Submission to the House of Commons Standing Committee on Finance on Bill C-38: *Jobs, Growth and Long-term Prosperity Act*

June 1, 2012

ABOUT THE ASSEMBLY OF FIRST NATIONS

The Assembly of First Nations (AFN) is the national, political representative of First Nations governments and their citizens in Canada, including those living on reserve and in urban and rural areas. Every Chief in Canada is entitled to be a member of the Assembly. The National Chief is elected by the Chiefs in Canada, who in turn are elected by their citizens.

The role and function of the AFN is to serve as a national delegated forum for determining and harmonizing effective collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action and for advancing the aspirations of First Nations.

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Introduction

In January of this year, First Nations and representatives of the Crown and the Government of Canada, participated in the historic Crown-First Nations Gathering (CFNG). The intent of the Gathering was to strengthen and reset the relationship between the Crown and First Nations, to move away from unilateral imposition of policies or laws that have impacts on First Nation peoples and territories to one that recaptures mutual respect and partnership.

Bill C-38 and the wide-sweeping and comprehensive changes to other pieces of legislation it contains, continues historic unilateralism and imposition that we have worked – and are continuing to work – to overcome.

First Nations and their duly mandated organizations all across Canada have universally expressed their opposition to this approach that is considered.

AFN understands that the review of Part 3 of Bill C-38 has been delegated to the FINA Sub-committee struck for this purpose. National Chief Shawn A-in-chut Atleo presented to the Subcommittee on May 29, 2012, and these comments are appended to this submission.

Specific items of concern include the closure of the First Nations Statistical Institute and changes to Employment Insurance.

First Nations Statistical Institute

Through **Part 4, Division 49**, Bill C-38 authorizes the Minister of Aboriginal Affairs and Northern Development to close out the affairs of the **First Nations Statistical Institute** as well as amended related statutes.

The First Nations Statistical Institute (FNSI) was established to be an autonomous, First Nations-led organization to assist First Nations decision-making, planning and investments through access to quality data and analysis.

While it is true that the institute was slower to become operational than originally planned, over the past two years it has started actively working with First Nation communities in the to assist in the development of information management tools and to interpret and analyse data for community purposes. FNSI supports First Nations achieving certification as part of the bond issuance process facilitated by the First Nations Finance Authority through compiling data to create a community profile.

FNSI has conducted work directly with approximately 178 with First Nation communities on planning and population projections; surveys for community-based research; and designed tools to manage electronic information generally, membership lists and education information. FNSI also carries out national level analysis & research,

including the development of an Aboriginal Data Inventory, a Guide to First Nation statistics, and 2011 Census Analysis.

FNSI has been actively working with other partners. At the AFN's National Forum on First Nation Citizenship last November, the institute profiled a flexible and adaptable population projection model to be used by First Nations and gave First Nations a desktop database tool to easily manage membership lists. AFN is currently partnering with FNSI on the development of a First Nations Community Well-being Framework at an Indigenous Statistics Conference later in 2012.

These services are provided at no cost to First Nations, and while many are community-specific, the tools and resources developed are often of use and application to other communities. Even over a short period of time, FNSI has been successful in building a body of resources and capacity. These are key elements to strengthen of First Nation governments and there is no similar institution nor plan to fill this gap upon the closure of the FNSI.

