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**Provincial Land Use Plans Branch
Ontario Ministry of Municipal Affairs and Housing
13th Flr, 777 Bay St. Toronto, ON M7A 2J3**

Delivered by email to: growthplanning@ontario.ca

RE: ERO 019-8462 – Review of proposed policies for a new provincial planning policy instrument

Introduction

The Kee:Way First Nations Heritage and Burials Working Group (“Kee:Way”) and the Chiefs of Ontario (“COO”) submit the following comments and recommendations as part of the public participation process for the Government of Ontario’s **ERO 019-8462: Review of proposed policies for a new provincial planning policy instrument (ERO 019-8462)**. We note that Ontario did not implement any of the comments submitted in the previous comment period for ERO 019-6813. These were small changes that would have had a big impact for First Nations. That said, we are submitting our initial comments for reconsideration in the comment period for ERO 019-8462.

Executive Summary

Kee:Way respectfully submits that the proposed actions of Ontario under ERO 019-8462 will give rise to serious harms with respect to the rights of First Nations peoples and communities, First Nations treaty rights, and that such actions towards First Nations funerary remains and related objects are not consistent with Ontario and Canada’s legal obligations regarding the protection of the rights of First Nations. The Crown’s legal obligations are based upon domestic and international law.

In its current proposed form ERO 019-8462 offers no definition, direction, protection, or management with regard to the respectful and dignified treatment of First Nations remains, related funerary objects, sacred and cultural artifacts, and any other objects of cultural patrimony belonging to First Nations. Simply put it is silent on all fronts – silent definitions with respect to First Nations, First Nations traditional, ancestral and treaty

territory, and it fails to specify objectives, process, and enforcement in regard to the subject matter.

In Ontario, there is no positive law, regulation or enforcement mechanism that imposes a strict standard on land developers or provincial bodies to address the issue of First Nations funerary remains and related objects. Ontario's response is a patchwork of policies and in this regard ERO 019-8462 continues the practice. Much of the decision-making at the point of contact occurs at the discretion of the developer and the patchwork policies within the planning and permitting process leaves mandatory consideration with regard to the rights of First Nations in the Ontario region.

PPS 2024: No protection, no enforcement, no mechanism for First Nations

By way of background, the Proposed Provincial Planning Statement, 2024 ("PPS 2024"), specifies the mission of the proposed review process. The preface at page five reads in part:

The Province is now seeking input on an updated proposed Provincial Planning Statement, with new and updated policies supporting increased intensification (e.g., around transit and, redevelopment of low-density commercial plazas and strip malls), scoping protections for employment areas, and promoting a range and mix of housing options, including housing for students and seniors .

PPS 2024 will have a direct impact on development planning and land use in the Greater Golden Horseshoe (GGH), the Greenbelt Plan, Oak Ridges Moraine Conservation Plan, and the Niagara Escarpment Plan. PPS 2024 is intended to streamline and quicken the pace of residential permitting and construction. Likewise, it plays a pivotal role as precedent setting policy-making and will influence land use planning standards across Ontario pursuant to the *Planning Act*. Moreover, the GGH covers a vast area of First Nations treaty territory.

The treatment of First Nations archaeological, burial, and sacred sites, including the protection of such sites is absent in PPS 2024. First Nations are not defined or referenced and PPS 2024 does not define an indigenous community in Ontario. The Province announced revisions in PPS 2024 and it is notable that the definitions were again silent.

For example, at page fifty-six PPS 2024 identifies twenty-nine key municipal and metropolitan areas within Ontario that are the focus of development. These designated large and fast-growing population centres are located on First Nations treaty territory (see Appendix 1 and 2).

