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Conservation du patrimoine naturel

Minister Benoit Charette
Ministère de l'environnement et de la lutte contre les changements climatiques
141, avenue du Président-Kennedy
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Montréal (Quebec) H2X 1Y4

Re: Mohawk Council of Kahnawà:ke Brief on Bill 46 "An Act to amend the Natural Heritage Conservation Act and other provisions"

Minister Charette,

1. Introduction

The Mohawk Council of Kahnawà:ke (MCK) welcomes the opportunity to provide input on Bill 46 "An Act to amend the Natural Heritage Conservation Act and other provisions". Given that Indigenous Peoples protect more than 80% of the world's biodiversity within their territories, it is vital that Indigenous Peoples have a central role in the establishment and governance of protected areas, and this must be reflected in the Bill.

The conservation of natural heritage is an important concern for the MCK. We assert inherent and aboriginal governance (jurisdictional) rights to our traditional territory. Within the Iroquois Confederacy, the Mohawks are the keepers of the Eastern Door and are responsible to address the issues that arise from the east from the mouth of the St. Lawrence River to the Great Lakes. In accordance with the Two Row Wampum treaty relationship, Mohawk jurisdiction continues to apply independently and in parallel to the Crown.

The Two Row Wampum is the most important diplomatic instrument in our history. Wampum belts were among the first documented agreements between First Nations and European settlers. The Two Row Wampum belt consists of two rows of purple beads separated by three rows of white. The white symbolizes the river of life or the land that we all now share. The two purple rows symbolize the Haudenosaunee and the Europeans traveling side by side, with mutual obligations but never interfering with each other's journey. Subsequent agreements were predicated upon this one. Each nation recognized the other's sovereignty and ecological stewardship was central to that co-existence. As part of our governance rights, we have a responsibility to care for and protect our territory,

including lands and bodies of water. We take our responsibility as stewards for future generations very seriously and any Crown action that interferes with our stewardship responsibilities is a breach of the Crown's obligations and the principle of non-interference.

When considering the impacts of development on our territory, we base our decision-making on respect for all parts of the natural world. In our language Ohen:ton Karihwatehkwen means "the words that come before all else." It is the opening address at gatherings, schools, ceremonies 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 and to remind us that all of Creation is sacred and interconnected. 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.

The Ohen:ton Karihwatehkwen is the basis of our approach to conservation because it outlines the roles and responsibilities of all of the components of the natural world, including humans. The purpose of each component, how humans benefit from it, and the role assigned by the Creator are recited. In this way, we give thanks and re-orient our minds to show respect and understanding of our relatives -- the non-humans as well as the natural elements. Reciting the "words that come before all else" was our first instruction from the Creator, and as a ceremonial practice it reinforces the relationships and conditions that promote health and a healthy environment. The Ohen:ton Karihwatehkwen is also an environmental code that is based on Kanien'kehá:ka (Mohawk) traditional laws and practices. Its underlying philosophy provides us with a framework for categorizing and assessing the health of the environment, including the impacts of current actions on future environmental health.

In all environmental decision-making, we consider the principle of the Seven Generations. Any decisions taken today must consider the impact of the selected actions on the next seven generations. By anticipating the consequences of our actions, seven generations into the future, we ensure that our actions reflect our responsibility to maintain the cycles of life.

This approach we take to conservation reflects our jurisdictional responsibilities and our inherent and aboriginal rights as Indigenous peoples in this territory. In assessing the application of various environmental conservation and protection measures we are guided by the knowledge that the lands and waters are inseparable from who we are as Kanien'kehá:ka.

The MCK will now comment on specific issues and make several recommendations on amendments to the Bill[1].

[1] Please note that some of the sections of the MCK's brief was adapted from the analysis document completed by the First Nations of Quebec and Labrador Sustainable Development Institute for the AFNQL on Bill 46.

2. MCK Analysis of Bill 46 and MCK Recommendations

Issue 1: Alignment with IUCN Standards

The Bill proposes a change in the definition of "protected areas" to refer to the definition in the IUCN *Guidelines for applying protected area management* and also adds the definition of "Other effective conservation measures" which refers to definition from the Conference of the Parties to the Convention on Biological Diversity, in decision 14/8 dated November 2018.

Although this change demonstrates the desire of the Government of Quebec to use a broader and more inclusive definition, it is our view that alignment with the *Guidelines for applying protected area management categories* should be reflected more explicitly in the Bill.

MCK Recommendation:

The Bill should incorporate into law many of the features included in the *Guidelines for applying protected area management categorie*s, which would also include the six protected area management categories and the definition of the four protected areas governance types.

