needs to be regional land use planning that respects Indigenous jurisdiction, knowledge and values. Indigenous groups need to be involved in all of these.

This is all the more serious when it comes to the Maliseet. As already mentioned, we never ceded or surrendered any of our rights to lands, waters or resources. But, due to the cumulative effects of projects and activities in our traditional territory, there are few accessible areas remaining for traditional uses and valued resources. This has caused significant challenges to the Maliseet people, our economy and our culture.

Our use of lands and resources, as well as our culture, traditions and way of life, continues to be threatened due to highly fragmented land uses and impacts. However, despite our Aboriginal title and the continual threats to our lands, waters and resources, cumulative effects are rarely assessed, and not assessed adequately.

By not taking cumulative effects more seriously, decisions are being made without acknowledging overall project impacts. This is allowing piecemeal infringement and ultimately, extinguishment of Aboriginal and treaty rights.

- **We recommend that cumulative effects, broadly defined, be required to be considered for all works.**

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[22] *Act*, *supra* note 1 s. 5(4)(e)

***Provide for Co-Management with Indigenous Peoples***

The right to self-government, or sovereignty, is an inherent right that is part of our identity as peoples. Before the coming of Europeans, we were organized as self-governing societies. We did not give up our right to self-government.

One way in which Indigenous peoples may exercise jurisdiction over their lands and resources is through co-management arrangements relating to land and resource management. In order to have the respectful relationships necessary for the ongoing project of reconciliation, and to reflect the principle of free, prior and informed consent found in UNDRIP, Indigenous peoples need to be partners with Canada in the decision-making stage of projects.

There is an opportunity under the *Act* to recognize the laws of Indigenous peoples and Indigenous decision-making. A framework that promotes reconciliation is one that will explicitly allow for jurisdiction to be shared over the protection of lands and waters with Indigenous peoples. This can be done through co-management and collaborative decision-making with Indigenous peoples. This needs to be based on nation-to-nation relationship, reconciliation and free, prior and informed consent.

This is particularly true for the Maliseet, who assert Aboriginal title. The Supreme Court of Canada in *Tsilhqot'in*[23] has stated that the right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain consent of Aboriginal title holders and that projects begun without such consent risk being cancelled. This needs to be recognized by Canada.

Those working with the Maliseet need to understand how the Maliseet, the decision-maker representing the traditional territory of the Maliseet in New Brunswick, engages in decision-making that will impact future generations.

This approach necessarily means that the revised *Act* will be required to re-direct some of the decision-making authority to Indigenous peoples. It is the Maliseet and other Indigenous

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[23] *Tsilhqot`in, supra* note 6

peoples that hold jurisdiction to consent to projects within our territories which could affect our Aboriginal and treaty rights.

- **We recommend that the *Act* be amended to provide for co-management and collaborative decision-making with Indigenous peoples. Both the federal Minister and affected Indigenous nations must have an opportunity to approve and consent to any work.**

***Require Renewal of Authorizations Issued Under the Act***

The 2012 amendments removed the requirement to renew authorizations issued under the *Act*. In other words, works provided approval under the *Act* never have to seek renewal of their authorization.

- **To ensure proper maintenance and monitoring of works, the requirement to renew authorizations issued under the *Act* should be reinstated.**

***Create a Public Registry***

Under the *Act*, an owner is not required to advertise information on their work, though the Minister of Transport may require that it be done in certain cases. This ultimately reduces transparency and accountability, and eliminates public consultation and more specifically, Indigenous consultation.

For the Maliseet to understand how traditional use of the waterways may be altered or impeded by a 'work' or project, we must be notified regardless of the size of the project.

- **To enhance transparency, we recommend the re-instatement of the provision that the owner of a work be automatically required to notify potentially affected communities, including Indigenous peoples, about their project.**

***Restrict Ministerial Discretion***

There is currently little direction on how the Minister exercises discretion under the current *Act*, including when the Minister: determines whether a work in a navigable water in the Schedule is likely to substantially interfere with navigation;[24] determines which waterways to add to the Schedule;[25] decides whether to provide an exemption to dumping, dewatering provisions;[26] and decides when to make orders to designate works as minor works and waters as minor waters.[27] These powers are exercised without any public or Aboriginal consultation or Parliamentary oversight.

