April 29th, 2019

The Honourable Rosa Galvez  
Chair of Standing Senate Committee on Energy,  
the Environment and Natural Resources  
Rosa.galvez@sen.parl.gc.ca

Subject: Mohawk Council of Kahnawà:ke Brief on Bill C-69 to Standing Senate Committee

Introduction

Senator Galvez,

The Mohawk Council of Kahnawà:ke ("MCK") welcomes the opportunity to inform the Standing Senate Committee on Energy, the Environment and Natural Resources of its position that Bill c-69 should be adopted by the Senate prior to the June 28, 2019 parliamentary adjournment.

For the MCK, the starting point in all our dealings with the Crown is to advance based on the Two Row Wampum Nation to Nation relationship. While Bill C-69 does not fully reflect the Nation to Nation relationship, it is nevertheless a step in the right direction compared with the current legislative and regulatory frameworks that are in place. If this Bill were to die on the order paper or amended in a manner that undermines its purpose, it will be a missed opportunity to significantly improve environmental assessments and advance the potential for reconciliation with Indigenous peoples.

Flaws and lack of credibility of CEAA 2012

The current process for reviewing projects in Canada is deeply flawed. As such, it fails to serve the interests of Canadians, the environment and most decidedly that of Indigenous Nations. The Canadian Environmental Assessment Act 2012 and the National Energy Board Act fail to appropriately consider Indigenous rights and the significant contributions that Indigenous peoples can make to protect the environment and optimize projects that take place on our lands.

The MCK has significant experience with CEAA 2012 and the NEB Act. In particular, the MCK has fully participated as an intervener in the NEB review of the Enbridge Line 9B reversal and Energy East projects. The current legal framework and institutions tasked with reviewing such projects do not have our confidence. The conflicts of interest, limitations on the list of issues assessed and disregard for Indigenous knowledge and rights are some of the issues we encountered during these processes. It should come as no surprise then that the review processes and decisions that result have no credibility within our communities.
Evidence of flaws with CEAA 2012 are manifest in negative impacts to the environment, arbitrary selection of projects that meet the threshold for necessitating an Environmental Assessment, court rulings overturning decisions because of flawed consultation processes and the lack of progress on reaching consensus (and by extension construction) of major infrastructure. It must be remembered that the current impasse in major project approvals is occurring under the existing CEAA 2012 regime.

**Bill C-69 is already a compromise**

In light of these concerns, we have participated from the early stages of Environment Canada’s legislative review process, including: the development of the two Expert Panel reports related to updating Environmental Assessment processes and the modernization of the National Energy Board, the release of discussion papers by the federal government and the release of Bill C-69 now under consideration.

At all stages of the process, we were pleased with certain aspects of the government’s direction and disappointed with other areas as we felt they did not go far enough. As such, we commented on positive aspects of the Bill, but also presented recommended amendments to the Standing Committee on Environment and Sustainable Development on how the Bill could be further enhanced. Our recommendations did not result in significant additional enhancements to Bill C-69. It should also be noted that many of the recommendations of the Expert Panel reports were not retained in Bill C-69. As such, our view is that Bill C-69 cannot be considered as catering to environmental groups and Indigenous Nations; rather, it is already a compromise that takes into account the views of various stakeholders.

Given the legislative calendar, further delays to the passage of the Bill are not appropriate. The Senate must pass Bill C-69 without suggesting any amendments that would further reduce or eliminate the improvements contained in the Bill, thus reducing the Nation to Nation relationship and the constitutional duty to consult which is carried out within the context of impact assessments into nothing more than a sham exercise.

**Beneficial aspects of Bill C-69**

As stated in the introduction, the starting point in all our dealings with the Crown is to advance based on the Two Row Wampum Nation to Nation relationship. While Bill C-69 does not fully reflect the Nation to Nation relationship, there are several features that will enable the Crown to carry out early and respectful engagement.

For example, Bill C-69 includes the need for an early engagement period of up to 180 days with Indigenous Nations. MCK believes this is extremely important as it gives the Nations an opportunity to provide critical information concerning their traditional knowledge of the local area and the potential impacts associated with the proposed project including assistance with scoping project and study areas. Project modifications can be discussed at an early stage prior to large investments of time and capital by proponents to improve project acceptability. Partnership opportunities may also be discussed at this stage as well as Impact Assessment criteria that may be unique to the Indigenous worldview.

The necessity to explicitly consider impacts to Indigenous rights and Indigenous knowledge in the project evaluation is another significant advancement in the Impact Assessment process included in Bill C-69. Requiring that impacts to Indigenous rights be considered in the Impact Assessment and by the
Minister in decision-making will help Canada meets its legal consultation obligations and will remove uncertainty in the jurisprudence about who must consider these impacts and when. This will improve impact assessments and if carried out properly, may also limit potential legal challenges to decisions.

Incorporating Indigenous knowledge in addition to scientific investigation will assist in the true determination of project impacts. In the current process, Environmental Assessments typically conclude that there are "no significant impacts" from all project activities when it is evident to us that this is not the case. By ensuring Indigenous knowledge is heard, a realistic assessment of project impacts may be possible and suitable mitigation and accommodation measures advanced.

The formalization of the importance of Regional and Strategic Impact Assessments in the Bill is also a key advancement. While the MCK has recommended and continues to recommend that triggers be included in the Bill to mandate Regional and Strategic Impact Assessments, their inclusion is a start to recognizing the importance of advanced planning if sustainable development is to be achieved. The ecosystem approach offered by Regional Impact Assessment will facilitate project level development by determining appropriate threshold levels of impact and appropriately measuring and managing cumulative effects. Strategic Impact Assessment will ensure that Canada as a whole is meeting national and international obligations when developing laws, regulation and policy.

Conclusion & Recommendation

The current environmental legislative and regulatory frameworks, including CEAA 2012 and the National Energy Board Act fail to appropriately consider Indigenous rights and the significant contributions that Indigenous peoples can make to protect the environment and optimize projects that take place on our lands. The current review processes have resulted in poor environmental assessments and virulent opposition to the agencies and regulatory bodies responsible for such assessments. It has resulted in approved projects being contested as illegitimate (lack of social acceptability) and in other approvals being overturned by the courts.

Taken as a whole, Bill C-69 is a compromise. Nevertheless, it will significantly improve environmental assessments and will provide the Crown with opportunities to act on a Nation to Nation basis with Indigenous Nations. While the MCK has made numerous suggestions on how the Bill could be improved in its submission to the Standing Committee on Environment and Sustainable Development, at this late stage, the MCK's primary recommendation would be that the Bill should include triggers to mandate Regional and Strategic Impact Assessments. These assessments would remove much of the uncertainty around the inclusion of the "contribution to sustainability" criteria outlined in the Bill.

The MCK firmly believes that this Bill will not be detrimental to the economy and the advancement of projects and recommends that Bill c-69 should be adopted by the Senate prior to the June 28, 2019 parliamentary adjournment without any amendments that would further reduce or eliminate the improvements contained in the Bill.

Chief Ross Montour
Mohawk Council of Kahnawà:ke