Kee:Way and COO concerns and objections to PPS 2024

The concerns and objections by Kee:Way to ERO 019-8462 and PPS 2024 are as follows:

- PPS 2024 omits reference to the following terms of reference:
 - (a) First Nations, First Nations rights, First Nations treaty rights, First Nations funerary and or human remains, First Nations Ancestral territories, First Nations cultural and or spiritual artifacts;
- PPS 2024 does not reference reconciliation a basis for First Nations-Crown consultation. Ontario courts have recognized reconciliation and it is appropriate when considering First Nations funerary remains and cultural objects in the course of Ontario's reform to land use and permitting on First Nations treaty lands.
- **First Nations have a right to be defined in accordance with their traditional, ancestral, and treaty territory.** First Nations are not a mere plurality of "indigenous communities". First Nations have (a) treaty territory and (b) traditional as well as ancestral territory. These latter categories of territory will include buried and or submerged remains and objects that fall within First Nations patrimony. These categories recognize the territorial consequences European settlement had upon First Nations. Examples of this occur within GGH in light of the traditional and ancestral territories that subsequently changed following the establishment of British North America and the events surrounding the American Revolutionary War. Haudenosaunee and Anishinaabe ancestral sites overlap within GGH. Likewise specific First Nations communities were relocated to reserve lands and were forced to leave behind their patrimony within their ancestral territory.

In this respect, Kee:Way strongly opposes the terms of reference and implications contained in section 4.6 Cultural Heritage and Archeology. Accordingly, section 4.6 ought to be revised to include the following:

1. Protected heritage property, which may contain built heritage resources or cultural heritage landscapes, shall be conserved. **This includes First Nations protected sites within their ancestral and territorial boundaries as well as their treaty territory.**
2. Planning Authorities shall not permit development and site alternation on lands containing archeological resources **and** or areas of archaeological potential unless the archaeological resources have been conserved. **This subsection requires the agreement of affected First Nations communities and applies to both traditional, ancestral, and treaty territory.**

...

5. Planning authorities **shall consult with First Nations communities throughout the development proposal and permitting process. Agreement with the affected First Nations community is required to fulfil the goal of identifying, protecting and managing archaeological resources, built heritage resources and cultural heritage landscapes that are within the patrimony of the First Nations. This includes permitting within traditional, ancestral, and treaty territory of the impacted First Nation.**

- PPS 2024 makes no attempt to provide a process for the respectful and dignified treatment and return of First Nations funerary remains, related objects and sites, and artifacts. This omission results in a failure by Ontario to empower First Nations and development stakeholders to pursue early resolution and a plan of action. Likewise, the same objection is raised with respect to the lack of an enforcement mechanism to protect First Nations rights.
- Kee:Way objects to PPS 2024 and a land development process that will cause irreparable harm to First Nations well-being and First Nations identity via the destruction and harm to their ancestral and patrimonial linkages. First Nations well-being includes physical, mental, and spiritual well-being in the context of respectful and dignified treatment of First Nations ancestors and related artifacts.
- An example regarding the discretionary approach of PPS 2024 is in the last paragraph of preamble, starting at the very bottom of page:

The Province's rich cultural diversity is one of its distinctive and defining features. Indigenous communities have a unique relationship with the land and its resources, which continues to shape the history and economy of the Province today. Ontario recognizes the unique role Indigenous communities have in land use planning and development, and the contribution of Indigenous communities' perspectives and traditional knowledge to land use planning decisions. The Province recognizes the importance of consulting with Aboriginal communities **on planning matters** that may affect their section 35 Aboriginal or treaty rights. **(emphasis added)**

- Kee:Way submits that the Crown's duty to consult is determined by the nature of the First Nations' right at issue. Respectfully, the undignified treatment and removal of First Nations ancestors without any comprehensive consultation process is not merely a "planning matter" but directly impacts the integrity, well-being, and identity of First Nations peoples.
- Kee:Way asserts that consultation must be meaningful and comprehensive. For example, PPS 2024 excludes First Nations perspectives and participation in the development assessment of a natural heritage system. Defining permissible development within NHS does not include consideration First Nations treaty

rights nor does it provide for consultation with respect to First Nations generally. PPS 2024 reads at page forty-eight:

Natural heritage system: means a system made up of *natural heritage features and areas*, and linkages intended to provide connectivity (at the regional or site level) and support natural processes which are necessary to maintain biological and geological diversity, natural functions, viable populations of indigenous species, and ecosystems. These systems can include *natural heritage features and areas*, federal and provincial parks and conservation reserves, other natural heritage features, lands that have been restored or have the potential to be restored to a natural state, areas that support hydrologic functions, and working landscapes that enable ecological functions to continue. The Province has a recommended approach for identifying *natural heritage systems*, but municipal approaches that achieve or exceed the same objective may also be used.

