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December 22nd, 2016

Johanne Gélinas,
Chair of the Expert Panel
Review of Environmental Assessment Process

Re: Mohawk Council of Kahnawà:ke Recommendations on Environment Assessment Process Review

Ms. Gélinas,

The Mohawk Council of Kahnawà:ke (MCK) welcomes the opportunity to provide input to the Expert Panel on the Canadian Environmental Assessment Act (CEAA) and agrees with Canada's goal of restoring public confidence in the Environmental Assessment process. We have now conducted a preliminary assessment of CEAA 2012 and provide the following comments to the Expert Panel.

The MCK submits these preliminary comments on our experience with CEAA and recommendations for improvements. Given the limited budget and time constraints associated with the Expert Panel's deadline of December 23, 2016, the MCK reserves the right to make additional representations at any time, including subsequent development phases. In fact, the MCK hereby formally requests additional consultation, including once a draft bill has been developed.

1. **Applicable Legal Framework**

a) **Mohawk Rights and Interests**

Before providing our comments and recommendations regarding the CEAA review, it is important to provide a brief and non-exhaustive overview of Mohawk rights and interests. These rights and interests form the basis of the important reforms that are required to the CEAA.

The Mohawks of Kahnawà:ke assert aboriginal title rights to our traditional territory, including the bodies of water on our traditional territory. Furthermore, we assert jurisdictional rights as inherent and aboriginal rights, including over the land and water resources on our traditional territory. Canada and provincial jurisdiction over land and water resources must be exercised in a manner that is compatible with the aboriginal rights, including jurisdictional rights, of Indigenous Nations. We also assert aboriginal rights related to hunting, fishing, trading, and gathering. We take our responsibility as stewards of the

land for future generations very seriously. Finally, Mohawk rights to fish for food have also been recognized by the Supreme Court of Canada[1] under Canadian law.

When considering the impact of development, the Mohawks of Kahnawà:ke base decision-making on respect for all parts of the natural world. In our language Ohén:ton Karihwatéhkwen means "the words that come before all else". It is a speech given at gatherings, schools, and the beginning and end of each day to remind us of the important responsibility we all share to ensure that the cycles of life continue. We acknowledge that every part of the natural world has importance, not only for the benefits they provide for human survival, but also for the role they play within the web of life. Any decisions taken today must consider the impact of the selected actions on the next seven generations, and our actions must reflect our responsibility to ensure that the cycles of life continue.

b) EA's, the Constitutional Duty to Consult and Accommodate and UNDRIP

According to the Supreme Court of Canada, the constitutional duty to consult and accommodate Indigenous Nations arises when "the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it[2]." What is required to uphold the Honour of the Crown will vary according to the circumstances of each case. Where the contemplated Crown conduct can result in significant adverse impacts to aboriginal rights, then accommodation will be required[3].

For the MCK, this means that Canada's consultation and accommodation requirements, under Canadian law, pertain to all projects and strategic higher level decision making that can adversely affect the aboriginal title and rights described above.

In the past few years, Indigenous participation in Environmental Assessments is one of the primary ways that the Crown has attempted to meet the legal consultation and accommodation obligations described above.

The *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*") also provides for Indigenous consultation requirements, respect for Indigenous decision-making processes/bodies and

> that States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources[4].

The Expert Panel has also flagged Canada's international legal obligations as one of the key issues to be examined. The Panel's Terms of Reference indicate that the Panel shall "reflect the principles of the Declaration in its recommendations, as appropriate, especially with respect to the manner in which

[1] R v. Adams [1996] 3 SCR 101
[2] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council [2010] 2 SCR 650
[3] Haida Nation v. British Columbia (Minister of Forests) [2004] 3 SCR 511
[4] See UNDRIP, sections 18, 19 and 32.

environmental assessments processes can be used to address potential impacts to potential or established Aboriginal and treaty rights[5]".

Firstly, Canada's s. 35 consultation and accommodation requirements (derived from s. 35(1) of the *Constitution Act (1982)*) and Canada's legal obligations under *UNDRIP* (an international human rights law instrument) are not identical. Therefore, in addition to considering *UNDRIP*, the Expert Panel needs to consider and assess the relationship between EA's and the constitutional duty to consult and accommodate. While we applaud the Panel's initiative to see how *UNDRIP* can inform the environmental assessment processes, the MCK submits that a great deal of work still needs to be accomplished regarding the use of Canada's environmental assessment processes as a means of meeting Canada's consultation and accommodation obligations to Indigenous Nations.

