MISSISSAUGAS OF THE NEW CREDIT FIRST NATION
DEPARTMENT OF
CONSULTATION AND ACCOMMODATION

May 24, 2019

To Whom it May Concern:

The Mississaugas of the Credit First Nation ("MCFN") submits the following comment in respect of the amendments to the *Environmental Assessment Act*, R.S.O. 1990 that are being proposed in Bill 108, *More Homes, More Choice Act, 2019*.

MCFN has grave concerns regarding these amendments. In our view, these amendments will result in reduced transparency in respect of activities that are being done on our lands and within our Territory (and the impacts associated with those activities) if said activities fall under the umbrella of a "Class Environmental Assessment". This will compromise MCFN's right and responsibility to protect the environment and productive capacity of its lands, Territory and resources.

MCFN is also of the view that the proposed changes appear to be in support of the creation of a regime in which triggers for the Duty to Consult and Accommodate may be removed. This cannot be permitted.

MCFN will discuss these concerns in its comments below.

MCFN Rights and Territory

MCFN's traditional territory spans from Long Point on Lake Erie to the Niagara River, then down the River to Lake Ontario, northward along the shore of the Lake to the River Rouge east of Toronto then up that river to the dividing ridges to the head waters of the River Thames then southward to Long Point, the place of the beginning (the "Territory"). It is a vast territory over which MCFN has a stewardship responsibility.

MCFN asserts Aboriginal rights not only to continued use of the lands, waters, and watershed ecosystems within its Territory for a variety of livelihood, harvesting, ceremonial and spiritual purposes, but also specifically asserts an Aboriginal right to protect the integrity of the environment, and the lands and resources, within its Territory, including archeological resources. This right is not only inherent, but is protected under Article 29 of UNDRIP.

The MCFN Territory is perhaps the most highly urbanized land in Canada. Unfortunately, much of this development took place at a time prior to the articulation by the Supreme Court of Canada of the Crown's Duty to Consult and Accommodate Indigenous communities ("DTCA"). MCFN was not consulted prior to the vast preponderance of the development that has taken place on its Territory.

The MCFN formally claimed unextinguished Aboriginal title to all water, beds of water, and floodplains in our traditional territory in 2016. Water within the traditional territory of the MCFN was never surrendered by the MCFN or its ancestors. As a result, MCFN continues to have unextinguished Aboriginal title to all water, beds of water, and floodplains in its traditional territory. It is important to note that this is an Aboriginal Title Claim, not a Treaty rights claim.

The Proposed Amendments

The amendments proposed in Bill 108 that MCFN has particular concerns with include the following:

1. *Exemptions of projects from Environmental Assessment*. The proposed new section 15.3 would allow for specified categories of projects to be exempt from Class Environmental Assessments ("EAs"), meaning that they would be granted virtually automatic approval, requiring no further actions in terms of environmental assessment. This means that municipal water and wastewater management projects, projects relating to minor improvements to water crossings; establishing (or eliminating) a new provincial park or conservation reserve; projects involving maintenance work relating to bridges and culverts, ditches, storm sewers, and storm water management facilities, will all be exempt from Class EAs.

   The new section 15.4 also allows the Minister to amend Class EAs if satisfied that the amendments are consistent with the purposes of the Act and are in the public interest. This includes the ability to exempt other projects or undertakings from the Act by amending the Class EA. The only conditions that placed on the Minister with respect to making these amendments is that he or she must ensure that adequate public notice is provided, and that members of the public have an opportunity to comment.

2. *Part II Orders requests.* The proposed amendments to section 16 of the Act relate to Part II Order requests. Part II Order requests, if granted, require that a higher level of assessment be done on a project through an individual EA, and receive Ministerial approval before it can go ahead. The new, proposed amendments provide that a Part II Order can only be requested and/or granted in two circumstances: first, if the Order can prevent, mitigate, or remedy adverse impacts on "*existing* Aboriginal or treaty rights of the Aboriginal peoples of Canada" (emphasis added), and second, where it is "a matter provincial importance" (the new section 16(4.1)).

Impact of the Proposed Amendments

From MCFN's view, First Nation participation should be considered in all Environmental Assessments, but it is not clear in the amendments where and how such participation will take place. The projects that will be exempt from Class EAs may be "low risk" to most Ontarians, but they could involve potentially very high risks or impacts to MCFN, especially in respect of archeology.

