Jason Patchell
Co-Panel Manager, Marathon Palladium Project
c/o Impact Assessment Agency of Canada
160 Elgin Street, 22nd Floor
Ottawa ON
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October 25, 2021

RE: Public Notice – Marathon Palladium Project Joint Review Panel Invites Comments on Draft Public Hearing Procedures

Dear Mr. Patchell:

We - Isabel McMurray, Rose Stacey and Gwenyth Wren - would like to submit the following comments to the Joint Review Panel (the "**Panel**") for the Marathon Palladium Project's Draft Public Hearing Procedures (the "**Draft Procedures**"). As students enrolled in Environmental Law at Osgoode Hall Law School, we have reviewed the Draft Procedures and make recommendations on the following issues of concern:

1. Access issues pertaining to a virtual public hearing process;
2. The meaningful consideration and incorporation of Indigenous knowledge; and
3. The protection of confidential Indigenous knowledge.

PART I: ACCESS TO PUBLIC HEARINGS

Public hearings are an integral part of the environmental assessment process. They give the public and communities that may be affected by the social, economic, and environmental externalities of a project the opportunity to hear from project proponents, government, experts, and other individuals or organizations with interests in the project. More importantly, they give concerned community members the opportunity to express grievances, support, and ask questions.

Given the location, the potential impact on Indigenous communities, and the magnitude of the Marathon Palladium Project proposal, it is essential that the public has sufficient access to the public hearings. The current format of the public hearing proposed in the Draft Procedures pose many access issues and is wholly insufficient to accommodate the needs of the public who wish to participate. The Draft Procedures state that the "Panel is committed to conducting public hearing in a manner that provides for a full examination of relevant issues within the Panel's mandate and encourages public input and participation in a fair and equitable manner, with co-operation and courtesy."[1] The Community, General and Topic Specific hearing sessions will all be conducted virtually via Zoom video conference. A livestream of the hearings will be available on YouTube. The online format as presently designed does not encourage, rather it discourages, public input in a fair and equitable manner as access to reliable internet is a barrier to participation in the hearing.

The Digital Divide in Northern Ontario

The COVID-19 pandemic has highlighted how much we rely on internet connection. Making access to fast and reliable internet service more critical than ever before. The pandemic has also evinced the digital divide in parts of Ontario. Marathon is situated in Northern Ontario on

[1] Marathon Palladium Project Joint Review Panel, "Draft Public Hearing Procedures" (23 September 2021), at 1(b), online (pdf): *Canadian Impact Assessment Registry (CIAR)* <iaac-aeic.gc.ca/050/documents/p54755/141405E.pdf> [Draft Procedures].

the Northshore of Lake Superior, and the surrounding areas, including reserves that are home to potentially impacted Indigenous communities, are all underserviced areas with slow internet. Not only is the internet unreliable, many of these areas do not have access to 4G data coverage and have spotty cell phone reception leaving no viable alternatives to the internet.

The optimal speed for a Zoom video conference is 3.0 Megabits per second (Mbps).[2] In Marathon, Ontario, only 31% of the population has the requisite internet speed for optimal Zoom functionality. In Biigtigong Nishnaabeg and Ginoogaming First Nations, less than 10% of the area has over 1.5 Mbps.[3] Finally, 100% of internet users in Pays Plat reserve have less than 3.5 Mbps download speed and there is no 4G cellular data at all.[4] These bandwidth speeds illustrate what most Northern Ontarians and remote Indigenous communities already know through experience: Wi-Fi is at best slow and at worst nonexistent.[5] With this backdrop of the reality of internet users in the proposed project area, we can dig into the finer details of the virtual hearing protocol to demonstrate why they are insufficient and disadvantage the public who wish to participate.