Secondly, EA's serve both an assessment and decision making purpose. The duty to consult and accommodate and Canada's legal obligations under *UNDRIP* need to be considered within the context of each of these components. The Panel's TOR question how "environmental assessment processes can be used to address potential impacts". The MCK submits that ensuring that correct processes are in place can ensure that potential impacts are identified, but processes alone do not ensure that potential impacts are addressed.

The addressing or accommodation of impacts to rights and interests is not only a question of process, it is primarily an outcome of decision making. Addressing potential impacts can only really be accomplished in two ways: by placing conditions on the scope of a project and on how it is carried out or by refusing a project, as appropriate. It is the MCK's experience that Indigenous participation in environmental assessment processes usually falls well short of ensuring that potential impacts on Indigenous Rights are addressed on this level.

The MCK submits that the Crown's duty to consult and accommodate, when at the very high end of the spectrum, and *UNDRIP* must be interpreted as to require Indigenous consent before certain projects are permitted to move forward. In these cases, the identification of the impacts is insufficient to meet Canada's legal obligations. The process must provide for Indigenous decision making and ultimately, it is only by acknowledging the jurisdictional rights of Indigenous Nations as a decision maker that true accommodation and reconciliation will be achieved.

We also submit that Indigenous participation in monitoring of project conditions will also rarely result in the accommodation of potential project impacts. Monitoring alone simply helps identify impacts stemming from project implementation. Some of the impacts that materialize may be irreversible and no accommodations may be possible, while in other cases, accommodation may only be achieved by carrying out of concrete measures to address impacts that have materialized.

Therefore, our comments and recommendations will not only pertain to how environmental assessments can be improved from the standpoint of Indigenous participation in processes, but also

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[5] See TOR: http://eareview-examenee.ca/panels-terms-of-reference/

with respect to Indigenous participation in decision making (establishment of project conditions and project authorization).

2. **The Purpose of EA's: the Seven Generations principle, ecosystem approach and meeting national and international commitments**

The Mohawk Council of Kahnawà:ke believes that the main purpose of an Environmental Assessment process should be to protect the foundational Mohawk principle of "Seven Generations". This principle states that any actions taken today must consider the impacts on the next seven generations and must not limit their ability to thrive. In some respects, this principle has parallels to that of Sustainable Development as defined by the Brundtland Commission in 1987[6].

To ensure this principle is respected, an ecosystem approach to evaluating impacts is necessary and EA must encompass planning at the strategic, regional and project levels. These three levels of assessment may be led and reviewed by different levels of government or private sector actors, as appropriate, but the federal government must play a central role in standardizing how these instruments are completed. This can only be accomplished by modifying how Canada undertakes the review and screening of individual projects as discussed below.

Furthermore, the MCK firmly believes that adopting an ecosystem approach is the only way in which environmental assessment processes can be used to fulfill Canada's constitutional consultation and accommodation requirements. The current project specific processes do not adequately identify, address and accommodate potential project impacts on Indigenous rights and interests.

We also believe that the international and national commitments made by Canada must be respected within the EA process. The EA process is an ideal vehicle for transforming Canada's words into concrete actions, or at the least, should be a tool to evaluate how a specific project compares with the commitments of the government. Federal commitments could also be considered within the lens of a Strategic EA to evaluate the impacts of these commitments prior to their implementation. This would provide a venue for Indigenous and public consultation in the aspirational goal setting of the government.

3. **Types of EA's and their triggers**

As outlined above, an ecosystem approach to evaluating impacts is necessary and Environmental Assessment must encompass planning at the strategic, regional and project levels in order to ensure that Indigenous Rights and interests are fully considered prior to projects being approved.

