

Nishnawbe Aski Nation

Office of the Grand Chief

100 Back Street, Unit 200, Thunder Bay, ON P7J 1L2
Tel: (807) 623-8228 Fax: (807) 623-5193 www.nan.on.ca



October 28, 2011

Hononourable Peter Kent, Minister of Environment Canada
Member of Parliament for Thornhill (Ontario)
Les Terrasses de la Chaudière
10 Wellington Street, 28th Floor
Gatineau, Quebec K1A 0H3
Fax: (819) 953-0279
Email: Minister@ec.gc.ca

Dear Minister:

RE: Nagoya Protocol and Canada's Draft Domestic Policy Documents

I am writing with regard to the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (the "Protocol"), and the draft policy documents prepared by Canada on domestic implementation of the *Protocol*. The deadline for states to sign the Protocol is February 1, 2012. However, such signature is not essential since states are free to agree to be bound by the Protocol at any time in the future.

Over the last several years, various Indigenous peoples and communities in Canada have been engaged by the Canadian government in discussions on access and benefit sharing in relation to genetic resources, and the inextricably linked topic of traditional knowledge. In particular, Nishnawbe Aski Nation ("NAN") participated in one engagement session on June 5, 2009 at the Fort William First Nation, outside Thunder Bay, Ontario.

These discussions were not "consultations," as required under section 35 of the *Constitution Act, 1982* and international law. To our knowledge, the government has not agreed to or carried out any genuine consultations on such crucial matters as Indigenous rights to genetic resources and traditional knowledge and has not accommodated Indigenous peoples' concerns. Instead, the government has generally referred to discussions with Indigenous representatives as "engagement" sessions. In the absence of consultations and accommodation, the Canadian government has unilaterally taken positions that have been opposed by numerous Indigenous organizations and peoples in Canada and elsewhere in the world.

Evidence of such widespread opposition during the negotiations of the Protocol is found on the website of the Convention on Biological Diversity (CBD), at <http://www.cbd.int/doc/?meeting=ABSWG-09-3RD>. Under the heading of "Information Documents" (Nos. 21 and 22), there are two detailed Joint Submissions prepared by the Grand Council of the Crees (Eeyou Istchee) in collaboration with many other organizations.

In June 2011, the Grand Council of the Crees and other organizations tabled a further Joint Submission elaborating on "substantive and procedural injustices" in the Protocol relating to Indigenous peoples' human rights (see CBD website at <http://www.cbd.int/icnp1/submissions/>). The Canadian government is well aware of the basic concerns raised by Indigenous organizations and others, but has virtually ignored them.

NAN supports the central objective of the Nagoya Protocol, namely, "fair and equitable sharing of the benefits arising from the utilization of genetic resources, ... taking into account all rights over those resources." However, NAN has serious reservations about key aspects of the text. The Protocol was negotiated without the full and effective participation of Indigenous peoples. The Protocol does not appear to include a binding framework that guarantees the human rights of Indigenous peoples related to genetic resources and traditional knowledge, including those rights affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). The Protocol appears to include limitations on Indigenous rights that are inconsistent with Canada's international human rights obligations and with the objective of "fair and equitable" benefit sharing specified in both the *Protocol* and *Convention on Biological Diversity*.

The situation has been fundamentally aggravated by the federal/provincial development of a suite of documents laying out a plan for domestic implementation of the Nagoya Protocol, as follows: (1) Draft Domestic Policy Guidance for Canada; (2) Comparison chart of the Protocol and the Draft Policy; and, (3) Discussion Document on the Nagoya Protocol. The issues involved in these draft documents have been discussed and negotiated behind closed doors by Canada and the Provinces/Territories since 2009, and are only now being presented to First Nations. The governments of Canada and Ontario have never consulted NAN on these crucial matters.

NAN, which represents 49 First Nations with traditional territories covering approximately two thirds of Ontario, was not directly notified by Canada about the suite of domestic implementation documents. The notification periods for selected organizations and communities were not sufficient. According to a September 22, 2011 email from Environment Canada, the deadline for written comment was first set for October 21, and then later extended to October 28. A further Environment Canada email on October 6, 2011 indicated that a two-hour meeting would take place for the Ontario Region in Toronto on October 14. Aside from an opening presentation on the Nagoya Protocol and closing remarks, the proposed agenda only allowed for 75 minutes for plenary discussion.

