

April 1, 2020

VIA EMAIL TO  
IAAC.MartenFalls.AEIC@canada.ca

Caitlin Cafaro  
Crown Consultation Coordinator  
Impact Assessment Agency of Canada  
Ontario Region  
600-55 York Street  
Toronto, ON M5J 1R7

Dear Ms. Cafaro:

**Re: Nibinamik First Nation – Additional Information and Consultation on Marten Falls First Nation’s Proposed Community Access Road Project**

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We are legal counsel for Nibinamik First Nation (“**Nibinamik**”) in relation to the above-noted project. We are writing regarding the Impact Assessment Agency’s (the “**Agency**”) February 24, 2020 letter and March 13, 2020 email to Nibinamik about the Agency’s review of Marten Falls First Nation’s proposed Community Access Road Project (the “**Project**”). Specifically, we are writing in response to your request for any additional information that would contribute to the Agency’s understanding of the Project’s potential impacts on Nibinamik’s Aboriginal or Treaty rights and any additional consultation methods or activities that Nibinamik may propose to the Agency’s Indigenous Engagement and Partnership Plan (“**IEPP**”). As your request is for “additional” information, we note, but will not repeat, the information about Nibinamik’s rights, claims, and interests or jurisdictional processes and discussions that was outlined in our October 1, 2019 letter to the Agency regarding this Project.<sup>1</sup>

We would like to raise the following three additional matters with you:

- 1) The Agency’s Regional Assessment of the Ring of Fire Area (February 2020);
- 2) Ontario’s Northern Road Link Announcement (March 2020); and

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<sup>1</sup> A copy of which is attached for ease of reference and is also available at the Agency registry, online: <https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80184/comment-22857/2019%2010%2001%20Letter%20to%20CEAA%20re%20Consultation%20with%20Nibinamik%20re%20Marten%20Falls%20Community%20Access%20Road.pdf>.

### 3) Nibinamik-Specific Consultation Work Plan.

We would like to schedule a call with you to discuss how these first two recent developments (i.e., the Agency’s Regional Assessment of the Ring of Fire Area and Ontario’s Northern Road Link) will interact with the review for this Project. As further outlined below, our view is that the regional assessment and the proposed Northern Road Link will necessarily need to inform and will affect the scope of this review.

Based on this discussion, Nibinamik intends to work with the Agency to complete a tailored consultation work plan that outlines how the Agency’s IEPP will apply to their community, in light of Nibinamik’s distinct traditions, governance processes, protocols, and ways of sharing information and knowledge. Some initial points for this discussion are outlined below.

#### 1. The Agency’s Regional Assessment of the Ring of Fire Area

On February 10, 2020, the Minister of Environment and Climate Change announced that Canada would undertake a regional assessment of the Ring of Fire region under the *Impact Assessment Act*.<sup>2</sup> Nibinamik applauds this decision. As we outlined in greater detail in our October 1, 2019 letter regarding this Project, there is a critical need to consider how these individual road project reviews fit into—and are cumulative and strategic decisions in—the broader Ring of Fire development.

Nibinamik previously participated in discussions with Ontario that envisioned this sort of regional and cumulative assessment process under the Regional Framework Agreement (“RFA”) and Joint Jurisdictional discussions. The RFA contemplated, among other things, the co-development of joint Environmental Assessment processes for Ontario and the Matawa First Nations to review and consider the cumulative and regional effects of various Ring of Fire activities (e.g., roads, mining development, affects on watersheds, etc.). Ontario unilaterally cancelled the RFA in August 2019. The Agency’s regional assessment now provides an opportunity to consider the cumulative and larger socio-ecological and regional impacts in the Ring of Fire area that would otherwise be missed by individual project-by-project assessments.

