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C. P. PL 81
Loi modifiant diverses dispositions en matière d'environnement

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Ms. Paquette,

Introduction

The Mohawk Council of Kahnawà:ke ("MCK") has significant concerns related to Omnibus Bill 81 *An Act to amend various provisions relating to the environment*. These concerns build on submissions made by the MCK to the MELCCFP during the preliminary consultations related to these amendments (letter from Chief Ross Montour to Minister Benoit Charette, dated March 15, 2024 and letter from Chief Ross Montour to Marisol Moore, Director, MELCCFP, dated April 12, 2024, attached). Unfortunately, the majority of the MCK's concerns and recommendations were not addressed.

The MCK has two overriding concerns that apply to existing provincial environmental legislation and many of the proposed amendments.

The first is the lack of acknowledgement and clarification, in the legislation, on how Aboriginal and Treaty rights must be considered within the context of government decisions taken pursuant to the Quebec environmental legislative framework. Over the past several years, and more recently in both letters, we provided clear rationale as to why the explicit inclusion of Indigenous rights and consultation obligations must be integrated within the texts of provincial environmental legislation. In our March 15, 2024 letter, we wrote that:

> *To be clear: the MCK does not accept the response we often receive from the MELCCFP and SRPNI to the effect that including these requirements in legislation is not required because the government ensures that Indigenous consultation obligations are met when applicable. This has not been our experience and the government's refusal to include this requirement more likely reflects a desire to maintain discretionary control over Indigenous consultation rather than a sincere belief that such provisions are not required and would not be beneficial for Indigenous communities.*

The MELCCFP's dismissive and unhelpful response regarding this concern was as follows:

> *Rest assured that the ancestral and treaty rights of Indigenous people in Canada, recognized and affirmed by section 35 of the Constitution Act, 1982 are taken into account in the application of the various provisions of the Act*[1].

For the reasons that we have explained repeatedly, and which are further outlined in our detailed comments related to sections 90 and 122 of Bill 81, the MCK rejects this response from the MELCCFP and maintains its position and recommendations.

The second major issue is related to the MCK's outstanding objection to a legislative and regulatory scheme that requires and prioritizes the payment of financial compensation for environmental destruction, including works in wildlife habitat and the destruction and degradation of wetlands and bodies of water, instead of in-kind compensation. For reasons, we have explained time and time again, this legislative and regulatory scheme has been, as we predicted, a total failure in achieving the no net loss principle and is completely unresponsive to Indigenous consultation and accommodation obligations. While the proposed amendments in Bill 81 provide some additional flexibility for the Minister to require in-kind compensation, the MCK remains opposed to the overall legislative and regulatory scheme that prioritizes the requirement to pay financial compensation for environmental destruction and degradation.

We therefore maintain our recommendation that this entire scheme must be changed to require in-kind compensation, with a greater emphasis on the establishment of a robust avoid, mitigate and "in-kind" compensation regime. The proposed amendments outlined in Sections 90 and 120-122 of Bill 81 would actually enable the opposite and facilitate the justification of destruction of wetlands and bodies of water.

Finally, the MCK wishes to emphasize that we are strongly opposed to the proposed amendments to section 31.4.3 of the *Quebec Environment Quality Act* which would enable government and Hydro Quebec to move forward with preliminary works on projects without having completed the environmental assessment processes provided for in sections 31.1 and 31.1.1 of the Act.

Please also see attached to this letter our more detailed analysis and recommendations related to specific sections of Bill 81 for your consideration during the review of the Bill. In some instances, our recommendations provide constructive suggestions on how certain proposed amendments can be enhanced.

Ratsénhaienhs Ross Montour
Mohawk Council of Kahnawà:ke

C.C Minister Benoit Charette, MELCCFP (ministre@environnement.gouv.qc.ca)

[1] Letter from Maude Durand to Grand Chief Cody Diabo, dated November 29, 2024.