Exclusionary Protocols

Appendix B sets out the virtual hearing protocol. Paragraph 2(a) encourages participants to join the public hearing using a desktop or laptop equipped with a video camera, and a microphone.[6] Not only do the Draft Procedures encourage participants to turn on the camera when they join, but they also mandate it when an individual is speaking. Paragraph 2(e) states that participants must keep their camera and microphone on while participating, and the video feed

[2] Columbia University, " Working From Home Online Connection" (n.d.), online: *Columbia University Faculty of Arts and Sciences* <fas.columbia.edu/home/contingency-planning/working-home-wifinetwork-considerations#:~:text=Zoom%20is%20very%20flexible%20when,meetings%20with%20HD%20video%20quality>.
[3] Connected North, "Ontario Access Map" (2021), online: *Ontario Broadband Levels* <bsn.maps.arcgis.com/apps/webappviewer/index.html?id=27c55b431b91419f9e0cd9015b3c6e4f>.
[4] *Ibid*.
[5] *Ibid.*
[6] Draft Procedures, *supra* note 1, Appendix B at 2(a).

should clearly show the face of the participant presenting.[7] As enabling a video and a microphone on Zoom uses more bandwidth, this requirement demonstrates the Draft Procedure's disregard for the reality of the public who means to participate. Paragraph 2(d) states that "Participants should participate from a quiet location with minimal background noise. Participants must make reasonable efforts to prevent interruptions for the duration of their active participation in the hearing session, including silencing sources of noise (e.g., cellular telephones, computer notifications) and preventing in-person interruptions."[8]

Internet connectivity is sometimes superior in shared spaces in a home, which this requirement does not take into account. Furthermore, individuals who may wish to utilize a public space with superior internet access, such as a public library or community center, cannot necessarily control the noise levels of other patrons. Therefore, this stipulation is a de facto double edge knife for members of the public who wish to participate: either participation is restricted by "spotty" Wi-Fi, or, where Wi-Fi is sufficient, background noise and disruptions may prevent participants from speaking. These audio and visual requirements also present an equity issue because they do not recognize that some people do not have access to a quiet space within their dwelling; furthermore, some people are unhoused and may only be able to access the internet in public spaces.

Appendix B: Virtual Hearing Protocol does deal with technical issues under section 3 however not adequately enough that they serve to address this access to internet gap. Section 3 states:

> (a) If an active Participant loses their connection, then the Panel will pause the meeting until that person or person(s) can rejoin the public hearing. Alternatively, the Panel will adjourn the meeting until technical issues can be resolved.

[7] Draft Procedures, *supra* note 1, Appendix B at 2(e).
[8] *Ibid*, Appendix B at 2(d).

(b) In the event of an interruption in the video or audio feed lasting greater than 5 minutes, the Participant must immediately contact the Zoom Host by telephone at the number provided at the end of this document. The Participant may be required to rejoin the meeting by telephone as an interim measure or reschedule their presentation.
(c) The Panel will assess the need to adjourn on a case-by-case basis.[9]

These complex protocols set out are exclusionary, and insufficient to fulfill the Panel's mandate under *Canadian Environment Assessment Act, 2012* given the digital reality in Northern Ontario.[10] These protocols are not consistent with rules of procedural fairness because it is unfortunate, but clearly the case, that the public who stands to be affected the most by the project, essentially people who live in the surrounding area, as a result of bad Wi-fi in the proposed project area, will be the ones who lack access to the public hearings. Furthermore, many participants may be uncomfortable using Zoom, as are other individuals who are not tech-savvy. One of the components of procedural fairness is a meaningful opportunity to be heard.[11] We believe because of the internet issues and individuals' differing abilities to access Zoom, a large proportion of the most directly affected public lack a meaningful opportunity to be heard.

This has far-reaching policy implications as one of the reasons for the overhaul of the CEAA 2012 was to increase public consultation and ensure those most vulnerable to project impacts will have the opportunity for meaningful consultation.[12] Access to a public hearing is a form of access to justice, especially for Indigenous communities, and we know that access to justice is a structural issue that pervades both judicial and non-judicial forums. The Draft Procedures currently continue to enforce structural barriers that vulnerable populations experience. This is a concern for both the government and project proponents. Not receiving feedback and

