



Government of Canada
Permanent Mission of Canada
to the United Nations and the
Conference on Disarmament

Gouvernement du Canada
Mission permanente du Canada
auprès des Nations Unies et de la
Conférence du désarmement

Note No.: YTGR0052

Reference: Letter from the Special Rapporteur on the rights of indigenous peoples

The Permanent Mission of Canada to the Office of the United Nations at Geneva presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to transmit to the Special Rapporteur on the Rights of Indigenous Peoples the Government of Canada's response to the letter of the Special Rapporteur dated January 2, 2013.

The Permanent Mission of Canada to the Office of the United Nations at Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 4 February 2013.



Response of Canada to the Letter from the United Nations Special Rapporteur on the Rights of Indigenous Peoples dated January 2, 2013

1. Introduction

By way of letter dated January 2, 2013, the United Nations Special Rapporteur on the Rights of Indigenous Peoples communicated to Canada information that he had received concerning “the alleged hunger strike carried out by the Chief of the Attawapiskat First Nation in protest of recent legislative developments as well as the social and economic conditions affecting indigenous peoples in Canada.” In his letter, the Special Rapporteur requested the “Government of Canada’s views on the accuracy of the information” contained in the letter and indicated that he particularly wanted specific information on:

- Whether a meeting between Aboriginal leaders, the Prime Minister and the Governor General was being considered;
- Bill C-45 and whether indigenous peoples had an opportunity to provide input into provisions that may affect their rights and interests, prior to its passage; and
- Measures being taken to monitor the health of Chief Spence.

What follows in this document is Canada’s response to the Special Rapporteur. Canada has sought to provide information on these three areas of particular interest to the Special Rapporteur, although Canada would note that the situation regarding the various protests remains fluid and the details of Chief Spence’s health are not necessarily available to the Government. Canada further observes that it is not possible to provide a comprehensive response to all aspects of the various issues mentioned in the letter within the 30 days set by the Special Rapporteur. Should the Special Rapporteur require additional details, Canada will endeavour to provide additional information.

2. Meeting between Aboriginal leaders, the Prime Minister and the Governor General

On January 11, 2013, at the request of the Assembly of First Nations (AFN), a working meeting was held between a delegation representing the Government of Canada and a delegation of Chiefs. The Prime Minister of Canada, the Right Honourable Stephen Harper, attended for the Government and was accompanied by government ministers, including the Honourable John Duncan, Minister of Aboriginal Affairs and Northern Development; the Honourable Tony Clement, President of the Treasury Board and Minister for the Federal Economic Development Initiative for Northern Ontario; the Honourable Leona Aglukkaq, Minister of Health, Minister of the Canadian Northern Economic Development Agency and

Minister for the Arctic Council; and Mr. Greg Rickford, Parliamentary Secretary to the Minister of Aboriginal Affairs and Northern Development. The Assembly of First Nations was represented by a delegation of 20 participants, including 17 Chiefs, headed by National Chief Shawn A-in-chut Atleo. Chief Spence reportedly declined to attend the working meeting. The Prime Minister participated in the entire meeting, which lasted approximately four hours.

Participants in the closed working meeting addressed a number of issues. It is reported by the Government and the Chiefs present at the meeting that these issues, ranging from land claims to fiscal matters, were discussed in a frank and open dialogue.

As an outcome of the meeting, the Prime Minister:

- agreed to a further high-level dialogue between the Government and the AFN on the treaty relationship and comprehensive claims;
- agreed with the need to provide enhanced oversight from the Prime Minister's Office and the Privy Council Office on Aboriginal matters; and
- agreed to debrief the members of his Cabinet and government on the day's discussions and agreed to meet with AFN National Chief Atleo in the coming weeks to review next steps.

Following the working meeting, the Governor General hosted a ceremonial meeting at his official residence, Rideau Hall.

Canada's system of government is a constitutional monarchy and a parliamentary democracy. Within this framework, the Prime Minister and the other ministers that participated in the January 11 working meeting represent the executive branch of the Canadian federal government. They are accountable to the democratically-elected House of Commons for the decisions and policies of the government. On the other hand, the Governor General represents The Queen who is the formal or titular Head of State in a constitutional monarchy. It would be inappropriate for the Governor General to participate in a working meeting where public policy is being discussed as his role can only be performed after ministers have decided the policy issues and tendered their advice. The Queen has reportedly responded to inquiries from members of the public regarding this situation by agreeing with this interpretation of the role of the Crown, and by suggesting that they direct such inquiries to the Prime Minister. However, as mentioned above, the Governor General did host a ceremonial meeting at his residence, which Chief Spence attended, along with a number of Aboriginal leaders.

