Métis Nation of Ontario
Lands, Resources and Consultations

December 21, 2016

Ms. Johanne Gelinas
Panel Chair
Expert Panel, Review of Environmental Assessment Processes

RE: Preliminary Comments of the Métis Nation of Ontario

Via electronic mail

Dear Madam Gelinas:

I am writing on behalf of the Métis Nation of Ontario (MNO) to provide **preliminary** comments to the Expert Panel for the Review of Environmental Assessment Processes. The MNO would like to acknowledge the importance of the Review given that the structure and implementation of environmental assessments are essential for the protection of the rights, interests and way of life of the regional rights-bearing Métis communities in Ontario.

The MNO represents Métis citizens and communities throughout the province. On December 9, 2015, the Ontario legislature passed the Métis Nation of Ontario Secretariat Act, 2015 (the "MNO Act"). This legislation recognizes that the MNO "was created to represent and advocate on behalf of its registered citizens, and the Métis communities comprised of those citizens, with respect to their collective rights, interests and aspirations." The MNO Act goes on to state that MNO citizens "identify as descendants of the Métis people that emerged in west central North America with their own language (Michif), culture, traditions and way of life" and that " [t]hese Métis people collectively refer to themselves as the Métis Nation, which includes Métis communities within Ontario."

Based on the mandate it receives from its citizens, today totalling over 19,000 Métis in Ontario, the MNO has established governance structures at the local, regional and provincial levels. At the local level, the MNO is comprised of twenty-nine (29) Chartered Métis Community Councils. At the provincial level the MNO is run by elected provincial governing body known as the Provisional Council of the Métis Nation of Ontario (PCMNO). The MNO and the Chartered Community Councils are organized administratively into nine (9) Regions throughout the province. Pursuant to the terms of the Regional Consultation Protocols established for each of the nine Regions of the

MNO, consultation with the MNO's Chartered Community Councils is undertaken on a regional basis through their respective Regional Consultation Committees. Each Regional Consultation Committee has four to six representatives, including the elected Chartered Community Council Presidents in the respective regions and the PCMNO Regional Councilor for the particular Region, as well as the Captain of the Hunt for the Region.

The governance structure of the MNO and the way that the MNO expects that consultation is to be undertaken with it is important for the Panel to understand because this has a direct impact on how, exactly, the MNO can participate in, and respond to, requests for consultation which are made of it, including participation in this review of CEAA, 2012. The MNO understands the importance of this Review process and intends to fully participate; however, the amount of time allocated for the formulation of meaningful comments for the Panel has simply not allowed the MNO to prepare a final submission by the deadline of December 23, 2016. The MNO, as a large, province-wide organization, must operate in accordance with its own internal protocols to ensure that the views presented to the Committee by the MNO are truly representative of the citizenship of the MNO. To this end, these preliminary comments are being carefully considered by all of the MNO's elected leadership, at the provincial, regional, and local levels. In the coming weeks, the MNO will be having a facilitated workshop with MNO leaders to discuss and finalize the final response by the MNO to the Panel and/or the Minister of the Environment. The MNO's final submission will be submitted to the Panel and/or the Minister of the Environment for its consideration in early 2017. The MNO also anticipates reviewing and providing comments on the Panel Report which we understand will be issued by the end of March, 2017.

Please accept the following preliminary comments from the MNO on the matters as set out herein and as outlined in the Terms of Reference for the Panel:

1. *How to restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with the provinces and territories to avoid duplication?*
2. *How to ensure decisions are based on science, facts and evidence and serve the public's interest?*
3. *How to provide ways for Canadians to express their views and opportunities for experts to meaningfully participate?*
4. *How to require project advocates to choose the best technologies available to reduce environmental impacts?*

5. *How to ensure that environmental assessment legislation is amended to enhance the consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects?*

Our preliminary submission will outline the broad challenges of the changes introduced to the *Canadian Environmental Assessment Act, 2012,* as well as preliminary recommendations that we will elaborate upon further in our final submission expected by the end of February, 2017.