[9] Draft Procedures, *supra* note 1, Appendix B at 3.
[10] *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19. [CEAA 2012]
[11] *Baker v Canada (Minister of Citizenship and Immigration),* 1999 2 SCR 817, CanLII 699 (SCC) at para 22.
[12] Meinhard Doelle & John Sinclair, "The new IAA in Canada: From revolutionary thoughts to reality" (November 2019) 79 Environmental Impact Assessment Rev 1 at 3.

participation about the project proposal from the public threatens the viability of the project and poses a financial risk to GenPGM. If the project does get immaturely approved without sufficient and adequate participation, GenPGM may face litigation risks, project delays, or unforeseen consequences they would otherwise have been alerted to.[13] These factors pose great financial costs to such a large infrastructure project, as well as reputational risk for GenPGM if they are seen as a corporation that is not conducting sufficient public consultation.[14]

As the Draft Procedures stand, it is likely that the Panel will not hear from all segments of the public affected by the project, rather only those who have superior internet access and are comfortable participating over Zoom. Addressing the risks of silencing those who have a right to participate which will lead to an incomplete assessment, we make the following **Recommendations:**

1. The Panel should develop alternative methods to solely virtual hearings and host in-person hearings following appropriate COVID-19 restrictions.
2. If in-person sessions are not feasible due to health and safety concerns, the Panel should set up mobile units with reliable internet in areas where members of the public who wish to participate do not have internet access. This could take the form of temporary trailers, renting out spaces in community centers or buildings nearby

PART II: CONSIDERING AND RESPECTING INDIGENOUS KNOWLEDGE

We urge the Panel to thoughtfully engage with the principles of environmental justice in their work. Environmental justice is "a framework through which to understand the distribution of

[13] Cynthia Williams & John Conley "Global Banks as Global Sustainability Regulators?: The Equator Principles Law and Policy"(2011) 33:4 Law & Pol'y 542 at 561.
[14] *Ibid* at 567.

environmental harms and benefits among different groups and individuals, and the processes, biases, and structures that lead to distributional inequities."[15]Historically, the environmental harms of resource extraction in Canada have been distributed to remote Indigenous communities while the benefits have been distributed elsewhere. In practice, this constitutes environmental racism. Robert D. Bullard defines environmental racism as "any policy or practice or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups or communities based on race or colour."[16]

There has been a recent push to include principles of environmental justice in new environmental legislation in Canada, notably in proposed amendments to the *Canadian Environmental Protection Act, 1999.*[17] The new *Impact Assessment Act* alludes to principles of environmental justice by incorporating project impacts on Indigenous groups and their rights, considerations related to Indigenous cultures, and principles of GBA+.[18] The Marathon Palladium project is a review panel under the CEAA 2012, which includes no such environmental justice allusions. As such, we urge the Panel to broaden their interpretation of section 5(1)(c), which requires that the assessment take into account environmental effects that may impact Indigenous peoples, to include the holistic principles of environmental justice.[19] This includes an honest and transparent assessment of the distribution of environmental benefits and burdens.

Further, we note that section 5 of the *United Nations Declaration on the Rights of Indigenous Peoples Act* requires that "The Government of Canada must, in consultation and

[15] Nathalie J. Chalifour & Dayna N. Scott, "Environmental Justice" in William A. Tilleman, Alastair R. Lucas, Sara L. Bagg, Patrícia Galvão Ferreira, eds, *Environmental Law and Policy*, 4th ed (Toronto, Canada: Emond, 2020) 59 at 60.
[16] *Ibid* at 63.
[17] House of Commons, *Healthy Environment, Healthy Canadians, Healthy Economy: Strengthening the* Canadian Environmental Protection Act, 1999, (June 2017) (Chair: Deborah Schulte) at 5.
[18] *Impact Assessment Act,* SC 2019, c 28, at ss 22(1)(c), (l), (s) [IAA].
[19] CEAA 2012, *supra* note 10 at s 5(1)(c).

cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[20] In the absence of substantive government action to that effect, it behoves the Panel and the Secretariat to act in accordance with the principles of UNDRIPA. This includes obtaining the "free and informed consent prior to the approval of any project affecting their lands or territories and other resources[.]"[21] We ask that free, prior, and informed consent be implemented meaningfully. This means that Indigenous communities must maintain the right to refuse a project, and that this refusal must be meaningfully reflected in the Panel's recommendations to the Minister of the Environment and Climate Change.