Recommendations:

In light of the seriousness with regard to PPS 2024 omissions, Kee:Way recommends the following:

- **Ontario must act upon the binding articles of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), in particular articles 11, 12, and 31 and undertake reform legislation on repatriation with full and meaningful participation of Ontario First Nations.**

Kee:Way recommends that this be carried out in a manner consistent with the recommendations of the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). Specifically, Ontario must refer itself to the state obligations set forth in paragraphs 87 and 88 of EMRIP's 2020 publication, "Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples" (UN. Human Rights Council. Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/45/35 <<
<https://digitallibrary.un.org/record/3876274?ln=en>>>).

By way of background, Canada adopted UNDRIP and subsequently enabled it to become part of federal law. UNDRIP Articles 11, 12, and 31 read:

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Ontario has the opportunity to become a venue for best practices surpassing both Mexico and the United States in the field of First Nations repatriation. Kee:Way strongly encourages that Ontario take seriously and pay close attention to the state obligations described in EMRIP's findings with respect to recommendations state government responsibilities.

- **With respect to the *Planning Act*, Kee:Way recommends that Ontario implement mandatory First Nations inclusion and participation in the planning process.**

Kee:Way notes that Ontario's current legal framework is a patchwork of general laws of application and policies that rely largely upon interpretative discretion. Kee:Way recommends these changes to further Crown – First Nations reconciliation.

- **Similarly, Kee:Way recommends the use of mandatory language in the policy reform process and require direct participation by First Nations in the planning process at the municipal level. Kee:Way advises that these recommendations also apply to the “Standards and Guidelines for Consultant Archaeologists and the corresponding Technical Bulletin: Engaging Aboriginal Communities in Archaeology in Partnership with First Nations”.**

Conclusion

Kee:Way urges Ontario to consider the long-term negative impact of PPS 2024. Revenue cannot justify infringing and usurping First Nations rights, treaty rights, and First Nations well-being.

Ontario and its related governing bodies will reap billions in property tax revenues and related development fees over the next two decades. This unprecedented housing boom will occur on First Nations treated territory. The absence of funding by Ontario is not acceptable in light of the serious issues at stake. Moreover, on 15 February 2023, Ontario announced that revenues in “2022-23 are projects to be \$196.4 billion”, or \$16.6 billion more than initially forecasted in 2022 (See: <https://www.ontario.ca/page/2022-23-third-quarter-finances>).

Kee:Way submits that it is not acceptable in 2024 to pursue fast track housing that will lead to irreparable harms on the well being of Ontario First Nations. Kee:Way seeks timely clarification from Ontario with respect to its mandate and intention regarding meaningful consultation on PPS 2024 and ERO 019-8462. Kee:Way demands that Ontario act honorably given the serious nature of the harms at issue.