Role of Strategic EA (SEA) – SEA's assess how sustainability can be achieved at a jurisdictional level through the development of legislation and policies. These must be developed and implemented in

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[6] "Sustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future." Report of the World Commission on Environment and Development: Our Common Future, 1987 http://www.un-documents.net/our-common-future.pdf

collaboration with Indigenous Nations and the population at large. The Crown's duty to consult and accommodate will apply to all SEA's that will have a potential adverse effect on Indigenous rights, since the Crown's duty applies to strategic higher level decision making[7].

Role of Regional EA (REA) – REA's determine the ecological features of a region, typically defined by a geographical boundary such as a watershed and develop a vision for the future of the region to ensure long-term sustainability. Sustainable development opportunities are assessed while respecting any applicable SEAs. Decisions must be based on western and Indigenous science while establishing criteria and constraints for specific projects to respect moving forward. REA's should also establish protected areas that are essential for environmental or social processes. The Crown's duty to consult and accommodate will apply to all REA's that will have a potential adverse effect on Indigenous rights, since the Crown's duty applies to strategic higher level decision making[8].

Role of Project Level EA (PEA) – The objective of a PEA should be to take the goals identified in the REA and move them towards implementation. The PEA should evaluate a series of alternatives for meeting the identified REA goal and select the one that minimizes impacts and ensures sustainable development. The Crown's duty to consult and accommodate will apply to all projects that have a potential adverse effect on Indigenous rights.

MCK recognizes that different jurisdictions are involved in various categories of EA and as such a collaborative approach between federal, provincial and Indigenous governments are required to ensure the seven generations principle is maintained. In general, the MCK supports the views advanced by West Coast Environmental Law on the subjects of federal jurisdiction, multijurisdictional cooperation and the triggering of regional, strategic and project EA's[9].

More specifically, the MCK believes that the federal government should be responsible for developing guidelines for the execution of Strategic and Regional EA's. We also support the view advanced by West Coast Environmental Law that Canada does have the jurisdiction to proceed with and trigger SEA and REA's, even in situations where collaboration with provinces cannot be achieved. From an Indigenous perspective, federally mandated SEA and REA's are especially important given that ecosystems, and the rights of Indigenous Nations that may be impacted transcend provincial boundaries.

In order to ensure that these essential SEA and REA's are considered at a project specific level, the federal government must restore the triggers that initiated a CEAA project review that were removed in CEAA 2012. An initial screening is critical to the efficient operation of the Agency. Screening should consider Strategic and Regional EA's completed and will assist with parameter setting for the project level EA. If no SEA and / or REA exist to support the project EA, the level of investigation required by the Agency should be more involved and could include the necessity for a Regional Level EA.

[7] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council [2010] 2 SCR 650

[8] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council [2010] 2 SCR 650

[9] http://www.eareview.ca/wp-content/uploads/uploaded_files/dec.12-09h55-anna-johnston-west-coast-environmental-law-preliminary-written-submission-and-supporting-documents.pdf

It is to the benefit of the provinces and project proponents to work proactively to develop SEA's and REA's to inform the project specific EA process and ensure the interests of Indigenous Nations and all Canadians are appropriately assessed versus the narrow economic interests of the project proponent. MCK believes that projects that wish to proceed in advance of SEA or REA planning must be subjected to a more rigorous screening that incorporates aspects of this higher level input. Clear protocols must be established to outline the necessary steps that must be completed in a general sense and an evaluation by the Agency for project specific requirements should also be included.

4. MCK experience with CEAA 2012

a) Insufficient and Inconsistent Application of Federal EA's

Given the relatively recent changes to CEAA, MCK has had limited experience with EA's undertaken since the 2012 modifications have been in effect. Of projects reviewed by MCK, we have noted that many have not qualified for a federal Environmental Assessment, despite demonstrable impacts to the environment. The MCK has also noted inconsistency in the application of the legislation, with some projects being subjected to federal EA requirements and other very similar projects being deemed not to require a federal EA.

Numerous port projects in Quebec along the St. Lawrence River demonstrate these discrepancies. Of five projects that MCK is aware of, two are expansions of existing ports and therefore do not qualify, one is a new port that is undergoing a federal EA, and two others have been deemed to be too far from the community to warrant our engagement. The system used to determine when Kahnawà:ke's interests are potentially impacted was entirely inappropriate. Despite the fact that the impacts associated with all of these projects are similar and will lead to enhanced shipping traffic and the loss of fish habitat, MCK has been engaged in a variety of different ways and to different extents.

b) EA's do not fulfill their purpose

The current federal EA process does not adequately consider the environment or social matters. Environmental and social matters are treated as nuisance issues by proponents who have the goal of demonstrating that "no significant impacts" occur as a result of their projects.