Sections of Bill 81 that the MCK is opposed to or partially opposed to with recommended amendments

Section 25

Overall, the proposed amendment to subsection 13.1(2) of the *Act to affirm the collective nature of water resources and to promote better governance of water and associated environments* is an improvement, but the wording of the amendment lacks clarity and can be further strengthened. The MCK suggests the following alternate wording:

> 13.1 The Minister may define major directions for integrated, concerted water resource management.
>
> In addition, the Minister must prepare and submit to the Government the directions and objectives to be pursued to conserve wetlands and bodies of water, so as to ensure and enhance the various benefits they bring, in particular by performing the following functions:
>
> *(2)* Promoting the resilience of wetlands and waterbodies by regulating appropriate consideration of hydrology, hydraulics and hydromorphological processes in design to maintain resilient, self-sustaining natural systems and / or restore impaired systems, ensuring an appropriate flow and sediment transport regime and the capacity for these systems to mitigate flooding and drought through retention, evaporation, and infiltration of precipitation and meltwater.

Section 28

The MCK is opposed to the suppression of subparagraph 15.9 (1) of the *Act to affirm the collective nature of water resources and to promote better governance of water and associated environments*. The removal of the requirement to prioritize funding compensation projects within the affected MRC could be particularly damaging to the exercise of Indigenous rights if the wetlands and bodies of water required to support the exercise of rights in one RCM are then used to carry out compensation projects elsewhere.

The MCK is also unclear as to the implications of replacing reference to watersheds with "integrated water management zone" and re-iterates the importance of taking a watershed-based approach.

Sections 31-33

The MCK is opposed to amendments to the *Act respecting the communauté métropolitaine de Montréal*, which remove requirements to obtain certain approvals from the Quebec Minister of the MELCCFP in the development of certain by-laws. The subject matter of these by-laws (air pollutants, wastewater) may have impacts on the rights and interests of the Mohawks of Kahnawà:ke and should be subject to Crown consultations.

Section 36
The MCK is generally opposed to amendments that enable the adoption of regulations that will remove requirements to obtain certain approvals from the Quebec Minister of the MELCCFP to allow for activities to be carried out in "natural settings" established by the *Natural Heritage Conservation Act*.

Section 37
The MCK is vigorously opposed to the proposed amendment to section 18 of the *Natural Heritage Conservation Act*, which changes the requirement for the Minister to replace decreases in the area of designated wetland and bodies of water with the implementation of conservation, restoration or creation of wetlands measures as soon as possible, with the requirement to replace these areas with "natural settings to foster the achievement of no net loss of wetlands". This replaces the obligation to implement concrete measures, as soon as possible, with the more general/vague objective of fostering the achievement of no net loss. The MCK also notes that while the legislation requires Indigenous consultation as part of the designation process (section 14 of the NHCA), there is no Indigenous consultation obligation outlined for the exercise of Ministerial authority related to changes that will result in decreases to the areas of designated wetlands and bodies of water. This is problematic- while MCK asserts that the common law duty to consult and accommodate will apply to the exercise of this authority, the statute itself should be coherent and provide for Indigenous consultation in the exercise of this authority also.

Section 47
The MCK is opposed to the proposed amendment to section 128.9 of the *Act respecting the conservation and development of Wildlife*, and more specifically the amendment which would allow the Minister to base a decision to allow the alteration of wildlife habitat on the payment of money into a compensation fund. For the reasons MCK has explained, these funds do not result in the achievement of no net loss, and do not respond to Indigenous consultation requirements.

Section 58
The MCK is opposed to the proposed amendment of subsection 18 (1.1), which would provide that the Minister may authorize <u>any</u> forbidden activity with respect to threatened or vulnerable species- this significantly expands the scope of potential authorizations beyond those currently contemplated by the Act.

The MCK is in favour of the addition of the proposed subsection 18 (2), which would provide that the Minister may consider the implementation of habitat replacement measures in order to authorize an activity that could impact threated and vulnerable species. However, the MCK remains concerned that this option is to be evaluated in conjunction with the option of payment of financial compensation, of which we remain opposed.