- **There needs to be set factors that must be considered in the exercise of Ministerial discretion that amount to more than just considering what is in the "public interest".**

***Consider Climate Change***

The *Act* should consider how environmental pressures such as climate change may impact the potential for waterways to remain navigable. For example, climate change will alter the range of extreme flows that has been historically observed in the Saint John River watershed due to an increase in the frequency and duration of extreme weather, which will result in higher floods and lower low-flows in the future. Higher evapotranspiration rates due to increased temperatures will more than offset the future increase in precipitation, resulting in lower summer flows. Annual flow rates have already decreased at Fort Kent near Grand Falls by 13% between 1970 and 2000.[28]

These climate change effects cannot be readily controlled. Therefore, added emphasis needs to be put on the protection of all reaches to the highest degree feasible. Any additional impacts of human activities, such as increasing wastewater from an increasing population or increases in runoff from the impervious cover in expanding urban or agricultural areas, will only add to the pressures on the water resources.

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[24] *Act*, *supra* section 5(4)
[25] *Act*, *supra* section 29(2)
[26] *Act*, *supra* section 24
[27] *Act*, *supra* section 28(2)
[28] Canadian Rivers Institute 2011, *supra* note 13

- **We recommend that, during any required environmental assessment, proponents of works be required to show that they have quantitatively considered climate change in their impact predictions. For example, this can be done by modeling existing and future flow regimes (including high and low flows) using established trends or future climate projections that take into account site-specific changes in air temperature and precipitation and associated extreme weather events that are expected to result from climate change.**

***Remove Pipelines Buried Under Bed of Navigable Water from Minor Works and Water Order***

Changes made in 2009 included the creation of a Minor Works and Water Order, which allowed works to be built if they met the criteria for that class of works (i.e., "minor works"). After amendments made in 2012, pipelines buried under the bed of navigable waters are included in this Order.[29] These works may proceed without notice under the *Act*.

The construction of pipelines under navigable waters is not a minor undertaking, and while certain construction methods can minimize impacts to waterways, improperly constructed or maintained crossings can pose threats to navigation. Few studies of pipeline crossing compliance have been undertaken; however, a study of trenchless crossings completed by Fisheries and Ocean Canada in 2011 found that of 30 trenchless crossings visited, 4 showed evidence of unauthorized open-cut trenched crossings or exposure of previously buried pipelines (either commodity or telecommunication pipelines).[30] The author of that report suggested increased oversight and ongoing monitoring of pipeline crossings in order to ensure protections for aquatic species; however, the same recommendations would also apply to ensure protection of navigation, especially with regards to exposure of pipelines on the beds of navigable waters. The potential for pipeline crossings to impact navigation is especially relevant for the Maliseet, because 396 new stream crossings will be built within or near the Saint John River watershed as part of the Energy East Pipeline Project. The majority of those stream

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[29] *Order Amending the Minor Works and Waters (Navigable Waters Protection Act) Order*, https://www.tc.gc.ca/eng/programs-675.html

[30] Nugent, S. 2011. A review of trenchless watercourse crossings in Alberta with respect to species at risk. Canadian Manuscript Report of Fisheries and Aquatic Sciences 2947: vi + 69 p

crossings will be built using a trenched method, with the result that the pipeline will likely lie only 1-2m below the streambed.

- **We recommend that pipelines buried under the bed of a navigable water are removed from the Minor Works and Water Order, and that they not be considered a designated work under the *Act*. Instead we recommend that pipelines be listed as works requiring approval to become either approved works or permitted works.**

Pipeline crossings must be properly designed, constructed and maintained to ensure that the pipeline does not become exposed over time, especially where it is installed with a trenched method or with shallow depth-of-cover. An exposed pipeline poses a very hazardous danger to navigation.

***Regulate Existing and Proposed Hydroelectric and Other Dams***

The prohibitions on throwing or depositing included in the *Act* apply to all navigable waters, not just those listed in the Schedule. It is not clear whether the prohibition on dewatering navigable waters similarly applies to all navigable waters. It is also unclear how the operation of hydro dams, including several located on the Saint John River, is considered in the *Act*. As dams restrict or release flows along a waterway, the navigability of both the reservoir or headpond as well as of downstream reaches may be affected, at times potentially constituting dewatering.

- **We recommend that the *Act* clearly regulate existing and proposed hydroelectric and other dams to ensure navigation protection, especially where such operations may constitute dewatering.**

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