The elimination of the need for the evaluation of various alternatives including not proceeding with the project has removed an important rationale for conducting the EA. Without the opportunity to compare and contrast alternate proposals for achieving project goals, the proponent can pre-select the most cost-effective, most straight-forward, or simply the first option that was thought of, without requiring a comprehensive reflection on other ways of achieving the same objective. The public is left evaluating a single option and is expected to accept the view of the consultant hired by the proponent on the level of impact on each social and environmental aspect of a project without being able to review comparative harm. It should not be the responsibility of the public-at-large to present and evaluate alternatives on the proponent's behalf.

c) Problems with EA Screening

MCK understands that it is not practical for every project to undergo an intensive environmental assessment. However, MCK strongly objects to the approach taken in CEAA 2012 that simply eliminated broad classes of projects from any EA consideration and limited the scope of EA to consider impacts on a small subset of the environment. Projects should be evaluated based on their scale and level of impact or potential impact. MCK believes various categories of EA could be established based on an initial analysis of a given project which would then define the process to be followed.

However, the establishment of screening criteria must be developed jointly by Canada and Indigenous Nations and Canada's constitutional duty to consult and accommodate Indigenous Nations must not be diminished as a result. Screening criteria should consider the specific project proposal but also the context within which the project is proposed i.e. whether a regional EA has been completed. Finally, an appeal process is required to allow Indigenous Nations or the public to appeal the screening level determination. Previously, individuals could request a "bump-up" to a federal EA if a project was evaluated by a provincial or regional entity. A similar procedure could be used to request a "bump-up" consideration at the initial planning stages of the EA.

d) Specific Examples

Quebec Port Expansion – Beauport 2020

MCK is currently involved in the early stages of a federal EA review process for a port expansion in Quebec City, designated when the proponent chose to voluntary submit to the federal EA process. MCK has the following observations with respect to the process to date.

While MCK applauds the decision to undertake the EA, we note that a private proponent would be unlikely to take a similar approach. In our preliminary review, MCK has identified numerous troubling issues with relation to the project, particularly with respect to impacts to fish habitat, impairment of navigation and community safety. Without a partner willing to submit to a federal EA, the status of any MCK involvement in the project would be in question.

Secondly, once the federal EA process began, Kahnawà:ke was not initially considered a "community of interest" because of the distance from "reserve" lands to the project location. Proximity from "reserve" land to a project site is often used as a basis for engaging in consultation; however this approach is seriously flawed. The necessity for engaging in consultation must be based on the potential project impacts on our aboriginal rights and title, thus more accurately identifying areas that could impact the Mohawks of Kahnawà:ke. In this case, a DFO representative noted that the project could impact fish migrating upriver. These fish pass by Kahnawà:ke's "reserve lands" and it is was for this reason that it was suggested that MCK be contacted. Unfortunately, by the time we were notified we had missed an opportunity to consult on the EA Terms of Reference thus limiting our engagement on this aspect of the project.

Thirdly, MCK notes that the project proponent and government are primarily concerned with information related to fishing locations, quantities fished and other specific locations used for the hunting and gathering. While fishing does still occur by the Mohawks of Kahnawà:ke throughout the St. Lawrence River, MCK does not believe that active fishing should be the sole impact determinant. MCK notes that the construction of the St. Lawrence Seaway had serious detrimental impacts to the community and the ability to easily access the St. Lawrence River for fishing opportunities. Some community members are also afraid that pollution in the river is poisoning the fish and therefore do not consider them safe to eat. These factors have reduced the amount of fishing that currently occurs on the river. While there are still many active fishermen, MCK notes that this number is steadily increasing as the importance of culture and traditional practices are again being recognized and promoted. Further impacts to the fishery resulting from increased industrial development will hamper these efforts and we do not believe it is appropriate to consider a snapshot in time as a rights determinant.