In line with these principles and legislative guidance, we raise the following concerns with the Draft Procedures:

- Separating the Community Hearing Sessions from the Topic Specific Hearing Sessions and from the General Hearings artificially separates Indigenous Knowledge from Western science.
- The Draft Procedures should explicitly outline the Panel's commitment to meaningfully and respectfully receiving Indigenous oral evidence shared in the hearings.

Inappropriate Division of Hearing Sessions

Section 3(b) of the Draft Procedures explains that "The public hearing will consist of Community, General and Topic-Specific hearing sessions."[22] Appendix A elaborates on the purposes of each kind of hearing session. The General Hearing Sessions are geared towards general participants, where they and the Proponent may present their conclusions and ask questions of each other, and in turn be asked questions by the Panel.[23]

[20] *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14, s 5.
[21] *Ibid*, s 32.2.
[22] Draft Procedures, *supra* note 1 at para 3(b).
[23] *Ibid*, Appendix A at para 1(b).

The purpose of the Community Hearing Sessions is to allow the Proponent to present on issues of particular interest of Indigenous communities, and for "Indigenous peoples, and their experts, to share with the Panel their views and concerns related to the Project, including on the potential environmental and socio-economic effects of the Project and on the location, extent and exercise of Aboriginal or Treaty rights that may be affected by the Project[.]"[24]

The Topic Specific Hearing Sessions are for "Experts with specialized knowledge or expertise" to share the results of their technical review of the proposed project.[25] The Draft Procedures explicitly state that "Only Participants who have expertise or who have hired experts may register to participate in the topic-specific sessions."[26]

This separation of Indigenous issues from other panel issues has the potential to artificially separate Indigenous considerations from "general" or "topic-specific" considerations before the Panel. While the Panel may intend for these sessions to create a specific opportunity for Indigenous communities to share their concerns about the project in a culturally appropriate, focused environment, removing "Indigenous" issues from "general" or "topic-specific" risks compartmentalizing Indigenous considerations, rather than viewing them as an integrated component in a holistic assessment. In other words, removing Indigenous considerations from the General Hearing Sessions decentres Indigenous communities and their perspectives.

Removing Indigenous considerations from the Topic Specific Hearing Sessions implies that Indigenous peoples are not technical experts. This goes against the Agency's own guidance. *Indigenous Knowledge under the Impact Assessment Act* states that "Indigenous knowledge is understood as a body of knowledge built up by a group of Indigenous people through generations

[24] Draft Procedures, *supra* note 1*,* Appendix A at para 2(a).
[25] *Ibid,* Appendix A, at para 3(b).
[26] *Ibid*, at para 3(c).

of living in close contact with the land. Indigenous knowledge is cumulative and dynamic. It builds upon the historic experiences of a people and adapts to social, economic, environmental, spiritual and political change."[27] In practice, Indigenous knowledge is technical, place-based expert data compiled by Indigenous communities since time immemorial.

The IK Guidance goes on to add that Indigenous Knowledge "will be considered alongside Western scientific knowledge and other information throughout the course of the impact assessment."[28] This reflects the concept of two-eyed seeing. Elder Albert Marshall, of the Mi'kmaq Nation, explains that "Two-eyed seeing refers to learning to see from one eye with the strength of Indigenous knowledges and ways of knowing, and from the other eye with the strengths of western knowledges and ways of knowing – and learning to use both of these eyes together for the benefit of all."[29] By focusing Indigenous participation in the hearings on the Community Hearing Sessions, implicitly removing or excluding it from the General and the Topic Specific Hearing Sessions, the Panel is choosing to see with one eye at a time.

Recommendations:

1. The Final Public Hearing Procedures (the "**Final Procedures**") should make explicit the Panel's commitment to a holistic, integrated assessment, where Indigenous Knowledge and Western Science are integrated and weighed equally in each hearing session.