The MCK is in favour of the majority of the amendments to subsection 18(3), which outlines more clearly the factors that the Minister must consider before delivering an authorization

to carry out an activity, however, the MCK recommends that impacts related to the exercise of indigenous land use and rights, within the meaning of section 35(1) of the *Constitution Act, 1982* be added as factors to consider, along with any available Indigenous knowledge.

Sections 71 and 72
The MCK is opposed to amendments to Section 15.4.41 of the *Act to affirm the collective nature of water resources and to promote better governance of water and associated environments*. These changes do not address our fundamental concerns with the financial compensation scheme. Rather, these changes are relatively minor and only have the effect of making it easier to use the funds for other purposes.

The MCK is also unclear as to what is meant by the terms "on a priority basis" and "integrated water management zone". The term "on a priority basis" should not be interpreted as to allow funds allocated for one RCM to be used on a "non-priority" basis in other territories. This could be particularly damaging to the exercise of Indigenous rights if the wetlands and bodies of water required to support the exercise of rights in one RCM are then used to carry out compensation projects elsewhere. The MCK also re-iterates the importance of taking a watershed-based approach.

Sections 77 and 80
Amendments to sections 24 and 31.0.3 of the Quebec Environment Quality Act is another missed opportunity to include a requirement that the Minister consider impacts to the exercise of Indigenous rights and knowledge in decision-making.

Section 84
Section 31.2 *in fine* of the Quebec *Environment Quality Act* should be further amended to include a requirement that proponents send notices to concerned Indigenous communities at the same time that municipalities are notified.

The MCK is concerned with the proposed amendments to sections 33.3.3 and 33.3.4 of the Quebec *Environment Quality Act*, in as much that there remain no objective criteria that the Minister must apply in determining whether an impact assessment statement is complete. It has been the MCK's experience that many sections of the impact assessment statements are shockingly deficient (for example, false/incorrect statements related to Indigenous communities and land use that were developed without any consultation of the actual Indigenous community; non-credible cumulative effects assessments) but nevertheless accepted by the MELCCFP as being "complete". This situation must be addressed and remedied within the legislative and regulatory framework associated with this review process.

Section 88
The MCK is strongly opposed to the proposed amendments to section 31.4.3 of the Quebec *Environment Quality Act* which would enable government and Hydro Quebec to move forward with preliminary works on projects without having completed the environmental

assessment processes provided for in sections 31.1 and 31.1.1 of the Act. This would be permitted under the guise that these projects help the government meet energy transition and climate change targets. It has been our experience with the Northvolt project that using energy transition and climate change targets can have the effect of permitting works that have significant adverse environmental effects (i.e. destruction of large areas of significant wetlands) and thus be contrary to achieving the objectives of the *Environment Quality Act*. Enabling projects to move forward with preliminary works prior to an environmental assessment being completed also means that there is a presumption that the whole project will eventually be authorized to proceed; although the environmental effects of the project are unknown, and also regardless of any potential impacts to Indigenous rights. Indigenous consultation is not provided for in the truncated review process outlined in the proposed section 31.4.3 and even if it were provided for, it is not possible to carry out complete Indigenous consultation regarding a project and its effects, as a whole, outside of the context of a full environmental assessment process. Therefore, impacts to Indigenous rights that will stem from the implementation of the project are, as a whole, "pre-authorized" using this process; in breach of the Crown's legal duty to consult and accommodate.