3. Bill C-45

Bill C-45, the *Jobs and Growth Act, 2012*, was introduced in order to implement a number of commitments made in the Budget tabled in Parliament on March 29, 2012, and certain other measures.¹

¹ Canada, Department of Finance, *Jobs, Growth and Long-term Prosperity: Economic Action Plan 2012*. Ottawa: Public Works and Government Services Canada, 2012

These commitments included proposing legislation to streamline the review process for major economic projects,² and continuing to work with First Nations to address barriers to economic development on reserves.³ Canada wishes to note that, although the Bill has received Royal Assent, some of the amendments in question will not come into force until a date or dates yet to be designated by the Governor-in-Council.

The Special Rapporteur has requested information relating to four sets of amendments contained in Bill C-45 and, in addition, has raised the question of whether indigenous peoples were provided an opportunity to provide their input with respect to these changes.

1. Amendments to the *Indian Act*

Once it enters into force, Bill C-45 will amend the *Indian Act*⁴ in two ways, to simplify the ability of Bands to designate the use of portions of reserve land for economic development and move at the speed of business for the benefit of the Band. The idea of simplifying land designations is not new.

These amendments to the land designation process that will allow them to take advantage of economic opportunities while maintaining full ownership in their lands.

The House of Commons Standing Committee on Aboriginal Affairs and Northern Development (AANO) has been studying, on an ongoing basis, issues relating to land use and sustainable economic development. This study included hearing from a number of witnesses, including witnesses representing a variety of Aboriginal groups and communities.

In March 2012, the National Aboriginal Economic Development Board, a group consisting of Aboriginal business and community leaders, voiced its concerns at AANO that “First Nations do not have an ability to move swiftly in developing their lands as a result of the restrictions that arise under the *Indian Act* and the red tape that comes with them.” The process of designating land was identified by the Board as one of the most problematic barriers, due to the length and complexity of the process, which adds time and cost to transactions, and has placed First Nation financing in jeopardy on a number of projects.

According to the Standing Senate Committee on Aboriginal Peoples (SSCAP), inefficient voting practices destabilize First Nation governance, erode self-determination, and are injurious to economic development on reserve. Repeated votes are not only costly, but also impose an ineffective process on First Nation communities.⁵

The amendments to the *Indian Act* contained in Bill C-45 will simplify land designations by Indian Bands by changing two elements of the process: voting and Governor in Council confirmation.

² Ibid., p. 89

³ Ibid., p. 171

⁴ R.S.C., 1985, c. I-5

⁵ Canada, Parliament, Standing Senate Committee on Aboriginal Peoples, “First Nations Elections: The Choice is Inherently Theirs”, May 2010.

2. Amendments to the *Navigable Waters Protection Act*

Bill C-45 also includes amendments to the *Navigable Waters Protection Act*.⁶ The main purpose of the Act is to protect navigation in the context of permitting the construction, placement, repair, etc., of works in, on, over, under, through or across navigable waters and regulating the introduction and removal of certain obstructions and other things in navigable waters.

In line with the Government of Canada's general commitment to encourage long-term economic growth and job creation, the amendments to this Act will allow for a risk-based approach to the regulation of works and other potential obstructions in navigable waters. Bill C-45 amendments build on earlier amendments (2009) to create a modern and flexible legislative scheme that is responsive to Canada's current and anticipated needs relating to the construction of infrastructure in navigable waters, such as bridges, wharfs and transmission lines.

The following are some specific examples of the 2012 amendments to the *Navigable Waters Protection Act*:

- The Act is renamed the *Navigation Protection Act* to better reflect the Act's historic and modern focus on the protection of navigation.
- Regulatory oversight applies to works placed in, on, over, under, through or across Canada's busiest waterways which are set out in a schedule to the Act. The construction, placement, etc., of works in navigable waters which have not been included in the Schedule to the Act remain subject to the common law protection of the public right of navigation.
- Owners and proponents of works in navigable waters that are not listed in the schedule to the Act can opt in to benefit from having their work regulated under the Act as a compliant work.
- The idea, first introduced in 2009, of pre-approval of certain works (which resulted in the pre-approval of works such as small docks and boathouses which pose very little negative impact on safe navigation) is built upon by expanding the categories of works that can be permitted in accordance with the Act.