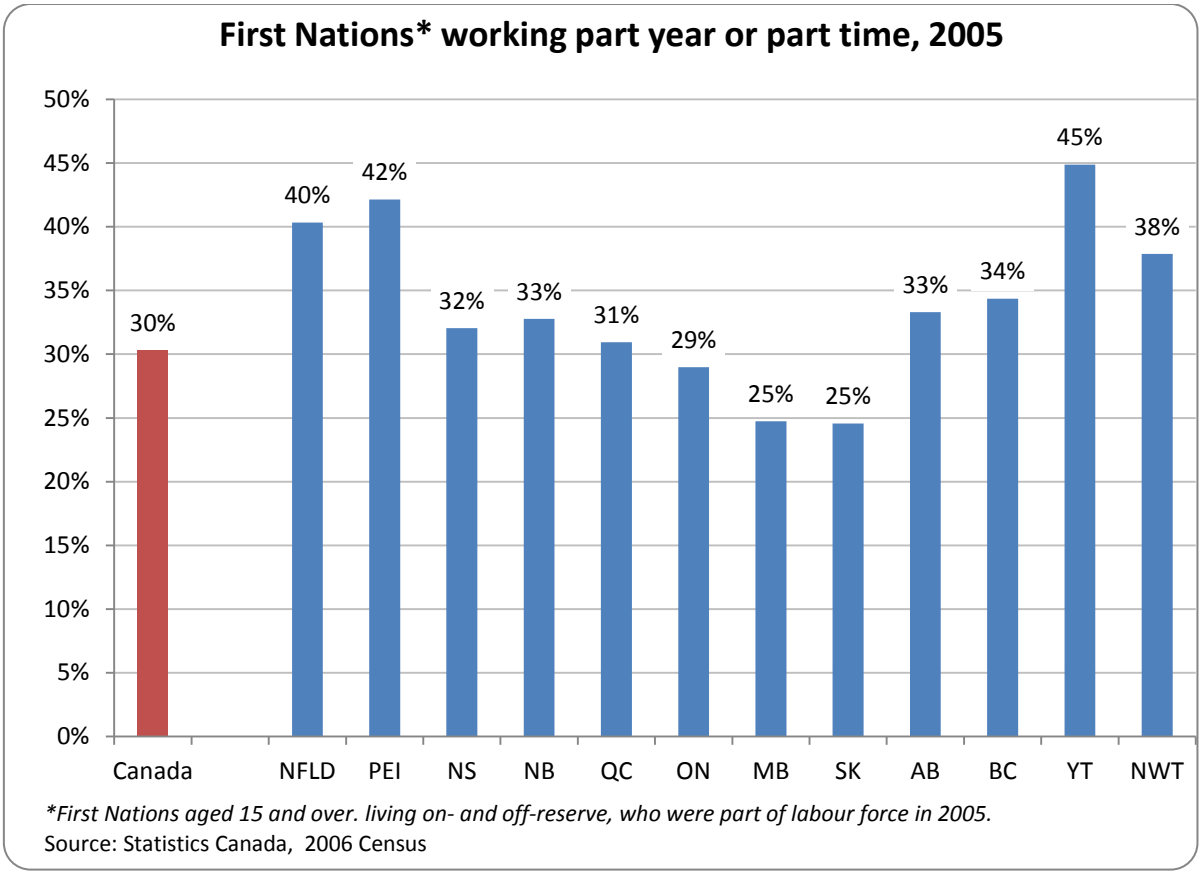
Canada did not approach any of the First Nations or their organizations working directly with FNSI, nor was a comprehensive evaluation conducted after FNSI began offering services before the before the unilateral cancelation of funding in Budget 2012.

AFN recommends that the decision to close the First Nations Statistical Institute be immediately reversed and full funding be restored.

Changes to Employment Insurance – Part 4, Division 43

First Nation people living on-reserve have a very low labour force participation rate at 52%, compared to 67% for non-Aboriginal Canadians. Of this, 30% is either part year or part time.

There is much diversity across the country for First Nation part-time workers. More than four in ten First Nations living in the Yukon (45%), Prince Edward Island (42%), and Newfoundland and Labrador (40%) were part time or part year workers.



Given the already low labour market attachment and the proportion of part-time and season workers among First Nations, and initial assessment of the changes to the Employment Insurance regime indicates they will have negative impacts on First Nation individuals particularly restricting the eligibility of frequent claimants and requiring longer commuting times. In addition, the requirement for claimants to accept "similar work" potentially at a lower skill level will effectively crowd the market and reduce opportunities for those without transferable skills. These measures will increase reliance on income support and social welfare, and will not address First Nations' urgent and ongoing training needs nor support local economies.

It remains that these changes were made absent of any engagement or consultation with First Nation communities as to how they would impact their populations. The federal government must undertake such consultation immediately, and work directly with First Nation governments on the needed human capital and economic measures to support their productivity.

Conclusion

First Nations have significant concerns about the magnitude of provisions put forward in Bill C-38 and the almost universal lack of engagement or consultation with First Nations in advance of these changes being introduced.

Funding reductions being implemented by federal departments as part of Budget 2012 have targeted policy development capacity within National and regional representative organizations, as well as independent institutions, such as the First Nations Statistical Institute and the National Centre for First Nations Governance. This represents a significant erosion of the policy and planning supports to First Nation governments. In an overall environment that requires continued and enhanced accountability and transparency in decision-making, Bill C-38 undermines nascent capacity gains for First Nations and fails to provide alternatives to meet these needs in the future.

In sum, the federal government has not fulfilled its obligations to First Nations, nor fulfilled the promise of partnership and a renewed relationship from the January 2012 Crown-First Nations Gathering.