Sections 90 and 122

The MCK has longstanding opposition to the financial compensation scheme used to justify the destruction of wetlands and there is ongoing litigation between MCK and the government of Quebec (Superior Court file No 500-17-138547-240) related to the constitutionality of this legislative and regulatory scheme with respect to Indigenous consultation and accommodation obligations. The MCK notes that the proposed amendments to the Environment Quality Act (proposed section 31.5.1), which applies to projects undergoing environmental assessments, provide additional compensation options than what is currently available, in three situations; where projects 1) adversely affect wetlands or bodies of water, 2) alter wildlife habitat or 3) adversely affect a specimen of a threatened or vulnerable species. In these instances, the government or the committee of Ministers may require different compensation measures from proponents including financial compensation calculated by the method identified in regulations, varied financial compensation determined in regard to special circumstances, and/or the carrying out of measures/compensation projects.

However, these amendments do not address the MCK's fundamental problems with the current legislative and regulatory scheme. While the proposed amendments would provide for certain discretion and flexibility in determining whether financial compensation or the implementation of "measures" is required of a proponent, there are still two fundamental problems with the proposed amended scheme.

From an environmental/ecological perspective, the law still heavily relies on the financial compensation mechanism that has proven to be a dismal failure at achieving no net loss. The MCK suspects that, in most instances, proponents will have no trouble convincing provincial officials that the payment of a financial contribution is the only feasible/appropriate method of compensation, given the cost and difficulty of implementing

projects. Therefore, the MCK is skeptical that these amendments will significantly change the status quo.

Furthermore, in the potentially rare instances where the government exercises its authority to require that a proponent implement "measures" including restoration projects, there are no criteria in the law that would ensure that the projects that will be developed and approved are adequate to respect no net loss principles or will be appropriate to offset impacts to threatened and vulnerable species. In many cases, especially with respect to the destruction or modification of habitat supporting threatened and vulnerable species, the impacts may be irreversible and the idea of being able to compensate for these losses is illusionary. In addition, it is difficult to find suitable projects that can support threatened and vulnerable species, and these projects are often experimental in nature with uncertain probability of success. Considering this, the proposed amendments should have included criteria to address these challenges to ensure that measures and compensation projects truly support achieving the no net loss principle and the survival of threatened and vulnerable species. The current proposed amendments simply indicate government discretion to establish the "conditions, restrictions and prohibitions" associated with the implementation of the measures, which is insufficient for the MCK.

Secondly, from the perspective of Indigenous consultation and accommodation obligations, the amended provisions still fail to acknowledge and address how the loss of wetlands and bodies of water, adverse effects to wildlife habitat and threatened and vulnerable species relate to the exercise of Indigenous rights. As the MCK has explained to the provincial government on numerous occasions, wetlands and bodies of water, wildlife habitat and threatened and vulnerable species play important roles in sustaining the exercise of Indigenous rights, such as hunting and fishing, and the exercise of stewardship rights and responsibilities. Threatened and vulnerable species often have important cultural or spiritual significance to Indigenous peoples, which is also not acknowledged in the legislation.

While the duty to consult and accommodate is a constitutional duty that applies independently of the provisions of the Quebec *Environment Quality Act*, it is nevertheless problematic that the legislation fails to provide the required flexibility to enable the Crown to discharge this duty. Firstly, as noted with respect to other amendments included in this omnibus legislation, the Quebec *Environment Quality Act*, as a whole, should be amended to include provisions indicating how/when impacts to Aboriginal and treaty rights within the meaning of section 35(1) of the *Constitution Act, 1982*, Indigenous knowledge and the *United Nations Declaration on the Rights of Indigenous Peoples* apply to provincial Crown decision-making under the Act.

These legislative changes are important and required because, when meeting provincial officials within the context of Indigenous consultation meetings, we are often told that they can only require that a proponent carry out compensation as per the requirements of the legislation and that no additional Crown measures to offset impacts to rights can be required

or provided. Upon close examination of the proposed amended text, the government's discretion to require a modification to the calculation of financial compensation only applies based on the characteristics of the wetlands/habitats in question, and not whether those wetlands or habitats serve to support the exercise of Indigenous rights. Furthermore, the proposed text does not indicate when/how the government or committee of ministers would exercise their authority to require that a project be carried out instead of, or in addition to, some measure of financial contribution and how this relates to the government's assessment of Indigenous knowledge or impacts to Indigenous rights.