Fourthly, consideration of cumulative effects by the proponent appears to be required on a summary basis only. MCK was informed that we would have to be 'creative' if we wished to have the cumulative impacts of the hundreds of increased ships passing through our community via the Seaway considered in the project; however this is one of the most significant impacts associated with an increased number of ports. Every ship that passes the community creates dangerous conditions in the water (particularly for those swimming nearby), reduces access to a portion of the community (as a result of operation of a lift bridge), inhibits navigation, and erodes the small remnant of natural shoreline that exists in Kahnawà:ke. A comprehensive consideration of the additional number of vessels passing by Kahnawà:ke both as a standalone consideration and in conjunction with the expected increase in vessels due to numerous projects is required to appropriately assess the impact on the Mohawks of Kahnawà:ke. This issue highlights the need to undertake SEA and REA prior to consideration of a PEA.

Finally, MCK notes that the EA process is currently on-hold as the proponent has been unable to produce sufficient information to meet the minimum standard of a complete submission. Fortunately for the proponent, the EA process allows them as much time as required to complete submissions and respond to questions. Those reviewing the projects do not receive the same considerations. Currently the Port 2020 project is almost one year behind schedule, but once the EIA is accepted, MCK will still have just thirty days to review the documentation and respond to the significant amount of information provided. Beyond the unacceptability of the timeline, MCK further notes that without any forewarning of when the material will be submitted it is very difficult to plan in such a way as to have sufficient resources available when the Environmental Impact Statement is received. We have already had two "false alarms" on this project and staff have no choice but to juggle competing demands to the extent possible once a report is issued.

Energy East Pipeline project

Another current experience with the precursors of an environmental assessment is the work that has been prepared by TransCanada for the Energy East pipeline project. While the actual EA has been put on hold for the time being, MCK has the following observations on the project to date.

With respect to process, MCK has concerns that the EA process is being led by the National Energy Board (NEB). The NEB is responsible for reviewing the project application in its entirety and the inclusion of the EA in their scope has led to confusion concerning roles and responsibilities. Additionally, it appears that with NEB considering the EA, the scope has been limited to consider only those issues already identified through the NEB hearing process. As such, issues such as contribution to upstream greenhouse gas emissions from the project are not considered and a holistic approach to EA is discarded. It is also unclear how the process will be implemented within the scope of the hearing. The timelines for the EA appear scheduled to run in parallel with those of the NEB hearing process, thus limiting the opportunity for intervenors to use the findings of the EA to assist in their interventions in front of the Board. Given the size and scope of this project, the timelines proposed for review of both the EA and the overall regulatory review of the necessity of the project by the NEB simply are not realistic. Finally, MCK does not believe that the Board is sufficiently removed from the issues inherent to the regulatory review to appropriately review and assess the Environmental Assessment.

Secondly, MCK has concerns with the engagement approach used in this project. In this case, the proponent was left largely responsible for engaging with Indigenous communities. While funding was offered for environmental impact studies and Traditional Land Use studies, the scope of these studies was extremely limited both in physical land area considered and also in monetary value offered to complete the work. Additionally, many communities including MCK were not comfortable accepting money from the proponent given the perceived conflict of interest engendered by this approach. We were further discomforted by the possibility of sensitive data being transferred to the proponent.

Finally, the Environmental Impact Statement submitted by TransCanada follows a familiar pattern. A consultant conducts a stand-alone assessment of species and habitats, identifies standard mitigation measures that should be employed, and then provides an expert opinion that states that the project, with mitigation measures will have "no significant impact". In this case, the construction of a 4,500 km pipeline through half of Canada and a wide variety of habitats. It is intuitive that this project will have significant impacts not just on one or two habitats of special concern, but on many local ecosystems and the communities that rely on these ecosystems. The "no significant impact" statement is held up to justify the lack of compensatory wildlife creation projects or benefits for affected Indigenous Nations. Impacts must be assessed with consideration for local communities and the ramifications of the impacts accepted and honestly discussed within the EA process.

5. Specific recommendations

The MCK has the following specific recommendations to make which take into account: 1) our Indigenous rights and title; 2) the Seven Generations principle and ecosystem based approach to environmental assessments; 3) Crown consultation and accommodation obligations and *UNDRIP*; and 4) the specific shortcoming and challenges that we have experience with CEAA 2012:

With respect to the exercise of decision making authority (project conditions and approvals that are based on environmental assessments)

1) The legal obligations stemming from the Crown's duty to consult and accommodate and *UNDRIP* must be considered by the Panel with respect to how environmental assessment processes are used as a means to discharge these legal obligations.