Presentation to the Sub-Committee on Bill C-38 (Part III) of the House of Commons Standing Committee on Finance

National Chief Shawn A-in-chut Atleo

May 29, 2012

Check against delivery

Introduction

- Greeting [Nuu-chah-nulth]. Acknowledgement of Algonquin Territory.
- I thank-you for the opportunity to speak to you today about Part 3 of Bill C-38.
- I am currently National Chief, for the Assembly of First Nations (AFN), the National political advocacy organization of First Nations in Canada.
- In January of this year, First Nations and representatives of the Crown and the Government of Canada, participated in the historic Crown-First Nations Gathering (CFNG).
- The intent of the Gathering was to strengthen and reset the relationship between the Crown and First Nations, to move away from unilateral imposition of policies or laws that have impacts on First Nation peoples and territories to one that recaptures mutual respect and partnership.
- Bill C-38 and the wide-sweeping and comprehensive changes to other pieces of legislation it contains, continues historic unilateralism and imposition that we have worked to overcome.
- In November 2010, Canada endorsed the United Nations Declaration on the Rights of Indigenous Peoples, which reflects the recognized customary international law standard of free, prior and informed consent.
- Free, prior and informed consent is not mentioned anywhere in Bill C-38.
- Domestic law recognizes and enforces the duty to consult and accommodate First Nations when Crown conduct or omission may adversely impact established or potential Aboriginal and Treaty rights.
- Part 3 of Bill C-38 will have direct impact on the Federal Government's ability to fulfill these standards.
- The AFN is not a First Nation government. Consultation or engagement with the AFN does not replace nor fulfill the Crown's duty to consult and accommodate Treaty and rights holders where their rights may be infringed.

- To date, First Nations have not been engaged or consulted on any of the changes to the environmental and resource development regime proposed within Bill C-38. This opens the Crown to future risk and will have numerous – and likely unintended consequences.

- The stated intention of these legislative and associated regulatory changes is to improve the timeliness and efficiency of environmental regulations and project assessments.

- In its current form, Part 3 of Bill C-38 clearly presents a derogation of established and asserted First Nation rights.

- If enacted it will increase the time, cost and effort for all parties and governments as First Nations will take every opportunity to challenge these provisions.

- There are a number of specific concerns with the changes proposed in Part 3 of Bill C-38, which I will outline here.

Changes to the Scope and Purpose of the *Fisheries Act*

- As I know you are aware, Bill C-38 changes the scope and purpose of the *Fisheries Act,* to the protection of fish that support commercial, recreational or Aboriginal fisheries. Previously, the Act had prohibited *"harmful alterations, disruptions or destruction"* of fish habitat. The proposed change prohibits **serious harm to fish**, as defined as "the death of fish, any permanent alteration to, or destruction of fish habitat"

- I come from a fishing peoples – the Nuu-Chah-Nulth.

- *Hishukish tsa'walk* and *iisaak* are the key principals that govern how Uu-athluk manages aquatic resources in Nuu-Chah-Nulth Ha-houlthee.

- *Hishukish tsa'walk* is the understanding that everything is connected; nothing is isolated from other aspects of life surrounding it and within it. This includes people as part of the ecosystem. *Iisaak* is respect with caring.

- These principles are the basis for respect of ourselves, others, and nature. In managing aquatic resources, these values bring respect for

the oneness between humans and the environment and respect for all other life forms. Our obligation to sustainably manage all aquatic life forms exists regardless of their perceived economic value

- The balance of resources and habitats is one that changes over time, and this is something well known to First Nations. However, only enabling the protection of aquatic species once there is certainty of their demise or permanent destruction of their habitats is likely too late, and will not restore the necessary balance for their sustainability.

- Bill C-38 would remove protection for fish habitat from the *Fisheries Act* and enable the Minister to create regulations allowing for the deposit of deleterious substances. This may leave fish species and habitats vulnerable to destruction and prevent First Nations from continued enjoyment of the constitutionally protected right to fish.

- First Nations have a shared vision with all Canadians for clean water. Our watersheds provide us life, food, and health. Bill C-38 clouds that vision by creating new, political discretion to poison our waters by changing s. 36 of the Fisheries Act. Instead of allowing deleterious deposits to destroy our water, we must fulfill our inherited obligation as responsible stewards of the environment.

- Changes to the *Fisheries Act* will also reduce federal decision-making about fisheries management, the effect of which will be to narrow the triggers to consult and accommodate First Nations, thereby reducing the federal obligation.

- First Nations will vigorously oppose any attempts by the Crown to erode or evade lawful obligations and responsibilities to First Nations.

Honour of the Crown

- The *CEAA* last underwent a legislative review prior to Supreme Court decisions which established the duty to consult and accommodate. It has never been updated to operationalize the duty to consult and accommodate. In this regard, the *CEAA 2012* is a step backwards.

- The *CEAA 2012* ends environmental assessments for minor projects, referred to as “screenings”. Projects with minor environmental effects

may have profound effects on First Nations rights, triggering the duty to consult and accommodate.

- In addition, *CEAA 2012* will continue substitution of provincial environmental assessments for the federal process as well as deeming 'equivalency' of such processes, which would exempt the *CEAA 2012* from further application.

- This raises significant concerns, and it could very well lead to more situations such as the Prosperity Mine project, which was approved through the Provincial environmental assessment process, but subsequently rejected following more stringent federal review.