The absence of Indigenous specific criteria is also reflected in the proposed amendments that provide the government with the authority to require, in situations not covered by the three situations outlined in the provision, that a proponent carry out work or compensation projects in order to "ensure the adequate protection of the environment or of the health, safety, welfare or comfort of human beings, to protect other living species or to prevent adverse effects on property". It is interesting that the Crown can explicitly require additional or modified measures of a proponent to ensure the "comfort of human beings" or to "prevent adverse effects to property", but that this same flexibility is not built into the legislation to respond to the constitutional duty to consult and accommodate Indigenous peoples and their rights.

The MCK therefore re-iterates its recommendation that the *Environment Quality Act* be modified to clearly articulate when and how impacts to Aboriginal and treaty rights within the meaning of section 35(1) of the *Constitution Act, 1982*, Indigenous knowledge and the *United Nations Declaration on the Rights of Indigenous Peoples* will be considered throughout the legislation, including when the government of committee of ministers exercises its authority with respect to projects impacting these crucial elements (wetlands and bodies of water, wildlife habitats and threatened/vulnerable species).

Section 93

The MCK is concerned about the potential for this provision to be misused. In other contexts, our experience has been that government or proponents may claim that an emergency requires the issuance of authorizations outside of the normal approval and assessment processes. These "emergencies" are often invoked to remedy a lack of planning or to circumvent a more rigorous review process. The MCK is therefore concerned that what the law already allows with respect to preventing damage from an apprehended disaster may be manipulated and abused. We therefore recommend that clearer criteria be established within the legislation to describe when and how this exception applies. In regard to the provisions related to compensation for impacts to wetlands and bodies of water that may arise in these situations, we refer you back to our comments and recommendations regarding compensation for impacts to wetlands and bodies of water more generally.

Section 98

The MCK has serious concerns regarding the proposed amendments for regional and sectoral environmental assessments. These concerns were outlined our submission

regarding the preliminary consultation, and we formulated several recommendations, as follows:

> MCK Recommendation 4: The EQA section on strategic assessments should be amended to include the acceptance of requests for regional assessments that are not premised on the achievement of a specific development plan or sectoral project. These assessments should be carried out by an independent committee. These assessments will not require the government to adopt a decree at the end of the process, but the law should require that any reports/recommendations stemming from these assessments be considered in any project specific assessments. Ideally, these amendments would also confirm the possibility of collaboration agreements for the completion of regional assessments provided for under the federal Impact Assessment Act and remove the barriers that Quebec has currently implemented against federal Impact Assessment Act regional assessments.
>
> MCK Recommendation 5: Any regional or sectoral assessments and any decrees issued pursuant to these must consider Indigenous knowledge and impacts to Aboriginal rights. This requirement must be included in the legislation and not be subject to the discretion of government administration.
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> MCK Recommendation 6: The methodology for carrying out a regional or sectoral assessment should be established by regulation, be sufficiently detailed, and be developed in collaboration with Indigenous communities. Adequate protection of Indigenous data and knowledge and funding also need to be ensured.
>
> MCK Recommendation 7: The scheme should not enable proponents to benefit from exemptions from specific ministerial authorizations when these are required to fully understand the specific project impacts to the receiving environment and the corresponding impacts to Indigenous rights.

Unfortunately, the MCK's recommendations were not adopted, and our concerns remain.

In addition to re-iterating these recommendations, the MCK is not satisfied with proposed section 31.9.1 which indicates that one of the objectives of sectoral and regional assessments is to include Indigenous communities <u>in the planning of the development</u>. Indigenous governments should not be engaged on the premise that they are to support the planning of a proposed development or sector. Rather, as recommended by MCK, Indigenous communities should participate in sectoral and regional assessment on the premise that these studies are tools to help assess the potential impacts of a proposed development on Indigenous rights and in consideration of Indigenous knowledge.