2) Clear, established protocols should be established and followed for all federal consultation. MCK notes that the federal government has made some progress on this front with respect to notification and engagement. We continue to have concerns with timelines, funding and incorporation of Indigenous input in decision making.

3) Where projects impacts are identified, it is insufficient for environmental assessment processes to provide Indigenous Nations with opportunities to identify concerns or to provide them with an opportunity to participate in the monitoring of impacts. Indigenous Nations must have the opportunity to exercise their jurisdictional rights, including the right to impose project conditions or refuse projects when appropriate. The MCK does not propose a specific model for this at this time; however, we are available and interested in participating in additional consultation on how this can be achieved.

4) Whenever monitoring of project related impacts does occur, there should be Indigenous participation in monitoring activities and further opportunity for binding conditions to be placed on proponents to compensate or remediate the impacts that are identified.

5) CEAA 2012 eliminated the need to evaluate alternative options for achieving a project objective and does not provide for the evaluation of a 'do nothing' option. This approach does not provide Indigenous Nations or the public at large sufficient information to appropriately evaluate whether the environmental and social impacts associated with a project are justified. Projects presented tend to be based on the least cost option with cost considerations stemming solely from those costs borne by the proponent. Restoration of multi-option evaluation is required to allow for a thorough examination of all possible project iterations.

With respect to Strategic and Regional Environmental Assessments

6) Strategic and Regional Environmental Assessment are required in order to properly assess adverse and potential adverse impacts on aboriginal rights and title. These assessments pertain to higher level strategic decision making and Canada has a duty to consult and accommodate Indigenous Nations in the elaboration of these assessments.

7) Whenever possible, a collaborative approach with the provinces should be prioritized. However, Canada has the jurisdiction to proceed with and trigger SEA and REA's, even in situations where collaboration with provinces cannot be achieved. From an Indigenous perspective, federally

mandated SEA and REA's are especially important given that ecosystems, and the rights of Indigenous Nations that may be impacted transcend provincial boundaries.

8) In order to ensure that these essential SEA and REA's are considered at a project level, the federal government must restore the triggers that initiated a CEAA project review that were removed in CEAA 2012. An initial screening is critical to the efficient operation of the Agency. Screening should consider Strategic and Regional EA's completed and will assist with parameter setting for the project level EA. If no SEA and / or REA exist to support the project EA, the level of investigation required by the Agency should be more involved and could include the necessity for a Regional Level EA.

With respect to ensuring that projects are subject to Environmental Assessment

9) Regulations Designating Physical Activities"[10] created as part of CEAA 2012 led to the arbitrary assignment of projects that qualify or are exempt from the EA process. This approach incentivizes projects that approach, but do not exceed, these thresholds and leads to decision making based on project description rather than potential impacts to the environment. MCK does not support this approach to decision-making. Each project presents individual challenges and should be evaluated on their specific merits. MCK supports the creation of various levels of intensity of EA assessment including designating projects that do not require federal EA. We believe these decisions should be based on level of potential environmental and social impact and classification decisions should be subject to public review. One important consideration for classification is the completion of Strategic and / or Regional EA's. The implementation of regionally based planning will allow for the identification of the types of projects that are acceptable for the environment and local communities. Project EA's that follow within the parameters established by higher level EA's should be able to proceed within a simplified review framework.

10) CEAA 2012 limited federal Environmental Assessments to areas under federal jurisdiction.[11] This approach serves to limit projects that require federal EA and limits the effectiveness of EA's that are required by prioritizing certain species and habitats while discounting impacts on others. MCK strongly believes that an ecosystem approach to environmental assessment with the goal of protecting the interests of the next Seven Generations is necessary to ensure the long-term sustainability of our resources and environment. Ecosystems do not respect jurisdictional boundaries and as such a collaborative management approach is necessary.

