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Written Submissions by the British Columbia Métis Federation

Submitted to the Expert Panel regarding the Review of Federal Environmental Assessment Processes

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Introduction

The British Columbia Métis Federation ("BCMF") is a non-profit association that works with Métis communities across British Columbia. Founded in 2011, BCMF's mandate is to advance the culture and rights of Métis people and to work with Métis communities toensure the well being of our members. We currently have 7,500 members across British Columbia.

The Crown has a constitutional obligation to consult with Métis people about proposed developments that have the potential to affect their rights. Generally speaking, consultation activities with BCMF to date have been inadequate and superficial, resulting in no real value for government or proponents and providing little meaningful voice for our members. Our members favour a balanced and responsible approach to development that is inclusive of our unique voice and perspective.

Environmental assessment processes present an opportunity for the Crown to engage in meaningful and valuable consultation activities with BCMF about development activities that have the potential to affect our members' rights. However, we cannot support the practice of regulatory agencies or the enactment of regulatory processes and procedures that do not incorporate our views. Doing so puts our members' rights and livelihoods at risk. Involving our communities in the environmental assessment process is a necessary step in the reconciliation of our views respecting environmental issues, and in the mutual obligation of ensuring that Métis rights are protected.

Background

British Columbia Métis Federation

BCMF is a non-profit association established in British Columbia in 2011. It is governed by its President, Keith Henry, and a democratically-elected board of directors.

Much of BCMF's work is focused on building and maintaining relationships with governments, industry partners and service delivery organizations throughout British Columbia. We work with these organizations to meet the needs of our members, advance their concerns, and ensure that their voice is present. The BCMF engages with regulatory agencies and other government entities in relation to issues of interest and concern to our members.

Métis Rights

Métis rights are constitutionally enshrined and protected. Our members have important knowledge about the social and economic landscape of the regions they live in, as well as about land and the natural environment. They value the integrity and beauty of the natural environment, and are committed to defending, protecting and advancing our rights. BCMF is continually engaged in research with our members to ensure the protection and advancement of, and advocacy for, their rights.

Reform of Environmental Assessment Processes

While environmental assessment processes present an important opportunity for the Crown to engage with BCMF about projects that have the potential to affect our members' rights, existing processes are limited in their ability to protect Métis rights. One of the key limitations of existing environmental assessment processes is their failure to incorporate Métis perspectives. This is a matter of grave concern, as decisions about whether or not proposed projects will proceed to development have the potential to significantly affect the land and our rights. BCMF's members are not able to ensure that their rights are protected in the course of resource development if they are excluded from the environmental assessment process for these projects.

In 2015 BCMF established a consultation office to collaborate with the Crown on issues and activities affecting our members. The purpose of our consultation office is to work with the Crown to ensure that the duty to consult and accommodate our members in respect of any project that has the potential to affect the rights and interests of our members is fulfilled, and that consultation activities are meaningful and have lasting investment value. We have a long way to go in achieving this goal, and reform of existing environmental assessment processes is an important part of the process.

In these submissions, we elaborate on our concerns about the limitations of existing environmental assessment processes. We also provide a number of recommendations to address these limitations. Each of our recommendations builds upon the understanding that our members must be involved in the environmental assessment of projects that have the potential to affect their rights and interests if these assessments are to be meaningful.

Appendix "A"

CONCERNS REGARDING FEDERAL ENVIRONMENTAL ASSESSMENT PROCESSES AND RECOMMENDATIONS FOR REFORM

The following is a summary of the deficiencies with existing environmental assessment processes, and the BCMF's recommendations for addressing these shortcomings.

Concern No. 1: *Existing environmental assessment processes do not meaningfully fulfil the Crown's constitutional obligations to Indigenous Peoples.*

The Crown has a constitutional duty to consult and accommodate Indigenous peoples, including the Métis, about the potential effects of proposed projects on their Aboriginal rights interests and title,[1] and to attempt to justify the potential infringement of these rights.[2] These obligations flow from the rights guaranteed to Indigenous peoples pursuant to section 35(1) of the *Constitution Act, 1982* and the Crowns' duty to act honourably in its dealings with Indigenous peoples. To meet its constitutional obligations, the Crown must engage in meaningful consultation with Indigenous peoples, seek to accommodate their concerns, and attempt to justify potential infringements.[3]

The Crown's obligations to Indigenous peoples are distinct from the Crown's legislative obligations in the environmental assessment process. These obligations lie upstream of legislative requirements and the statutory mandate of decision makers, and statutory decision makers must respect the legal and constitutional limits they impose.[4]

For the reasons set out below, environmental assessment processes are currently inadequate for the Crown to fulfill its constitutional obligations.