1. *How to restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with the provinces and territories to avoid duplication?*

Changes made to the federal EA process under the *Canadian Environmental Assessment Act, 2012* (CEAA, 2012) through the passage of the federal "omnibus" budget bill included unjustly narrowing the involvement of the Government of Canada in the conduct of environmental assessment processes; if, therefore, a project type was not designated by the *Regulations Designating Physical Activities*, an assessment was not triggered. Tremendous discretionary powers were also introduced that invited unnecessary and inappropriate political interference by the government of the day. Strict regulatory timelines and the dilution of federal oversight were also introduced as a result of the amendments made through the omnibus budget bill.

To restore robust federal oversight and a thorough environmental assessment of areas under federal jurisdiction, will necessarily require repealing many, if not most, of the changes made in CEAA, 2012. This will mean a return to a process whereby ministerial discretion is minimized, much greater reliance is placed on an independent examination of changes from a proposed project and meaningful consultation with Aboriginal nations is embedded in the process.

A goal of environmental assessment is to instill and ensure public confidence in the decisions made by government when a government decision has the potential to negatively or adversely affect matters of importance to the public including, for example, biophysical health and socio-economic benefits. However, from the perspective of the MNO, the application of the CEAA, 2012 is inextricably linked to the protection of the rights, interests and way of life of the regional rights-bearing Métis communities in Ontario. Therefore, any changes to CEAA, 2012 must respect the significant judicial developments enunciated over the last decade in the many Supreme Court of Canada

decisions in respect of the Crown's duty to consult, the Honour of the Crown and the promise contained in s. 35 of the *Constitution Act, 1982*.

Harmonization with provincially-regulated environmental assessment processes should also be a priority in order to eliminate duplication of efforts; simply put, a proponent should not have to conduct two separate environmental assessments, nor should Aboriginal communities be engaged in separate EA reviews that cover the same ground.

2. *How to ensure decisions are based on science, facts and evidence and serve the public's interest?*

It has been suggested by proponents, EA practitioners and Crown regulators that the identification of negative effects to Aboriginal and treaty rights is "impossible" and better left to the Crown to evaluate and consider outside of the regulatory process or to be determined by Aboriginal peoples themselves. We would submit that the environmental assessment process can be, if done in collaboration with Aboriginal communities, an appropriate vehicle for identifying, assessing, consulting about, mitigating and accommodating impacts to Aboriginal and treaty rights and ways of life. To fail to provide and mandate such a process within the EA itself is a lost opportunity and risks potential impacts not being identified or adequately assessed. Ad hoc approaches to identifying, assessing, mitigating and accommodation of Aboriginal interests is not effective, and undermines the MNO's confidence in the regulatory process as well as in the Crown's ability to meaningfully discharge the duty to consult, as discussed further below.

The primary vehicle for identifying and measuring negative and positive impacts to the biophysical and socio-economic matters of interest to Canadians resulting from a natural resource project is the environmental assessment process. This process, established and managed by the Crown has a 45-year long history in Canada of considering and evaluating large scale natural resource projects and gathering predictive information on the consequences of proceeding with approval of a particular project. The process contemplates that biophysical and socio-economic valued components are identified, changes to these components are quantified and then a public debate ensues over the acceptability of the changes.

The conduct of environmental assessment processes are underpinned by the notion that a rational scientific method provides the very basis for their execution and that "in order to be credible, the [EA] process must be based on scientific objectives, modeling and experimentation, quantified impact predictions and hypothesis-testing."[1]

[1] Noble 2010: 4

Standardized EA methodology can be summarized into three (3) basic steps: selecting components for study through a credible scoping process; collecting information on those components specific to the project area and; identification of changes on those components resulting specifically from the proposed project. General EA principles should apply to these basic steps: only those components with a high probability for change resulting from the project should be studied; single project EA's are not a regional planning exercise nor are they an appropriate vehicle to identify acceptable levels of change for components; the proponent should pay for the conduct of an EA and the costs should not be borne by the public or Aboriginal nations; the EA should be free from both political and proponent interference; and opportunities for review and critique using principles of procedural fairness and natural justice are the bedrock of any EA process.