With respect to ensuring that assessments are adequately carried out

11) MCK notes that governments and project proponents often cite delays in project review as rationale for eliminating or streamlining regulatory processes. MCK contends that these challenges can be addressed by ensuring that EA agencies have sufficient staff to carry out their

[10] http://laws-lois.justice.gc.ca/eng/regulations/SOR-2012-147/index.html
[11] http://www.ceaa.gc.ca/default.asp?lang=En&n=16254939-1

mandated responsibilities. Funding must be sufficient to ensure that Canada not only has strong laws on environmental protection, but that these are also enforced. Administration of programs must occur within a reasonable timeline, while understanding the inherent complexity of environmental issues and the need for appropriate consultation. Project specific issues must be considered when assessing timelines.

12) Environmental Assessment must consider both existing and historic conditions when determining environmental impacts. In many cases, Indigenous Nations are penalized for not sufficiently "using" resources to warrant a determination of social impact. This approach fails to recognize historic industrial and cultural pressures that have been placed on Indigenous Nations and the resources that were historically harvested. In many cases, efforts are being made to restore and regain the use of traditional territories. Furthermore, with this approach, asserted Aboriginal title rights are almost always ignored and seen as irrelevant. Environmental Assessment that considers a 'point-in-time' as the basis for decision making fails to recognize the importance of these efforts and the scope of Indigenous rights.

13) Rationale for the determination of 'no significant impact' must be formalized. This determination is often based solely on the opinion of a hired 'expert' and is highly subjective. Oftentimes geographic or temporal scale is used to justify this finding i.e. comparing the lost habitat to that available in the province, the country or even the world or the duration of impact is 'only' five, ten, twenty years. This approach fails to recognize the importance of these habitats to local populations. The 'no significant impact' finding also eliminates the need for any compensatory measures to offset harms. A procedure to quantify how significant impacts are determined would help standardize the EA process and facilitate review by the public. MCK favours elimination of the 'no significant impact' finding in place of 'no, low, medium or high impact'.

14) Additional Indigenous involvement is required within all aspects of EA including post-approval construction, operating and project monitoring. Consultation on on-going engagement, monitoring strategy, compensation project design and implementation and the incorporation of Indigenous knowledge must be prioritized. Indigenous knowledge must be weighted similarly to scientific investigation and both should be considered expert knowledge.

15) Social aspects of environmental assessment are often haphazardly addressed. Proponents must be involved in consultations but the process must be led and facilitated by the Crown. Many Indigenous Nations are unwilling to except funding or even engage with proponents. There must be recognition of the historic loss of trust with Indigenous Nations and measures implemented to attempt to rebuild these relationships.

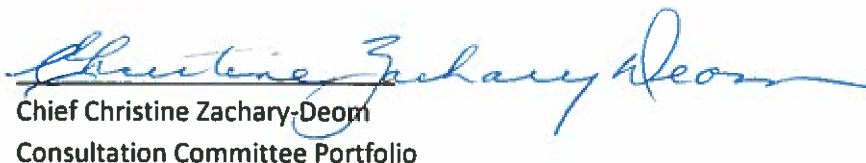
16) Environmental Assessments are often multi-jurisdictional. Coordination between Federal, provincial and Indigenous governments is required to ensure that all aspects are appropriately considered. Dialogue between federal and provincial officials is often confused or non-existent.

If EA's are downloaded to provincial, municipal or quasi-government agencies, the issue of Crown consultation obligations must be addressed.

6. Next Steps

The MCK looks forward to continued participation in the process to update and improve the Canadian Environmental Assessment process. We anticipate opportunities for consultation on proposed legislative changes and encourage the Expert Panel to recommend that Canada incorporate the proposals outlined above in the spirit of Nation to Nation collaboration. Finally, we note the interrelatedness between the various pieces of legislation currently under review in addition to CEAA 2012, including the Fisheries Act, Navigation Protection Act and the National Energy Board Act. A holistic approach that considers the many interactions between these instruments is appropriate and necessary to maximize the benefit of the review process and we anticipate that synergies between these Acts will be considered in the enhancement process. To that end, we encourage the Expert Panel to review this current submission in conjunction with MCK submissions provided on the other Acts to develop a more comprehensive understanding of the position of the MCK.

Sincerely,



Chief Christine Zachary-Deom
Consultation Committee Portfolio