(i) The Crown's duty to consult may arise prior to the environmental assessment process

Consultation with Indigenous peoples must take place early, when the project is being defined, and should continue until the project's completion.[5] This ensures that concerns about a proposed project are addressed and integrated at the earliest stage of government decision-making, before irrevocable decisions about the proposed project are made. Relying solely on environmental assessment processes for consultation means that, by the time the assessment is triggered, important decisions about the project may have already been made without any consultation having taken place with Indigenous peoples.

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[1] *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida*"), at para. 20.
[2] *Sparrow*, at 1110-1112; *Tsilhqot'in*, at para. 80.
[3] *Haida*, at paras. 41-42; *Tsilhqot'in*, at paras. 78 and 80; *Sparrow*, at 1110-1112.
[4] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (CanLII), at para. 106. Also, *Beckman v. Little Salmon / Carmacks First Nation*, 2010 SCC 53 (CanLII), at para. 48; *Halfway River First Nation v. British Columbia*, 1999 BCCA 470 (CanLII), at para. 177.
[5] *Kwikwetlem*, at para. 70.

(ii) The duty to consult is triggered at a low threshold

The Crown must consult about any decision or activity with the potential to impact Indigenous peoples' rights and title. By contrast, the threshold for initiating an environmental assessment for a proposed project is set out in legislation and subject to change. The starting point for consultation should not be conflated with a government decision about when an environmental assessment is required.

(iii) Environmental assessment does not allow for iterative consultation

Consultation requires an interactive process, which includes opportunities for Indigenous peoples to identify concerns about a proposed activity and provide information about the potential impacts of the proposed activity on their rights, and for the Crown to take steps to accommodate these concerns and attempt to justify infringements of rights and title.[6] The legislated timelines for environmental assessment processes and restricted scope of issues considered in the process precludes meaningful consultation.

(iv) Adverse environmental effects are not equivalent to impacts on rights and title

The scope of an environmental assessment is very different from the objective of reconciliation which underlies the Crowns' constitutional obligations to Indigenous peoples. In the context of environmental assessment, the Crown can justify a project's serious environmental effects based on its potential socio-economic benefits. By contrast, the Crown can only justify an infringement of Aboriginal rights by demonstrating that the project contributes a compelling and substantial objective consistent with its fiduciary duty to Indigenous peoples. The infringement must be more than simply in the public interest. The project must be necessary, it must be designed to minimally affect Aboriginal rights, and the adverse effects on Indigenous peoples cannot outweigh the benefits for the general public.[7]

(v) Government representatives in environmental assessments cannot fully accommodate impacts or justify infringements

Consultation must involve Crown representatives who have the capacity and mandate to address Indigenous peoples' concerns and give effect to meaningful accommodation. However, government representatives in the environmental assessment process often lack the required mandates to fully address concerns and provide necessary accommodation measures and to attempt to justify infringements on rights.

(vi) The Crown must consult regardless of whether an environmental assessment is required

CEAA 2012's streamlined approach to environmental assessments means that a number of projects will not be required to undergo a full assessment. When a project does not trigger an environmental assessment, the Crown will often rely on the proponent of the project to engage in consultation activities with Indigenous peoples. In many cases this means the Crown is absent from the consultation process. While the

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[6] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 209 BCCA 68 (CanLII) ("*Kwikwetlem*"), at para. 68.

[7] *Sparrow,* at 1113-1119*; Tsilhqot'in*, at paras. 77 and 88.

Crown may delegate certain procedural aspects of consultation to third parties,[8] it cannot completely disengage from the consultation and accommodation process.[9] The Crown alone can fulfill its constitutional obligations,[10] and must do so regardless of whether a particular project has triggered an environmental assessment.

Recommendations:

1. Consultation over and above environmental assessment processes

The recommendations that follow would, if implemented, improve current environmental assessment processes by ensuring that Indigenous peoples, including the Métis, are meaningfully involved in the review of projects that could affect the land and their rights. However, environmental assessments by their nature remain insufficient on their own to meet the Crown's constitutional obligations to Indigenous peoples. The Crown must consult and accommodate Indigenous peoples and attempt to justify infringements consistent with the honour of the Crown regardless of the parameters of environmental assessment processes.