With that said, it is not clear how the Agency’s regional assessment for the Ring of Fire is interacting with the Agency’s review of this Project. Clearly one must inform the other and vice versa.<sup>3</sup> We would like to schedule a call with you to further discuss how these processes interact

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<sup>2</sup> Government of Canada, “Regional Assessment of the Ring of Fire Area,” (11 February 2020), online: <https://iaac-aeic.gc.ca/050/evaluations/proj/80468?culture=en-CA>; *Impact Assessment Act*, SC 2019, c 28, s 1, online (PDF): <https://laws-lois.justice.gc.ca/PDF/I-2.75.pdf>.

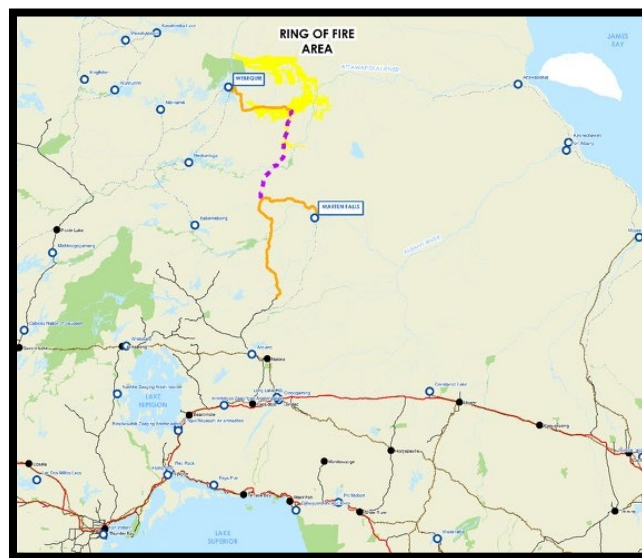
<sup>3</sup> The courts have been clear that regional and cumulative effects are part of the considerations in Canada’s duty to consult and accommodate, as are surrounding and historical context: *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 42.

and, in light of that information, discuss how Nibinamik can best and most efficiently participate in both these Agency assessment processes.

## 2. Ontario’s Northern Road Link Announcement

On March 2, 2020, Ontario announced its proposed Northern Road Link project.<sup>4</sup> As further outlined below, the proposed Northern Road Link would forever change Nibinamik’s territory and fundamentally affects the scope of the Agency’s review of this Project.

The proposed Northern Road Link project, if completed, would be the first all-season road connecting the Ring of Fire area and surrounding First Nations to the provincial highway north of Aroland. It would “link” this Project with a supply road proposed by Webequie First Nation. Both roads are currently in the middle of the Agency’s review and assessment processes. The below map illustrates the proposed Northern Road Link project (dotted line) and the Marten Falls and Webequie proposed roads (orange lines):



Ontario’s announcement significantly changes the scope of the impacts and assessment of this Project. As opposed to assessing a 190 to 230 km new community access road running from Marten Falls to the northern end of Painter Lake forestry road—which is the current scope of the Project Description submitted to the Agency—the above map makes clear that this road is part of a significantly larger project footprint and plan.

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<sup>4</sup> Government of Ontario, “Moving Forward with Road Access to the Ring of Fire,” (2 March 2020), online: <https://news.ontario.ca/opo/en/2020/03/moving-forward-with-road-access-to-the-ring-of-fire.html>.

This Northern Road Link proposal is not merely speculative. Ontario has signed agreements with Marten Falls First Nation and Webequie First Nation regarding the proposed Northern Roads Link project.<sup>5</sup> While Nibinamik is not aware of the terms or scope of those agreements, they at the very least demonstrate the intent of the provincial Crown to move ahead with this new proposal. There has been no consultation with Nibinamik about the Northern Road Link project, or its impacts on their Aboriginal and Treaty rights.

Canada cannot ignore the now drastically expanded scope of this Project. We are raising this with you for two reasons:

- i) to put the Agency and the Crown on notice of this development and the resulting change in the Project's scope; and
- ii) to request a call to further discuss how the Agency will be responding and moving ahead.

Among other things, we would like to hear if there are any updates about the Agency's proposed coordination with Ontario during the federal review of this Project in light of Ontario's proposed Northern Roads Link project and announcement.