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[27] Impact Assessment Agency of Canada, "Indigenous Knowledge under the Impact Assessment Act: Procedures for Working with Indigenous Communities" (26 November 2020) at s 2, online: *Impact Assessment Agency of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/indigenous-knowledge-under-the-impact-assessment-act.html> [IK Guidance].

[28] *Ibid* at s 2.1.

[29] Indigenous Circle of Experts, "We Rise Together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation" (2018) at 57, online (pdf): *ICCA Consortium* <www.iccaconsortium.org/index.php/2018/03/28/launch-of-indigenous-circle-of-experts-report-we-rise-together>.

2. The Final Procedures should either offer consolidated sessions rather than distinct sessions or should explicitly state that Indigenous communities are welcome to attend the General and the Topic Specific Hearing Sessions.
3. Further, the Final Procedures should explicitly state that Indigenous Knowledge holders are experts for the purposes of the Topic Specific Hearing Sessions.

Respecting Oral Evidence

The Draft Procedures note that participants may provide written submissions and/or make oral submissions, depending on which specific hearing session they choose to participate in.[30]There are specific time limits for oral submissions for the General Hearing Sessions and the Topic Specific Hearing Sessions.[31]

We commend the Panel for not introducing a time limit for the Community Hearing Sessions which, as noted earlier, are intended for Indigenous communities to present their community views on the project.[32] We further commend the Panel for including provisions regarding the interpretation of Indigenous languages at the hearing sessions.[33] The Final Procedures should take one step further to outline how the Panel will respectfully consider oral evidence provided by Indigenous communities. Specifically, encouraging participants to be clear and brief in questions and responses should not be used as licence to discount or ignore oral evidence and oral histories presented by Indigenous participants.[34]

In the judicial context, Canadian courts have long struggled with admitting oral histories and giving them adequate weight in decision-making.[35] Some judges have notably expressed

[30] Draft Procedures, *supra* note 1 at para 4.
[31] *Ibid*, Appendix A at paras 1(c), 3(c).
[32] *Ibid*, Appendix A para 2(b).
[33] *Ibid,* at para 11(c).
[34] *Ibid,* at para 8(d).
[35] Lori Ann Roness & Kent McNeil, "Legalizing Oral History" (2000) 39:3 J of the West 66 at 67–68.

frustrations at the difficulty of distinguishing between what a settler-colonial regime would call "mythology" from what they perceive to be the actual "real" matters of the case.[36] Recently, a judge found that absence of evidence regarding how oral traditions and stories were preserved over thousands of years was a contributing fatal factor to a community's Aboriginal title claim.[37]

The Panel must avoid these pitfalls and be sure to respectfully listen to oral traditions and stories with the intention of understanding how these have implications on the proposed project. The Agency's IK Guidance explains that "if a knowledge holder shares a story, it is important to discuss what is being communicated in order to understand what the relationship is between that particular story and the proposed project."[38] This communication must be respectful of both the knowledge holder and the content of the story itself.

The Panel must understand that it is operating within the context of the settler colonial regulatory regime, and that it is tasked with acting as a translator for Indigenous Knowledge shared at the public hearings. As such, the Panel must be competent cross-cultural translators, cognisant of their own cultural foundations.

Recommendation:

1. The Final Procedures should outline how the public hearings will respectfully listen to, question, and consider oral histories and oral traditions shared by Indigenous participants.

PART III: PROTECTING CONFIDENTIAL INDIGENOUS KNOWLEDGE

The importance of protecting the confidentiality of Indigenous traditional knowledge has been underscored in the *Protecting Confidential Indigenous Knowledge under the Impact*

[36] Roness & McNeil, *supra* note 36 at 69.
[37] *Chippewas of Saugeen First Nation et al. v. The Attorney General of Canada et al.*, 2021 ONSC 4181 at para 407.
[38] IK Guidance, *supra* note 27 at Section 4.1.