2. Indigenous-driven environmental assessment processes

The main deficiencies with current environmental assessment processes are rooted in their inability to fully and appropriately engage the Métis and address their concerns about development activities that have the potential to affect their rights. Indigenous-driven environmental assessment processes are essential to addressing these gaps and ensuring that Indigenous laws, knowledge, perspectives, culture and traditions are incorporated into the review processes.

Indigenous-driven processes enable environmental reviews to assess both a project's tangible impacts, including its impacts on the physical environment, and its intangible impacts on Aboriginal rights. This is key if an assessment of the effects of a proposed project on rights is to be accurate. This is also important for determining how to address Indigenous peoples' concerns or accommodate potential impacts on their rights.

While Indigenous-driven environmental assessment processes may differ from one nation or community to the next, the underlying principle is to ensure that Indigenous perspectives and concerns, including those of BCMF's members, are properly understood and used to inform the review process. This will go a long way to adding credibility to environmental assessment processes.

3. Participation in decision-making

The federal government's decision to adopt the principles of *UNDRIP* and the Supreme Court of Canada's decision in *Tsilhqot'in* have important implications for environmental assessment processes. Both *UNDRIP* and *Tsilhqot'in* confirm the importance of

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[8] *Haida,* at para. 53.
[9] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation et al.*, 2006 CanLII 26171 (ON SC), at paras. 92-95.
[10] *Haida,* at para. 53.

Indigenous peoples' participation in decision-making about matters that have the potential to affect their rights.

Article 18 of *UNDRIP* confirms the rights of Indigenous peoples to participate in decision-making respecting matters that would affect their rights and to maintain and develop their own decision-making institutions. Article 32 requires government to consult and cooperate in good faith with Indigenous peoples to obtain their free, prior and informed consent about any project affecting their lands and other resources.

In *Tsilhqot'in*, the Supreme Court of Canada confirmed the importance of obtaining the consent of Indigenous peoples potentially affected by resource development activities as a way of providing greater predictability for the activities. One obvious way for government to secure the consent of Indigenous peoples is through collaborative decision-making processes.

Collaborative decision-making provides an alternative to government's current policy of unilaterally imposing and seeking to fit Indigenous peoples into existing environmental assessment processes. This model of decision-making would allow BCMF to be directly involved in determining whether and how a project that has the potential to affect their members' rights should proceed to development.

4. Traditional knowledge

A key component of Indigenous-driven environmental assessment processes is their emphasis on Indigenous laws, knowledge, perspectives, culture and traditions. While western scientific information is important and should inform environmental assessments, equal weight should be given to Indigenous knowledge, including Métis knowledge studies.

To date, reliance on traditional knowledge within the context of environmental assessments has usually been limited to the traditional use studies commissioned by proponents. These studies are driven by the proponent's particular project agenda, which often seek to identify specific areas that might be of particular concern to an Indigenous group. They are often ineffective in demonstrating the implications that development of the land may have for the exercise of Aboriginal rights.

Indigenous-driven environmental assessment processes support the inclusion of available traditional knowledge to fully assess a project's tangible and intangible impacts. For an environmental assessment to be complete, it must rely on traditional knowledge in conjunction with available western scientific knowledge.

Concern No. 2: ***The accommodation of Indigenous concerns offered by existing environmental assessment processes is limited.***

The Crown's constitutional obligations require it to both consult and, when necessary, accommodate Aboriginal rights potentially affected by proposed development. In the context of environmental assessments, government will often equate the mitigation of Indigenous concerns with their accommodation. Mitigation is not synonymous with accommodation. Mitigation is only one form of accommodation.

The implications associated with a project's potential effects do not disappear with the termination of its environmental assessment and a determination that the project's environmental effects are outweighed by the public interest in having the project proceed. Proper accommodation measures must be put in place. If not, once a project has been approved Indigenous peoples are often left wondering what they can do to ensure their rights are protected and preserved in light of government's decision.

As part of the consultation and accommodation process, the Crown must demonstrate a willingness to consider and address Indigenous interests.[11] This may require the Crown to change its plans, proposed actions and policies.[12] The Crown and Indigenous peoples may also work together to negotiate alternative solutions to ensure that both of their interests are addressed. Whatever the approach, to be effective accommodation measures will need to be determined on a project-by-project basis and in collaboration with Indigenous peoples.

Recommendations:

1. Indigenous-driven environmental assessment processes

As described above, Indigenous-driven environmental assessment processes will enable the Métis to have a central role in determining how to address or accommodate a project's potential effects on their communities, the lands and their constitutionally-protected rights.

2. Participation in decision-making

As described above, the Métis must have the ability to make decisions about whether and how development activities that have the potential to affect their rights will proceed, and, if the activities are to proceed, what mitigation, accommodation and other justification measures are required.