A more detailed description of the EA methodology is as follows:

1. Select Valued Components (VC) and Key Indicators (KI)
2. Select measureable parameters
3. Determine Temporal, Spatial parameters
4. Define Standards or Thresholds for Significance of change
5. Establish Baseline Conditions for VCs
6. Describe Potential Change for selected VC & KI
7. Describe Mitigation Measures to offset, manage or eliminate change
8. Determine Significance of Residual Effect
9. Cumulative Effects Analysis
10. Follow up and Monitoring, Environmental Protection Plans

Each step should be followed in a systematic and defensible manner. How each step is executed should be available for review and critique, as should the results of the assessment. This is the very basis for scientific inquiry.

The prediction of change to Aboriginal and treaty rights, interests and way of life deserves this same level of examination and consideration.

For the sake of argument, let's suppose that environmental assessment methodology is not appropriate for the identification of changes to Aboriginal and treaty rights. What process would then be used in place of EA methodology? Currently, the collection of Traditional Environmental Knowledge or Traditional Land Use information is used as a substitute or a proxy for EA methodology. Opinions or issues and concerns of Aboriginal nations about a proposed development are used as a substitute or a proxy for the use of EA methodology, as are holding meetings, conducting a site visits, or hiring archaeology assistants or monitors. These are neither defensible nor standardized methods for identifying changes to, for instance, valued components.

Including Aboriginal nations early in the scoping of environmental assessments in order to select components of study capable of accurately predicting changes to their unique rights and interests would help to ensure that the EA process can in fact inform and be relevant to the Crown consultation process. Project proponents are expected to assess all potential effects of their projects on other components of the environment in a recognized and credible manner, and effects on the rights and way of life of Aboriginal peoples should be treated no differently. The cost of assessing effects on Aboriginal nations and their rights should similarly be borne by proponents and not by those nations. Increasing First Nation, Métis and Inuit government confidence in the outcomes of the environmental assessment process will help lead to accommodation of effects to their rights, interests and way of life as part of the Crown consultation process.

EA methodology is used to predict changes on many difficult and elusive socio-economic components of public interest. Public perceptions influence the selection of components and are used to measure such changes. Predicting changes to Aboriginal and treaty rights requires input from Aboriginal nations to select appropriate and measurable parameters and indictors that can accurately describe changes to Aboriginal and treaty rights. This must and can be done.

3. *How to provide ways for Canadians to express their views and opportunities for experts to meaningfully participate?*

The principles underpinning a meaningful duty to consult process can also be used to ensure a meaningful environmental assessment process. It is unclear to what degree this review process is intended to engage with the duty to consult and its interactions and overlap with the EA process. Bearing this in mind, the MNO submits that there are broad principles from the duty to consult, as articulated by the Supreme Court of Canada which provide useful direction on meaningfully engaging with Aboriginal communities regarding their rights and interests during an environmental assessment. To date, these have not appeared to be meaningfully incorporated into EA processes. They include, but are not limited to, the following:

- provide enough time for the environmental assessment process to unfold;
- engage early with each Aboriginal nation and seek input on the structure of the process prior to its start;
- public consultation is similar, but not the same as Aboriginal consultation efforts;
- consultation must be direct and with the representatives of the Aboriginal collective;
- consultation must respect the processes of the Aboriginal nation;

- for consultation to be meaningful, accommodation cannot be disregarded at the onset;
- Aboriginal nations must be able to influence the outcome and not just 'blow off steam';
- the capacity of the Aboriginal nation influences consultation; and
- Aboriginal nations have a reciprocal responsibility to participate in consultation.

The MNO would suggest that each of these key principles be embedded within the regulatory process. Specifically, at each regulatory milestone (public disclosure, terms of reference development and approval, Environmental Impact Statement review for completeness, information requests, public hearing, panel report etc.), these consultation principles should apply. The proponent and the regulator should ask the question: "*how did the potentially-affected Aboriginal nation influence this milestone*?"

When possible, environmental assessment documents should be written in plain language to ensure that all Canadians are able to fully engage in the consultation process.