Assessment Act guidelines.[39] While the Marathon Palladium Project is governed by CEAA 2012, and therefore does not include the provisions regarding confidential Indigenous knowledge present in the IAA,[40] the Draft Procedures *do* include reference to confidentiality requests. The Protecting IK Guidance may thus serve as an important marker of confidentiality procedures in the context of public hearings. Specifically, the recommendations on engaging with Indigenous communities and following appropriate protocols are particularly salient within the context of the Marathon Palladium Project and the role of the Panel.[41]

The Draft Procedures set out the availability of keeping information confidential under paragraph 12.[42] Confidentiality procedures, including requests for confidentiality and their respective legislation, are discussed in more detail in the *Canadian Environmental Assessment Act, 2012 Final Procedure for Requesting Confidentiality.*[43] As such, the following comments are submitted in regards to both the Draft Procedures and the Confidentiality Procedures.

The Confidentiality Procedures note that should section 35(3), 35(4), or 35(4.1) of *Canadian Environmental Assessment Act* apply, the information provided by participants will remain confidential.[44] Under Section 35 of the Act, the Panel will permit evidence to be brought forward and remain confidential should the publicization of such information cause "specific, direct and substantial harm" to the witness or the environment.[45] While the Confidentiality

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[39] Government of Canada, "Protecting Confidential Indigenous Knowledge under the Impact Assessment Act" (26 November 2020), online: *Impact Assessment Agency of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/protecting-confidential-indigenous-knowledge-under-the-impact-assessment-act.html> [Protecting IK Guidance].
[40] IAA, *supra* note 18, s 119.
[41] Protecting IK Guidance, *supra* note 39.
[42] Draft Procedures, *supra* note 1 at para 12.
[43] Marathon Palladium Project Joint Review Panel, "Final Procedure for Requesting Confidentiality" (26 March 2012) online (pdf): *CIAR* <iaac-aeic.gc.ca/050/documents/54919/54919E.pdf>. [Confidentiality Procedures].
[44] While the Project falls under the *Canadian Environmental Assessment Act*, *2012*, the Confidentiality Procedures were developed prior to the implementation of CEAA 2012 and as such reference provisions under the *Canadian Environmental Assessment Act*. *Ibid* at 1.
[45] *Canadian Environmental Assessment Act*, SC 1992 C35 at s 3-4.

Procedures lay out the administrative details of requesting confidentiality, such as what information to include in the request for confidentiality, whether the information will be given in writing or orally in an *in camera* session, they fail to account for how the Panel intends to handle Indigenous traditional knowledge or traditional ecological knowledge specifically. As a result, the Confidentiality Procedures do not account for how the Panel will establish a relationship or line of communication with Indigenous communities whereby such information could be communicated in an appropriate manner.

Relationship Building: A Two-Way Dialogue

The Draft Procedures' provisions are focused solely on the participants providing information with no specification as to how the Panel intends to partake in a two-way relationship with participants. Within the context of Indigenous consultation, leading Canadian jurisprudence is clear that consultations must be a two-way dialogue. Referring to the need for a "two-way dialogue," the Federal Court of Appeal's reasoning in *Tsleil-Waututh Nation* laid out that a consultation process that limits its engagement to "listening to and recording the concerns of the Indigenous applicants" was not sufficient.[46] In referring to a consultation process which failed to meet necessary criteria to fulfill the duty to consult, Justice McVeigh in *Peguis First Nation* noted, "The problem, in short, is that in this case, Canada's consultation with Peguis was a monologue, rather than a dialogue."[47]

The importance of a two-way, multi-step consultation process is further articulated in Indigenous community consultation protocols such as the *Pays Plat First Nation Consultation*

[46] *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153 at para 558.
[47] *Peguis First Nation v Canada (Attorney General),* 2014 FC 990 at para 147.

Protocols.[48] The protocols highlight guiding principles that serve as the "foundation for dialogue[,]" two of which include facilitating communication and building "positive, long term relationships[.]"[49] Section 11 C of the protocols goes on to list how consultation will occur and cites "formal meeting[s], informal meeting[s]...coffee/meal meeting[s] in the community and outside the community, community dinners...and personal visits".[50] The combination of formal and personal forms of engagement highlight the need to develop and foster relationships with Indigenous communities.