3. Ongoing environmental monitoring and management

One way to address Métis concerns about the potential effects of a project is to ensure their involvement in the ongoing environmental monitoring and management of the project. Through their active observation, documentation and reporting of activities that have the potential to affect their rights, involvement in monitoring and management activities provides BCMF's members with the opportunity to meaningfully participation in and add value to development decisions.

Concern No. 3:*The timelines set out in current environmental assessment legislation are extremely short, and the environmental assessment processes are often rushed.*

The tight timelines provided for in CEAA 2012 mean that the consultation undertaken in connection with environmental assessments is often hurried, and Indigenous peoples are not given the time necessary to fully consider the potential effects of a proposed

[11] *Haida*, at para. 42.
[12] *Kwikwetlem*, at para. 68.

project on their rights. In *Gitxaala*, the Federal Court of Appeal criticized this aspect of Canada's consultation activities in the context of the environmental assessment for the Enbridge Northern Gateway Pipeline project.[13]

Indigenous perspectives must inform environmental assessments about the potential effects of the proposed project on Aboriginal rights and title. The current timelines contained within CEAA 2012, however, are often so short that they do not provide Indigenous peoples with adequate time to pull together and present this information. Addressing Indigenous peoples' concerns about the potential effects of proposed development on their rights should not be arbitrarily limited by legislative timelines.

Recommendation:

1. Indigenous-driven environmental assessment processes

Indigenous-driven environmental assessment processes remove the guesswork around when and how Indigenous peoples should be engaged as part of the process. For instance, instead of forcing Métis perspectives into existing regulatory processes, our members would have a central role in deciding what the process will look like.

Concern No. 4: ***Current environmental assessment processes are limited in their ability to consider the cumulative effects of projects.***

The increase in development activities across British Columbia in recent years has raised concerns about the effects of many development projects operating at the same time in the same area. CEAA 2012is limited in its ability to consider the cumulative effects of projects.

Recommendation:

1. Cumulative Effects Assessments

The environmental assessment of a project cannot take place in a vacuum and should not be treated as separate from other projects operating within or planned for the same area. They must incorporate cumulative effects assessments and consider the potential impacts of all of these projects potentially operating within the same area. Such cumulative effects assessments must incorporate Métis perspectives about the potential effects of these projects on their ability to exercise their constitutionally-protected rights. One way to obtain this information is through the use of Métis knowledge studies.

Concern No. 5: ***Indigenous peoples are often not provided with adequate capacity funding to fully participate in environmental assessment processes.***

It is extremely important that BCMF have the opportunity to engage with the Crown as much as possible on issues affecting the rights of their members, including through environmental assessment processes. However, BCMF is a non-profit organization and our ability to participate in these processes is severely restricted by our limited internal

[13] *Gitxaala Nation v. Canada*, 2016 FCA 187 (CanLII).

capacity.

The funding provided to Indigenous peoples is often insufficient to allow them to meaningfully participate in the environmental assessment process. As a result, they are often forced to bear the burden of studying the potential effects of a project on their land and resource use. To undertake this work, financial and human resources must be diverted away from other important programs and services.

Recommendation:

1. Adequate capacity funding

Indigenous peoples cannot meaningfully participate in consultation and environmental assessment processes or determine whether they can consent to a proposed project without the funding required to assess the potential impacts of the project on the land and resources and their rights.

Canadian courts have expressly endorsed the provision of funding by the Crown for First Nations to participate in consultation.[14] Appropriate funding is essential to a fair and balanced consultation process and to ensure a level playing field between First Nations and the Crown.[15] While these cases dealt specifically with First Nation consultation, the principle is equally applicable to other Indigenous communities.

It is also important to ensure that funding is provided to Indigenous peoples to support their participation in consultation processes on a timely basis. There must be adequate time for them to review any information that has been provided about the proposed activity and to provide their input.

BCMF has limited resources to participate in environmental assessments and related consultation processes that are meant to support resource development initiatives. We should not be forced to fund industry's initiatives. Without access to appropriate and timely capacity funding, we will be without the means to properly engage with the Crown on issues that could have long-lasting impacts on the constitutionally-protected rights of our members.

[14] *Wabauskang First Nation v. Minister of Northern Development and Mines et al.,* 2014 ONSC 44214 (CanLII), at para. 232.

[15] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CanLII 20790 (ON SC), at para. 27; *Enge v. Mandeville et al.,* 2013 NWTSC 33, at para. 269.