For example, municipal water and waste water projects, or the creation of a new park or conservation reserve, have the potential to have significant impacts to culturally and archeologically sensitive areas – so much so that when these projects are taking place within MCFN's Territory, MCFN ensures that its Field Liaison Representatives (FLRs) are out there as this work is being done, to ensure that it is being done in a respectful way. Under the proposed new EA regime, however, these projects would proceed without assessment, and potentially without appropriate and meaningful consultation and accommodation of MCFN.

In addition, and as mentioned above, the amendments relating to Part II Order requests provide that such orders will only be granted in circumstances where an Order "may prevent, mitigate or remedy adverse impacts on the *existing* aboriginal and treaty rights of the aboriginal peoples of Canada" (emphasis added). This suggests that a MCFN may only be able to request a Part II Order if that request is related to impacts on rights that have been proven to "exist" in a Canadian court. It is our view, as we will set out in more detail below, that in neglecting to provide for "asserted" Aboriginal and Treaty rights, the proposed process may be constitutionally deficient.

MCFN Recommendations

The law provides that Environmental Assessments and other like regulatory processes can be a way in which the Crown meaningfully discharges its constitutional Duty to Consult and Accommodate First Nations.[1] The proposed amendments, however, will result a number of activities being exempt from

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environmental assessment. This concerns MCFN, as these amendments will in effect, and if passed, remove potential triggers for the Duty to Consult and Accommodate. The law however also provides that the Crown cannot "delegate away" the constitutional duty.[2] MCFN would therefore like to know how the Crown of Ontario – in particular, the Ministry of the Environment, Conservation and Parks – intends to discharge its constitutional Duty to Consult and Accommodate in respect of projects that will be exempt from environmental assessment, in the event that these amendments are passed.

In respect of Part II Orders, when referring to the grounds upon which a Part II Order can be requested and/or granted, the language in the proposed amendments must be revised to include reference to "asserted" Aboriginal and treaty rights, in addition to "existing" Aboriginal and treaty rights. The Duty to Consult and Accommodate is a constitutional duty, and exists to protect impacts to both existing and asserted rights. This country's courts have made it clear that the Duty to Consult and Accommodate lies upstream of any legislation.[3] To have otherwise would render the legislative regime unconstitutional.

In addition, MCFN is of the view that specific language should be incorporated into the proposed amendments that would provide for a mechanism that would allow a First Nation to request that a specific, individual EA be completed, if and where it can be demonstrated that a project or undertaking will or has the potential to adversely impact a First Nation's rights, lands, and/or resources.

Last, where the Minister is contemplating amending a Class EA, there should be specific language in the Act that requires not only public notification and consultation, but also consultation with First Nations. First Nations are not merely another stakeholder, and public consultation is not the same as the consultation that is required under the constitutional Duty to Consult and Accommodate.[4] There should be clearly defined mechanisms and processes to ensure municipalities and proponents consult with and accommodate MCFN. What is more, MCFN is of the view that amendments should include reference to the provision of capacity resources for First Nations to participate in consultations, particularly if a project is within the vicinity of the community (reserve) boundaries and/or the boundaries of the First Nations traditional territory.

In addition to the above recommendations, MCFN would like to put to the government of Ontario the following questions, and requests a response to each:

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[1] See for example *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, 2004 SCC 74 (CanLII), <http://canlii.ca/t/1j4tr> at para 40.

[1] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 (CanLII), <http://canlii.ca/t/1j4tq> at para 53.

[1] See for example *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (CanLII), <http://canlii.ca/t/flkdx>, at para 106; *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 (CanLII), <http://canlii.ca/t/2df7v> at para 48; *Halfway River First Nation v. British Columbia*, 1999 BCCA 470 (CanLII), 64 B.C.L.R. (3d) 206 at para 177.

- Where are the Environmental Assessments for Water & Energy/Electricity Transmission projects, and why are these not included in the Environmental Assessment review process?
- Why are there no provisions for early involvement in the Environmental Assessments at the Environmental Impact Statement stage, when the EA is being defined?
- Will the regulatory agencies consult on the permits, authorizations or other approvals in the Environmental Assessment processes?
- What and where are the performance standards for Environmental Assessments, and how is this reported on?

Regards,

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