The schedule of navigable waters contains those waterways that support busy commercial or recreational activity, are accessible by ports and marinas, and / or are close to heavily populated areas. The choice of waterways included in the schedule was based on evidence of navigational use. Specifically, nautical charts compiled by the Canadian Hydrographic Service, reliance on historical data from the Navigable Waters Protection Program as well as Statistics Canada numbers related to freight movement on Canadian waterways were used to compile the schedule.

⁶ R.S.C., 1985, c. N-22 ("*NWPA*")

Works in navigable waterways not listed in the schedule can also be subject to the requirements under the Act, if they are opted in under the Act. Once opted in, they are regulated in the same way as are works constructed, placed in, etc., a navigable water listed in the schedule to the Act. Otherwise, these works are subject to the public right of navigation which is protected under the common law.

Furthermore, the amendments do not affect other legislation related to Canada's waters. There are several other acts administered by Transport Canada that protect marine safety such as the *Canada Shipping Act, 2001*.

There will also be no reduction in the environmental protection of Canada's waters as a result of these amendments. Nothing in this Act in any way compromises either federal or provincial/territorial environmental laws. This includes the *Fisheries Act*, the *Species at Risk Act* and the *Canadian Environmental Assessment Act, 2012*.

As described above, the amendments relate to matters of general application that do not deal specifically, or even disproportionately, with the interests of Aboriginal groups. Nevertheless, as part of the Parliamentary process, Parliament did hear from a number of witnesses, including the Assembly of First Nations.⁷

3. Amendments to the *Fisheries Act*

Bill C-45 made a small number of technical amendments to the *Fisheries Act*⁸ and the *Jobs, Growth and Long-Term Prosperity Act*⁹ to provide legal clarity to previously amended sections and to provide a transitional authority for existing authorizations for the killing of fish by means other than fishing and the harmful alteration, disruption or destruction of fish habitat. The amendments were:

- An addition to Section 40 to direct all fines collected under Section 40 of the *Fisheries Act* to the existing Environmental Damages Fund, to be used for proactive initiatives to further advance the protection of Canada's fisheries.
- An amendment to Section 2 to clarify that the term "Aboriginal" in relation to a fishery, to include fish harvested for purposes set out in a land claims agreement entered into with an Aboriginal organization.
- An amendment to Section 20(4) to address the unintended consequence of previous amendments to the *Fisheries Act* that did not allow for authorization of obstructions to fish passage. A provision was added to clarify control of the obstruction of fish passage by fishing gear.

⁷ Canada, Parliament, *Proceedings of the Standing Senate Committee on Energy, the Environment and Natural Resources*, 41st Parliament, 1st Session. Issue No. 32 – November 22, 2012

⁸ R.S.C., 1985, c. F-14

⁹ S.C. 2012, c. 19. This Act had itself made certain amendments to the *Fisheries Act*, a number of which had yet to come into force at the time of the introduction of Bill C-45.

- A transitional authority added to provide certainty to holders of existing *Fisheries Act* section 32 and 35(2) authorizations, and to enhance legal clarity and provide consistency for departmental staff, proponents and partners.

A number of witnesses, including the Assembly of First Nations, voiced their views at committee as part of the Parliamentary process.¹⁰ We would note, however, as just described, that the amendment to the definition of “Aboriginal” was made with a view to clarify the scope of the serious harm to fish prohibition under the new subsection 35(1) of the Act, a prohibition that is not yet in force.

4. Amendments to the *Canadian Environmental Assessment Act, 2012*

Finally, Bill C-45 made a number of technical amendments to the *Canadian Environmental Assessment Act, 2012*¹¹ (CEAA) to ensure concordance between the French and English versions of the Act. It also added a transitional provision to address a technical loophole for projects that could have required an environmental assessment under the former Act (but did not up to July 6, 2012) and would, if proposed today, be subject to the current Act.