Within the context of confidential traditional knowledge, lessons can be gleaned from *Ktunaxa Nation*.[51] In their factum, Ktunaxa referred to the "Ktunaxa doctrine of secrecy regarding their spirituality[.]"[52] This doctrine restricted knowledge keepers from sharing the "beliefs and sacred sites" with non-community members and places restrictions on those who have obtained this knowledge from sharing it "widely[.]"[53] As a result, Ktunaxa did not immediately disclose all information pertaining to their sacred sites earlier in the consultation process. While *Ktunaxa Nation* dealt with a religious freedom claim, the elements of the case pertaining to confidential information are particularly salient in light of the information-gathering approach outlined in the Draft Procedures. The lack of two-way dialogue may serve as a barrier to confidentiality requests being filed by Indigenous communities.

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[48] These protocols apply to both proponents and government bodies engaging with the community. Pays Plat First Nation, "Pays Plat First Nation Consultation Protocol" (10 May 2011) at 2, online (pdf): *CIAR* <iaac-aeic.gc.ca/050/evaluations/proj/54755/contributions/id/28325>. [PPFN Consultation Protocol]
[49] *Ibid.*
[50] PPFN Consultation Protocols, *supra* note 48 at 18.
[51] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.
[52] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC (Factum of the Appellant) at para 29. [Ktunaxa Factum]
[53] Ktunaxa Factum, *supra* note 54 at para 24.

Establishing and Following Protocol

Building on the need to establish a two-way dialogue in engagement with Indigenous communities is the need to also establish protocols by which confidential information can be shared. The importance of following established Indigenous protocols for the sharing of traditional knowledge is noted in the IK Guidelines. The guidelines reflect the growing need to address consultation fatigue, respect and prioritize Indigenous governance systems, and work cooperatively with Indigenous communities.[54] The Draft Procedures make clear that Indigenous communities are anticipated to participate in the Community hearing sessions, and that confidentiality requests are available. Appendix A of the Draft Procedures also notes at paragraph 2(c) that the Panel Secretariat will "seek input from individual Indigenous communities to ensure Community sessions are conducted in a culturally appropriate and respectful manner."[55] However, the Confidentiality Procedures make no mention or specification regarding how confidential Indigenous knowledge will be protected or what protocols will be followed. Lastly, and as outlined in Part I of this comment, the virtual format of the public hearings may inhibit the ability of Indigenous protocols to be followed.

Recommendations: As the Confidentiality Procedures have been finalized, the following recommendations are made solely with respect to the Draft Procedures.

1. The Final Procedures should expand upon paragraph 2 of Appendix A to expressly state the manner in which the Panel will engage with Indigenous communities *prior to* the Community hearings.
2. The Final Procedures should expressly state in paragraph 2(c) of Appendix A that in addition to seeking input form Indigenous communities on how to conduct Community

[54] Protecting IK Guidance, *supra* note 39.
[55] Draft Procedures, *supra* note 1, Appendix A at para 2(c).

sessions in an appropriate manner, that the Panel will also follow Indigenous communities' protocols in respect to confidential Indigenous knowledge.