In addition, there is absolutely no content in the rest of the section on how the government intends to ensure that Indigenous communities participate in the planning in question. The roles of the initiator of the assessment, the Bureau, the Minister and the "public" is further outlined, but there is no actual role indicated for Indigenous communities and governments anywhere else in the proposed section on regional and sectoral assessments.

The MCK is also concerned regarding the actual implementation of proposed section 31.9.17- it has been our experience that little/no monitoring or follow-up on project authorizations takes place in the province of Quebec (unless specific complaints are submitted to the MELCCFP). In a case where projects will potentially benefit from significant exemptions, it is necessary to ensure that monitoring and follow-up take place, and the MCK has little confidence that the province will put in place the necessary resources to ensure that this is done.

Finally, the MCK deplores that proposed section 31.1.18 includes measures to ensure the confidentiality of certain information, but once again fails to consider how Indigenous knowledge is to be protected.

Section 106
The MCK submits that consultation with potentially affected Indigenous communities be included in the section regarding significant water withdrawals.

Section 120
The MCK has the following enhancements to recommend related to the proposed amendments to section 46.0.3 of the Quebec Environment Quality Act:

Editing 46.0.3 (1) a) to read: "the boundaries of all of the wetlands and bodies of water affected and, if applicable, their catchment areas, floodplains, migration corridor, ecological setbacks, and their location in the hydrologic system of the watershed".

Adding proposed 46.0.3 (d): "a hydrogeological evaluation to determine groundwater depth, flow direction, soil conditions, and interconnections between wetlands and waterbodies within and in proximity to the study area"

The MCK is also strongly opposed to the proposed amendments to subsections 46.0.3 (2) and (2.1), which further weakens criteria to justify the authorization of the destruction of wetlands. It does not make any sense to require that a proponent describe alternative scenarios to demonstrate that the selected scenario has the "least adverse effects on wetlands and bodies of water", since this would imply that the only other scenarios being looked at are those that involve the destruction of even more wetlands and bodies of water.
The MCK is also strongly opposed to the addition of subsection 46.0.3 *in fine*. This appears to have been added in consideration of a specific industry (perhaps cranberry production), but has the potential to be misused to further enable the destruction of wetlands and bodies of water.

Section 121
Similarly, the MCK is strongly opposed to the proposed amendments to section 46.0.4 of the Quebec *Environment Quality Act* which further weakens criteria to justify the authorization of the destruction of wetlands. The MCK is particularly concerned with the proposed amendment to subsection 46.0.4 (1) which could be interpreted as lessening the value of

wetlands or remnant wetlands since the regional habitats are already poor or the wetlands have been impacted by other factors, such as invasive species. The MCK recommends revising this wording to ensure that the value of wetlands are not being inappropriately discounted, especially in areas that have been impacted and where thresholds have already been crossed (i.e. remaining wetlands in areas with considerable development should be highly valued).

Section 123

In addition, the MCK is strongly opposed to the proposed amendments to section 46.0.6 of the Quebec *Environment Quality Act* which further weakens criteria to justify the authorization of the destruction of wetlands. More specifically, the MCK is concerned about subsection 46.0.6 (1), which only requires the applicant to demonstrate that they are avoiding the wetlands "as much as possible". This criteria is not very helpful in demonstrating whether impacts are justified, since it is relatively easy for a proponent to design a project that meets this requirement.

<u>Sections of Bill 81 that MCK supports</u>

Section 25

MCK is in favour of the proposed addition outlined in Section 25 3°:

by adding the following subparagraph at the end of section 13.1 of the *Act to affirm the collective nature of water resources and to promote better governance of water and associated environments*

"(7) ensuring ecological connectivity by allowing the free movement of species, interconnection between critical habitats, and the circulation of nutrients and energy."

Section 60

The MCK is in favour of the proposed amendment to section 39, which includes the determination of modalities for carrying out habitat replacement projects, which should be prioritized over the payment of monetary compensation.