4. ***How to require project advocates choosing the best technologies available to reduce environmental impacts?***

Restoring concepts from the previous *Canadian Environmental Assessment Act,* including the need for the project; alternatives to the project; renewable resource capacity, would help to identify impacts to both biophysical and socio-economic components. Reflecting recent decisions from the Supreme Court of Canada regarding the execution of a meaningful duty to consult process should be explicitly included in the federal EA process revisions including, but not limited, to the following:

- Disaggregating information about impacts and mitigation measures for each Aboriginal nation;
- Requiring unique valued components for each Aboriginal nation involved in the environmental assessment process that reflect the unique rights held by that nation; and
- Ensuring compensable damages as a possible mitigation measure to offset impacts to rights, interests and way of life from a proposed decision.

5. ***How to ensure that environmental assessment legislation is amended to enhance the consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects?***

The MNO suggests that the following changes to CEAA, 2012 be considered to enhance consultation, engagement and participatory capacity of the MNO when the MNO is involved in an environmental assessment in respect of a major resource development project. Please note that the changes are structured to apply to Aboriginal nations across Canada and are not specific only to the MNO.

Definitions

- A definition must be included for 'Indigenous rights'
  - This could include a reference to s. 35 of the *Constitution Act, 1982* or a more defined list of Aboriginal rights.
- The definition of 'environment' needs to be explicit in including people, and interactions amongst people. This would then include Indigenous peoples' rights. This will ensure that effects on the rights of Indigenous peoples are included as a component for study in the assessment of project effects.
  - This will allow the Minister to designate, under section 14(2), projects which are not prescribed by regulation but may cause adverse effects to Aboriginal and treaty rights.
  - It would also allow the inclusion of Aboriginal and treaty rights as part of the factors to be considered under section 19(1) as components which must be properly assessed using accepted methodology.

Purpose

- Include identification of effects on Aboriginal and treaty rights to broaden the purpose of the Act beyond promoting communication and cooperation with Aboriginal peoples.

Environmental Effects

- Aboriginal and treaty rights should be classified under s. 5(1)(a) instead of separately under s. 5(1)(c)
- "Current use of lands and resources by Aboriginal peoples for traditional purposes" is an incorrect and very narrow description for an assessment of Aboriginal and treaty rights. This term should be deleted or replaced to recognize future use.
- This could be accomplished by adding the following text to section 5(1)(a): "the existing Aboriginal and treaty rights as defined in Section 35 of the Constitution Act, 1982".
- Or by adding to Schedule 2 of CEAA, 2012, Aboriginal and treaty rights as recognized and affirmed in Section 35 of the Constitution Act, 1982.

- An effect on a biophysical component of the environment (e.g., an effect on fish or moose) should not be a pre-requisite for the identification of an effect on an Aboriginal or treaty right to fish or hunt.

Environmental Assessment by Review Panel

- When review panels are struck, section 43(1) makes their terms of reference controlling.

- The Agency has previously adopted provincial standing tests into Joint Review Panel (JRP) terms of reference, and this has the potential to narrow and limit the scope of participation.

- CEAA, 2012 should be amended to make it clear that the test for standing for participation in the JRP processes cannot be narrowed or circumscribed by the JRP terms of reference.

The interaction of environmental assessment processes and the Crown's duty to consult is complex and varies from project to project, and tribunal to tribunal. Increasingly, the Crown has relied on the EA process to discharge most, if not all, of what the Crown perceives its obligations under the duty to consult. From the outset of this review process, it has been unclear whether the Committee intended to engage on whether the duty can or should be discharged through an EA process. If it is the case that the EA process is going to be the primary vehicle for discharging the duty to consult, as it seems to increasingly be used by the Crown, then a more fulsome nation to nation dialogue and collaborative process must be set up with Indigenous peoples and government such as the MNO. Such a complicated and critical issue cannot just be one of many questions dealt with in a broad and time-limited public consultation process. While the MNO hopes that its above comments related to the duty to consult assist the Committee, the MNO wishes to make clear that the MNO believes that there is a lot of work yet to be done to untangle if, and how, the duty to consult should overlap and interact with the EA process. The MNO would welcome a meaningful, collaborative dialogue specific to this crucial issue, but stresses that it must be on a nation-to-nation basis with adequate time and funding allotted to it.

The MNO appreciates your review of the preliminary comments raised herein and looks forward to completing its internal consultation process and formulating final comments for submission to the panel in February 2017.

Yours very truly,

Aly N. Alibhai
Director, Lands, Resources and Consultation Branch
Métis Nation of Ontario