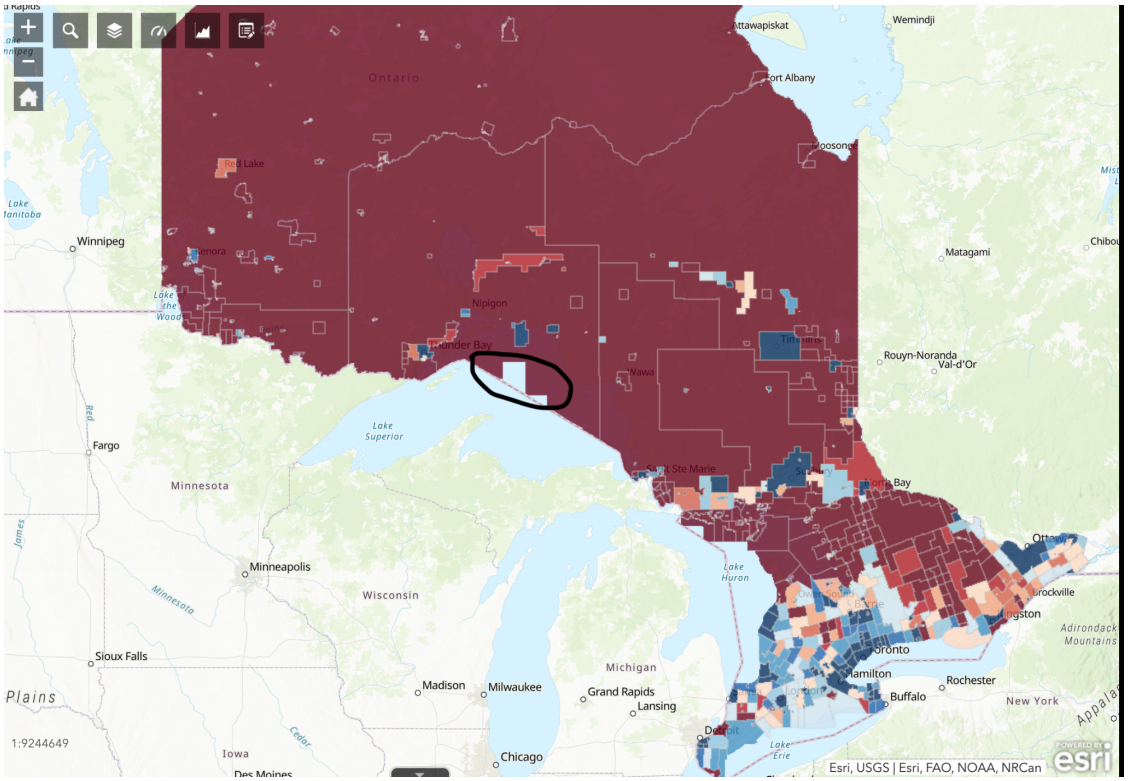
3. In response to Biigtigon Nishnaabeg's comments on the Draft Procedures, the Panel recognized the preferences for in-person confidential engagement sessions as they are "more in accordance with BNFN's [*sic*] traditional of oral transmission of information."[56] The Final Procedures should thus expressly state at paragraph 3 that, where possible and necessary, Community hearings will be conducted in-person.

CONCLUSION

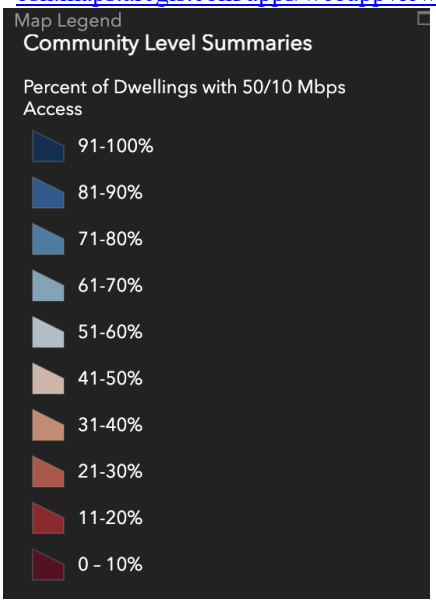
We have highlighted that the current Draft Procedures represent broader systemic issues with impact assessment and public consultation mechanisms: those whose voices must be heard are often the ones who are silenced and excluded. We recommend the Final Procedures adopt an approach based on the principles of environmental justice, which will ensure that all members of the affected communities are meaningfully engaged with in a manner that respects Indigenous knowledge, cultural differences, and recognizes inherent accessibility issues.

[56] Marathon Palladium Project Joint Review Panel, "Re: Invitation to Participate in a Confidential Session for the Marathon Palladium Project Environmental Assessment" (23 August 2021) online (pdf): *CIAR* iaac-aeic.gc.ca/050/documents/p54755/141112E.pdf.

APPENDIX A



(Connected North, "Ontario Access Map" (2021), online: *Ontario Broadband Levels* <bsn.maps.arcgis.com/apps/webappviewer/index.html?id=27c55b431b91419f9e0cd9015b3c6e4f>.)



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