The Canadian government's process on the domestic implementation documents and whether Canada should sign the Nagoya Protocol prior to February 2012 are completely unacceptable to NAN. Canada's signature is linked to these draft documents, which, if implemented in relation to Indigenous peoples, would defeat the object and purpose of the *Protocol* prior to ratification in many crucial ways. The government's process is not a consultation consistent with Canada's constitutional and international obligations. As determined by the Supreme Court of Canada in the 2004 *Haida Nation* case, consultations would require the "full consent" of Aboriginal nations on "very serious issues" relating to their rights. In Canada and internationally, such consent is referred to as free, prior, and informed consent (FPIC) of First Nations. As a corollary, the current process is not consistent with the honour of the Crown in Canada. The far-reaching significance of Indigenous peoples' genetic resources and traditional knowledge is affirmed in the preamble of the Protocol as follows:

Noting the interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities...

The time line for any reasonable and fair consultation process on the Nagoya Protocol and the draft domestic implementation documents must be for a period that will permit First Nations, including NAN First Nations, the time to carefully assess the draft documents in the context of the two treaties concerned and potential effects on Indigenous peoples' rights and related state obligations. First Nations should be provided with funding that will enable them to exercise due diligence in relation to the Protocol and the draft domestic documents. The underlying issues are complex and cannot be properly addressed in the current federal process, which is a sham.

Given the lack of adequate consultation, let alone FPIC, on the draft domestic implementation documents, it is not surprising that the substance of these documents is seriously deficient. In this regard, NAN has not yet had the time to fully consider the Joint Submission prepared by the Quebec Cree and other Indigenous peoples, but NAN is supportive in principle of the critique detailed in the Submission. The draft domestic implementation documents give little or no recognition to the human rights of Indigenous peoples, particularly as affirmed in UNDRIP. Although the preamble of the Protocol highlights the UNDRIP, the government documents make no reference to this human rights instrument at all. The draft documents appear to weaken the binding obligations of the Protocol and Convention by changing "shall" to "should," and by carving out large and vague areas of Canadian government discretion in relation to the management and other rights relating to genetic resources.

The draft documents appear to narrow the scope of First Nation property and other rights by referring to "established" rights only, and, further, by restricting such established rights to rights determined under self-government and comprehensive claim agreements, of which there are very few in Canada, and none in Ontario. That narrow interpretation is inconsistent with the international and domestic obligations of Canada under the Treaties, including Treaties 5 and 9 in the traditional territory of NAN First Nations. Such kinds of distinctions based on "established" rights (found in the Protocol and Canada's draft documents) have been determined to be discriminatory by the *UN Committee on the Elimination of Racial Discrimination*. In its 2011 report, the UN Permanent Forum on Indigenous Issues has expressed concern that the "established rights" approach in the Protocol is too limiting and discriminatory. These are just some examples of the serious flaws with the draft domestic implementation documents.

NAN supports the central objective of both the *Convention on Biological Diversity* and the *Nagoya Protocol*: "fair and equitable sharing of the benefits arising out of the utilization of genetic resources, ... taking into account all rights over those resources" (article 1 of both treaties). However, for the reasons summarized in this letter, NAN does not support the signature by Canada of the Protocol, as currently drafted, by February 1, 2012. And, most emphatically, NAN does not agree with the draft domestic implementation documents prepared by Canada and the Province without First Nations consultation and consent. The draft domestic documents appear to undermine the obligations of Canada under the Convention and even the Protocol – a precedent that is legally and morally unacceptable. The time line for consideration of the Protocol and the domestic implementation documents should be extended, so as to enable full and effective consultations and facilitate First Nations FPIC, including the consent of NAN First Nations.

The issues raised by the Nagoya Protocol and the draft domestic implementation documents may be considered by the NAN Chiefs Assembly of November 22 - 24, 2011. Therefore, we reserve the right to confirm or adjust the NAN position based on direction from the sovereign First Nation governments of the Treaty 5 and 9 territory in Ontario.

Sincerely,
NISHNAWBE ASKI NATION



Dr. Stan Beardy,
Grand Chief.

cc. Paul Boothe, Deputy Minister, Environment Canada
Caroline Caza, A/Executive Director - Ecosystems & Biodiversity Priorities, Environment Canada
Hon. Jim Bradley, Ontario Ministry of Environment
NAN Executive Council, First Nations, Tribal Councils
National Chief Shawn A-in-chut Atleo, Assembly of First Nations
Regional Chief Angus Toulouse, Chiefs of Ontario
Grand Chief Dr. Matthew Coon Come, Grand Council of the Crees (Eeyou Istchee)