Canada observes that this amendment is technical in nature and does not negatively impact the rights or interests of First Nations. Its effect is to ensure that no major project escapes application of the CEAA. Once the amendments to the CEAA were introduced in Parliament, a number of witnesses, including the Assembly of First Nations, were given an opportunity to voice their views as part of the Parliamentary process.¹²

4. Measures being taken to monitor the health of Chief Spence

Much of the information on this topic of particular interest has been addressed above. Canada reiterates that while the Government of Canada is not directly involved in Chief Spence’s decisions about her diet or personal healthcare, the Minister of Aboriginal Affairs and Northern Development had repeatedly made attempts to contact and meet with Chief Spence to encourage her to terminate her protest because of fears that she was risking her health and well-being.

- On December 7, the Minister of Aboriginal Affairs and Northern Development extended an offer to have Parliamentary Secretary Greg Rickford visit Attawapiskat on December 12 or 13.
- On December 11, the Minister of Aboriginal Affairs and Northern Development indicated publicly his willingness to meet with Chief Spence.
- On December 13, the Minister attempted to reach Chief Spence through her cell phone number and then followed up by sending her a letter that day, reiterating his offer to meet with or speak to Chief Spence.

¹⁰ See *Proceedings of the Senate Standing Committee on Energy, the Environment and Natural Resources*, supra.

¹¹ S.C. 2012, c. 19, s. 52

¹² See *Proceedings of the Senate Standing Committee on Energy, the Environment and Natural Resources*, supra.

- On December 18, the Minister attempted to reach Chief Spence by phone.
- Another letter reaching out to Chief Spence was sent on December 23. This letter outlined our Government's commitment to engaging in discussions with First Nations leaders on the treaty relationship.
- On December 24, Senator Brazeau attempted to with Chief Spence on Victoria Island but was turned away by the Chief's representatives.

Canada also observes that, like all other Canadians, Chief Spence can access provincial health care services should she require them. Chief Spence ended her protest on January 24, 2013.

5. Conclusion

As the Government of Canada has noted in previous correspondence with the Special Rapporteur, Canada is committed to pursuing a vision where Aboriginal Canadians, communities and peoples are healthy, safe, self-sufficient and prosperous. The Prime Minister of Canada has recently stated that Canada's "goal is self-sufficient citizens and self-governing communities. Our goal is to promote improved governance. Our goal is greater Aboriginal participation in the economy and in the country's prosperity." The Government of Canada is committed to on-going dialogue on Aboriginal issues and to taking achievable steps that will provide better outcomes in First Nations communities. Canada observes that the amendments contained to Bill C-45 support these goals and aims and, if carefully considered, advance opportunities for progress to be made.

The current protests must be viewed in their larger context, which includes uncertainty and divisions within Aboriginal communities and across Aboriginal leadership on how best to proceed. The Government of Canada continues to monitor protests and actions by Aboriginal groups and individuals, and is working hard to make progress on many fronts simultaneously.

Canada notes that its Government is committed to a strategy of incremental and practical measures to strengthen Canada's future prosperity for the benefit of all Canadians. Canada will continue to focus on real, structural reforms and increasing the effectiveness of long-term investments. In trying to find practical solutions to real issues, work continues with willing partners to renovate programs, and develop approaches, including new legislation.

Canada takes its consultation obligations seriously. These are supported by a whole of government approach and include robust consultation principles and directives, training and guidance for federal officials and collaborative partnerships between Canada, Aboriginal groups and provinces and territories. Canada does not interpret the concept of free, prior and informed consent, as expressed in the United Nations Declaration on the Rights of Indigenous Peoples, as providing indigenous peoples

with a veto on legislative and policy decisions.¹³ Instead, we believe that the concept is about meaningful consultation and should, in practice, focus on fostering partnership.

Canada trusts that the above provides clarification with respect to the questions posed in the Special Rapporteur's letter dated January 2, 2013.

Ottawa

February 1, 2013

¹³ Canada notes that, as explained in Canada's statement of support for the Declaration, the Declaration is an aspirational, non-legally binding document that does not reflect customary international law nor change Canadian laws. In endorsing the Declaration in 2010, Canada reiterated its commitment to continue working in partnership with Aboriginal peoples in creating a better Canada. See Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples dated November 12, 2010. Available online: <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>