Issue 2: Indigenous Governance Rights, IPCA's and other jurisdictional concerns

Indigenous governance rights and importance of IPCA's

The absence of acknowledgement of Indigenous governance rights, through the recognition of Indigenous Protected Conservation Areas (IPCA's) in Bill 46 is a missed opportunity and is unacceptable. There are several definitions of IPCAs, but the fundamental transversal principle aims at the conservation of Indigenous cultural values regarding their close link with nature, in addition to the conservation of biodiversity. The Indigenous Circle of Experts, for its part, defines three essential elements shared by IPCAs, regardless of their governance and management objectives: "They are Indigenous-led; they represent a long-term commitment to conservation; and they elevate Indigenous rights and responsibilities."

Recent studies confirm that the total numbers of birds, mammals, amphibians and reptiles were the highest on lands managed or co-managed by Indigenous communities and recommended increased collaboration with Indigenous communities as a means for Canada to meet its international commitments pertaining to preservation of biodiversity.[2]

The inclusion of First Nations communities as real partners in achieving conservation objectives through the explicit legislative recognition of IPCA's is both legally and pragmatically sound. The current level of participation that is limited to the Quebec government's ability to delegate certain limited powers to Indigenous governments is insufficient.

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[2]Schuster, Richard, et al., Vertebrate biodiversity on indigenous-managed lands in Australia, Brazil, and Canada equals that in protected areas, Environmental Science & Policy, November 2019, pages 1-6. Available online at: https://reader.elsevier.com/reader/sd/pii/S1462901119301042?token=31C21A1366FFBA934611248E7E336F599E3B37C55CEB2E2EF8A5EE3EB91537978C07B3CBE3AB4C8A87CD43703922F0EC. See also the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, Global Assessment on Biodiversity and Ecosystem Services (draft Report), available online at: https://ipbes.net/global-assessment.

Inadequacy of delegation

Bill 46 proposes an amendment to section 12 of the current law in order to explicitly allow the delegation of all or part of the powers of the Minister to an Aboriginal community with regard to the management of an area covered by a conservation measure. While the MCK is not opposed to this option, this should be an additional option for including Indigenous governments in certain aspects of protected areas management, but is not an adequate substitute for the recognition of Indigenous governance rights and the acknowledgment of IPCA's in the Act. The MCK envisions that delegation would be an appropriate mechanism to acknowledge the role of Indigenous Peoples in inspection, monitoring and reporting of protected areas within traditional territories that may not be established as IPCA's.

Furthermore, the addition of section 12.2 specifying that acts taken in the exercise of delegated power are not binding on the government is not acceptable. Firstly, it is unclear what the intention of this section is and how it would be applied in practice. It appears however, that the government wishes to limit its responsibility and provide minimal commitment to support the achievement of the conservation objectives advanced by Indigenous governments. The government should remain responsible for the mandate it has given in accordance with the terms of an agreement confirming the delegation of authority.

The MCK is also concerned with the delegation of power in connection with the management of a protected area that can be granted to individual persons or to private companies. These entities may not have the legal duty to consult and accommodate Indigenous peoples, and therefore, any such delegation must be subject to prior consultation and accommodation before any decision on such delegation is made.

Indigenous governance rights do not depend on MRC approvals

Indigenous governance rights and participation in the creation of protected areas should not be depending on MRC approval or participation. While MCK is also open to collaboration with other jurisdictions and neighbouring communities, this should not be a legal requirement or impediment. For example, Bill 46's provisions associated with man-made landscapes should be amended. Man-made landscapes aim "to protect the biodiversity of an inhabited area, whether land or water, where the landscape and its natural components have been shaped, over time, by human activities in harmony with nature and have distinctive features the conservation of which depends to a large extent on the continuation of the practices that originally shaped them". According to the terms used in this definition, it can undoubtedly be an interesting tool for communities that would like to get involved in the protection of such sites.

However, Bill 46 indicates that the application to have a man-made landscape recognized must be filed by an Aboriginal community and the MRC (or metropolitan community) concerned. It appears incoherent that communities cannot submit an autonomous request for recognition of a man-made landscape. Having to be accompanied by an MRC is once again a compromise of the autonomy of Aboriginal communities and a perpetuation of a paternalistic attitude towards them. In addition, in our case, the Mohawk Territory of Kahnawà:ke is not legally part of the MRC de Rousillon and therefore, this requirement of Bill 46 could not be applied to our situation.