Sincerely,

Kee:Way First Nations Heritage and Burials Working Group

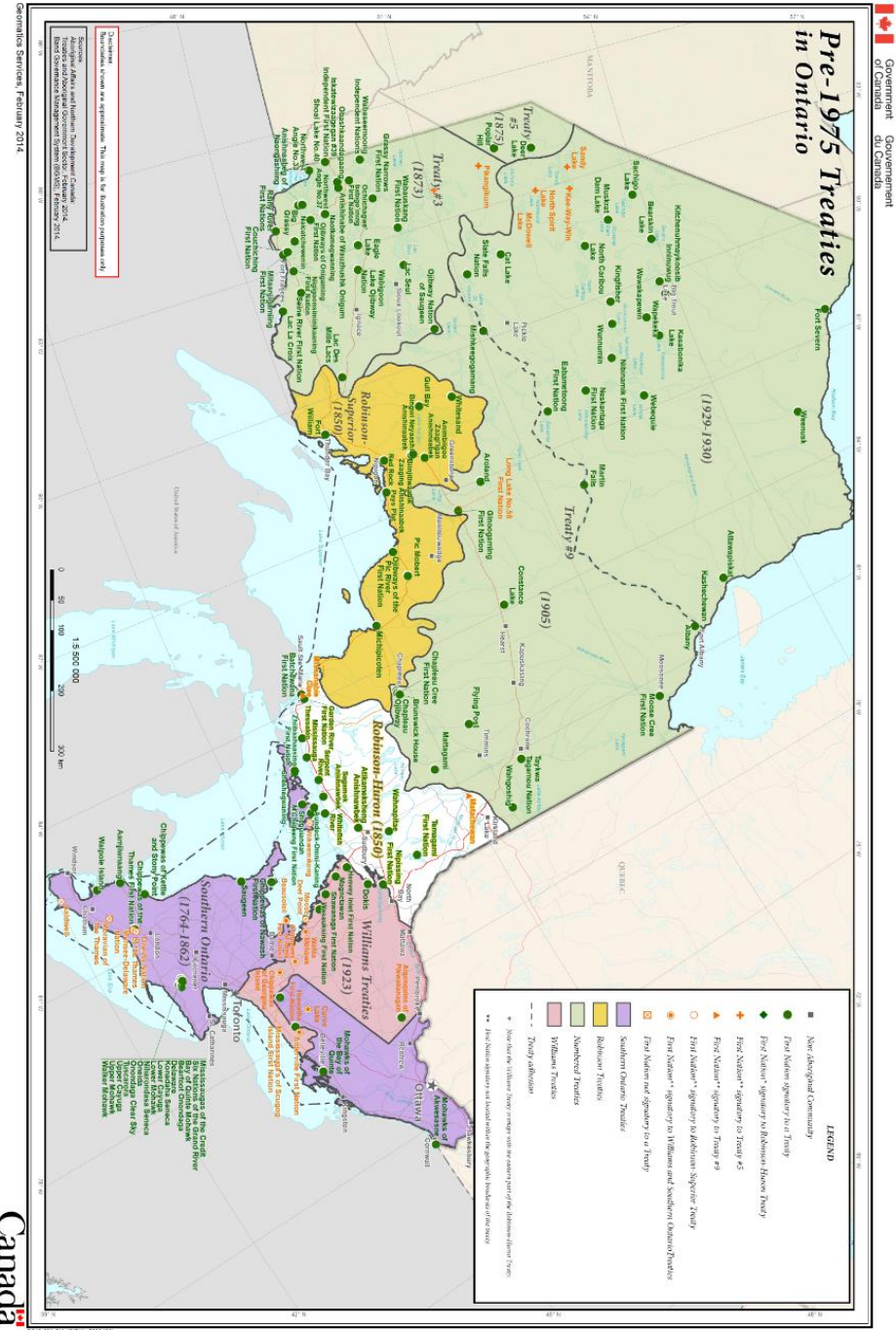
The Chiefs of Ontario

APPENDIX 1

9: Appendix – Schedule 1: List of Large and Fast Growing Municipalities

Town of Ajax	City of Mississauga
City of Barrie	Town of Newmarket
City of Brampton	City of Niagara Falls
City of Brantford	Town of Oakville
City of Burlington	City of Oshawa
Town of Caledon	City of Ottawa
City of Cambridge	City of Pickering
Municipality of Clarington	City of Richmond Hill
City of Guelph	City of St. Catharines
City of Hamilton	City of Toronto
City of Kingston	City of Vaughan
City of Kitchener	City of Waterloo
City of London	Town of Whitby
City of Markham	City of Windsor
Town of Milton	

APPENDIX 2



APPENDIX 2 continued

7: Figure 1 – Natural Heritage Protection Line

