Response to PPSC NCQ issues dated June 15, 2020

1. Section 25 and 25 of the Charter

The concept of "other" is the predominate essence of Section 25 and 26 of the Constitution Act 1982. "Other peoples" and "other rights and freedoms" are clearly outlined as being in existence. The Royal Proclamation of April 17, 1982, states, inter alia, the following:

> "Of All Which our Loving Subjects and all others whom these Presents may concern are hereby required to take notice and to govern themselves accordingly."

In a publication of the Department of Land and Forests (Ontario), "Indians of Ontario," (1943) the following statement is made:

> "Champlain spent the year 1608 at Tadoussac and Quebec, completing his bases and making arrangements with the different tribes to give him right of way through their country for exploration and trade. He made a mistake by becoming party with the Algonquin Indians and their allies against the Iroquois and fostering that international strife which was so destructive to all Indians within our Province for the good part of a century later."

The distinction of "other" comes through this "mistake." The Algonquins became the enemy of the British and the Haudenosaunee, evidenced in the Beaver Wars (1640-1701) which "ended" with the Treaty of Friendship in Montreal in 1701. We have not progressed very much in the Algonquin Nation since 1701.

Furthermore, evidence would be brought forward from Indigenous participants in the constitutional negotiations demonstrating that "other people" and "other rights and freedoms" were contemplated by these sections of the Constitution Act 1982.

The 1947 Nationality Act was designed to change people in the territory known as Canada, from British subjects into Canadian citizens; this did not apply to members of the Algonquin Nation, as they were never British subjects. A subsequent amendment of the Indian Act was designed to remedy that gap in the Nationality Act, however it did not achieve, in law, the "citizenship" of the Algonquin Nation. They do not fall within the provisions of the Proclamation of 1763, as they were not "Indian tribes connected to us and under our Protection," as only the Haudenosaunee Confederacy were so described, as evidenced in the British extending suzerainty to them in the Treaty of Utrecht 1713.

Suffice it to say that this aspect of the NCQ can only be dealt with by a complete evidentiary record. It is also grounded in the laws, traditions, customs and practices of the Algonquin Nation, which can be applied to this case.

2. Section 35

The government concedes that expert evidence is required

3. Section 7

In Beaver v Hill[1], the Ontario Court of Appeal observed as follows"

> "As I will explain, the motion's judge's decision that Mr. Hill does not have standing to assert the claim he is making at that it is not justifiable cannot be sustained on the record before us. This is a determination that should usually (but not invariably) be made on the basis of evidence, as the Supreme Court jurisprudence wages." (para. 23)

4. Genocide and Apartheid

In Beaver v Hill, the Court of Appeal stated: "Proceeding in this area (constitutional law) call for a "measure of flexibility not always present" in ordinary litigation: Lax Kw'alaams Indian Band v Canada 2011 SCC 56, at para. 46. Also the Court observed:

> "…because we are still feeling our way in this delicate area, courts should avoid making definitive pronouncements where a case is in the early stages and where the applicable law is yet in the year stage of development." (para. 28)
>
> Behn v Moulton Contracting Ltd. 2013 SCC 26

The Court of Appeal also observed:

> "Finally, how the individual and collective aspects of Aboriginal and treaty rights are to be reconciled practically in live litigation like this case is an unresolved issue." (para. 34)

As to the present discussion in society regarding "systemic racism," for indigenous peoples, the seeds of this lie in policies of genocide and apartheid beginning with the Papal Bull of 1493 that suggests "the savages have no soul," and carried on with the concept of "dominion" over indigenous peoples evidenced in the Indian Act.

Those deep arguments can no longer be avoided, and no reconciliation will ever happen while these issues are swept under the rug.

This issue would require a full evidentiary record.

[1] Beaver v Hill 2018 Carswell ONT 16797 at para. 23

5. Duty to Consult

In Beaver v Hill, the Court of Appeal dealt with this issue in discussing the collective rights asserted by an individual in discussing Lebel J., decision in Behn (supra), the Court observed as follows:

> "While accepting that "Aboriginal and treaty rights are collective in nature," Lebel J. left the door ajar for individuals to assert or protect such rights: (i.e. duty to consult)
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> "However certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances individual members can assert certain Aboriginal or treaty rights, as some of the intervenors have proposed."

Furthermore, the duty to consult is rooted in the laws, traditions, practices and customs of the indigenous group.

This aspect would also require a full evidentiary record. As the Court of Appeal observed in Beaver v Hill:

> "Finally, how the individual and collective aspects of Aboriginal and Treaty rights are to be reconciled practically in live litigation like this case is an unresolved issue."