Importance of coordination with other jurisdictions

In addition to considering Indigenous governance rights and jurisdiction, the initiatives resulting from Bill 46 will require alignment with those of the Government of Canada. Given the common targets of the two levels of government in terms of the protection of the terrestrial environment, freshwater and the marine environment, it would be beneficial for all to coordinate conservation efforts. Separate jurisdiction and borders mean nothing to species and the habitats they require to survive and thrive. Also, some protected areas span over land, shorelines and water so separate statuses can be challenging. What happens in adjacent jurisdictions could significantly impact a protected area (e.g. invasive plants). That Bill 46 does not contain any provisions to harmonize or even collaborate with Canada or adjacent provinces is cause for concern.

Enforcement and implementation concerns

Finally, there is also a need to consider Indigenous rights and interests in the implementation and enforcement of the Act. The Bill should be amended to require consideration of the exercise of Aboriginal and treaty rights by inspectors that are responsible for the implementation of the Act. Training of Ministry inspectors regarding Indigenous rights and interests should also be considered as an implementation issue.

MCK Recommendations:

1. Bill 46 must ensure that IPCA's are explicitly incorporated in the Bill as a separate protected areas governance type.
2. Bill 46 must acknowledge the jurisdiction of the Indigenous groups working on the designation to define the IPCA. This must include flexibility for the Indigenous groups involved to choose to use the statuses defined in the Act (e.g. it could be a marine reserve that's also an IPCA) or it could be a hybrid of some of the statuses or something completely different.
3. The regulations and guidelines that must be developed to implement the IPCA provisions of the Bill must be developed with Indigenous governments.
4. Bill 46's delegation of authority to Indigenous governments should be in addition to (and not instead of) the IPCA's, and the Bill should specify the type of delegations that could take place specific to the Indigenous context.
5. Section 12.2 should be removed or clarified and amended in a manner that is acceptable to Indigenous governments. The terms of agreements for delegation of authority should allow for an ongoing role/responsibility for the government of Quebec.
6. Bill 46 must explicitly state that Indigenous consultation and accommodation requirements (as further outlined in Issue 3) are met prior to any delegation to third parties.
7. Bill 46 should be amended to contain provisions to harmonize and collaborate with Canada and adjacent provinces.
8. Bill 46 should be amended to require consideration of the exercise of Aboriginal and treaty rights by inspectors that are responsible for the implementation of the Act.

Issue 3: The Duty to Consult and Accommodate

Proposed section 2.1 is an "empty shell" and consultation should consider impacts to rights, health, socio-economic conditions, and historical and cultural connections to land

Section 2.1 of the proposed Act includes the requirement that the government consult Aboriginal communities separately, "when the circumstances so require", and shall accommodate "when it is fitting to do so". In contrast, the Act must also be construed in a manner consistent with section 6 of the *Quebec Sustainable Development Act*, which outlines a series of factors that must be considered in the government's "pursuit" of sustainable development and includes the requirement to consider the activities, rights and interests of municipalities, citizens, and citizens' groups.

MCK supports the acknowledgement of the government's consultation and accommodation obligations in the legislation. However, the proposed section 2.1 is an "empty shell" since the legislation is too vague to ensure that meaningful consultation is carried out. In addition, Indigenous consultation must extend beyond the legal duty to consult and accommodate, since impacts to rights, while extremely important are not the only potential types of impacts stemming from the creation of protected areas. It should be remembered that the establishment of protected areas without consulting First Nations has sometimes had dramatic consequences for communities that have been denied access to their ancestral lands to practice their traditional activities, which can have negative consequences on the exercise of rights, but also on health, socio-economic conditions and impact connection to land from a historical or cultural standpoint. This could include impacts to the transmission of language and culture.

Therefore, it is important that consideration of impacts to aboriginal rights, health and socio-economic conditions, and connection to historic and culturally significant sites is explicitly acknowledged in the Bill and informs decision making. There are also no requirements for the government to consider Indigenous knowledge in any of the processes outlined in the Bill.

Consultation must apply to all government action and the exercise of the Minister's authority

The current Bill falls well short of this standard and only provides for limited and arbitrary consultation in some cases. For example, the Bill requires the government to consult Aboriginal communities in establishing Natural Settings, but not in the designation or termination of any of the conservation measures (protected areas, nature reserves).

In those cases, a "public information" period shall be held, and "depending on the concerns raised" by "the groups to be consulted," the Minister shall also hold "targeted consultations." Therefore, unlike the wording concerning natural settings, these provisions relating to the power of the government to amend or terminate protected areas take great care not to expressly specify consultation with Aboriginal communities, but rather refer to "targeted consultation." This formulation dismisses the special constitutional status of Aboriginal rights by diluting them in with the interests that other groups might claim.

In addition, for both natural settings and protected areas, the amendment or termination of a status may be motivated by "public interest," which is concerning. Indeed, past experiences have unfortunately shown that impacts to the rights of Aboriginal communities are often minimized and

subsumed into the notion of public interest. In addition, the public interest remains a largely discretionary ground for amending or terminating the protection of a territory.