### **3. Nibinamik-Specific Consultation Work Plan**

As outlined in greater detail in our October 1, 2019 letter to the Agency, Nibinamik has established Aboriginal and Treaty rights across their Homeland that stand to be directly and significantly impacted by the Project. The Project plans to cut through the north and open up Nibinamik's Homelands for the first time. For a remote, fly-in community such as Nibinamik, the social, cultural, environmental, and rights-related impacts are profound. Clearly more than consultation by correspondence is required. Yet, to date there has been no direct engagement or consultation between Nibinamik and the Agency regarding the Project.

Nibinamik would like to work with the Agency to put in place a community-specific work plan that identifies how the IEPP for this Project will be undertaken with their community and outlines any gaps or additional activities that need to be included. For example, as an Indigenous community, Nibinamik has traditional protocols and decision-making processes for working with neighbouring First Nation communities about developments that may impact Nibinamik's Homelands and shared traditional territory. These discussions are a critical part of supporting any Project decisions, yet they are not contemplated or included in the Agency's IEPP.

In addition, Nibinamik has its own community-based land use planning process, access protocols, and governance processes that apply when engaging with the Crown or others. These

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<sup>5</sup> These agreements were announced as part of Ontario's March 2, 2020 announcement of the Northern Roads Link proposed project.

are referenced in greater detail in our October 1, 2019 letter and need to be woven into the Agency's IEPP with respect to consultation with Nibinamik.

Nibinamik is deeply concerned about proposed developments on their Homelands and is committed to working with their neighbouring First Nations, the Crown, proponents, and others to assess and minimize impacts on their Aboriginal and Treaty rights and the environment. Like many Indigenous communities, however, they struggle with the volume of project proposals, consultation requests, and securing the necessary capacity to effectively engage.

Nibinamik appreciates the Agency's provision of funding for review of the planning and Impact Statement phases of the Project assessment. As you are aware, sufficient capacity funding is critical to allow Indigenous communities to meaningfully participate in consultation with the Crown and has been determined to be a key part of structuring a reasonable consultation process.<sup>6</sup> A representative of the community will, if they have not already, be in touch with the Agency regarding this offer.

Capacity is more than just funding. It also includes looking for synergies, where possible, and adjusting timelines to allow for more fulsome responses. In particular for this Project, finding the necessary capacity includes recognizing the reality that there are four separate engagement processes for this Project—federal, provincial, proponent, and Indigenous—occurring simultaneously and that this is only one project of many that are proposed throughout Nibinamik's Homelands. Securing the necessary capacity must involve identifying ways that Nibinamik can effectively and efficiently participate in these processes while minimizing duplication of efforts and burdens on their community.

## **Conclusion**

It is essential that any decisions within Nibinamik's Homelands that have the potential to affect the lands, waters, and resources are made in deep partnership and collaboration with Nibinamik. We look forward to further discussing the above important matters with you and putting in place a consultation process between the Agency and Nibinamik that respects their traditional protocols, processes, and ways of sharing information and Indigenous knowledge. A representative from our office will follow up to arrange a time for an initial call related to the points outlined above.

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<sup>6</sup> *Saugeen First Nation v Ontario (MNR)*, 2017 ONSC 3456 at paras 26–27; *Enge (North Slave Métis Alliance) v Mandeville*, 2013 NWTSC 33 at para 269; *Platinex Inc v Kitchen Uhmaykoosib Inninuwig First Nation*, [2007] OJ No. 2114 at para 27; *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, para 1138 rev'd 2014 SCC 44 on other grounds; and *Clyde River (Hamlet) v Petroleum Geoservices Inc*, 2017 SCC 40 on the point of participant funding as affecting the consultation process.

Should the Agency have any questions regarding this letter or its contents, please feel free to contact me directly at <sup><Personal information removed></sup> or [amonem@pstlaw.ca](mailto:amonem@pstlaw.ca).

Sincerely,

<Original signed by>

Alex Monem  
Partner, Pape Salter Teillet LLP

cc Nibinamik Chief and Council