- This also invokes for many First Nations the Natural Resource Transfer Agreement (NRTA) of 1930, which was a unilateral agreement between Canada and the provinces of Manitoba, Saskatchewan Alberta to transfer resources and lands never ceded or surrendered by way of Treaty by the First Nations.

- The impact of the NRTA has been to lessen the scope and implementation of the numbered Treaties in the prairies, and is a source of continued and ongoing conflict and litigation – over 80 years later.

- Canada needs to learn from its history. **First Nations will not stand for such unilateral actions, and will take all avenues available to them to prevent further derogation of their rights.**

- The increase in discretionary powers afforded to the Minister within the *Fisheries Act* and the number of Cabinet decisions under *CEAA 2012* and the *NEB Act* will severely impair transparency and accountability to First Nations. The broad restrictions around Cabinet confidences will mean First Nations will find it increasingly difficult to know how the government considered First Nations rights when developing accommodation measures.

- This too compromises the Crown's ability to discharge its duty to consult and accommodate First Nations and is an area for clear challenge.

- Finally, time frames established for First Nations to respond to notices under the *CEAA 2012* and the *National Energy Board Act* are insufficient and do not allow adequate time for appropriate review, analysis and response.

- It is unreasonable to provide First Nations with only 20 days to provide comprehensive scientific and legal materials related to assessing the potential impacts of a project on First Nations rights during the screening process for a project under *CEAA 2012*.

- Any notices under *CEAA*, the *NEB* or the *Fisheries Act* related to development, authorizations, regulations or policies must be sent directly to communities in an accessible form. The use of online notices limit First Nations' participation and is therefore insufficient to fulfill the Crown's duty to consult with First Nations.

- While the Government has an established legal duty to consult and accommodate First Nations on Bill C-38 Part 3, as well as any regulations created under the authority of the Act, and any new policies created to interpret the Act, such consultations have not yet taken place.

- Numerous First Nation organizations, including the Union of British Columbia Indian Chiefs, Manitoba Keewatinowi Okimakanak and the Assembly of First Nations have registered protests to the *CEAA* Agency's first call for comments on regulations to be developed under *CEAA 2012*, which had a deadline of May 23, 2012.

- Section 62(h) of the *CEAA* and section 105(g) of the *CEAA 2012* states that one of the objectives of *CEAA 2012* is to consult with First Nations on policy issues, however, there has been no identification of a process or funding for such consultation to take place. There is no parallel provision of the *Fisheries Act*.

- The AFN agrees with the UBCIC that the duty to consult is triggered whenever the government contemplates acts, including policy changes, which impact on First Nations rights.

- Lacking proper funding for engagement and consultation, the AFN agrees with the assessment in the DFO's 2012-2013 RPP stating that the Department "may not be able to adequately maintain public trust and confidence, and subsequently it[s] reputation."

Conclusion

- Canada needs to take a step back and reconsider its approach.
- Hastily moving forward on significant and broad changes that will impact the exercise by First Nations of established and asserted rights will have long reaching and expensive consequences.
- Taking time to work with First Nations, jointly, on resource management and protection plans will achieve far better outcomes in terms of certainty and increased prosperity.
- This is the spirit in which First Nations participated in the Crown-First Nations Gathering, and it is in this spirit – of a renewed and respectful relationship that we urge Canada to proceed.
- In closing, I will make the following recommendations:
    - Part 3 of Bill C-38 needs to be withdrawn to take the time to work with First Nations to ensure their rights and interests are reflected and will not be compromised through such legislation.
    - Failing that, I would recommend that the legislative amendments in Part 3 be separated from the main Bill, to ensure appropriate study and amendments can take place, with engagement and input from First Nations.
    - Specific funding allocations must be made to engage and consult with First Nations on *CEAA 2012*, amendments to the *Fisheries Act,* amendments to other legislation within Section 3 of the Act, regulations that will be promulgated under the amendments, and any new policies relevant to the interpretation of amendments to new or existing environmental legislation.
    - Finally, any and all notices provided with regards to project reviews, regulatory promulgation, license authorizations, or other matters within the scope of *CEAA*, the *National Energy Board Act*, or the *Fisheries Act* must be directly sent to First Nations in an accessible form and medium and that First Nations are given adequate time to respond to these notices.

- Going forward, we continue to call upon Canada to work with First Nations in true partnership, reflective of the original Nation-to-Nation relationship, Treaties and Aboriginal rights.

- Bill C-38 unacceptably impacts First Nation rights.

- It also impacts collectively our ability to ensure the protection and sustainability of our most precious resources. I have been speaking about fish tonight, which is a closely held resource. But any conversation of fish, of any of our natural resources, brings us to a discussion of our waters – of our rivers, and lakes, and oceans.

- This Bill places our collective lifeblood at risk.

- It is time for a shared vision – between First Nations and Canadians – to manage and protect the resources that have sustained us since the beginning of time.