Several provisions of Bill 46 also provide for granting the Minister wide discretion, which is problematic. The discretionary power of the Minister must be subject to some framing so that it is not exercised according to political opportunities and give rise to aberrations.

For example, an authorization from the Minister is required to carry out an activity in a natural setting, but the Minister may, "if the public interest justifies it," exempt an activity from this obligation. In addition, an activity that is already the subject of an authorization under the *Environment Quality Act* (EQA) is not subject to the obligation to obtain an authorization under the *Natural Heritage Conservation Act* (NHCA), which is already the case. Nevertheless, the EQA stipulates that the Minister "may" refuse to issue an authorization on the grounds that "the project is to be carried out in an area entered in the register of protected areas […] or in the register of other conservation measures." Once again, this decision is discretionary and there are few criteria governing the exercise of its power. In any event, any decision on the granting or the lifting of an area's protection must be made with the provision for adequate consultation and accommodation of Aboriginal communities.

Overall, there is also a lack of clarity on who within the government has the obligation to consult, when the obligation is triggered and when accommodation is required. The level of consultation outlined in the Bill is well below the level of consultation that municipalities are provided under the proposed legislation.

MCK Recommendations:

1. In addition to section 2.1, the Bill must be amended to include specific Indigenous consultation requirements pertaining to all government action (including all areas where the exercise of Ministerial authority is provided for) with wording to the effect that impacts to a) Aboriginal rights; b) the health and socio-economic situation of Indigenous peoples and c) the historic and cultural heritage of Indigenous peoples must be considered prior to decisions being made.
2. In particular, the Bill currently provides many instances where the Minister may act unilaterally- for example exempting works in natural setting, changing protection designations, etc. All of these decisions could have potential impacts to the rights and interests outlined above and should be subject to consultation prior to these decisions being taken.
3. In addition, the Bill must also explicitly acknowledge the requirement to consider Indigenous knowledge in decision making.

Issue 4: The addition of category VI: the protected area with sustainable use

Bill 46 also proposes to add to the Quebec legislative framework the category of protected area "with sustainable use," a concept which would already correspond to category VI of the international guidelines of the IUCN. As soon as the Bill was introduced, the Government of Quebec announced the possibility of registering Anticosti Island under this designation in order to ensure its protection, while carrying out certain "sustainable" economic activities.

The MCK is extremely concerned about the potential implementation of this category of protected area. The possibility of carrying out so-called "sustainable" economic activities in a protected area can be a threat to conservation. If abused, it could water down the concept of sustainable use to the benefit of industry, while making it possible to still look good by meeting the surface area objectives of protected areas. The government talks a lot about its "targets to hit" for protected area size. It would be disastrous if this new category were to enable exploitation activities that go against the vision of communities or that undermine efforts to create new protected areas aimed at strict preservation of ecosystems. When developing the network of protected areas in Quebec, we must not lose sight of the fact that this network should ideally contain protected areas of various categories to ensure the best use of different management tools available. Thus, the increase in category VI protected areas should not come at the expense of other categories focused more on the strict preservation of ecosystems. In addition, Indigenous rights to practice important harvesting and other traditional activities within protected areas must be acknowledged within the definition of sustainable-use.

There is currently no consensus on the definition of the concept of "sustainable use," however, it is clear that minimum guidelines should be established in the Bill, so that they can be the subject of in-depth debates and some consensus can be arrived at on what constitutes "sustainable use" prior to Bill 46 being adopted. The MCK does not support leaving this important aspect up to discussion in future government regulations or policies.

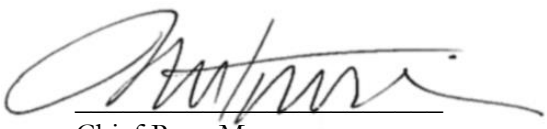
MCK Recommendations:

1. The Bill must include guidelines on what constitutes "sustainable use" and acceptable "economic activities" that could be permitted. While MCK can appreciate the need for some flexibility, the characteristics of what constitutes sustainable use and acceptable economic activities must be defined in the Act. This work must be completed in collaboration with Indigenous governments.

4. Conclusion

The MCK submits that the Bill in its current form is seriously flawed. The lack of acknowledgement of IPCA, the weak provisions associated with Indigenous consultation and the lack of assurances on how the protected areas with sustainable use designations will be defined and used to meet targets are the primary issues that we have identified as problematic. We look forward to having a discussion with your Ministry on how our recommendations will be addressed and the amendments to the Bill that will be required.

In peace and friendship,



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